A CRITICAL ASSESSMENT OF THE EFFICACY OF THE NIGERIAN ANTI-MONEY LAUNDERING LEGAL AND INSTITUTIONAL FRAMEWORKS FOR POLITICALLY EXPOSED PERSONS.

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ABSTRACT

Over the past decades, there has been an increased focus on politically exposed persons (PEPs), and through outrageous examples, their ability to misappropriate huge sums of public funds from Nigeria, which is then laundered domestically or transnationally through financial institutions and other methods adopted in laundering the proceeds of grand corruption. The prevalence of grand corruption and money laundering and the number of PEPs involved in the plunder of state resources in Nigeria is staggering. Grand corruption and money laundering, is for Nigeria, a pervasive and devastating socio-economic and political problem; because many of Nigeria's pressing concerns such as underdevelopment, slow economic growth, abject poverty and poor health care systems have all been exacerbated and prolonged by grand corruption through the misappropriation of public funds.

The link between PEPs, corruption and money laundering is well established. This has led to the promulgation of laws and regulations, the creation of institutions and the design of policies aimed at combating these phenomenon in Nigeria. Yet, addressing the serious challenge of grand corruption and money laundering remains an acute challenge facing Nigeria. Constraining, disrupting, and deterring PEPs from misappropriating and laundering public funds is fundamental for Nigeria's development. The continued search for effective solutions to the problem of grand corruption and money laundering is the catalyst for this thesis.

Thus, drawing from several research methodologies such as the qualitative approach through interviews, this study was undertaken to provide a critical analysis and assessment of the efficacy of the Nigerian anti-money laundering (AML) legal and institutional frameworks for combating the laundering of the proceeds of corruption by PEPs; and their operation in practice. Given the unique political, economic and financial power of PEPs by virtue of their access to state resources and influence over government institutions; this study, inter alia, critically explores the political, constitutional and legal challenges that impedes the implementation of AML laws on PEPs in Nigeria. The analysis and assessment of the effectiveness of these frameworks targeting PEPs in Nigeria causes this thesis to conclude that the AML laws and practice relating to money laundering in Nigeria do not in any significant way disrupt the laundering of the proceeds of corruption. Ultimately, the research proposes a new legal model and takes the position that what is needed is the introduction of the Unexplained Wealth Orders which presents more opportunities and gives law enforcement greater latitude to facilitate the recovery of the proceeds of corruption.

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LIST OF ABBREVIATIONS

AML	Anti-Money Laundering
CAB	Criminal Asset Bureau
CBN	Central Bank of Nigeria
CDD	Customer Due Diligence
CTR	Currency Transaction Report
DNFI	Designated Non-Financial Institutions
DNFBP	Designated Non-Financial Business and Professionals
EDD	Enhanced Due Diligence
EFCC	Economic and Financial Crimes Commission
FATF	Financial Action Task Force
FCA	Financial Conduct Authority
FSRB	FATF-Style Regional Bodies
IMF	International Monetary Fund
MLPA	Money Laundering Prohibition Act
NCBAF	Non-Conviction Based Asset Forfeiture
NCA	National Crime Agency
NFIU	Nigerian Financial Intelligence Unit
NNPC	Nigerian National Petroleum Corporation
OECD	Organisation for Economic Co-Operation and Development
SCUML	Special Control Unit against Money Laundering
SERAP	Socio-Economic Rights and Accountability Project
STR	Suspicious Transaction Report
TI	Transparency International
UK	United Kingdom
UNCAC	United Nations Convention against Corruption

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- Administration of Criminal Justice Act 2015
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- Central Bank of Nigeria Act 2007
- Constitution of the Federal Republic of Nigeria 1999
- Corrupt Practices and Other Related Offences Act 2000
- Economic and Financial Crimes Commission (Establishment) Act 2004
- Freedom of Information Act 2011
- Money Laundering Prohibition Act 2012
- Nigerian Financial Intelligence Unit Act 2018

UK Legislation

- Criminal Finances Act 2017
- Proceeds of Crime Act 2002

Ireland Legislation

- Criminal Asset Bureau Act 1996
- Proceeds of Crime Act 1996
- Civil Asset Forfeiture Law (Law 793) of 2002

US Legislation

- United States Patriot Act
- United States Foreign Corrupt Practices Act 1977(FCPA 1977)

Other Legislations

- The United Nations Convention against Corruption 2005
- The Palermo Convention, Article 6
- European Union Fourth Anti Money Laundering Directive 2015/849 of the European Parliament and of the Council

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STATEMENT OF COPYRIGHT

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CHAPTER ONE

GENERAL INTRODUCTION AND OVERVIEW

1.1 INTRODUCTION

For years, the menace of grand corruption and money laundering has remained an intractable challenge which has continued to loom large in Nigeria. History is littered with outrageous examples of the way in which public officials, or what in today's legal parlance are called politically exposed persons (PEPs) have misappropriated and plundered state resources which are public funds, while utilising domestic and international financial institutions to launder the proceeds of corruption. Every year, vast sums of public funds are misappropriated and laundered illegally from Nigeria to foreign jurisdictions. The colossal scale of grand corruption and money laundering in Nigeria, and the number of PEPs involved in the outright misappropriation, conversion, diversion and theft of public funds is staggering.

A simple definition of money laundering is to describe it as the conversion, transfer or concealment of illegally obtained money, so that it appears to have come from a legitimate source.[1] Simply put, it is legitimising the proceeds of crime, in this case, corruption. On the other hand, grand corruption refers to corruption which occurs at the highest level of government and involves the misappropriation or embezzlement of public funds for the benefit of a few at the expense of the public good.[2]

Grand corruption and money laundering have grown exponentially over the years, and with this growth has come an increase in socio-economic underdevelopment in Nigeria. Rapacious PEPs have been culpable of stealing public funds rather than contributing to the socio-economic development of Nigerians. The pursuit of short-term gains in the exercise of public office have allowed grand corruption to become endemic in Nigeria. Most public officials are not moved by the desire to serve, but the desire to have access to public funds for self-enrichment. These activities facilitate the vicious cycle of grand corruption in Nigeria. The problem is particularly dire in Nigeria where good governance, integrity, accountability and transparency are uncommon attributes in the conduct of public affairs.

Acts of corruption by PEPs have become the rule, rather than the exception, and corruption has become a euphemism for describing the political leadership in Nigeria. Based on research,

[1] Tim Bennett, *Money Laundering compliance* (2nd edn, Tottel Publishing 2007) 1
[2] Charles Kenny and Tina Soreide, *Grand Corruption in Utilities* (The World Bank 2008) 5

illicit proceeds derived from grand corruption and other economic and financial crimes in Nigeria are predominantly perpetuated by persons entrusted with prominent public functions; elected or appointed into various government positions who disregard public interest to misappropriate public funds.[3]

Consequently, Nigeria has been plagued with the risk, threat and damage resulting from the misappropriation and laundering of public funds by corrupt PEPs. This is so because, many of Nigeria's pressing concerns such as underdevelopment, slow economic growth, abject poverty, poor health care systems, poor infrastructure, massive inequality and low life expectancy have all been exacerbated and prolonged by corruption through acts of diversion of federal and state resources by corrupt PEPs.[4] These risks have long been an inherent challenge in Nigeria's political system, thereby affecting the nation in an adverse manner.

Considering the plethora of corruption related money laundering cases involving PEPs, Nigeria represents a prototypical example of the links between corruption and money laundering. Grand corruption provides a free territory for money laundering to thrive in Nigeria. This is also as the perennial nature of money laundering in Nigeria is inextricably intertwined with grand corruption perpetuated by PEPs. Grand corruption in Nigeria, especially those involving PEPs constitutes a major threat and underlies majority of the money laundering cases reported in recent times.

To buttress these facts, research done by Global Financial Integrity held that between 2005-2015, some $182 billion was lost through illicit financial flows from Nigeria to developed countries as a direct consequence of money laundering.[5] In similar vein, between 2014-2015, the startling sum of $37billion was laundered into London alone from Nigeria.[6] In other words, the amount of money that is the proceeds of grand corruption and money laundering from Nigeria is huge, with severe ramifications for the provision of basic services.

[3] Daniel Agbiboa,' As it was in the Beginning: The vicious cycle of corruption in Nigeria' (2013) 4 Studies in Sociology of Science 21

[4] Gabriel Lanre Adeola,' The Deepening culture of corruption in Nigeria society: Implications for Governance, Development and Stability' (2018) American International Journal of Research in Humanities, Art and Social Sciences 2328

[5] Global Financial Integrity, 'Illicit financial flows to and from Developing countries: 2005-2014 (April 2017) < http://www.gfintegrity.org/wp-content/uploads/2017/05/GFI-IFF-Report-2017_final.pdf> accessed 14 November 2018

[6] The Guardian,' Nigeria not seeking a Cameron apology but wants its assets back' < https://www.theguardian.com/politics/2016/may/11/nigeria-not-seeking-cameron-apology-wants-assets-back> accessed 4 February 2019

Grand corruption is the main predicate offence in Nigeria as far as money laundering is concerned, and as such, how Nigeria deals with the scourge is directly linked to the success or otherwise of its anti-money laundering (AML) legal frameworks.[7] The need to disrupt the flow of the proceeds of crime generally gave rise to the promulgation of laws and regulations, the creation of institutions, the design of policies and mechanisms aimed at combating money laundering. However, despite the legal regimes in existence to combat money laundering in Nigeria, they have not translated into practical successes in the fight against money laundering, particularly as it relates to PEPs. Nigeria faces serious obstacles in combating grand corruption and money laundering. The AML legal frameworks are ineffective and does not in any significant way disrupt or deter corrupt PEPs from engaging in corruption related money laundering activities. Thus, PEPs in Nigeria continue to misappropriate public funds, while acquiring assets far above their legitimate income, emboldened by the deficiencies in the Nigerian legal system.

The prevalence of these acts perpetuated by PEPs in Nigeria has attracted significant local and international attention due to the fact that these acts have led to a developmental problem of the greatest magnitude in Nigeria. Nigeria provides a quintessential example of the destructive effects of grand corruption and money laundering on a country, and the impact it has in slowing down its development. This has also affected Nigeria's global image and earned it an unenviable reputation by international organisations who for years have statistically adjudged Nigeria to be among the most corrupt nations on earth.[8] The prevalence of scandals involving the misappropriation of public funds in Nigeria points to the conclusion that grand corruption is immense and has metastasised throughout the body politic, and has continued to maintain its upward trend in Nigeria.

1.2 AIMS AND OBJECTIVES OF THE THESIS

This thesis begins to make evident the nature of grand corruption and money laundering in Nigeria, specifically those perpetuated by PEPs. This is because, grand corruption has become an issue of major political and socio-economic relevance in Nigeria. The fact that grand corruption and money laundering involving vast sums of wealth and assets too often go undisrupted and unpunished indicates severe loopholes in the extant legal framework in Nigeria.

[7] Chioma Amobi,' Money laundering Regulations in Nigeria: The problems with enforcement, the British connection and Global efforts' (2010) 21 European Business Law Review 827

[8] Transparency International,' Corruption Perceptions Index 2019' (January 2019) < https://www.transparency.org/en/cpi/2019/results/nga> accessed 6 April 2019

This research is motivated by the imperativeness of finding solutions regarding the menace of corruption related money laundering in Nigeria.

All things considered, the objective of this research is to provide the readership with a critical and holistic assessment of whether the Nigerian AML legal and institutional frameworks are effective and robust enough in combating and disrupting the prevalence of grand corruption and money laundering activities involving PEPs, and the level of implementation of these laws in Nigeria. This is in line with policy debate on the efficacy of using AML regimes to combat corruption related money laundering; because AML measures can contribute significantly to the detection, disruption and reduction of grand corruption.[9] To reiterate, grand corruption is the main predicate offence in Nigeria as far as money laundering is concerned, and as such, how Nigeria deals with the scourge is directly linked to the success or otherwise of its AML legal frameworks.

In pursuit of the objective of analysing Nigeria's AML legal framework, the research focuses on issues relating to AML compliance, which consists of a set of extant anti-money laundering practices which the law requires regulated persons (such as banks) to establish and maintain for the disruption of money laundering. Banks are a crucial component in this analysis because they are the main conduits for corrupt PEPs laundering the proceeds of corruption[10]; they also assume a substantial role because they are the first line of defence in combating money laundering. However, most commercial banks in Nigeria have been complicit in the unpatriotic and economically destructive involvement in aiding the corrupt launder the proceeds of corruption. The research ultimately aims to propose new legal models that could help reinforce the law and practice relating to financial crime in Nigeria, to increase the effectiveness of the extant legal frameworks in Nigeria.

1.3 METHODOLOGY

This thesis is focused on and presents the first socio-legal assessment of the Nigerian AML legal and institutional frameworks in combating the prevalence of money laundering activities of PEPs. The research reviews the conceptual, theoretical and empirical literature on grand corruption and money laundering in Nigeria; and the effectiveness of the legal frameworks to

[9] David Chaikin and Jason Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave Macmillan 2009) 1; Financial Action Task Force,' Best Practices Paper: The Use of the FATF Recommendations to combat Corruption' (October 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/bpp-use-of-fatf-recs-corruption.pdf> accessed 15 December 2019

[10] Ping He,' A typological study on money laundering' (2010) 13 Journal of money laundering control 15

combat same. By virtue of the fact that this study is an exploratory research which is directed at discovering whether the AML legal frameworks actually disrupt money laundering perpetuated by PEPs, the analysis in the thesis draws from a mixture of methodologies conducted through the analysis of primary and secondary sources. The research took methodological approaches that builds on and goes beyond what has been done before. In this regard, the doctrinal, socio-legal, qualitative and comparative approaches were employed.

Firstly, the study applied the doctrinal legal approach which focuses on analysing the laws, such as the Money Laundering Prohibition Act 2011(as amended in 2012) (MLPA 2012), the Economic and Financial Crimes Commission Act 2004 (EFCC) and Central Bank of Nigeria (Anti-Money Laundering and Combating the Financing of Terrorism in Banks and other Financial Institutions in Nigeria) Regulation 2018 which addresses issues under investigation. The thesis examines the law related mechanisms used by financial institutions to control money laundering through their institutions. It also examines some cases in foreign and local courts as it relates to issues explored in this thesis. Secondly, to ensure a practical focus, the research utilises a qualitative methodology through conducting interviews with a range of key stakeholders at the frontline of combating money laundering in Nigeria.

Qualitative interviews are considered to be one of the most powerful ways of gaining insights on a field of study in order to enable the appreciation of multiple perspectives for a greater understanding of the subject being studied. [11] The practitioners interviewed were representatives of law enforcement, such as the Economic and Financial Crimes Commission and the Nigerian Financial Intelligence Unit (NFIU). This contributes to the quality, depth and originality of this research. It was therefore one of the appropriate methodological approach to use for this study, allowing an understanding of how AML regimes are applied practically.

Thirdly, the thesis also employs socio-legal approach whereby political, economic and other factors that influence, impact or impinge on the efficiency and effectiveness of the AML framework are discussed. Issues such as immunity clause, lack of political will and lack of independent judiciary are some contextual factors which would be discussed that hinder the implementation of a robust AML framework that can deter PEPs from engaging in money laundering.

[11] Haradhan Kumar Mohajan,' Qualitative Research methodology in Social Sciences related subjects' (2018) 1 Journal of Economic Development, Environment and People 23

Finally, based on the fact that the research finds that the extant legal, regulatory and institutional AML frameworks in Nigeria are ineffective, the research ultimately aims to propose new legal models that could help reinforce the law and practice relating to financial crime in Nigeria. In this regard, the Unexplained Wealth Order (UWO) legislation is considered. The UWO targets the significant increase in the assets of a PEP that he/she cannot reasonably explain in relation to their lawful income; essentially deeming a PEPs unexplained accumulation of wealth to be a form of corruption.[12] Such laws have operated with significant success in Ireland and the United Kingdom (UK).

Therefore, a comparative approach of the UK and Ireland will be used in this study with a view to providing recommendations to identified problems. Under the parameters of this study, these jurisdictions were selected for comparative analysis because they are both common law jurisdictions like Nigeria; and the high level of development in their legal systems in disrupting financial crime.

1.4 STRCUCTURE OF THE THESIS

This thesis is comprised of an introductory chapter and five substantive chapters. These chapters broadly present the findings from the research as described in the methodology. Chapter **1** introduces this work. It proceeds by giving an overview of the whole work. Chapter **2** is the first substantive chapter which serves as a foundation for the discussion which is to follow in subsequent chapters. A definition of the concept of corruption and grand corruption is an essential starting point for discussions in this chapter. The chapter provides some insight on corruption, particularly grand corruption involving PEPs in Nigeria using case studies; a theme that will be continued in subsequent chapters. It would also be paramount to analyse and discuss the problem of grand corruption and its manifestations and challenges in Nigeria. The chapter discusses the destructive powers of grand corruption wherein the chapter highlights corruption as a major obstacle to economic and social development in Nigeria.

A holistic analysis of corruption in Nigeria will benefit from looking at the social dimensions that sustain this phenomenon. The chapter argues that factors affecting the stimulation of corruption are found in the larger social matrix of resilient social norms which constitute the environment of corruption in Nigeria. Some invaluable work has been advanced on the theoretical understanding of social norms and practices which have been instrumental in

[12] Jeffrey Boles,' Criminalising the problem of Unexplained Wealth: Illicit enrichment offence and human rights violations' (2014) 17 New York University Journal of Legislation and Public Policy 835

making corrupt behaviour optimal in Nigeria, thus, producing vicious cycles of corruption. The impact of social norms is evident in attitudes to corruption in Nigeria because they determine accepted forms of behaviour in a society.

Furthermore, in this chapter, a number of contributory factors that play a role in stimulating grand corruption are examined. In this regard, it is argued that weak institutions, constitutional constraints, lack of political will and problems in the administration of justice have all developed as core reasons why grand corruption remains endemic in Nigeria. The chapter argues that PEPs often enjoy impunity for grand corruption because the judicial system is unable or unwilling to hold them accountable.

Chapter **3** critically discusses and examines the subject of politically exposed persons. Within the confines of this thesis, PEPs are individuals who are or have been entrusted with prominent public functions, their families and close associates. This is fundamental in order to understand the scope of individuals who fall within this bracket. The chapter discusses and explains the potential heightened money laundering risk when entering into financial transactions and business relationships with PEPs by those in the regulated sector. The chapter analyses PEPs definitions in the context of the Nigerian PEP. It argues that some definitions have been construed on principles outside the socio-legal context of the Nigerian PEP, and thus, difficult to implement.

Other issues examined in this chapter includes the level of prominent public function necessary to be classified as a PEP, how long a person remain a PEP after leaving office, who constitutes an immediate family member or business associate of a PEP, the distinction between domestic and foreign PEPs, the exclusion of junior or middle ranking PEPs. The chapter analyses some of the contentious issues and challenges associated with PEPs, and the impact of their activities. Also, the chapter examines some of the major conundrums that impedes effective implementation of AML laws against PEPs in Nigeria.

Chapter **4** provides a complete understanding of money laundering and anti-money laundering phenomenon. Inter alia, the chapter discusses money laundering in the context of corruption. It analyses certain typical stages in the money laundering process, as well as examining some of the common methods used in laundering the proceeds of corruption by PEPs in order to conceal the nature and ownership of such proceeds. It presents examples that illustrate the variety of methods available in money laundering schemes. This is followed by an analysis of the roles played by those in the regulated sector in facilitating money laundering in Nigeria,

such as lawyers and banks in particular. Also, the chapter discusses some of the economic and social effects of money laundering activities in Nigeria.

Furthermore, the chapter offers insights to enhance understanding of the nexus between corruption and money laundering; both are symbiotic, not only do they tend to co-occur, but the presence of one tends to create and reciprocally reinforce the incidence of the other. The chapter argues that the crux of the nexus or relationship between these crimes extends to the fact that mechanisms within the framework of combating money laundering can contribute significantly to the detection of corruption and related offences by providing the basis for financial intelligence and asset recovery. The chapter examines some of the salient and intrusive set of AML measures to prevent money laundering and aid in combating corruption, such as suspicious transaction reports, enhanced due diligence et cetera.

The crux of Chapter **5** is to critically analyse the anti-money laundering legal, institutional and regulatory framework for combating money laundering in Nigeria. This is with a view to assessing the effectiveness of the various laws, enforcement mechanisms and whether the AML laws as they are today disrupt money laundering in Nigeria vis-à-vis the prevalent nature of corruption related money laundering in Nigeria. In achieving this objective, the chapter examines provisions of some notable pieces of legislations such as the MLPA 2012, EFCC Act 2004 and the Central Bank of Nigeria (Anti-money Laundering and Combating the Financing of Terrorism in Banks and other Financial Institutions in Nigeria) Regulation 2018. It analyses the money laundering offences created by law, penalties and punishments for non-compliance by those in the regulated sector.

In order to add substance, the chapter offers an original perspective on the efficacy of the AML framework by eliciting the views of stakeholders such as law enforcement through interviews which expresses an informed opinion of the impact of the AML laws in Nigeria. One of the key findings were that banks have fallen significantly short by non-compliance with critical AML preventive measures such as filing suspicious transaction reports when they suspect money laundering, especially from high risk customers. The chapter examines the potency of law enforcement institutions like the EFCC in combating money laundering as it relates to the success or failure in the area of prosecutions and convictions of PEPs charged with money laundering offences in Nigeria.

Importantly, the chapter considers the suitability of utilising the criminal justice system as currently practiced in Nigeria as the only avenue to seeking redress in cases of corruption

related money laundering committed by powerful PEPs. It provides an examination of the deficiencies and challenges in the criminal justice system in Nigeria which frustrates the trial of PEPs. The analysis in this chapter reveals significant weaknesses in the AML legal framework. It causes this chapter to conclude that these frameworks are ineffective and do not disrupt or deter PEPs from engaging in money laundering activities in Nigeria.

Acknowledging the serious problem of grand corruption and money laundering, and the need for improved approach to combat same, Chapter **6** prescribes solutions and recommendations which can improve and reinforce the extant legal frameworks in Nigeria. Presently, little can be done in Nigeria to act swiftly on highly suspicious wealth of PEPs when the origin of such wealth cannot be explained by anything other than grand corruption. The extant approaches in Nigeria's legal framework has produced a mere trickle of results against a torrent of corrupt funds being misappropriated and laundered by PEPs in Nigeria. In this regard, the thesis recommends the urgent promulgation of the Unexplained Wealth Order in Nigeria as a viable option in disrupting money laundering and fighting grand corruption. A definition of the UWO is a natural starting point to begin this chapter. It proceeds by providing an in-depth analysis of the way in which non-conviction-based asset forfeiture regimes can contribute immensely to the fight against grand corruption and money laundering unlike the traditional criminal law which is hampered by the procedural safeguards inherent in criminal proceedings which provides excessive protections for criminals.

Additionally, the chapter examines the radical features of the UWO, such as placing the burden of proof on the respondent whose wealth is in dispute, the extra-territorial and retroactive effect of the UWO. Importantly, the chapter analyses the scope and impact of the UWO, its potential benefit as well as challenges to implementation. This includes the prospect of depriving individuals their property which may be in conflict with constitutional and human rights. Against this background, the chapter assesses the scope of application, procedure, and impact of the UWO in the UK and Ireland. It considers the argument for and against this legislation arising from their promulgation in these countries. The findings from this comparative research are applied to the Nigerian context, to draw potential lessons and to consider the extent to which they could be transposed to Nigeria.

CHAPTER TWO

AN OVERVIEW OF GRAND CORRUPTION AND THE DIVERSION OF PUBLIC FUNDS IN NIGERIA

2.1 INTRODUCTION

To begin with, corruption is a global phenomenon. It is not peculiar to Nigeria. Corruption is an insidious plague that has a wide range of deleterious effects on societies. It has remained a perplexing issue and an inherently clandestine phenomenon with international and local dimensions.[13] The degree of its prevalence, persistence and gravity differs from country to country; and this in turn has a significant impact on development of an individual country. Some jurisdictions such as Hong Kong, New Zealand and United Kingdom have found ways to curtail corruption, inter alia, because they are more committed, better equipped and have the necessary political will to achieve positive results.[14] Others are ill-equipped and lack the political will to combat this scourge. Unfortunately, Nigeria falls in the latter category due to the crisis of corruption despite the promulgation of laws and institutions to combat it.

From the military era, down to recent democratic administrations, the issue of corruption particularly as it involves public officials or in today's legal parlance, politically exposed persons (PEPs) have continued to loom large in Nigeria. Corruption remains deeply rooted in Nigeria especially in public service where massive personal wealth is acquired from criminal diversion of public funds using corrupt means. The advent of democratic governance in Nigeria after several years of military rule led to an upsurge in the passage of laws, the creation of institutions, the design of policies and mechanisms aimed at combating corruption.

Yet it remains ubiquitous in the functioning of society and economic life in Nigeria.[15] Corruption's evil flows not just from the fact that some corrupt PEPs are able to become very rich by dishonest means; it causes untold hardship because many of Nigeria's pressing concerns such as underdevelopment, slow economic growth, poverty, poor health care systems, massive inequality, unequal distribution of wealth and low life expectancy have all been exacerbated and prolonged by corruption through acts of diversion of federal and state revenues by corrupt

[13] Bright Bazuaye,' Combating corruption and the Role of the Judiciary in Nigeria: Beyond Rhetoric and Crassness' (2016) 42 Commonwealth Law Bulletin 125

[14] Jon Quah,' Five success stories in combating corruption: Lessons for policy makers' (2017) 6 Asian Education and Development Studies 275

[15] Leena Koni Hoffmann and Raj Navanit Patel,' Collective Action on corruption in Nigeria: A social Norms Approach to connecting society and Institutions' (May 2017) < https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-05-17-corruption-nigeria-hoffmann-patel-final.pdf> accessed 19 March 2018

public officials.[16] Not only does corruption hinder and distort development and economic growth, it endangers the stability of democratic institutions.[17]

Socially, it pulls down the moral foundation of society as corruption is seen and accepted as a way of life in Nigeria; and continues to characterise the way of life for majority of Nigerians and its institutions.[18] Now, it is very easy to talk about corruption, but like many other complex phenomena, it is difficult to define corruption in concise and concrete terms. Nevertheless, there have often been a consensus as to what exactly constitutes the concept of corruption. In recent years, a plethora of theoretical and empirical research on corruption have emerged. Empirical research in particular has flourished, with scholars and reputable organisations all defining corruption.[19] Corruption has often been defined as the misuse of entrusted power for private gain.[20]

To avoid the confusion of defining corruption, and in sticking with the core context of this thesis; this thesis adopts an operational definition of corruption as conceptualised by some studies. It involves behaviour on the part of politically exposed persons or public officials in which they improperly and unlawfully advance their private interests of any kind, or *those* of others contrary to the interest of the office or position they occupy.[21] The loss of stolen resources through endemic corruption and abuse of office by corrupt PEPs has had destructive effects on majority of Nigerians who barely live above poverty levels despite the country's vast resources earned primarily from petroleum.[22] Some scholars argue that the discovery of oil has led to a litany of ignoble corrupt practices in Nigeria.[23] This is because the energy resource sector yields majority of Nigeria's wealth; and the nature of the sector often makes it possible for monumental corruption.[24]

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[16] Adeola (n4)
[17] ibid
[18] Preye Inokoba and Weleayam Ibegu,' Economic and Financial Crimes Commission (EFCC) and political corruption: Implications for the consolidation of Democracy in Nigeria' (2011) 13 The Anthropologist 283
[19] Hongying Wang and James Rosenau,' Transparency International and Corruption as an issue of Global Governance' (2001) 7 Global Governance 25
[20] Transparency International,' What is Corruption?' < https://www.transparency.org/en/what-is-corruption> accessed 6 April 2018; Stephen Platt, *Criminal Capital: How the Finance Industry Facilitates Crime* (Palgrave Macmillan 2015) 87
[21] Kempe Ronald Hope, *Corruption and Governance in Africa: Swaziland, Kenya, Nigeria* (Palgrave Macmillan 2017) 2
[22] Nlerum Okogbule,' Official corruption and the dynamics of money laundering in Nigeria' (2007) 14 Journal of Financial crimes 49
[23] Samson Adesote and John Ojo Abimbola,' Corruption and National Development in Nigeria's Fourth republic: A historical discourse' (2012) 14 Journal of Sustainable Development in Africa 81
[24] ibid

Furthermore, Nigerians have grown cynical about corruption by PEPs.[25] Examples abound of corrupt PEP's criminal diversion of public funds and laundering same to offshore jurisdictions. This has affected Nigeria's global image and earned it an unenviable reputation for being among the most corrupt countries on earth. This proposition is substantiated by evidence from reputable organisations such as Transparency International (TI) through its annual Corruption Perception's Index (CPI) which have over the years statistically adjudged Nigeria to be among the most corrupt nations in the world.[26] Such concerns are further echoed in the findings of several reports such as reports commissioned by Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) describing corruption in Nigeria as 'prevalent, virtually endemic and institutionalised'.[27]

In fact, a former British Prime Minister, David Cameron, described Nigeria as ''fantastically corrupt'' during an anti-corruption summit held in London.[28] As will be discussed in later sections of this chapter[29], although several criticisms have emerged about the use of TI's CPI, the CPI has for years since its inception in the mid 1990's had a significant impact in the fight against corruption. This is because its yearly publications generate widespread interest across the world and contributes to galvanising international anti-corruption initiatives such as those sponsored by the World Bank.[30] This thesis adopts TI's index and methodology to prove the levels of corruption in Nigeria.

Due to lack of transparency, accountability, enforcement of anti-corruption laws and a number of other contributory factors discussed in the course of this chapter, corruption by PEPS remains prevalent and deeply rooted in Nigeria. It is against this background that this chapter aims to provide some insight on corruption, particularly grand corruption involving public officials in Nigeria. Due to brevity constraints and in keeping with the word limits, no attempt is made in this chapter to review the vast growing literature on other forms of corruption by academics and practitioners.[31]

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[25] Ilorah Peter, *Corruption in Nigeria: The WayOut* (Praise Peter Communications, 2009) 1
[26] Transparency International,' Corruption Perceptions Index 2013' (3 December 2013) <www.transparency.org/whatwedo/publication/cpi_2013> accessed 27 March 2018
[27] GIABA,' Corruption-Money Laundering Nexus: An analysis of Risks and Control measures in West Africa' (May 2010) < https://www.giaba.org/media/f/114_corruption-and-money-laundering-nexus---english-rev051810-1-.pdf> accessed 20 November 2018
[28] Chizu Nakajima,' The London Anti-Corruption Summit May 2016' (2016) 23 Journal of Financial Crime 674
[29] Section 2.6
[30] Staffan Andersson and Paul Heywood,' The Politics of Perception: Use and Abuse of Transparency International's Approach to measuring corruption' (2009) 57 Political Studies 746
[31] Ronald Hope (n21)

However, this chapter takes cognisance of the existence of other classifications of corruption such as ***petty corruption****;* which refers to the kind of corruption that manifests itself at a lower level which people can experience daily in their encounter with public administration and services such as government agencies where civil servants make unjustified demands to perform or not perform services that are ordinarily functions of their role.[32] This is not to state that petty corruption does not pose its own dangers. It is also widespread in Nigeria and carries with it many of the economic and governance liabilities as grand corruption.

However, given the scope and nature of corruption and its broad classifications, this chapter focuses on grand corruption as it has been identified as perhaps the most damaging type of corruption, not only in the sums of money stolen; but because of its broader societal consequences.[33] Moreover, the type of figures that exist in this category of corruption are immense, and in the context of underdevelopment and poverty, almost unimaginable as it impacts negatively on Nigerians who can least afford the diversion of large sums of public money into the hands of corrupt PEPs.

This chapter begins to make evident the nature of grand corruption in Nigeria, specifically those perpetuated by public officials, a theme that will be continued in subsequent chapters. The chapter is based on research from scholars in the anti-corruption and anti-money laundering field. It draws from the literature on corruption, particularly in Nigeria. The chapter aims to provide an analysis of grand corruption in Nigeria and the contributory factors as to why corruption flourishes in Nigeria. To this end, it is identified and argued that weak institutions, poor enforcement of laws, lack of political will, cultural and social norms have all developed as core reasons why corruption and grand corruption have remained endemic in Nigeria.

The chapter posits that one of the primary reasons for endemic corruption in Nigeria is underpinned by social norms, and this becomes paramount given that those who emerge as the leaders of tomorrow and who might have the opportunity to engage in corrupt practices are still the same members of the society. In addition, the chapter argues that although laws and implementation of laws are fundamental in tackling corruption, strong political will is paramount and must be exhibited by the leadership by showing strong resolve to fight corruption. The chapter also argues for strong institutions because where there are weak

[32] ibid
[33] Chaikin and Sharman (n9) 9

institutions, particularly in the enforcement and implementation of laws and regulations, this gives room for corruption to thrive.

To this end, the chapter is outlined as follows: The first section deals with definitional considerations of corruption, the destructive powers of corruption, evidence of the extent of corruption in Nigeria and why corruption flourishes in Nigeria; with an analysis of social norms as the root cause of corruption. This is followed by the second section which analyses grand corruption in Nigeria with some case studies; factors affecting the curbing of grand corruption in Nigeria such as weak institutions, lack of political will, as well as delays in the dispensation of justice. The third section concludes the chapter. It must be remembered that this chapter serves as a foundation for the discussion which is to follow in subsequent chapters.

It is apposite to mention to the readership that **money laundering** is dealt with extensively in Chapter Four.

2.2 *DEFINITIONS OF CORRUPTION*

Corruption has attained uncanny monstrosity and sophisticated dimensions, rendering the task of conceptualising it, as herculean as the fight against it.[34] Various definitions abound, each emanating from different perspectives depending on the intellectual or political stand point of the scholar. According to Bright, the difficulty in defining corruption is linked to its secret and clandestine nature; as well as its many manifestations, dimensions and forms.[35] Statutory definitions exist both at the domestic and international levels.

Corruption has many connotations and interpretations, varying by time, place as well as discipline. It has been simply defined as the act of doing something which is done for some benefit either personally or for someone else, contrary to the rights of others.[36] Adopting a narrow view of the concept, Pogoson stated that despite different views through which corruption is viewed, a common ground opinion conceives corruption as the perpetration of a vice against the well-being, an effort to secure wealth or power through illegal means- the abuse of public office in exchange for private benefits.[37]

The United Nations Convention against Corruption (UNCAC) defines corruption to include all of the following activities: the active and passive bribery of domestic and foreign public officials as well as officials from international organisations; the embezzlement or diversion of public property by an official; trading in influence or illicit enrichment by a public official; and bribery and embezzlement in the private sector.[38] In Nigeria, the Corrupt Practices and Other Related Offences Act 2000, an act that is dedicated to curbing corruption in Nigeria defines corruption simply by saying that corruption includes bribery, fraud and other related offences.[39] This thesis considers this definition vague and makes one wonder if corruption is closely viewed in the context of bribery.

In the same vein, Transparency International defines corruption as the *abuse of an entrusted power for private gain*.[40] Similarly, World Bank defines corruption as the abuse of public office

[34] Bazuaye (n13)
[35] ibid
[36] ibid
[37] Irene Pogoson,' Globalisation and Anti-Corruption Reform in Nigeria: 2003-2007' in D U Enwewmadu (eds), *Anti-Corruption Reforms in Nigeria Since 1999: Issues, challenges and the way forward* (IFRA Special Research Issue 2009) 62
[38] UNCAC, Article 15-22
[39] Corrupt Practices and Other Related Offences Act 2000, s2
[40] Transparency International 2009, ''The Anti-Corruption Plain Language Guide'' (July 2009) < http://issuu.com/transparencyinternational/docs/ti_plain_language_guide?mode=window&backgroundColor=%23222222> accessed 20 March 2018

for private gain.[41] In the context of this thesis, it involves behaviour on the part of politically exposed persons in which they improperly and unlawfully advance their private interest of any kind, or those of others contrary to the interest of the office they occupy.[42] It becomes apparent when a public official experiences a conflict of interest in circumstances of having to exercise the powers of public office in the public interest on the one hand, and personal interest in attaining private gain on the other hand.

Ackerman is of the view that the UNCAC definition encompasses several corrupt activities, which is also, how corruption manifests in Nigeria. For instance, bribery, embezzlement, contract inflation, nepotism, cronyism, influence peddling, conflicts of interest[43] are all forms of how corruption manifest in Nigeria. These definitions find support in the case of *AG Ondo v AG Federation,*[44] wherein Mohammed Uwais stated that ''Corruption is not a disease which afflicts public officers alone but society as a whole. If it is therefore to be eradicated effectively, the solution to it must be pervasive to cover every segment of the society''.

Essentially, the common denominator in all these is that corruption is the abuse of office, abuse of due process for personal or selfish interest against the common good. It is a crime of which the society is the victim.[45]Although most of the definitions place the public sector at the centre of corruption, it must be pointed out in this chapter that this should not be taken to mean that corruption cannot occur or that its effects are minor in the private sector. It exists in the private sector as much as in the public sector. Private sector corruption deserves as much attention as public sector corruption due to close synergies between those in the private sector and those in the public sector.[46] This is so because, in modern times, the private sector performs roles that were previously discharged by public officials in national governments. Therefore, they have the same opportunity and propensity to act corruptly like any other public servant. As a matter

[41] The World Bank Group,' Helping Countries Combat Corruption: The Role of the World Bank' < http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf> accessed 16 March 2018
[42] Ronald Hope (n21) 2
[43] Susan Rose-Ackerman and Bonnie Palifka, *Corruption and Government: Causes, Consequences, and Reform* (2nd edn, Cambridge University Press 2012) 9
[44] (2002) 9 NWLR Pt 772
[45] Bazuaye (n13)
[46] Leonce Ndikumana,' The Private Sector as culprit and victim of corruption in Africa' (2013) Political Economy Research Institute University of Massachusetts < https://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_301-350/WP330.pdf> accessed 02 May 2018

of fact, most government public projects are contracted to and handled by private actors such as procurement in sectors like defence, health, infrastructure and energy.[47]

To demonstrate, in Nigeria, government corporations such as the Nigerian National Petroleum Corporation (NNPC) go into partnership, joint venture agreements and other similar contractual obligations for the discharge of public functions with those in the private sector, i.e. in the oil and gas industry.[48] For this reason, it can create opportunity in the sense that some private actors can often exploit their connections with influential politicians to perpetuate acts of corruption. Therefore, it can be held that the private sector can also be involved in most government corruption. Having said that, private sector corruption is beyond the scope of this chapter.

2.3 A SUCCINCT HISTORICAL CONTEXT OF NIGERIA'S CORRUPTION STRUGGLE

The history of corruption in Nigeria is one of periodic deterioration. The scope and complexity of corruption in Nigeria is immense. Corruption has progressively eaten into the fabric of the Nigerian society for decades and this has consequently earned Nigeria the status of being among the most corrupt countries on earth.

However, it is not enough to say that people in Nigeria are corrupt, but to ask who and what is corrupting them? Some indication to these questions comes from the fraudulent accumulation of public funds which has resulted in the phenomenal enrichment of Nigerian public officials at the expense of the populace. Consequently, this has created poverty for majority of the citizens while concentrating wealth on politically exposed persons. Nigeria is thus, in a paradoxical situation in which the scandalous wealth of public officials exits in the midst of unspeakable mass poverty. Rampant corruption among the ruling class, overtime taught a dangerously disruptive lesson to the generality of the people that being honest does not pay; this situation is also highly indicative, at the attitudinal level as the society is conducive to, or largely tolerant to corruption.[49]

Historically, pre-colonial Nigeria made up of villages and tribes was regarded as moral; whereby theft, extortion and misappropriation of property was considered morally

[47] Rose-Ackerman and Palifka (n43) 27

[48] Ed Reed,' Nigeria moves to private partnerships in refining sector' (Energy Voice, 9 April 2020) < https://www.energyvoice.com/oilandgas/africa/234013/nigeria-moves-to-private-partnerships-in-refining-sector/> accessed 11 May 2020

[49] Moses Udo Ikoh,' Nigerian corruption complex: Rethinking complementarities to curative measures' (2018) 25 Journal of Financial Crime 576

unacceptable within these societies which had orthodox ways of preventing and penalising corrupt practices.[50] Many scholars of Nigerian politics hold the view that corruption and unethical practices in Nigeria are symptoms of perversion of traditional values and beliefs such as honesty, kingship and ethnic solidarity by the exploitative colonial era.[51] The implication being a cultural transformation in areas of value system, governance and politics which led to people's moral values being eroded while giving room for corruption. Despite the existence of pre-colonial moral codes, it did not prevent public officials who benefited from the newly created opportunities which arose from independence from engaging in acts of corruption, even though it was inconsistent with historical, traditional and moral codes under which they grew up.

Nigeria gained independence in 1960 and its immediate aftermath in Nigeria led to political authority and exploiting maximally the public wealth of the state which was previously unavailable.[52] After independence, the theme of corruption dominated the general perception of government activities. Thus, the corruption of public office arguably existed in Nigeria since the establishment of modern structures of public administration in the country, post the British colonial government. Furthermore, the misrule, ineptitude and massive corruption of the first republic after independence set the agenda for military rule in Nigeria as a corrective form of governance committed against corruption.[53]

However, the long periods of various military rule in Nigeria from 1966-1998 was identified and characterised by corruption, greed, abuse of power by military dictators such as General Sani Abacha, who transformed governance into kleptocracy and institutionalised the plundering of public funds.[54] It is pertinent to state that one of the paramount reasons given by the masterminds of several military coups in Nigeria was widespread corruption.

Return to democratic government in 1999 brought respite and optimism in Nigeria from the massive corruption that existed during various military regimes. Nonetheless, from a catalogue of examples which would be provided in the course of this chapter and thesis, grand corruption has been immense and proved to be substantially worse than ever before in the history of

[50] Paul Ocheje,' Norms, laws and social change: Nigeria's anti-corruption struggle 1999-2017' (2018) 70 Crime Law & Social Change 381
[51] ibid
[52] ibid
[53] Okechukwu Oko,' Subverting the scourge of corruption in Nigeria: A reform prospectus' (2002) 34 New York University Journal of International Law and Politics 397
[54] ibid

Nigeria because of the sheer number of democratic public officials involved in the misappropriation and theft of public funds which should have been channelled towards the provision of infrastructure and used for the general welfare of Nigerians. The lack of basic amenities, poverty, unemployment, has contributed to general citizens disenchantment. The World Bank posits that 4 in 10 Nigerians were living in poverty and millions more are vulnerable to falling below the poverty line.[55] Economic hardship and crass poverty have rendered attempts to stem the tide of corruption in Nigeria because poverty makes people amenable and irresistible to corruption.[56]

Corruption breeds poverty and poverty aids corruption to flourish. Generally, citizens attitudes to corruption vary, as well as their reactions to and experience of corruption.[57] Corruption is practiced for a combination of reasons, such as low salaries which are sometimes delayed or not paid as a result of the embezzlement of workers salaries and pensions by public officials.[58] When paid, salaries are too meagre to meet the needs of the people. Most people tend to engage in corruption as a response to their immediate and pressing circumstances due to the hardship caused by grand corruption.[59] This has led to most people taking care of their wants and needs for economic survival, even if dishonestly. It also explains why many Nigerians give into corruption, same corruption they blame for their economic woes. In Nigeria, governance is more about sharing spoils rather than promoting overall prosperity.

Some members of the society who have learnt that corruption pays with little or no consequence have taken to a culture of corruption, learning to steal and engage in corrupt practices as their leaders when they themselves assume positions of authority. Like scholars hold, corruption tends to foster more corruption, perpetuating and entrenching social injustice in daily life. Such

[55] World Bank,' Poverty & Equity Brief: Nigeria' (April 2021) < https://databank.worldbank.org/data/download/poverty/987B9C90-CB9F-4D93-AE8C-750588BF00QA/AM2020/Global_POVEQ_NGA.pdf> accessed 10 August 2021

[56] Anthony Adebayo,' The nexus of corruption and poverty in the quest for sustainable development in Nigeria' (2013) 15 Journal of Sustainable Development in Africa 225

[57] Leena Koni Hoffmann and Raj Navanit Patel,' Collective Action on corruption in Nigeria: A social Norms Approach to connecting society and Institutions' (May 2017) < https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-05-17-corruption-nigeria-hoffmann-patel-final.pdf> accessed 19 March 2018

[58] BBC,' Letter from Africa: The looting of Nigeria's pensions funds' (28 June 2013) < https://www.bbc.co.uk/news/world-africa-23001786> accessed 10 August 2021

[59] Leena Koni Hoffmann and Raj Navanit Patel,' Collective Action on corruption in Nigeria: A social Norms Approach to connecting society and Institutions' (May 2017) < https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-05-17-corruption-nigeria-hoffmann-patel-final.pdf> accessed 19 March 2018

an environment weakens societal values of honesty and integrity, as the impunity of dishonest practices and abuses of power or position steadily erode citizens sense of moral responsibility.[60]

There are also systemic factors that combine with social norms to sustain corruption in Nigeria. These include politics of ethnicity and tribalism, and societal pressures on public servants who are expected to live in affluence. Based on ethnicity or regional affiliations, if a person from a particular state or constituency wins an election or is appointed into public office, people from his/her state or constituency expect benefits from having a home-grown government official in office. This is also as certain segments of the citizenry do not hide their expressions of solidarity with persons of their tribe being arrested or prosecuted for corruption. Demonstrations by supporters such as market women, business people, artisans who express sympathy for the ordeal of public officials accused of corruption are some of the ways that it has been sought to convey social antipathy to the anti-corruption fight thereby letting corruption flourish. These are some of the ways that corruption as a way of life have become pervasive and popularised in Nigeria.

On the positive side, corruption is being discussed in public fora in Nigeria; because of increasing awareness that unless corruption is controlled, it will be impossible to arrest an imminent degeneration of society.

2.4 UNDERSTANDING THE DESTRUCTIVE POWERS OF CORRUPTION

Chief Afe Babalola addressing the court in *A-G Ondo State v A-G Federation* held as follows:[61]

> It is a notorious fact that one of the ills which have plagued and still plaguing the Nigerian Nation is corruption in all facets of our National Life. It is an incontrovertible fact that the present economic morals and or quagmire in which the country finds itself is largely attributable to the notorious virus known as corruption. This court is bound to take judicial notice of these facts and is so invited to do so.

There is no doubt that corruption is a widespread phenomenon and a global problem which has often been linked to poor and developing countries. This is because corruption is usually highlighted as one of the core reasons for underdevelopment in these countries.[62] Also, historically, the most egregious cases of grand corruption emanated from these countries and

[60] ibid
[61] 51 [2002] 9 NWLR
[62] Benjamin Olken,' Corruption in Developing countries' (2012) 4 Annual Review of Economics 1

have contributed to their persistent fall in several corruption index such as Transparency Internationals CPI.[63]

Corruption is now appreciated as a global concept that requires global solutions; because it is found in all countries regardless of its stage of development.[64] In other words, no country is immune from corruption and even developed countries can be linked to corruption. For instance, the prevalence of bribery of foreign politicians and failing to tackle bribery by their companies in other countries contributed to the promulgation of the United States Foreign Corrupt Practices Act 1977(FCPA 1977), which outlawed and criminalised US companies from bribing foreign public officials.[65] Likewise in the UK, the controversy involving BAE systems (British Defence Contractors) payment of bribes to foreign public officials to secure arms contract led to the promulgation of the UK Bribery Act.[66]

Nevertheless, developing countries are disproportionately affected by corruption. The above preposition finds justification in a statement made by the then United Nations Secretary General, Kofi Annan in his statement to the United Nations General Assembly on the adoption of the United Nations Convention against Corruption.

> This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality, injustice, and discourages foreign investment. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.[67]

Transparency International estimates that at least $1trillion dollars is being taken out of developing countries each year through a web of corrupt activities like money laundering that

[63] Transparency International,' Corruption Perceptions Index 2017 (21 February 2018) <https://www.transparency.org/news/feature/corruption_perceptions_index_2017> accessed 09 March 2018
[64] The World Bank,' Combating Corruption' (26 September 2017) <http://www.worldbank.org/en/topic/governance/brief/anti-corruption> accessed 10 December 2017
[65] Chaikin and Sharman (n9) 7
[66] Jessica Lordi,' The UK Bribery Act: Endless jurisdictional liability on corporate violators' (2012) 44 Journal of International law 955
[67] United Nations Office on Drugs and Crime,' The Secretary-General: Statement on the adoption by the General Assembly of the United Nations Convention Against Corruption' (October 2003) <https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> accessed 16 February 2018

involves the use of anonymous shell companies.[68] The World Bank identified corruption as the single greatest obstacle to economic and social development.[69] According to the World Bank, corruption undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends. It undermines accountability and transparency in the management of public affairs. It also undermines socio-economic development as economic goals of growth, poverty alleviation, are all undermined by corruption.[70]

Not only the World Bank, but also the International Monetary Fund is of the view that corruption causes significant macroeconomic failures.[71] This is also as scholars such as Klitgaard is of the view that persistent developmental failures are often caused by corrupt states.[72] Corruption's evil flows not just from the fact that some corrupt individuals are able to become very rich by dishonest means, it causes untold damage to the state itself from the diminution of public funds and the wastage of funds to private pockets.

When a corrupt PEP diverts public funds, he does so from the people on whom that money should be spent and thereby deprives them of schools, hospitals, roads et cetera.[73] Nigeria is a popular and quintessential example of the destructive effects of corruption on a country, and the impact corruption has in slowing down its development. Although Nigeria is plagued with many other problems, the upsurge of corruption, particularly grand corruption in recent decades has been troubling.

To demonstrate, Nuhu Ribadu, Nigeria's pioneer chairman of the Economic and Financial Crimes Commission (EFCC), once held; that between 1960 when Nigeria gained her independence from Britain to 1999 which marked the start of civilian rule in Nigeria, public officials had stolen or wasted $440 billion. According to Ribadu, this was approximately the total sum of money needed to rebuild a devastated Europe in the aftermath of the Second World

[68] Transparency International, Empowering the UK to recover corrupt Assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery' <http://www.transparency.org.uk/publications/empowering-the-uk-to-recover-corrupt-assets/#.WocTmORLG1s> accessed 16 Feb. 18

[69] The World Bank,' Corruption Hunters Rally for Action against Fraud' (December 2010) < http://www.worldbank.org/en/news/feature/2010/12/06/corruption-hunters-rally-for-action-against-fraud> accessed 10 March 2018

[70] ibid

[71] International Monetary Fund,' IMF Adopts Guidelines Regarding Governance Issues < https://www.imf.org/en/News/Articles/2015/09/29/18/03/nb9715> accessed 26 March 2018

[72] Robert Klitgaard, *Controlling Corruption* (University of California Press) 9

[73] Stephen Platt, *Criminal capital: How the finance industry facilitates crime* (Palgrave Macmillan 2015) 86

War.[74] In similar vein, the Global Financial Integrity held that between 2005 and 2014, some $182 billion was lost through corruption and illicit financial flows from Nigeria.[75]

These outflows are not abstract numbers. They translate to and explain the apparent destructive effect corruption has on a nation riddled with poverty, lack of education, lack of good health care and lack of basic social amenities. For instance, it is held that 70% of Nigeria's population live below poverty line;[76] and according to UNICEF,[77] at an estimated 10.5 million, Nigeria has the world's largest number of out of school children. From these examples, it could be seen that stolen public resources by PEPs could be used for legitimate and beneficial purposes for the common good rather than being squandered by corrupt PEPs on illegitimate and unproductive activities.

In effect, acts of corruption disproportionately targets the poor, and helps keep them poor in Nigeria.[78] It is likely to deliver private benefits for unscrupulous public officials and enormous hardship for the public. Not only does corruption hurt the poor, it also deprives every citizen of access to basic infrastructures and economic development. Corruption also tends to foster more corruption, perpetuating and entrenching social injustice in daily life.[79] It weakens societal values of fairness, honesty, and integrity as the impunity of dishonest practices and abuses of power or position steadily erodes citizen's sense of moral responsibility to follow the rules in the interest of wider society.[80] No true sustainable national development can take place in Nigeria if her national wealth is diverted for the benefit of a few.

Thus, to put it succinctly, the cost and consequences of corruption for Nigeria in terms of damage to public life can generally speaking be summed up as follows: Enormous loss of government revenue, as government has less money to spend on public projects and infrastructures; the undermining of national development efforts and economic potentials;

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[74] Nuhu Ribadu,' Capital loss and corruption: The example of Nigeria- Testimony before the house financial services committee' in Jide Olakanmi (eds), *Anti-Corruption Laws* (Law Lords Publications 2016) 297; United Nations Office on Drugs and Crime,' Anti-corruption climate change: It started in Nigeria' (November 2007) < https://www.unodc.org/unodc/en/about-unodc/speeches/2007-11-13.html> accessed 16 March 18

[75] Global Financial Integrity, 'Illicit financial flows to and from Developing countries: 2005-2014 (April 2017) < http://www.gfintegrity.org/wp-content/uploads/2017/05/GFI-IFF-Report-2017_final.pdf> accessed 16 March 18

[76] International Monetary Fund, 'Nigeria: Selected issues' (March 2018) < file:///C:/Users/mhlj67/AppData/Local/Microsoft/Windows/INetCache/IE/H2N1N994/cr1864.pdf> accessed 20 March 2019

[77] UNICEF <https://www.unicef.org/nigeria/education.html> accessed 20 March 2019

[78] Michael Johnston,' *Party systems, competition, and political checks against corruption*' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption*, (Routledge 2002) 778

[79] Hoffmann and Patel (n15)

[80] ibid

erosion of efficiency, effectiveness and productivity of public services; the tainting of national image[81], as Nigeria is reputed for being one of the most corrupt Nations in the world.

2.5 WHY CORRUPTION FLOURISHES IN NIGERIA

In the literature, there are a plethora of reasons and factors for the prevalence of corruption in Nigeria. Prominent among these factors are: a corrupt leadership that lacks the necessary political will to curtail corruption,[82]and the society's tolerance of corruption[83]. Furthermore, other factors identified include: weak government institutions, poverty, greed, lack of accountability and transparency in public service, tolerance and acceptance of corruption by the populace, and ineffective anti-corruption agencies have all contributed to the prevalence of corruption in Nigeria.[84]

Kazeem is of the view that corruption in Nigeria is a by-product of the failure of leadership.[85] Contributing to the discourse of factors responsible for the prevalence of corruption in Nigeria, the former Deputy Governor (Financial System Stability), Central Bank of Nigeria, Mr. Adebayo Adelabu, stated at a compliance conference held in Lagos, Nigeria, that some of the factors responsible for the prevalence of corruption in Nigeria includes the following. **Social value** (Placing high value on the accumulation of wealth without regard to its source, **Legal** (Inadequate laws or poor implementation of legal/regulatory provisions), **Individual attitudes** (Insatiable appetite for wealth)[86]. For the purposes of this chapter, societal acceptance of corruption as a way of life, lack of political will, weak anti-corruption laws/institutions, delay in the administration of justice/ judicial corruption have been highlighted as contributory factors that aid in stimulating corruption. These factors will be analysed in the sections that follow.

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[81] Inter-Governmental Action Group Against Money laundering in west Africa (GIABA REPORT),'Corruption-Money laundering nexus: An analysis of risks and control measures in west Africa' 2010 <https://www.giaba.org/media/f/114_corruption-and-money-laundering-nexus---english-rev051810-1-.pdf> accessed 17 March 2018

[82] Akume Albert,' Combating Corruption in Nigeria and the Constitutional issues arising: Are they facilitators or inhibitors?' (2016) 23 Journal of Financial Crime 700

[83] Lanre Olu-Adeyemi and Tomola Obamuyi,' Public accountability: Implications of the Conspiratorial Relationship between Political appointees and Civil servants in Nigeria' (2010) 2 iBusiness 123

[84] ibid

[85] Kazeem AF,' A philosophical appraisal of leadership and development in Nigeria?' in Tony Edoh and Terhemba Wuam (eds), *Democracy, leadership and accountability in post-colonial Africa: Challenges and possibilities* (Aboki Publishers 2009) 110

[86] Adebayo Adelabu,' Fraud and Corruption: The Role of Banks and Other Corporate entities' (Compliance conference, Lagos, June 2014)

2.5.1 *INVESTIGATING SOCIAL NORMS AS THE ROOT CAUSE OF CORRUPTION IN NIGERIA*

The importance of social norms and practices in understanding corrupt behaviour in Nigeria is paramount. In this regard, it is pertinent to lay a groundwork with theories from scholars while discussing social norms. Mishra argues that widespread or endemic corruption as it is in Nigeria indicates that corrupt behaviour is the norm itself despite the fact that it is generally condemned.[87] He further argues that the pervasiveness of corruption contributes to its persistence in a significant way. When there are many corrupt individuals in the society, it becomes optimal to be corrupt despite the presence of anti-corruption policies and incentives.[88] This way corrupt behaviour becomes the equilibrium or the social norm.

Similarly, Collie argues that the pervasiveness of corruption gives individuals little cause to feel guilty about their own behaviour, and this combined with low risk of punishment and high social expectations of corruption makes corruption self-perpetuating.[89] Corroborating Mishra and Collie, Ackerman states that when corruption is endemic and the stigma is low, this has the tendency for more people to be corrupt, producing vicious cycles.[90] Furthermore, it has been held that though laws and the implementation of same are essential in fighting corruption; they cannot themselves foster a sustainable, comprehensive reversal of long-established assumptions and practices in the absence of a decisive shift in public apathy and a collective will to achieve collective behavioural change.[91]

A holistic analysis of corruption in Nigeria will benefit from looking at the social dimension that sustains this phenomenon. This is so because one of the reasons for wide spread corruption is the fact that it is sustained by social norms, beliefs and societal expectations.[92] This section argues that factors affecting the stimulation of corruption in Nigeria are found in the larger societal matrix of resilient social norms which constitute the environment of corruption in Nigeria; therefore, creating a society that is either conducive to, or largely tolerant to corruption.

According to Bicchieri, ***social norms*** are markers of how people behave in a society, and is indicative of how people choose to act in different situations. Ocheje on his part sees social norms as a pattern of behaviour which people conform to on the belief that most people engage

[87] Mishra Agit,' Persistence of corruption: Some theoretical Perspectives' (2006) 34 World Development 349
[88] ibid
[89] Paul Collier,' How to reduce corruption' (2000) 12 African Development Review 191
[90] Susan Rose Ackerman,'*Political corruption and Reforming Democracies: Theoretical Perspectives*' in Junichi Kawata (eds), *Comparing Political Corruption and Clientelism* (Ashgate Publishing 2006) 60
[91] Hoffmann and Patel (n15)
[92] ibid

in the same conduct.[93] They determine accepted forms of behaviour in a society.[94] Norms are also very important factor for consideration in any attempt to change social behaviour. Scholars are of the view that people's behaviours are often influenced by what others do and by what others think should be done.[95] This is because if a practice is widespread, like corruption is in Nigeria, there is a risk that most people will endorse it, hence reinforcing a social norm. Therefore, people may decide to act corruptly because they believe others do so, thus producing a vicious cycle and contributing to the persistence of corruption in the society.

Lawal observes that corruption in the Nigerian society has with the passage of time, become a convention, a psychological need, and a necessity. In Nigeria, the impact of social norms is evident in attitudes to corruption.[96] The 'every-one-is- doing it' (everyday corruption) mentality or the mind-set that is usually obtainable in Nigeria, the idea that someday it may be your day to get yours has taken hold of the Nigerian society and precipitated a slide in moral standards.[97] This is partly why many Nigerians have resorted to corruption as a strategy both for coping and for survival because most believe that the benefits of corruption outweigh the harm or that corruption makes everything easier.

Corruption has become a way of life in Nigeria to the extent that not to be corrupt tends to be regarded as an aberration.[98] This explains why corruption has become a phenomenon to be condoned and accommodated and why the stigma of being labelled corrupt is rarely seen as a problem in Nigeria. In Nigeria, public officials are expected to get richer and grant favours to family, friends and members of their community, putting pressure on them to engage in corrupt practices like nepotism, and criminal diversion of public funds.[99] Most PEPs engage in nepotism,[100] a form of corruption, which is usually practiced in Nigeria with those in power giving undue advantage to relatives or friends, i.e. offering them jobs upon that relationship

[93] Paul Ocheje,' Norms, law and social change: Nigeria's Anti-corruption struggle 1999-2017' (2017) 70 Crime Law and Social Change 363
[94] Cristina Bicchieri, *The Grammar of society: The Nature and Dynamics of Social Norms* (Cambridge University Press 2005) 8
[95] Cristina Ebicchieri and others,' A structured approach to a diagnostic of collective practices' (2014) 5 Frontiers in Psychology
[96] Tolu Lawal and Abegunde Oladunjoye,' Local government, corruption and democracy in Nigeria' (2010) 12 Journal of Sustainable Development 227
[97] Ronald Hope (n21) 128
[98] Oluwaseun Bamidele,' Culture, Corruption, and Anti-corruption struggles in Nigeria' (2016) 32 Journal of Developing Societies 103
[99] Steven Pierce, *Moral Economies of Corruption: State formation and Political culture in Nigeria* (Duke University Press 2016) 155
[100] Okechukwu Eme and Ifeanyi Okeke,' Buhari Presidency and Federal Character in Nigeria: A Human needs Theory Perspective' (2017) 3 International Journal of Philosophy and Social-Psychological Sciences 74

rather than an objective evaluation of ability or suitability.[101] In other words, a bestowal of patronage by reason of ascriptive relationship rather than merit.

Furthermore, in Nigeria, many still see the election or appointment of a relative into a public office as an opportunity for one of their own to partake in the national patrimony. Once a person is appointed into any political office, the expectations from his people and the society will be extremely high in terms of what the office offers.[102] Overtime, this belief and expectations from people in public office in Nigeria has helped sustain a culture of grand corruption in Nigeria. When such practice is taken as the norm in a society where public officials are put under pressure to exploit their positions, corrupt practices becomes entrenched.

As Alina states, in such a society where tolerance of corruption exists, it becomes part of the political process whereby winners of elections and appointees of public office treat state resources as the major source of spoils, feeding off public resources rather than promoting overall prosperity.[103] This creates an environment that sustains corrupt behaviour and tolerance of corruption by members of the society. Such tolerance revolves in vicious cycles as members of the society such as the younger generations become leaders of tomorrow. Some will transcend to becoming political figures and public officials who might find themselves in positions that create opportunity for corruption.

Socially, corruption has eaten deep into the society. Igwereme states that there is a tendency from the Nigerian society to celebrate corrupt officials who divert public funds.[104] The Nigerian society expects public office holders or politicians to live in affluence, having an array of assets attached to them with little or no attention paid to the source of such wealth; despite the knowledge of the levels of corruption among public officials.

According to Bamidele, the society's attitudinal weakness has contributed to sustaining corruption in Nigeria.[105] Bamidele questions why the society recognise public officials who have corruptly enriched themselves in the course of serving the country?[106] Why do Governors, some of whom have been implicated in engaging in corrupt practices be given awards, or

[101] Chaikin and Sharman (n9)
[102] Bamidele (n98)
[103] Alina Mungiu-Pippidi,' Controlling Corruption through Collective Action' (2013) 24 Journal of Democracy 101
[104] Ogbewere Bankole Ijewereme,' Anatomy of corruption in the Nigerian Public sector: Theoretical Perspectives and some Empirical Explanations' (2015) 5 SAGE Open 1
[105] Bamidele (n98)
[106] ibid

elected into the other positions of public service? Why would religious institutions ordain corrupt public officials, and sometimes organise thanksgiving services for corrupt ex-convicts after serving prison sentences?[107]

This attitudinal weakness in the society has contributed in eroding the right ethical standards required of public officials. Many exhibit expressions of solidarity with persons being investigated or prosecuted for corruption. For instance, when Chief Diepreye Alameiseigha was sentenced to prison for corruptly enriching himself in the course of serving as Governor of Bayelsa State, upon his release, he was eulogised and celebrated.[108]

Based on the above analyses, it becomes apparent that breakdown in social values has negatively impacted the prevalence of corruption in Nigeria. It has been a contributory factor in stimulating corruption and promoting the wealthy, which most times are public officials. Societal acceptance in respect of attitudes towards corruption and corrupt Nigerian public officials has made it doubly *difficult* to fight corruption in Nigeria. Thus, this thesis agrees with Pogoson who believes that combating corruption, especially in Nigeria where it is endemic, pervasive, and deep-rooted, must involve more than the promulgation of laws and institutions to fight corruption. Anti-corruption regime must involve multifaceted strategies that address the underlying social problems that spur correction.[109]

2.6 GRAND CORRUPTION IN NIGERIA AND SOME CASE STUDIES

The focus of this section is on grand corruption in Nigeria. The section examines grand corruption in Nigeria as a framework for the analysis undertaken in the entire research. Over the years, issues of grand corruption have frequently dominated Nigerian political space. Successive governments in Nigeria have at different times been accused of grand corruption and their inability to tackle same in Nigeria. There have also been several legal and institutional efforts to combat it, such as the creation of anti-corruption agencies[110] and the ratification of regional and international instruments on corruption.[111] However, the spate of grand corruption remains unaffected by Nigeria's domestic anti-corruption initiatives, and undermines its

[107] ibid
[108] ibid
[109] Pogoson (n37)
[110] The Economic and Financial Crimes Commission created in 2004 and the Independent Corrupt Practices Commission created in 2000
[111] The United Nations Convention against Corruption 2005 and the African Union Convention on Preventing and Combating Corruption 2003

commitment to the ratified regional and international treaties.[112] So far, none has proved successful and Nigeria remains one of the most corrupt countries in the world. Records show that political leaders at different levels have misappropriated Nigeria's resources,[113] and have institutionalised corrupt practices, which has severely constrained her development potentials.[114]

Just like corruption, grand corruption as a form of corruption has been a major obstacle to the achievement of sustainable development in Nigeria.[115] It has deepened poverty, inequality and has contributed to an increase in social ills in Nigeria.[116] According to scholars, grand corruption is the abuse of high-level power that involves the misappropriation or embezzlement of public funds for the benefit of a few at the expense of many, and causes serious and widespread harm to individuals and society.[117] Transparency International posits that grand corruption occurs when a public official deprives a particular social group or substantial part of the population of a fundamental right; or causes the state or any of its people a loss greater than 100 times the annual minimum subsistence income of its people; as a result of bribery, embezzlement or other corruption offences.[118]

Rose Ackerman submits that grand corruption refers to corruption at the highest level of government and involves a small number of powerful players and large sums of money.[119] Ackerman states that deals involved in grand corruption are by definition the preserve of top public officials.[120] Usually, the ingredient present in grand corruption cases is the seniority of public officials involved, and the size of public funds that is diverted.[121] To buttress, the Halliburton $180 million bribery scandal in Nigeria involving kickbacks and bribes in

[112] Florence Anaedozie,' Is Grand Corruption the Cancer of Nigeria? A Critical Discussion in the Light of an Exchange of Presidential Letters' (2016) 12 European Scientific Journal 5
[113] Economic and Financial Crimes Commission,' High Profile Cases Being Prosecuted by the EFCC' (25 November 2019) <https://efccnigeria.org/efcc/public-notices> accessed 25 November 2019
[114] Olu Awofeso and Temitayo Isaac Odeyemi,' The impact of political leadership on Nigeria's Development since Independence' (2014) 7 Journal of sustainable Development 240
[115] Scott Macwilliam and Mike Rafferty,' From Development and Grand Corruption in Governance' (2017) 6 Journal of Crime, Justice 12
[116] Dewale Adewale Yagboyaju,' Ethnic politics, political corruption and Poverty: Perspectives on Contending issues and Nigeria's Democratisation Process' (2009) 32 Ethnic Studies Review 131
[117] Kenny and Soreide (n2)
[118] Transparency International,' What is Grand Corruption and how can we stop it?' (21 August 2016) < https://www.transparency.org/en/news/what-is-grand-corruption-and-how-can-we-stop-it#> accessed 20 March 2019
[119] Rose-Ackerman Palifka (n43) 11
[120] ibid
[121] Olusola Akinpelu, *Corporate Governance Framework in Nigeria: An International review* (iUniverse Books 2011) 359

facilitating contract on the construction of liquefied natural gas in Nigeria,[122]the diversion of $2 billion defence budget in 2015 by retired Colonel Sambo Dasuki, former National Security Adviser,[123] and a significant number of cases which would be accessed in the course of this chapter are all instances of established cases of grand corruption in Nigeria.

Grand corruption represents a dangerous social phenomenon plaguing Nigeria despite legal and institutional efforts to combat it; and the most adversely affected victims are the citizens. Extensive research has shown that misappropriation of resources intended for economic development by the grand corruption of public officials is the major driver of economic underperformance and the perpetuation of the cycle of poverty.[124] This is because public funds that ought to be used to propel industrialisation, build schools, provide water, adequate transportation system, alleviate poverty and ensure good life for the people are criminally diverted and laundered by those who have access to the public treasury. Consequently, depriving and impoverishing many to the advantage of a few.

Grand corruption in Nigeria is so pervasive that it has turned public service for many into a kind of criminal enterprise.[125] The pursuit of short-term gains by Nigerian public officials in the management of public resources have allowed grand corruption to become endemic. Acts of corruption by political office holders have become the rule, rather than the exception and corruption has become a euphemism for describing the political leadership in Nigeria because they often provide a fertile ground for corruption to thrive.

What is obtainable among Nigerian public officials is a state of affairs where the exercise of public office is subverted by public officials who act self-interestedly and think of public office as a realm in which their self-interest supersedes the interests of the public at large; and where public officials pursue such self-interest with impunity. Public office is seen as financially attractive as they offer opportunities for self-enrichment. The problem is particularly dire in Nigeria where good governance, integrity, accountability and transparency are uncommon

[122] Will Fitzgibbon,' Files open new window on $182-Million Halliburton bribery scandal in Nigeria' (2015) International Consortium of Investigative Journalists<https://www.icij.org/investigations/swiss-leaks/files-open-new-window-182-million-halliburton-bribery-scandal-nigeria/> accessed 1 April 2020

[123] Country Report Nigeria,' Anti-corruption agency attempts to show no one is immune' (The Economist 13 January 2016) <country.eiu.com.ezphost.dur.ac.uk> accessed 20 April 2020

[124] Anaedozie (n112)

[125] Human Rights Watch,' Corruption on Trial: The Record of Nigeria's Economic and Financial Crimes Commission' (25 August 2011) < https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission> accessed 20 April 2018

attributes in the conduct of public affairs;[126] rather the political leadership is mired in the pursuit of selfish personal gains at the expense of broader national interest and development.[127]

Awofeso and Isaac blame the prevalence of grand corruption solely on a crisis of leadership, accusing most Nigerian leaders of a lack of self-discipline.[128] It is my submission that this preposition is an apt assertion of the current situation in Nigeria, especially when juxtaposed with the overwhelming sums of money stolen by public officials in Nigeria on a daily basis, which has resulted in a depletion of Nigeria's material resources. Suffice to say that there are quite a number of Nigerian politicians, and public officials who have conducted and discharged their duties with integrity, and who have rendered honest service to the nation while in office.

However, those are in the minority. Due to the rampancy of public officials embezzling vast sums of funds and laundering same to offshore financial centres around the world, Nigeria have been inundated by local and global corruption scandals perpetuated by public officials. Some have been convicted, albeit in foreign jurisdictions such as the case of James Ibori, a Nigerian PEP convicted and sentenced to 13 years in prison for diversion of public funds and money laundering in the United Kingdom.

Several reported grand corruption scandals in Nigeria point to the conclusion that corruption in Nigeria is immense and has metastasised throughout the body politics. There are a catalogue of corruption cases involving PEPs in Nigeria who are being investigated or prosecuted for abuse of office, money laundering, and other related crimes. These public officials include past Governors, Ministers, lawmakers and top military officers.

2.6.1 A CASE STUDY OF PUBLIC OFFICIALS INVOLVED IN GRAND CORRUPTION IN NIGERIA

To illustrate the alarming nature of grand corruption perpetuated by public officials in Nigeria, it is pertinent to provide some examples. Enforcement institutions such as the Economic and Financial Crimes Commission and other enforcement agencies continue to uncover cases of corrupt practices and money laundering among Nigerian public officials.

[126] Adams AJ,' Political corruption and national economic decline: An assessment of the impact of political corruption on the Nigerian economy' (2013) 1 Calabar Journal of Politics and Administration 105
[127] Michael M Ogbeidi,' Political Leadership and Corruption in Nigeria since 1960: A socio-economic analysis' (2012) 1 Journal of Nigerian Studies 2
[128] Awofeso and Odeyemi (n114)

2.6.2 *The case of Joshua Dariye (Former Governor Plateau State):*

Firstly, Joshua Dariye, a former Governor of Plateau State was found to operate numerous bank accounts in London which was used to transfer and launder stolen public funds.[129] In the course of investigation, a discovery of £810,000 pounds was traced to a UK account held by Dariye. Like many other corrupt public officials in Nigeria, Dariye used front agents to acquires assets in real estate where he purchased expensive properties. The London Metropolitan Police determined that Dariye had laundered about £10 million through London.[130]

Furthermore, Mr Dariye, a serving senator in Nigeria was accused of embezzling N1.6 billion(naira) ecological funds belonging to his state and siphoning money out of the country to foreign banks. Although he was initially arraigned in 2007, his trial was stalled for over eight years after he lodged several appeals to quash the charges against him. He was eventually sentenced to 14 years in prison in June 2018,[131] one of the very few convictions ever recorded in Nigeria involving a public official.

2.6.3 *The case of Diepreye Alamieyeseigha (Former Governor Bayelsa State):*

Secondly, another corruption scandal was that of Diepreye Alamieyeseigha, a former Governor of Bayelsa State. He was first detained upon arrival in London for money laundering, and being in possession of large quantity of undeclared cash. Following subsequent raids, $1.5 million in cash was recovered from his home in London. In addition, a further $2.7 million was also discovered in a Royal Bank of Scotland account linked to him. It was discovered that he purchased real estate worth $15million in London, and found to be the owner of four private properties in London worth millions of pounds.[132] In May 2006, a London court ordered confiscation of the seized cash pursuant to the Proceeds of Crime Act after breaching bail conditions. Upon returning to Nigeria, he pleaded guilty to criminal diversion of public funds and money laundering in a Nigerian court and was subsequently sentenced to 2years in prison.[133]

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[129] Agbiboa (n3)
[130] ibid
[131] Economic and Financial Crimes Commission,' Senator Joshua Dariye Bags 14 years for N1.6bn fraud' (12 June 2018) < http://www.efccnigeria.org/efcc/news/3269-senator-joshua-dariye-bags-14-years-for-n1-16bn-fraud> accessed 20 September 2018
[132] World Bank Stolen Asset Recovery Initiative,' Asset Recovery watch' < http://star.worldbank.org/corruption-cases/node/18493> accessed 03 April 2018
[133] ibid

2.6.4 *The case of James Ibori (Former Governor Delta State):*

Thirdly, one of the most highly criticised and sensational case of corruption in Nigeria involved a former Governor of Delta state, James Ibori. Initially, Ibori was charged in Nigeria with 170 counts for offences that includes theft of public funds, abuse of office, money laundering and failure to make full disclosure of his assets in the Declaration of Assets form.[134] During the trials in Nigeria, and according to the former chairman of EFCC, Ibori attempted to disrupt and evade the course of justice by bribing officials of the EFCC to the tune of $15 million to set aside his case.[135]

In December 2009, he was discharged by a federal high court sitting in Delta State of all 170 charges of corruption brought against him by the EFCC. The court's decision was based on a no-case submission made by the accused. The court held that the prosecution had failed to make out a prima facie case in respect of counts of money laundering preferred against Ibori. In April 2010, a new allegation of embezzlement of N40 billion(naira) ($266million) was pressed against him.[136] All attempts made to secure his arrests proved to be futile, and Ibori fled Nigeria, prompting the EFCC to request assistance of the Interpol. As a result of these corruption allegations, the UK courts froze Irori's assets valued at about £17 million[137].

In May 2010, Ibori was arrested in Dubai under Interpol arrest warrant, issued by UK courts. On 27th February 2012, accused of stealing $250 million from the Nigerian public purse, Ibori pleaded guilty to ten counts of money laundering and conspiracy to defraud at Southwark Crown court in London contrary to s328 of the Proceeds of Crime Act 2002.[138] The court was told how the amount he stole was unquantified.[139] It was the Crowns case that Ibori corruptly and fraudulently used nine companies to defraud the state, and that he purchased six properties outside Nigeria with stolen money and also operated bank accounts all over the world.

The properties acquired included a house in Hampstead, London, purchased for £2.2 million in cash, a mansion in South Africa for £3million, and a house in Houston, Texas, purchased for $1.8million. In 2005, he also instructed a solicitor to purchase a private jet for a sum of $20 million. One of the counts he was charged with involved the use of a client account of Arlington

[134] Hafsatu Mustapha,' R v James Inane Ibori- conquering the world of financial crimes' (2014) 219 Criminal lawyer 3
[135] Gbemi Odusote,' The Judiciary as a Critical Linchpin' (2013) 34 Liverpool law Review 123
[136] Mustapha (n 134)
[137] ibid
[138] *R v James Onanefe Ibori* [2013] EWCA Crim 815
[139] *Ibid*

Sharma solicitors, a firm of solicitors in Mayfair, as a private bank account for himself and his family through which he laundered money.

The law firm helped facilitate the laundering of the proceeds of corruption through the creation of a series of complex financial transactions involving several sophisticated money laundering schemes, such as the creation of trusts to ensure Ibori's assets were obscured. This case serves as a quintessential example of how most corrupt Nigeria public officials launder stolen wealth using corporate vehicles such as the incorporation of shell companies, the creation of trusts, and the use of gatekeepers like lawyers in facilitating money laundering schemes, which will be analysed in more detail in the chapter that follows.

2.6.5 *The case of Orji Uzor Kalu (Former Governor of Abia State)*

Fourthly, the case of Orji Uzor Kalu is another quintessential example of the involvement of PEPs in the plunder of public funds. Kalu served as a two term Governor of Abia State. Shortly after stepping down as Governor, the Economic and Financial Crimes Commission received several petitions from concerned indigenes against Kalu bordering on abuse of office, corruption and money laundering. Upon receipt of the petitions, the EFCC investigated the petitions which revealed that he plundered state resources.[140]

He was later charged to court alongside his company Slok Nigeria Limited on a 39-count charge of illegal diversion of public funds and money laundering to the tune of N7.1 billion (naira). According to the prosecution, the 7.1 billion formed part of the funds illegally diverted from the treasury of Abia State Government which was converted by the defendant. The EFCC alleged that Kalu incorporated a company in which he used for money laundering purposes and to retain the proceeds of grand corruption. These offences were in contravention of the Money Laundering Prohibition Act 2012.[141] The EFCC secured the conviction of Mr Kalu, a serving senator alongside his co-defendants on 39 counts of money laundering involving N7.1 billion at the Federal High Court in Lagos. The trial judge, Mohammed Idris, who is now a Justice of the Court of Appeal, sentenced Mr Kalu to 12 years imprisonment and wound up his company.

However, there was palpable surprise throughout the country, when the Supreme Court, in a unanimous judgment of its seven-member panel, nullified the judgment and ordered a retrial. The apex court ruled and held that the trial was a nullity on the grounds that Justice Idris, had

[140] *FRN V Orji Uzor Kalu* [FHC/ABJ/CR/56/07]
[141] *ibid*

been elevated to the Court of Appeal and no longer a judge of the Federal High Court as at the time he concluded the trial and handed down his verdict. At the time of writing, Mr Kalu has filed a fresh application at the Federal High Court, contending that having been convicted and sentenced in the same charge, it would amount to double jeopardy for him to be subjected to a fresh trial on the same charge.

Equally important in the discourse of grand corruption and one of the most compelling evidence to prove the levels of grand corruption in Nigeria perpetuated by public officials was a list of names released on the 1st of April 2017 by the Nigerian Federal Government through the Minister for Information, Lai Mohammed.[142] This list contained names of public officials alleged to have diverted public funds. It includes more than two dozen individuals, namely ministers, lawmakers, aides to high ranking officials and top military officers, all accused by the Nigerian federal government of criminal diversion of public funds.

It is instructive to note that the released names was as a result of a judgment delivered by Justice Hadiza Rabiu Shagari in favour of Socio-Economic Rights and Accountability Project (SERAP) where it ordered the federal government to immediately release to Nigerians information regarding the names of high ranking public officials from whom public funds were recovered and the circumstances under which such funds were recovered; as well as the exact amount of funds recovered from each public official.[143]

The judge agreed with SERAP that by virtue of the provisions of s4(a) of the Freedom of Information Act 2011, the federal government has a legally binding obligation to disclose the names of all suspected public officials who have diverted public funds, past and present.[144] SERAP argued that the public interest to know was greater than any other legitimate interest the government might wish to protect. A highlight of some names included in the list is as follows:

- Former National security adviser (Sambo Dasuki) accused of diverting $2.1 billion dollars in the scandal involving the procurement of military equipment.

[142] David Malingha Doya,' Nigerian Government names alleged treasury looters in face-of' (2 April 2018) <https://www.bloomberg.com/news/articles/2018-04-02/nigeria-government-names-alleged-treasury-looters-in-face-off> accessed 10 April 2018
[143] *SERAP V 2ORS* [2016] FHC/CS/964
[144] ibid

In addition to this, a total of $1.5 billion and £5.5 million pounds was allegedly embezzled through his office.[145]

- Rtd Lt-Gen Kenneth Minimah: N13.9 billion and N4.8 billion recovered by the EFCC in cash and property.
- Rtd Lt-Gen Azubuike Ihejirika: N4.5 billion recovered by EFCC
- Air Marshall Adesola Amosun: N21.4 billion recovered by the EFCC
- Inde Dikko, former Controller General Customs: N40 billion in cash recovered and properties
- Former Petroleum Resources Minister Dieziani Alison-Madueke: In just one of the cases the EFCC is investigating involving her, about N23 billion is alleged to have been embezzled.
- Former Niger State Governor Babangida Aliyu is alleged to have diverted N1.6 billion from office of National security adviser.[146]

2.7 EVIDENCE OF THE EXTENT OF CORRUPTION IN NIGERIA

In light of the fact that this chapter has made, and this thesis will be making postulations about endemic corruption, particularly grand corruption involving PEPs in Nigeria, it is paramount to advance some proof to that effect. In this regard, existing surveys and assessments provide an overall picture of the extent of corruption in Nigeria and other countries around the world. The best-known corruption assessments are the various Transparency International corruption indices, which includes the Global Corruption Barometer, and Transparency International's Corruption Perception's Index.[147] Others include World Bank's Worldwide Governance Indicators.

To demonstrate, the Worldwide Governance Indicator regarding control of corruption which ranges from 0 (lowest control of corruption) to 100 (highest control of corruption), shows that the levels of corruption in Nigeria have remained alarmingly high during past years accessed.[148]

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[145] Premiumtimes,' Nigerian Government releases more names of looters' (April 2018) <https://www.pmnewsnigeria.com/2018/04/01/nigerian-government-releases-more-names-of-looters/> accessed 10 April 2018

[146] ibid

[147] Anti-Corruption Resource Centre,' Nigeria: Evidence of corruption and the influence of social norms' (Transparency International global coalition against corruption) < https://www.transparency.org/files/content/corruptionqas/Nigeria_overview_of_corruption_and_influence_of_social_norms_2014.pdf> accessed 25 January 2019

[148] Daniel Kaugfmann,' The Worldwide Governance Indicator Project (World Bank) < http://info.worldbank.org/governance/wgi/#home> accessed 3 April 2018

The country scored as little as 11 on control of corruption in 2012, and 12 in 2017, and little significant variation can be seen since the first assessment in 1996, when Nigeria scored approximately 9.[149]

Similarly, data from the 2017 Global Corruption Barometer, assessed by Transparency International, also suggests that the population's perception of corruption is increasing.[150]

The CPI is the best known of these indices and has been widely credited with making the issue of corruption and good governance measurable on a relatively fair and rational basis, creating accepted criteria that allow for international comparisons of levels of corruption across the globe. This index has played a pivotal role in focusing attention on corruption, creating pressures for reforms across countries and influencing the actions of government, corporations, civil society organisations and the media.[151] The most compelling evidence of corruption in Nigeria has been the annual CPI published by Transparency International.

The CPI is calculated by aggregating and analysing data from independent sources that measure the level of public and private corruption in various countries. This data is then consolidated and standardised with a matching percentiles technique.[152] In achieving this objective, TI uses a compilation of data, which is measured on a scale of 0 (highly corrupt) to 100 (very clean) with lower scores signifying countries where corruption is prevalent.

Evidence from this index upon examination indicates that Nigeria has consistently performed poorly. To demonstrate, in 2012, Nigeria ranked 139 out of 177 countries, with a score of 27.[153] In 2013, it ranked 144 with a score of 25.[154] In 2014, it ranked 136 with a score of 27.[155] In 2015, it ranked 136 with a score of 26.[156] In 2016, it ranked 136 with a score of 28.[157] Also in

[149] ibid
[150] ibid
[151] Andersson and Heywood (n30)
[152] Transparency International,' Corruption Perceptions Index 2017' (February 2018) <https://www.transparency.org/news/feature/corruption_perceptions_index_2017?gclid=EAIaIQobChMIq6jZ4NCO2gIVyBgbCh2wBQlrEAAYASAAEgJRDvD_BwE#table> accessed 27 March 2018
[153] Transparency International,' Corruption Perceptions Index 2012' <www.transparency.org/cpi2012/results> accessed 27 March 2018
[154] Transparency International,' Corruption Perceptions Index 2013' (3 December 2013) <www.transparency.org/whatwedo/publication/cpi_2013> accessed 27 March 2018
[155] Transparency International,' Corruption Perceptions Index 2014' (3 December 2014) <www.transparency.org/whatwedo/publication/cpi2014> accessed 27 March 2018
[156] Transparency International,' Corruption Perceptions Index 2015' (27 January 2016) <www.transparency.org/whatwedo/publication/cpi_2015> accessed 28 March 2018
[157] Transparency International,' Corruption Perceptions Index 2016' (January 2017) <https://www.transparency.org/news/feature/corruption_perceptions_index_2016> accessed 27 March 2018

2017, Nigeria scored 27, and ranked 148.[158] In 2019, Nigeria ranked 146 out of 183 countries with a score of 26.[159] In the latest 2020 CPI index, Nigeria scored 25, and ranked 149.[160] These appalling scores is an attestation of endemic corruption in Nigeria.

Some criticise TI's CPI holding that the index is only a prominent measure because TI has established a near monopoly role among non-governmental organisations fighting corruption.[161] Furthermore, it is said that the CPI gained advantage being the first systematic attempt to develop a cross national measure of corruption thereby not only setting the standard for corruption, but also defining the field. Most scholars are sceptical about measuring perceptions rather than reported cases, prosecutions or even proven incidences of corruption.[162] This is so because perceptions are difficult to demonstrate empirically as one element contributing to perceptions of corruption in different countries is precisely their ranking in previous indices; therefore, introducing a certain endogeneity to the index that is compounded by the incorporation of rankings from previous indices into each new release.[163]

Others opine that the CPI should be interpreted with caution in that the sources used in the measurement of corruption are subjective and can be influenced by the occurrence of visible scandals in a country at a particular time which do not reflect underlying conditions and therefore prone to bias.[164] Although these arguments hold substance, the index remains instrumental and continue to exercise great influence in shaping the political focus in the politics of anti-corruption efforts, in academic research and also in galvanising support for measures aimed at fighting corruption.

Moreover, other surveys such as the World Bank's widely used Worldwide Governance Indicators face the same criticism for being perception based in general.[165] Nevertheless, TI is

[158] Transparency International,' Corruption Perceptions Index 2017' (February 2018) <https://www.transparency.org/news/feature/corruption_perceptions_index_2017?gclid=EAIaIQobChMIq6jZ4NCO2gIVyBgbCh2wBQlrEAAYASAAEgJRDvD_BwE#table> accessed 27 March 2018

[159] Transparency International,' Corruption Perceptions Index 2019' (January 2019) < https://www.transparency.org/en/cpi/2019/results/nga> accessed 6 April 2019

[160] Transparency International,' Corruption Perceptions Index 2020' (January 2021) < https://www.transparency.org/en/cpi/2020/index/nga> accessed 10 April 2020

[161] Andersson and Heywood (n30)

[162] Melissa Thomas,' What do the Worldwide Governance Indicators measure?' (2010) 22 European Journal of Development Research 31; Pornanong Budsaratragoon and Boonlert Jitmaneeroj,' A critique on the Corruption Perceptions Index: An interdisciplinary approach' (2020) 70 Socio-Economic Planning Sciences

[163] ibid

[164] Sheheryar Banuri and Catherine Eckel,' Experiments in culture and corruption: A review' in Danila Serra and Leonard Wantchekon (eds), *New Advances in Experimental Research on Corruption* (Emerald Group Publishing 2012) 54

[165]Thomas(n162)

candid that the CPI is a measure of how corruption is perceived, and is transparent about its methodology. The index remains popular and is still used to create awareness on a country's level of corruption. Therefore, these figures are reflective of endemic corruption in Nigeria, and not unconnected to the plunging of Nigeria's resources by corrupt politically exposed persons. Based on the foregoing, this thesis adopts TI's CPI as evidence to prove the level of corruption in Nigeria.

2.8 THE OIL INDUSTRY AND ITS ROLE IN FACILITATING GRAND CORRUPTION

Nigeria is abundantly rich in natural resources and one of the largest oil producing nations in the world.[166] The International Monetary Fund (IMF) has stated that the oil industry accounts for more than 75 percent of government revenue,[167] and 80 percent of foreign exchange earnings making Nigeria one of the most oil-dependent economies in the world.[168] As a result, the Nigerian economy has been heavily interlinked with the oil industry and massive dependence in this industry is rife, with the downside that it is a sector notorious for grand corruption as oil revenues constitutes majority of the public funds misappropriated by Nigerian political elites.[169] This is because oil resources contributes significantly in providing resources for the public sector and for capital projects which is appropriated by the President, Ministers, Federal Agencies and Departments, State Governors, Commissioners et cetera.[170]

With the billions of dollars in government revenues from this industry, Nigeria could probably solve its serious development and infrastructural problems. However, since the commercial discovery of oil in Nigeria, the phenomenally large revenue it has brought over the years has exacerbated the problem of grand corruption in Nigeria.[171] Scholars have held that the shift from dependence in agriculture and other sectors to a near total dependence on oil has fuelled corruption.[172] This is because it opened new, bigger, and more intensive opportunities for the irregular acquisition of money for private interest.[173] Others from the development literature have also argued that Nigeria suffers from 'resource curse', meaning the paradox that developing countries with abundance of income from natural resources like minerals and fuels

[166] Jim Playfoot, Phil Andrews and Simon Augustus, *Education and Training for the oil and Gas industry: The Evolution of four Energy Nations: Mexico, Nigeria, Brazil and Iraq* (Elsevier Science Publishing, 2015) 25
[167] International Monetary Fund,' Nigeria: (April 2014) <http://www.imf.org/external/pubs/ft/scr/2014/cr14103.pdf > accessed 14 March 2018
[168] Sunday Enebeli-Uzor,' The Nigerian Oil sector: Trends, Directions' (2013) 9 Zenith Economic Quarterly 48
[169] Playfoot (n166)
[170] Okechukwu Eme, *Politically Exposed Persons and the Nigerian State* (Lambert Academic Publishing 2016) 35
[171] Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Malthouse Press 2000) 3
[172] Adesote and Abimbola (n23)
[173] Pierce (n99)

tend to have less economic growth and worse developmental outcomes than countries with fewer natural resources.[174]

As Martin posits, ‘‘Nigeria’s oil should have been a blessing for Nigeria to be used to build infrastructures and invest in social services. Instead, it has been a curse, a lubricant that has produced massive corruption and dysfunctional governments’’.[175] This resource curse has been attributed to government mismanagement of resources and corruption.[176] Successive governments in Nigeria have been accused of high-level corruption by misappropriating vast amounts of oil funds. For instance, the most famous case is that of Governor of Central Bank of Nigeria, Sanusi Lamido, who in 2013 reported the disappearance of $20 billion in oil revenue that was criminally diverted by public officials.[177] Recently, more than $215 million have been allegedly misappropriated by some public officials in the oil sector in relation to the Niger Delta Development Commission.[178] Similar reports done by the KPMG, a leading auditing firm also revealed the massive corruption and misappropriation of public funds from the oil industry.[179]

Because Nigeria so much depends on the oil sector as her source of living, income, economic growth and development, corrupt practice in this sector automatically affects all other sectors of the economy.[180] The loss of revenue from the oil industry has had a devastating effect on the ability to carry out development actions, finance infrastructure or provide basic public service.[181] This is primarily as a result of the fact that vast incomes generated from the oil industry in Nigeria are diverted to the pockets of some individuals whose responsibility it is to manage the resources on behalf of the nation.[182]

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[174] Brenda Shaffer and Taleh Ziyadov, *Beyond the Resource Curse* (University of Pennsylvania 2012) 2
[175] Martin Patience, ‘Nigeria’s NNPC failed to pay $16billion in oil revenues’ (15 March 2016) <www.bbc.co.uk/news/world-africa-35810599> accessed 15 March 2018
[176] VOS Okeke,’ A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 in Nigerian Oil and Gas sector’ (2013) 14 British Journal of Arts and Social Sciences 98
[177] BBC,’ Nigeria Central bank head Lamido Sanusi ousted’ (20 February 2014) <www.bbc.co.uk/news/world-africa-26270561> accessed 15 March 2018
[178] Charity Philip Sidi,’ Impact of Corruption on the Oil Industry in Nigeria: Implication for Economic Growth’ (2020) 18 Journal of Management Sciences 33
[179] Musikilu Mojeed,’ The Damning KPMG Report Government and the NNPC do not want Nigerians to see’ (Dec 9 2011) www.premiumtimesng.com/news/3101-the_damning_kpmg_report_fg_nnpc_do_not_want_nigerians_to_see.html> accessed 15 March 18
[180] PA Donwa and Others,’ Corruption in the Nigerian Oil and Gas industry and Implications for Economic Growth’ (2015) 14 International Journal of African and Asian Studies 29
[181] John R Heilbrunn, *Oil, Democracy, and Development in Africa* (Cambridge University Press, 2014) 147
[182] Donwa (n 180)

2.9 FACTORS AFFECTING THE CURBING OF GRAND CORRUPTION IN NIGERIA

Nigeria faces severe crisis in its economic, social and political development that is connected to massive corruption, especially in the public sector. The fight against corruption has remained a constant priority for successive governments in Nigeria. The objective of this section is to elucidate the challenges in combating corruption in Nigeria. Several factors have been pointed out by scholars as responsible for the prevalence of corruption in Nigeria. These factors include the following:

2.9.1 *A SYSTEM THAT REWARDS CORRUPTION*

According to Human Rights Watch, the broadest obstacle any effort to tackle grand corruption in Nigeria faces is that the country's political system is built to reward corruption, not punish it.[183] Too often, corruption is a prerequisite for success in Nigeria's political process. Most public officials owe their illicitly obtained offices to political sponsors who demand financial returns that can only be raised through corruption.[184] Nigeria's political establishments, both the ruling party and opposition parties have at various times shown willingness to embrace and celebrate those convicted for criminal diversion of public funds and money laundering.

For instance, after the release of a former Nigerian Ports Authority chairman, Olabode George, who was convicted on corruption and money laundering related charges; a lavish welcome ceremony was held in his honour and attended by prominent ruling party politicians including former President Obasanjo and Governor Gbenga Daniel who declared George a hero.[185] In similar vein, former Governor Diepreye Alamiesiegha was granted a Presidential pardon by then President, Goodluck Jonathan, after he was convicted of large scale corruption related money laundering in Nigeria and other foreign jurisdictions.[186]

Furthermore, in Nigeria, some ex Governors and some corrupt PEPs who are either being investigated or prosecuted for diverting public funds while serving in different capacities in government are still active participants in the political system in Nigeria. Most corrupt PEPs have gone from being Governors, to legislators who make laws, while others also occupy other sensitive public offices such as being ministers of government despite being linked with large-

[183] Human Rights Watch,' Corruption on Trial: The Record of Nigeria's Economic and Financial Crimes Commission' (25 August 2011) < https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission> accessed 25 April 2019

[184] ibid

[185] ibid

[186] Global Witness, *International Thief Thief: How British Banks are Complicit in Nigerian Corruption* (Global Witness Limited 2010) 10

scale corruption.[187] It is submitted that no deterrence can be achieved in combating corruption if corrupt PEPS are rewarded for diverting of public funds.

2.9.2 *THE POLITICAL WILL:*

One of the key points to mention affecting the curbing of grand corruption in Nigeria is lack of political will. No anti-corruption mechanism or strategy is bound to succeed without strong leadership and political will.[188] Political will is a critical and paramount starting point to achieving a sustainable and effective anti-corruption fight.[189] Political will demonstrates the commitment by the political leadership to address the challenges or to fulfil a political pledge, such as fighting corruption, by pursuing the appropriate policy responses, including widespread reforms.[190] It involves building legitimacy, credibility, and broad-based political support and compliance both in society and within government.[191]

Political will is required to set an example and to demonstrate that no one is above the law. Unless clear and unambiguous signals of support emanate from the top, those responsible for administering and enforcing crucial aspects of the country's laws may feel inhibited.[192] In as much as anti-corruption and anti-money laundering laws might often exist, enforcement of these laws are usually frustrated without the necessary political will. Across the world, anti-corruption efforts will be less effective without political will and without strong leadership.[193] This is so because, without political will or with political interference, it becomes more daunting on enforcement agents to carry out their functions properly.

Consequently, this impedes the proper functioning of anti-corruption agencies which is capable of frustrating efforts at combating corruption and financial crimes by public officials.[194] For example, the work of investigators working in an anti-corruption commission is likely to produce, at best, only limited results unless they enjoy the support of their political masters.

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[187] Eniola Akinkuotu and Tobi Aworinde,' Nine Ex-Governors whose Corruption cases are forgotten' *Punch* (9 December 2019) < https://punchng.com/nine-ex-govs-whose-corruption-cases-are-forgotten/> accessed 20 March 2020

[188] Osita Nnamani Ogbu,' Combating corruption in Nigeria: A critical appraisal of the laws, institutions, and the political will' (2008) 14 Annual Survey of International and comparative law 99

[189] Emmanuel Sotande,' Impediments affecting the curbing of Illicit financial flows of organised crime in developing economies: Policy implications' (2019) Journal of Financial crime 5

[190] Transparency International,' Anti-corruption glossary' <https://www.transparency.org/glossary/term/political_will> accessed 09 Mar. 18

[191] Ogbu (n188)

[192] ibid

[193] Nuhu Ribadu,' Capital loss and corruption: The example of Nigeria- Testimony before the house financial services committee' in Jide Olakanmi (eds), *Anti-Corruption Laws* (Law Lords Publications 2016) 298

[194] ibid

Transparency International in analysing its published CPI explained that some African countries like Botswana, Seychelles and Namibia all scored better on the index compared to some OECD countries such as Italy, Hungary and Greece. It explained that the key ingredient that top performing African countries had in common is the political will that is consistently committed to the fight against corruption.[195] Furthermore, TI posits that in addition to having anti-corruption laws and institutions, these countries go an extra step to ensuring strict implementation of its laws. This is why the political will to support investigations and prosecutions, particularly in large-scale corruption cases cannot be taken for granted.[196]

According to Hatchard, Governments may well purport to oversee the enactment of laws and creation of institutions ostensibly designed to combat corruption.[197] Yet, in practice, this seeming political will is often a mere façade.[198] Far too often, as it is in Nigeria, successive regimes, both military and democratic regimes condemn corruption, but end up not doing enough to combat it. Lawson has stated that those who are called upon to make the changes necessary to limit opportunities for corruption are the very actors who benefit most from the status quo.[199] Similarly, Collier asserts that where the ruling bloc is relatively cohesive, implementation can be expected to be lax and powerful individuals to be insulated from scrutiny.[200]

Successful anti-corruption efforts depend on political will. It includes both the political will to initiate the fight against corruption in the first place and subsequently the will to sustain the battle over time, until results are achieved.[201] Successive governments in Nigeria through various measures, policies and programs have ostensibly attempted to combat corruption and raise the hope of Nigerians with the expectations that sustained anti-corruption drive will bring to justice corrupt public officials and act as a deterrent to others. Unfortunately, these measures have made little impact in the face of enormous grand corruption in Nigeria.

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[195] Transparency International, A redefining moment for Africa (February 2018) <https://www.transparency.org/news/feature/a_redefining_moment_for_africa> accessed 09 Mar. 18

[196] John Hatchard, Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa (Edward Elgar Publishing, 2014) 151

[197] Ibid 28

[198] ibid

[199] Letitia Lawson,' The Politics of Anti-Corruption Reform in Africa' (2009) 47(1) Journal of Modern African Studies 73

[200] Collier (n89)

[201] Andrew Nongogo and Yvonne Chibiya, *Independence of Anti-corruption Agencies: A study of six institutions in Southern Africa* (Human Rights Trust of Southern Africa 2006) 23

2.9.2.1 CATEGORIES OF POLITICAL WILL

In view of these points, Hatchard breaks down political will into several categories that can vary within a country from time to time. This categorisation is necessary, as it also reflects the problem of political will in Nigeria. These includes the following:

2.9.2.2 *Active Political will*: Hatchard refers to this as the ideal position where there is a genuine commitment at the highest political level to supporting anti-corruption efforts and developing effective good governance laws and institutions.[202]

2.9.2.3 *Partial Political will*: Hatchard is of the view that it is not uncommon for newly elected political regimes upon taking office to pursue high profile anti-corruption campaigns targeting members of the previous administration. This might involve supporting the prosecution on corruption-related charges of members of the previous regime. Even if justified, Hatchard holds that a President may be prepared to lead or support an anti-corruption agenda so long as it is kept within acceptable limits that does not seek to investigate the incumbent or his close senior supporters, creating a perception that corruption is a charge levelled at opponents and enemies, and overlooked among friends.

Hatchard argues that in principle this is clearly unacceptable as this usually targets political opponents, and also enables corrupt members of the incumbent administration escape justice; but is often the result of a difficult and unsatisfactory balancing act between providing protection for those key political supporters who helped bring the government into power as against the need to combat corruption[203].

Hatchard's theory is neatly illustrated in Nigeria where the incumbent President, Muhammadu Buhari, who was elected in May 2015 based on a reputation for honesty and combating corruption has often been accused of using the anti-corruption fight as a political tool aimed at targeting political opponents while leaving out indicted members of his cabinet out of prosecution. For instance, most of the President's aides have been tied to corruption and corrupts acts. An example involves a former Governor of River State and currently the incumbent Minister of Transportation, Mr Rotimi Amaechi.

[202] Hatchard (n196) 29
[203] Ibid 30

The former governor and some other former political office holders under his regime were indicted by a judicial commission of inquiry set up by the Rivers state government who called for their immediate prosecution into the sale of valued state assets worth $400 million under his administration.[204] His nomination as a minister under the current regime despite allegations of corruption has been largely controversial given that Amaechi was identified as one of those who contributed huge funds in propelling the President to power. This example gives credence to the widely held belief and lack of trust by the Nigerian society that anti-corruption fight never extends to the close allies of the government of the day.

2.9.2.4 *The Shifting political will*: Hatchard explains here that the status of the political will in a country may vary from time to time depending upon the policies of the current regime or following regime change. To elaborate, in Nigeria during the tenure of President Olusegun Obasanjo, which signalled the start of the democratic dispensation in Nigeria, several state Governors were convicted of corruption and other related offences. The EFCC under the leadership of, Mallam Nuhu Ribadu, was instrumental in carrying out investigations that subsequently led to convictions. However, in 2007 after the expiration of the tenure of Obasanjo, a new President emerged in the person of President Umaru Yar'adua.

This led to the removal of Nuhu Ribadu as the chairman of EFCC. The consequence of his removal led to the shielding of corrupt former governors, most notably James Ibori, the former Governor of Delta State from International investigations into corruption-related offences by blocking mutual legal assistance requests from the United Kingdom. It was only after the sudden death of President Yar'adua while still in office and the emergence of President Goodluck Jonathan that effective cooperation was resumed, which subsequently led to the conviction of Ibori in 2012 on money-laundering charges in the United Kingdom.[205] Therefore, the absence of strong political will in the governance against corruption is a major constraint that constitutes a major weakness in the fight against grand corruption in Nigeria.

[204] Rivers state of Nigeria, *White paper on the report of the judicial commission of inquiry for the investigation of the administration of governor Chibuike Rotimi Amaechi on the sale of valued assets of rivers state and other related matters under the chairmanship of honourable justice George Otakpo Omereji* (White paper 2015)
[205] Hatchard (n196)

2.9.4 *WEAK INSTITUTIONS:*

In the same fashion, weak enforcement institutions have also been identified as part of the pitfalls in combating grand corruption in Nigeria.[206] The strength and effectiveness of institutions shape the conditions in which corruption can thrive. Scholars have argued that the problem for Nigeria with regards attempts at combating corruption is not a lack of anti-corruption institutions or legislative frameworks. Instead, what exists are weak institutions some of which are themselves major perpetrators of corruption.[207] Institutions loom large especially in the context of corruption. In societies where the level of public-sector corruption is relatively low, one normally finds strong institutions of accountability that control abuses of power by public officials.[208]

In Nigeria, anti-corruption and other institutions are weak, and in some cases, have failed out rightly. The incumbent Director-General of the World Trade Organisation, Ngozi Okonjo-Iweala, stated that corruption has persisted in Nigeria because the country lacks the institutions, systems, and processes to prevent it.[209]

In other words, what prevails in Nigeria is a state of affairs where institutions across all levels and branches of government have been captured in a systemic manner, and has created a social state of being whereby those institutions, having been designed to underpin and support the rule of law and good governance while delivering public services, have been deliberately undermined or neglected to the point where they can no longer uphold the rule of law or act in the best interests of the nation for ethical functioning and service delivery.[210] In this regard, Akanle posits that corruption can never be prevented and fought without strong institutions.[211]

In Nigeria, the institutions that are mandated to fight corruption, such as the EFCC and the Independent Corrupt Practices Commission (ICPC) have often been criticised as institutions being used by the government as political tools to selectively fight perceived enemies of the

[206] Olayinka Akanle,' Corruption and the Nigerian Development Quagmire' (2015) 31 Journal of Developing Societies 421
[207] Ronald Hope (n21) 138
[208] Hossein Gholami and Habeeb Adbulrauf Salihu,' Combating corruption in Nigeria: The emergence of whistleblowing policy' (2019) 26 Journal of Financial Crime 131
[209] Premium Times,' Nigeria lacks institutions, systems, to prevent corruption' (17 February 2015) <http://www.premiumtimesng.com/news/more-news/177045-nigeria-lacks-institutions-systems-to-prevent-corruption-okonjo-iweala.html
[210] ibid
[211] Akanle (206)

government.[212] A practice that undermines the credibility of the anti-corruption institutions, and runs contrary to the aims and objectives for which these institutions were established.

These institutions in the first place were created with the purpose of fighting corruption at every level in the society, whether among government officials who have perpetually enriched themselves by corruptly abusing their positions while in office or any other individual or group of individuals conducting financial transactions by means that go against the laws of Nigeria. For a country with high level of corruption and money laundering perpetuated by public officials, it is not enough to have institutions and laws in place to curtail these phenomenon's, but these institutions must be apolitical and insulated from political manipulations from the government.

The practice of using anti-corruption institutions by the government in a manner contrary to their establishment have continued to diminish public confidence in these institutions and raises questions about the government's commitment to due process, accountability and transparency, due to their partisan nature in combating corruption. Therefore, in other for these institutions to work effectively, they must be neutral, truly independent and free of political manipulations. The emphasis for any government in Nigeria that aims to curtail corruption should be on strengthening these institutions, with a particular focus on deterrence, rather than using them as a tool for political opponents.

Rulers, administrators and bureaucrats come and go, but institutions and systems remain.[213] This is why the former US President, Barrack Obama, on his first Presidential visit to Africa encouraged Africans to build strong institutions and not strong men. Where institutions and systems are lacking, corruption will thrive.[214]

2.9.5 *CONSTITUTINAL CONSTRAINTS: IMMUNITY CLAUSE UNDER s.308 OF THE CONSTITUTION*

Constitutional immunity granted to certain public officials, as presently constituted in Nigeria has been a major hindrance to combating grand corruption. Attempts to investigate, prosecute, or confiscate illegally obtained assets from public officials are often frustrated by the presence of immunity which bars any form of prosecution on certain public officials in Nigeria. Constitutional immunity has become controversial in Nigeria because of its deployment in hindering the prosecution of corrupt public officials in Nigeria by anti-corruption agencies. It

[212] Akanle (206)
[213] ibid
[214] ibid

is recognised, that states must have in place strategies for taking appropriate action against public officials who abuse their office.

This is complicated by the fact that most public officials enjoy constitutional immunity from both criminal and civil action during their incumbency in office. Yet, these are often the same public officials involved in corruption related activities in Nigeria. Section 308 of the 1999 constitution in Nigeria has in crystal terms restricted legal proceedings against the President, Vice President, Governors and Deputy Governors respectively of the various states in Nigeria. For clarity purpose, the said section provides as follows: Notwithstanding anything to the contrary in this constitution

a) No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office
b) No process of any court requiring or compelling the appearance of a person to whom this section applies shall be issued
c) This section applies to a person holding the office of President, Vice President, Governor and Deputy Governor.[215]

This concept finds its root in the doctrine of 'rex non potest peccare' (*the King can do no wrong).*[216] The rationale behind the immunity clause is that public office holders who fall within the definition of the provision should enjoy absolute immunity to enable them carry out their official duties without distractions, be it criminal or civil. In *Abacha v FRN,*[217] the Supreme Court stated that the essence of the immunity clause in the constitution was clearly to suspend right of action or judicial relief against the officials during their tenure of office and to allow incumbents free hand from harassment. Thus, it is assumed that the immunity granted such officials is to protect them from frivolous actions in court while still in office to conduct the affairs of governance free from hindrance, embarrassment and possible difficulties that may arise if such official is being constantly pursued and harassed with court actions. It is my submission that though this may well be the intendment in the constitution and as interpreted by courts in Nigeria, however, the prevalence with which most Nigerian public officials and the grantees of this provision divert public funds for personal use makes it imperative to expunge this provision from the constitution.

[215] The Constitution of the Federal Republic of Nigeria 1999 (as amended), s308
[216] Ponnle Solomon Lawson,' Immunity clause in Nigeria's 1999 constitution: Its implications on executive capacity' (2014) 2 American Journal of Social Sciences 130
[217] [2014] LPELR SC 40

In practice, it has overwhelmingly continued to serve as protective shield or a legitimate instrument for corrupt public officials in diverting the nation's resources without any fear of any form of prosecution. The consequence being that the clause has technically created a class of individuals who are above the law, despite the fact that majority of cases involving corrupt practices and money laundering emanate from these same individuals that the law protects. Proponents of the removal of this section from the constitution have argued that the goal should be to ensure that corrupt public officials are called to account for his or her misdeed immediately it is discovered.[218]

Although they lose immunity after office, what the clause provides them with is the time to obliterate the trail of any illicit funds before immunity lapses, in which case, it becomes difficult to prosecute such corrupt public officials; therefore raising serious apprehension that the provision of s308 is adversative to the goal of combating corruption in Nigeria.[219] The Nigerian experience of the immunity clause has been horrendous, traumatic and yields to social anomaly in the sense of mismanagement of its resources which has led to underdevelopment.[220] Indeed, there has been widespread concern over allegations of corruption made against Nigerian sitting Governors by the EFCC.

State Governors such as James Ibori, Joshua Dariye and Alamieyeseigha are examples of Governors who despite allegations of abuse of office and embezzlement of public funds were precluded from prosecutions because of the immunity clause. Solomon is of the view that the clause is abused, misused and totally out of tune with the aspirations of combating grand corruption in Nigeria.[221] It is obvious that s308 is a provision too broad for the purpose for which it is meant for. A former chairman of EFCC, Nuhu Ribadu, remarked that unless we remove the immunity clause, it will be difficult to address the problem of corruption in Nigeria.[222] In the same vein, at the highest level, Nigeria's President between 2007 and 2010, Late Umaru Yar'adua, as a beneficiary of such legislation consistently spoke in support of the removal of immunity clause from the constitution. At the World Economic Forum in Davos, Switzerland, the President specially advocated for its removal in line with the principles of rule

[218] Albert (n82)
[219] ibid
[220] Okeke CE,' An appraisal of the functional necessity of the Immunity clause in the political Governance in Nigeria' (2015) 59 Journal of African law 99
[221] Lawson (n216)
[222] Ebenezer Olaoye,' The significance of the immunity clause for Democratic consolidation in Nigeria' (2012) 6 African Journal of Criminology and Justice Studies 89

of law and to prove his commitment to the battle against corruption, wherein he stated that nobody in Nigeria deserves the right to be protected by law when stealing public funds.[223]

Although there is some merit in the argument that constitutional immunity saves public officials from frivolous and vexatious litigation, it is my submission that it does not outweigh the need to make public officials accountable for their actions which affects millions of people while in office. From the examples provided above, Governors are amongst persistent offenders as far as the plundering of Nigeria's resources is concerned. Providing them with such immunity is completely unwarranted as this can inevitably promote corruption and serve as a protective shield for corrupt public officials. Given that there are 36 states in Nigeria, the implication of this provision is that it effectively provides immunity from prosecution for some 76 senior public officials in Nigeria.

Based on the foregoing, it is submitted that the immunity clause is in effect an excessive protection for public officials; and as a matter of urgency and necessity must be expunged from the constitution given the brazen recklessness of public officials in Nigeria.

2.9.6 *DELAY IN THE ADMINISTRATION OF JUSTICE/ CORRUPTION IN THE NIGERIAN JUDICIARY*

The role of the judiciary in combating corruption in Nigeria cannot be overemphasised. It is fundamental to note that owing to its constitutional responsibilities, the role of the judiciary as a bastion in the anti-corruption war is unique. Its ability to combat corruption is a function of legal and political mechanisms in place.[224] In Nigeria, these mechanisms and their effectiveness in the anti-corruption fight remains problematic. The traditional functions of the judiciary include the settlement of legal controversies, determination of facts, deciding the laws applicable to a particular controversy, interpretation of statutes, et cetera.[225] In corruption cases specifically, the decisions of judges in the adjudication process is crucial as it bears the burden of determining the guilt or otherwise of an accused public official or any other private citizen engaged in financial or other crimes in Nigeria.

However, anecdotal evidence suggests that the common perception among ordinary Nigerians is that the wealthy and powerful have turned the judicial system to their self-protection mechanism. Corruption in the Judiciary has been key to ensuring public officials go unpunished

[223] Lawson (n216)
[224] Bazuaye (n13)
[225] Gboyega Kusamotu, *Nigerian Federalism & Separation of Powers* (Sulek-Temik Publishing) 143

and are able to maintain their positions in Nigeria.[226] Corruption has attained a mind-boggling proportion in Nigeria, and presently at such a level that even the judiciary has virtually lost its perceived insulations from the plague of corruption in Nigeria.

According to Ayoade, though corruption is seen infiltrating other arms of government, the effect of such infiltration in the judiciary is considered particularly insidious.[227] In his summation, a corrupt judiciary means that the legal and institutional mechanisms designed to curb corruption will generally be handicapped.[228] This is because it is beyond doubt that a corrupt judge/s or a corrupt judicial system cannot meaningfully contribute to the fight against corruption. The best laws and institutions will prove insufficient to make any impact on corruption and money laundering if the judicial system is corrupt.

Evidence suggest that judicial corruption is an aberration that is discernibly a major stumbling block in the fight against corruption in Nigeria.[229] The events in the judiciary and its handling of corruption cases in Nigeria have placed the judiciary, often regarded as the last hope of the common man in the spotlight. Although the judiciary in Nigeria faces a myriad of challenges in the discharge of their judicial functions, such as interference by politicians, events such as alleged complicity by judicial officers when handling high profile corruption cases and corrupt practices within the judiciary itself raises questions regarding the effectiveness of the judiciary in the discharge and performance of its role in combating corruption in Nigeria.[230]

A former President of the Nigerian Bar Association and a Senior Advocate of Nigeria (SAN), Joseph Daudu, once stated that ‘‘perception backed by empirical evidence suggest that justice is purchasable, and it has been purchased on several occasions in Nigeria’’.[231] This statement is unfortunately a reflection of the views shared by most Nigerians about the Nigerian Judiciary. When the judiciary which is expected to serve as a guardian of the rule of law is itself corrupt, anti-corruption and anti-money laundering strategies are deprived of essential measures needed to reduce the benefits of corruption and to punish corrupt acts.[232] At the root of corruption in

[226] Anti-Corruption Resource Centre,’ Nigeria: Evidence of corruption and the influence of social norms’ (Transparency International global coalition against corruption) < https://www.transparency.org/files/content/corruptionqas/Nigeria_overview_of_corruption_and_influence_of_social_norms_2014.pdf> accessed 25 January 2019

[227] Morakinyo Ayoade, *Legal Perspectives to corruption, money laundering and Assets Recovery in Nigeria* (Department of Jurisprudence & International law, Faculty of Law 2015) 139

[228] ibid

[229] Das Vasudev,’ Judicial corruption: The case of Nigeria’ (2018) 25 Journal of Financial crime 926

[230] ibid

[231] Ayoade (n227)

[232] Bazuaye (n13)

Nigeria is the inability of the criminal justice system, particularly the courts, to hold anyone accountable especially the rich and powerful who are usually politically exposed persons.

This has often led to the Judiciary being criticised for contributing to the spread of grand corruption over its handling of high-profile corruption. This is because most criminal trials, especially on serious corruption charges is preceded by endless objections, applications to quash charges and judges granting all manner of questionable injunctions.[233] According to Salihu, it is noteworthy that cases of corruption and money laundering are not punished in Nigeria, as most high-profile cases have remained inconclusive.[234]

Lengthy delays are often encountered in the trial of corrupt public officials. Several corruption cases are held up in court for as long as 10 years without any progress being made with the trials. For instance, the high-profile cases of former Governors such as in *FRN v Rasheed Ladoja*[235], *FRN v Orji Uzor Kalu,*[236] and many other high-profile corruption and money laundering cases are still ongoing many years after arraignment. Indeed, waiting for years to conclude trials of corrupt public officials using the criminal law does not ensure justice as it runs the risk of physical evidence becoming tainted or destroyed, weakens witness memory, and makes the presentation of evidence difficult.[237] Therefore, the dictum justice delayed is justice denied becomes apt in this regard. This has had the consequential effect of people losing faith in the judiciary and are often discouraged about the outcome of corruption trials in Nigeria.

Odinkalu expressed the following dissatisfaction over the judiciary and its handling of corruption cases. ‘‘That a few cases that manage to get to court are frustrated by a combination of legal and procedural technicalities, delay and a lenient disposition by the Nigerian Judiciary towards suspects in white collar crime. This is the only way to describe the fact that most suspects in cases of the most egregious corruption in Nigeria get away with it. The capacity of the judiciary to offer meaningful dispute resolution or remedies in the midst of habitual corruption has become compromised and our jurisprudence has, to put it most charitably,

[233] Habeeb Abdulrauf Salihu,’ Corruption in the Nigerian Judicial system: An overview’ (2018) 25 Journal of financial crime 669
[234] ibid
[235] FHC/L/336C/08
[236] FHC/ABJ/CR/56/07
[237] Cherif Bassiouni,’ Human rights in the context of criminal justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’ (1993) 3 Duke Journal of comparative & International law 235

become quite tolerant of or complicit in corruption, given room for a suggestion that some form of quid pro quo has taken place''.[238]

Odinkalu's view has been a result of the judiciary's culpability in granting questionable court orders in favour of public officials alleged to have diverted public funds by tolerating delay tactics from defence lawyers. Accused public officials charged with offences such as money laundering, abuse of office and other economic and financial crimes in Nigeria have on numerous occasions capitalised on a weak and corrupt judiciary by filing all manner of court documents to either delay or truncate the trial process or completely undermine it. The EFCC on several occasions have lamented the indiscriminate restrictions and unjustifiable injunctions issued by the court to sabotage its efforts on corruption trials.

For instance, in the case of *Attorney General of Rivers State v Economic and Financial Crimes Commission*[239], the EFCC discovered illegal diversion of public funds totalling N100 billion naira against a former Governor or Rivers State. The then Governor proceeded to court challenging the EFCC's investigations against him. In a shock ruling, the judge granted all declaratory and injunctive reliefs sought by the accused, top of which was an order restraining the agency from further action regarding alleged economic and financial crimes committed by the former Governor. The implication of granting the injunction made the former Governor perpetually immune from arrest and prosecution by the EFCC, an injunction which has continued to be used a legal excuse to evade prosecution.

Furthermore, the actions and decisions of some judges have tended to present the judiciary as a formidable ally of alleged corrupt public officers, thereby truncating the anti-corruption efforts. This was confirmed in another controversial decision involving James Ibori, a former Governor of Delta State in Nigeria. The case was well criticised in Nigeria for the reason that Ibori was acquitted of all 170-count charge levelled against him by the Judiciary in Nigeria, meanwhile he was convicted in the United Kingdom and sentenced to 13years in prison on charges that were closely similar to charges he was arraigned for and discharged by the Nigerian Judiciary.[240]

In recent years, the number of allegations against corrupt judicial officers in Nigeria remain on the increase. The pedigree of the Nigerian Judiciary has often been eroded by the corrupt

[238] Chidi Anselm Odinkalu,' Corruption and Governance in Africa: How do we break the cycle in Nigeria?' (CLEEN FOUNDATION CONFERENCE, LAGOS, 2010)
[239] [2007] FHC/PHC/CS178
[240] *R v James Onanefe Ibori* [2013] EWCA Crim 815

tendencies of most Nigerian judges even at the highest level of the bench. For instance, in an unprecedented effort to eradicate corruption in the Judiciary, the Department of State Security Services (DSS) carried out a discreet nationwide clampdown on the Judiciary, placed 15 judges under investigation.[241] It was reported that two Supreme Court judges and five other judges were arrested in October 2016. During these raids, the DSS reported that it recovered $2million dollars from the judges and $800,000 from one singe judge's house.[242]

In view of the foregoing, judicial corruption presents a serious threat to the proper functioning of anti-corruption campaign, as well as the entire justice system. The imperativeness of tackling judicial corruption cannot be underestimated. In cases of corruption by PEPs, one corrupt judge can jeopardise the efforts of convicting a corrupt PEP. Therefore, without an honest judiciary and criminal justice system, the corrupt can escape the consequences of their crimes.

In the final analysis, as shown above in this chapter, corruption, particularly those perpetuated by public officials in Nigeria continue to linger in Nigeria. The pressing questions then becomes why aren't Nigerian anti-corruption/anti-money laundering laws working/effective? Does Nigeria have laws that are difficult to interpret or unworkable? Why are politically exposed persons not convicted more often when compared to the amount of PEP's that stand accused of corruption and money laundering? Nothing so far seems to have managed to stem the tide of grand corruption in Nigeria, hence the need for new thinking and new approaches. Subsequent chapters answer these pressing questions while providing solutions in the form of new legal models that can be utilised to combat grand corruption and money laundering in Nigeria.

[241] Habeeb Abdulrauf Salihu,' Corruption in the Nigerian Judicial system: An overview' (2018) 25 Journal of financial crime 669
[242] ibid

2.10 CONCLUSION

To summarize, endemic corruption has become a dangerous socio-economic phenomenon plaguing Nigeria, and has emerged as Nigeria's biggest challenge. Corruption has been a destructive and complex practice, yet it remains pervasive in the functioning of society and economic life in Nigeria. The chapter held that this is attributable to the fact that corruption is seen as a way of life that cuts across classes of people in Nigeria. It is also the reason why Nigeria has an unenviable reputation as one of the most corrupt countries on earth as indicated by Transparency International's Corruption Perception's Index.

Given the nature and scope of corruption and the intention of this thesis, the chapter focused on discussing grand corruption as it has been the most devastating type of corruption because of its deleterious effect on Nigerians at large. This is due to the vast sums of public funds that has been stolen and diverted away from legitimate and beneficial purposes, to illegitimate and unproductive ones. Consequently, resulting in underdevelopment, inequality and general discontent in Nigeria. Public officials have been blamed constantly for stealing public funds rather than contributing to the socio-economic development of the people. The chapter held that the pursuit of short-term gains in the exercise of public office have allowed grand corruption to become endemic as public funds are stolen with impunity. This is reflected in the regular scandals involving public officials or politically exposed persons enmeshed in the diversion and laundering of public funds.

Furthermore, the chapter examined various contributory factors that play a role in stimulating grand corruption in Nigeria. Some of the factors highlighted included a lack of political will to fight corruption, societal pressures on public officials, weak institutions, constitutional constraints and delay in dispensing cases involving public officials. It was identified and argued that lack of political will by Nigerian leaders in relation to the fight against corruption has contributed to stimulating corruption. This is because Nigerian leaders have been incapable of fighting grand corruption holistically regardless of individuals involved.

In addition, it was argued in this chapter that although laws and the enforcement of said laws are fundamental in curbing corruption, they are not sufficient for fostering a sustainable reversal of long-established social norms and practices. In this regard, this chapter argued that the mind-set of the citizenry needs to be disabused from seeing corruption as the norm. Using theories from Bicchieri who finds that social norms are markers of how people choose to act in different situations. This chapter has demonstrated that if a practice such as corruption is

widespread, as is the case in Nigeria, there is a risk that most citizens will endorse it creating a vicious cycle and contributing to the persistence of corruption in the society. The rampancy of grand corruption scandals in Nigeria suggests deeper problems in politics and society. The chapter has stated that there is a tendency in Nigerian society to celebrate corrupt officials who steal the nation's resources, consequently putting pressure on public officials to engage in corrupt practices.

The chapter has also examined the impact of the Nigerian oil industry in facilitating grand corruption because majority of the resources stolen by PEPs are funds generated from this industry. It was argued that in as much as the revenue from oil has brought some form of development, it has exacerbated the challenges of grand corruption in Nigeria. The chapter posited that huge amount of government revenue and foreign exchange earnings are derived from oil production, which has been seen by most as a resource curse. The chapter provided instances of corruption in this industry such as the diversion of $20 billion dollars in oil revenue, a staggering amount which can help develop Nigeria.

Also, it was identified and argued that the constitutional immunity afforded to some PEPs have been counterproductive in the sense that it has served as a protective shield, and frustrates investigation and prosecution of PEPs suspected to have been abused their office by misappropriating public funds in Nigeria. It was also argued that very little is done from the judiciary and the justice system to hold public officials to account in corruption related money laundering cases, as there continues to be a low risk of punishment. This failure has encouraged corrupt practices by public officials, who regard public office as a lucrative source of private wealth and power in Nigeria.

The prevalence of grand corruption and the theft of public funds have led to greater scrutiny of business relationships with politically exposed persons. The notion of politically exposed persons is central to anti-corruption and anti-money laundering legal framework across the world. This is because they represent a greater risk of corruption and money laundering as a result of the possibility that such individuals may abuse their positions and influence to carry out corrupt acts, and in turn use the financial system to launder these tainted proceeds. Laundering the proceeds of grand corruption within and outside Nigeria by politically exposed persons have been prevalent in Nigeria. Exploring these issues in light of the fact that grand corruption and money laundering are inextricably connected and self-reinforcing constitutes the aim of the chapter that follows.

CHAPTER THREE

A CRITICAL ANALYSIS OF THE CONCEPTION OF POLITICALLY EXPOSED PERSONS

3.1 INTRODUCTION

Revelations of grand corruption and the plunder of state assets have led to a greater scrutiny of business relationships with politically exposed persons (PEPs); this is with a view to addressing potential corruption and money laundering risk associated with these individuals.[243] Based on research, illicit proceeds coming from grand corruption and other economic and financial crimes are predominantly perpetuated by persons entrusted with public office who disregard public interest to misappropriate public funds.[244] Within the confines of this thesis, PEPs have been identified as individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. These persons pose difficult challenges with regards anti-corruption and anti-money laundering (AML) efforts to combat grand corruption and money laundering. This is because they are the most powerful political entity with access to state resources and influence over government institutions. They are also in a position to control AML controls, for example by undermining the development and/or effectiveness of anti-corruption and AML laws and institutions. In addition, they have the power to undermine key constitutional AML safeguards, such as through their power to appoint and remove heads of key AML institutions.[245]

The outright misappropriation, conversion, diversion and theft of public funds by PEPs, their families, and close associates have led to a heightened focus on these persons because they represent a greater money laundering risk by virtue of having access to government funds over which they exert control.[246] Scandals perpetuated by PEPs, have increased attention they receive from governments, law enforcement agencies and international organisations (e.g. Financial Action Task Force (FATF). This is largely due to the misappropriation of state resources, which are often laundered; through the financial system and other new and evolving methods.[247] As a result, they have become a specific risk factor in the AML regime which has

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[243] Theodore Greenberg and Larissa Gray, *Politically Exposed Persons*: *Preventive measures for the Banking sector* (The World Bank 2010) 3
[244] George Gilligan,' PEEPING at PEPs' (2009) 16 Journal of Financial Crime 137
[245] John Hatchard, *Combating Money Laundering in Africa: Dealing with the problem of PEPs* (Edward Elgar Publishing 2020) 2
[246] Greenberg and Gray (n243) 3
[247] Gilligan (n244)

led to calls by international organisations for more proactive actions by stakeholders both in financial institutions and other designated non-financial institutions regarding their activities.[248]

A range of simple, intricate and sophisticated methods are adopted by PEPs to conceal their proceeds garnered from corrupt practices. Leading anti-money laundering organisations like FATF, are mandated to set standards and implement measures against money laundering and terrorism financing. Similarly, some regulatory agencies like the Financial Conduct Authority (FCA) have all formulated requirements for dealing with PEPs. These measures by various organisations were designed to serve as a benchmark for subsequent legislative initiatives.[249]

Among the reasons for formulating policies to combat money laundering is because developing countries have been severely affected by corrupt regimes and this, in turn, motivated the improvement of AML measures globally; with particular focus on PEPs. This gave rise, for the need to apply more intrusive AML preventative measures; with respect to business relationships involving PEPs from those in the regulated sectors (such as banks, lawyers and real estate agencies).

Such preventive measures include; obtaining senior management approvals prior to establishing business relationships with a PEP, continuing a business relationship with a customer who is subsequently found to be a PEP or becomes a PEP, conducting enhanced due diligence, enhancing ongoing monitoring of such customers to monitor and evaluate their activities.[250] This is an indication that PEPs constitute a distinct type of customer, considered high risk for money laundering; given that there is always a possibility of abuse of office by such persons especially in countries where grand corruption is widespread. Usually, in a country with the levels of widespread corruption like Nigeria, PEPs may have certain advantages open to them in laundering the proceeds of grand corruption. This is because they may have firm control over state machineries giving them the capacity to exploit institutions.[251]

[248] Tayo Oke,' Extra-territorial money laundering legislation, criminal sanction, deterrence, and the African PEP' (2013) 39 Commonwealth law bulletin 631
[249] ibid
[250] FATF,' The FATF Recommendations' (February 2012) <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 31 October 2018
[251] Constitution of the Federal Republic of Nigeria (as amended), s5

It is pertinent to mention that there is nothing wrong with providing services to a PEP. Not all PEPs engage in corrupt activities, as some maintain appropriate levels of integrity.[252] However, a business relationship with a PEP should trigger a higher level of scrutiny, more than what is required of a usual client; as they are placed in a vulnerable position by having the capacity to control or divert public funds for personal enrichment.[253] This higher level of scrutiny, requires financial institutions (banks) and those in the regulated sector (lawyers, real estate agencies and those who deal in high value commodities) to apply additional measures to reduce the risk level. Therefore, all PEPs, especially, those holding senior, prominent or important positions, with substantial authority over policy, operations or the allocation of government owned resources are potentially in a position to abuse their offices for personal gain.

As emphasised in the preceding chapter, considering the plethora of corruption related money laundering cases involving PEPs, Nigeria represents a quintessential example of the links between corruption and money laundering. The leading money launderers and those who engage in misappropriating public funds in Nigeria are thought to be PEPs; elected or appointed into various government positions. The sheer scale of corruption in Nigeria and the number of public officials involved in the theft of public funds is staggering as the exercise of prominent public function presents public officials in Nigeria with an opportunity to act corruptly, which must be mitigated through enhanced controls.[254]

In addition to being high risk customers, there has been an increased academic focus on PEPs for various reasons. Firstly, there is no general consensus on the definitions of PEPs. This is not just fundamental, it is a prerequisite in order to understand the scope of individuals who fall within this bracket. Secondly, issues such as how precisely they may be categorised; and for how long a PEP should be considered a PEP after leaving office have also been problematic. To this end, the purpose of this chapter is to discuss and examine the subject of PEPs, particularly in Nigeria. The chapter shall examine some of the contentious issues and challenges associated with PEPs; and the impact of their activities and how they might be countered.

This chapter examines the approaches adopted in deciding when an individual maybe considered a PEP, how long a person remains a PEP, factors taken into consideration as to who

[252] Gilligan (n244)
[253] Kim-Kwang Raymond Choo,' Politically exposed persons (PEPs): risk and mitigation' (2008) 11 Journal of Money Laundering Control 371
[254] Akanle (n206)

constitutes a close associate or an immediate family member, the exclusion of junior or middle ranking PEPs and the distinction given regarding domestic and foreign PEPs. Additionally, the chapter also focuses on major challenges that inhibits enforcement of Anti-money laundering laws as it relates to Nigerian PEPs. In this regard, issues such as immunity clause for certain public office holders and the influence which PEPs have on financial institutions will be discussed.

3.2 A SUCCINCT OVERVIEW OF THE FINANCIAL ACTION TASK FORCE

In view of the fact that the FATF is the leading international organisation in combating money laundering, and the fact that various countries have adopted FATFs approach in combating this phenomenon, it is apposite to briefly discuss this organisation in order to appreciate its significance in the fight against money laundering and financial crimes. The FATF was created in 1989 by the G7 countries to combat the growing threat of money laundering across the world. Essentially, the FATF is an inter-governmental organisation that was founded with the objective of promoting effective implementation of laws, regulations, and other measures for combating money laundering, financing of terrorism, and similar threats to global financial integrity.[255]

The FATF sets the benchmark to promote national and international policies for effective implementation of legal, regulatory and operational measures for combating money laundering and terrorist financing.[256] In achieving this objective, they rely on a combination of annual self-assessments and periodic mutual evaluations. Internationally, the FATF is comprised of associate members known as FATF-style regional bodies (FSRB); these include: a) Asia-Pacific Group on money laundering, b) Caribbean Financial Action Task Force, c) Eastern & South Africa Anti-money laundering Group, d) West Africa Money laundering Group, e) Middle East and North Africa Financial Action Task Force, f) Council of Europe Anti-money laundering Group.[257] These FSRBs represents most major financial centres across the globe. In collaboration with these FSRBs, the FATF works to identify money laundering vulnerabilities with the aim of protecting the international financial system from misuse.

[255] Financial Action Task Force,' History of FATF' < https://www.fatf-gafi.org/about/historyofthefatf/> accessed 20 June 2018
[256] ibid
[257] Asia/Pacific Group on Money Laundering,' FATF-style Regional Bodies' < http://www.apgml.org/fatf-and-fsrb/page.aspx?p=94065425-e6aa-479f-8701-5ca5d07ccfe8> accessed 03 March 2018

Furthermore, as part of its mandate to combat money laundering, the FATF formulated a series of Recommendations (40+9) which sets international standards for combating money laundering.[258] Since the terrorist's attacks of September 11, 2001, FATFs focus and mandate has also included terrorist financing; FATF's Recommendations contain inter alia: I) AML/CFT policies and coordination including risk assessment and the application of risk-based approach, ii) the criminal offence of money laundering, confiscation and provisional measures, iii) Provisions for politically exposed persons, iv) rules on transparency and beneficial ownership of legal persons and arrangements, v) rules on international co-operation including international instruments, mutual legal assistance and extradition.[259]

It is pertinent to state that though FATF Recommendations are soft laws which are not binding, they possess coercive powers from the enormous support of the world's two most influential financial institutions such as the International Monetary Fund (IMF) and the World Bank (WB). [260] The IMF is empowered to oversee international monetary systems efficient operations. Besides, to promote economic development among its member states, the WB makes loans available to enhance economic programmes. Access to those loan facilities require a benchmark condition for which adherence to the FATF Recommendation is crucial and seen as the antidote to corruption prevention. [261] Another source of coercive powers is the classification of certain countries as Non-Corporative Countries and Territories (NCCT). Once a country is designated as NCCT, it is blacklisted, making it challenging to have financial transactions with other member countries.

The scope of the FATF Recommendations are to prevent money laundering and terrorist financing. They have been the basis of the existing anti-money laundering and counter terrorism financing paradigm, and have been extensively mirrored in the anti-money laundering laws of a substantial number of jurisdictions, including Nigeria.[262] They also have

[258] Financial Action Task Force,' The FATF Recommendations' (October 2018) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 20 June 2018
[259] ibid
[260] Nankpan Nanyun,' Role of FATF on financial systems of countries: Successes and Challenges' (2020) Journal of Money Laundering Control
[261] ibid
[262] Ehi Esoimeme, *A comparative study of the Money Laundering Laws/Regulations in Nigeria, United States and the United Kingdom* (CreateSpace Publishing 2014) 16

been translated into international binding instruments such as the European Union Anti-Money Laundering Directives.[263]

The Recommendations have been revised on several occasions to ensure that they remained relevant to the ever-changing ways in which criminals launder the proceeds of crime. The Recommendations have also been instrumental in combating grand corruption by increasing transparency of the financial system and facilitating the detection, investigation and prosecution of corruption and money laundering offences, and the recovery of misappropriated public funds. Thus, the FATF can be rightly considered as the main global body that sets standards and supervises the fight against money laundering.

3.3 DEFINING A POLITICALLY EXPOSED PERSON

One of the most paramount criteria which should establish immediately whether a potential customer is a corruption risk or not, is his classification as a PEP, which automatically triggers enhanced due diligence procedures.[264] The issue of PEPs has been a critical subject, especially within the financial sector and the AML regime in general. In order to understand the scope of individuals who fall within this bracket, it is fundamental to understand who a PEP is, how does one know when one is dealing with one?[265] Thus, within the context of anti-money laundering, the identification of customers who pose a heightened risk of money laundering are essential to any AML measure intended to be taken by those saddled with the responsibility of ameliorating the risk associated with such customers.

There is currently no international and unanimously agreed definition of a PEP, and defining PEPs have been the subject of much conjecture over the years. Several definitions have been advanced, each with its own distinct features but finding a universally accepted one has been difficult to arrive at. A perusal of international legal instruments and regulatory guidelines proves that there is no consistent terminology or comprehensive definition of a PEP. The FATF and European Union directives refer to these individuals as PEPs, while the United States Patriot Act refer to them as senior public figures.

The FATF, the European Union, the Wolfsberg Group and the United Nations Convention against Corruption have all adopted their own definitions of PEPs, with these definitions

[263] Council Directive 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

[264] Platt (n73) 97

[265] Gilligan (n244)

ranging between a broader and narrower approach to the problem of deciding when an individual may be considered a PEP, those who are categorised as PEPs, and how long a person remains a PEP.[266]

3.3.1 *FATF Definition:*

By virtue of Recommendation 12 of the FATF 40+9 Recommendations, the FATF defines politically exposed persons as individuals who are or have been entrusted with prominent public functions in a foreign country. This also encompasses family members and close associates of such PEPs. In its glossary, the FATF Recommendations states expressly that the definition does not encompass middle ranking or more junior individuals in the foregoing categories.[267]

3.3.2 *EUROPEAN UNION (EU) Definition:*

Article 3(9) of the Fourth ML directive states that politically exposed person's means natural persons who is or who has been entrusted with prominent public functions and includes the following: (a) heads of State, heads of government, ministers and deputy or assistant ministers; (b) members of parliament or of similar legislative bodies; (c) members of the governing bodies of political parties; (d) members of supreme courts, of constitutional courts or of other high-level judicial bodies, the decisions of which are not subject to further appeal, except in exceptional circumstances; (e) members of courts of auditors or of the boards of central banks; (f) ambassadors, charges d'affaires and high-ranking officers in the armed forces; (g) members of the administrative, management or supervisory bodies of State owned enterprises; (h) directors, deputy directors and members of the board or equivalent function of an international organisation.[268] (10) 'family members' includes the following: (a) the spouse, or a person considered to be equivalent to a spouse, of a politically exposed person; (b) the children and their spouses, or persons considered to be equivalent to a spouse, of a politically exposed person; (c) the parents of a politically exposed person.

[266] Raymond Choo (n252)
[267] Financial Action Task Force,' The Forty Recommendations' (October 2020) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 9 August 2018
[268] Directive 2015/849 of the European Parliament and of the council, Article 3 (9)

3.3.3 *UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC) DEFINITION:*

In the same vein, Article 2 of UNCAC defines PEPs as ‘‘ (i) any person holding a legislative, executive, administrative or judicial office of a state party, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provide a public service, as defined in the domestic law of that state party; (iii) any other person defined as ‘‘public official’’ in the domestic law of a state party’’.[269]

3.3.4 *USA PATRIOT ACT DEFINITION:*

The US Patriot Act refers to PEPs as senior foreign political figure. It defines the term as current or former senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government, whether or not they were elected officials; a senior official of a major foreign political party; and a senior executive of a foreign government-owned commercial enterprise. This definition also includes a corporation, business, or other entity formed by or for the benefit of such individual. Senior executive are individuals with substantial authority over policy, operations, or the use of government-owned resources.
Also included in the definition of a senior foreign political figure are immediate family members of such individuals, and those who are widely and publicly known as close associates of a senior foreign political figure.[270]

3.3.5 *Money Laundering (Prohibition) Act 2012 (Nigeria):*

In Nigeria, by virtue of the MLPA 2012, PEPs are defined as individuals who are or have been entrusted with prominent public functions, both within and outside Nigeria and those associated with them (family and business associates). They include Heads of State or Government, senior politicians, senior government officials, judicial officials and military officials. [271] In the same vein, in the Central Bank of Nigeria (CBN) anti-money laundering regulation, the same definition is reproduced, but with the inclusion of those occupying positions such as Heads of State, state Governors, the inclusion of Local Government chairmen, senior politicians, senior government, judicial and military officials, senior executives of state-owned corporations, important political party officials and members of royal families.[272]

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[269] United Nations Convention against Corruption, Article 2
[270] United States Patriot Act, s 312
[271] Money Laundering Prohibition Act 2012, s25
[272] Central Bank of Nigeria (Anti-money laundering and combating the financing of terrorism and other financial institutions in Nigeria) Regulation 2013

Although some aspects of the definition above vary, they contain some common denominators; which is that the above-mentioned persons perform prominent public functions, and are in positions of authority or previously been in positions of authority. With regards to prominent public functions, the FATF, EU Directives, UNCAC, MLPA all refer to PEPs who occupy ‘‘prominent public functions’’. The idea of prominent public function is ostensibly linked to the influential positions or functions they exercise.[273]

From the above definitions, it can be adduced that only high-level positions are included within the definitions of PEPs. Some of these definitions of PEPs are different and have varying degrees of detail on the types of positions that would be included in a prominent public function. This have resulted in limiting the scope of PEPs definitions to exclude domestic PEPs as the case with FATF and the US Patriot Act definition, and the exclusion of junior or middle ranking PEPs in the definition and categories of PEPs.

Scholars have observed from field research that these discrepancies in various definitions of PEPs has affected implementation efforts leading to an overall low compliance rate in countries across the globe.[274] As correctly noted by the World Bank, the current variations among approaches serve as both good excuse not to act and are seen as a real impediment to the development and implementation of effective PEPs controls whether by a jurisdiction, regulatory authority or banks.[275] Arguably, FATF definition of PEPs serves as a guideline in assisting stakeholders in the AML industry understand who PEPs are rather than a one size fits all approach. This likely explains why some of the definitions may have been designed in varying jurisdictions, to allow for flexibility, greater efforts and resources to be expended on more exposed PEPs with regards to the limitation of junior or middle ranking PEPs.

Despite the lack of uniformity in the global definitions of PEP, most jurisdictions have widely adopted FATF AML standards, and the expectations from regulated entities doing business with PEPs are universally similar, they are high-risk customers that those in the regulated sector must place extra attention to.

Furthermore, as the issue of PEPs continue to draw global attention due to the transnational nature of their money laundering activities, questions abound considering constant changes to the political environment within a country. This leads to a host of new persons becoming PEPs.

[273] Chaikin and Sharman (n9) 94
[274] Greenberg and Gray (n243) 25
[275] ibid

This is in addition to those persons who would have become PEPs by virtue of marriage and becoming a close associate of a PEP. Other material questions that arise includes: the precise level of seniority which triggers the PEP requirement, the factors taking into consideration as to who constitutes a close associate or an immediate family member of a PEP, the duration within which it becomes unnecessary to refer to an individual a PEP. This is because PEPs do not occupy public office for a protracted period of time. This thesis expands on some of the reasons why these narrow definitions of PEPs might be problematic, especially in relation to developing countries like Nigeria.

3.4 WHY THE FOCUS ON POLITICALLY EXPOSED PERSONS?

> Your doors are open to all sorts and conditions of men, except that you draw the line at dishonesty. You will not open even a deposit account with a stranger, unless he be satisfactorily introduced, lest you find that you have been entertaining a rascal unawares, who is making use of the cheque-book which you supplied him with, to victimize half a score of innocent people.[276]

In recent decades, there has been an increased international focus on PEPs and their ability to embezzle huge sums of public funds from their countries and launder same through domestic and international financial institutions. A definite link between corruption and money laundering has been established, as well as the involvement of PEPs in the link between these phenomena.[277] The World Bank, as part of its Stolen Asset Recovery Initiative said thus:

> Over the past 25 years, the world has learned about the gross abuses of corrupt politically exposed persons. Through outrageous examples, the way in which they have plundered public funds; while utilising domestic and international financial institutions to launder the proceeds of corruption. We do not know the amount of public funds misappropriated by public officials and mostly laundered through financial institutions, in particular, banks. The proceeds of corruption misappropriated from developing countries ranges from $20 billion to $40 billion per year, roughly the equivalent of the annual GDP of the world's 12 poorest countries where more than 240 million people live.[278]

[276] George Rae, *The country Banker: His clients, cares, and work, from an experience of forty years* (New York Charles Scribner's Sons 1886)
[277] Chaikin and Sharman (n9)1
[278] UNODC and World Bank,' Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities and Action Plan' (World Bank, Washington, DC, 2007) 9

The FATF first examined the risk posed by PEPs to the financial sector in 2001, when it analysed the money laundering vulnerabilities of private banking.[279] Public officials who utilised banking services provided by international financial institutions posed a risk due to the possibility that their source of their deposit was illicit and might have been acquired through the act of corruption. Furthermore, FATFs perceptions were also influenced by the landmark hearings and report that US multinational banks had facilitated the laundering of the proceeds of corruption from political leaders in countries like Nigeria, Mexico and Gabon.[280]

Additionally, FATF identified PEPs as requiring additional scrutiny; as a result of the immense risk of money laundering. According to FATF, the money laundering risk associated with PEPs were spelt out in its typologies report, wherein it stated that the sources of the funds that a PEP may try to launder are not only bribes or illegal kickbacks, but also maybe embezzlement or outright theft of states assets. PEPs that come from countries or regions where corruption is endemic and systemic seem to present the greatest potential risk; however, it should be noted that corrupt or dishonest PEPs can be found in almost any country.[281] The implication of the typologies report was that financial institutions shall be obliged to perform enhanced due diligence on customers identified as PEPs. FATFs view which is enshrined in its recommendations is that increased surveillance on the financial activities of PEPs act as a deterrence to serious corruption and improves the chances of detection of corruption through the reporting of suspicious transactions.

An increased awareness of the links between corruption and money laundering have led to various initiatives to curtail these crimes, and it was anticipated that these initiatives would aid in particular, developing countries to recover funds stolen by their political leaders.[282] Part of these initiatives includes the FATF 40 Recommendations which sets out measures which countries should implement in order to combat money laundering.[283] As mentioned in the preceding chapter, corruption has a devastating effect on economic developmental outcomes

[279] Chaikin and Sharman (n9) 85
[280] United States Senate Committee,' Private banking and money laundering: A case study of opportunities and vulnerabilities' < https://www.govinfo.gov/content/pkg/CHRG-106shrg61699/html/CHRG-106shrg61699.htm> accessed 25 March 2019
[281] FATF,' Report on money laundering typologies 2003-2004' (February 2004) < http://www.fatf-gafi.org/media/fatf/documents/reports/2003_2004_ML_Typologies_ENG.pdf> 25 March 2019
[282] Jackie Johnson, 'Little enthusiasm for enhanced CDD of the politically connected' (2008) 11 Journal of Money Laundering Control 291
[283] FATF,' The FATF Recommendations' (February 2012) <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 31 October 2018

in some of the world's poorest countries. Thus, an individual corrupt PEP can have a significant impact by depriving the people of desired developments. For instance, a significant amount of Nigerian public officials has been arraigned and convicted for laundering the proceeds of corruption in foreign jurisdictions. One of the most compelling evidence in this regard is that involving a former Governor of Delta State, James Ibori, convicted and sentenced to 13years in the United Kingdom for corruption, money laundering and other similar offences.

For years, the Nigerian economy have been bereft of any significant improvement as a result of misappropriation of public funds which reflects pervasive grand corruption in Nigeria.[284] Corrupt Nigerian leaders have often seen foreign banks and institutions as safe havens to launder and conceal the proceeds of corruption. The bulk of the laundered public funds from Nigeria, and Africa in general finds its way into various financial institutions and investment portfolios in safe havens in foreign jurisdictions.[285] Such proceeds are the result of illicit misappropriation of public funds by PEPs and those in positions of authority. The issue of PEPs has become problematic because they have evolved in the manner which they launder the proceeds of corruption. In the past, while PEPs have placed corruptly obtained funds with their own names, or those of their family members and associates, they have advanced to more sophisticated measures such as utilising shell companies to conceal their identification, and other legal arrangements to host illegal funds.[286]

High profile investigations carried out by the Nigerian government, and some foreign jurisdictions like the UK and the US continue to uncover sordid revelations of how stolen public funds running into billions have been siphoned to foreign jurisdictions and hidden in shell companies, trusts, foundations, through proxies such as family members or close associates of PEPs.[287] Such is the level of importance given to PEPs that heavy fines have been imposed on financial institutions that have held accounts of stolen public funds for several corrupt leaders without following adequate procedures, regarding due diligence. For instance, the Financial Conduct Authority (FCA) fined Guaranty Trust Bank (UK), a subsidiary of Nigerian Guaranty Trust Bank PLC £525,000 for failings in its AML controls for high risk customers. These failures were connected to banking services provided to PEPs with disregard to extant AML regulations which resulted in an unacceptable risk of handling the proceeds of

[284] RO Anazodo,' Leadership, Corruption and Governance in Nigeria: Issues and Categorical Imperatives' (2015) 9 African Research Review 41
[285] Oke (n248)
[286] Joy Geary, 'PEPs-Let's get serious' (2010) 13 Journal of Money Laundering Control 103
[287] Financial Action Task Force (FATF) 2002 Review of the FATF Recommendations consultation paper

corruption.[288] Also, in March 2012, the FCA fined Coutts and company £8 million pounds for failing to establish and maintain effective AML systems, and failure to assess the level of money laundering risk posed by PEPs by failing to gather sufficient information in ascertaining PEPs source of funds and source of wealth.[289]

In the same vein, Barclays Bank was fined £72 million pounds by the FCA for failing to perform appropriate due diligence on transactions involving wealthy clients who were known to be politically exposed persons, and should therefore have been subject to enhanced levels of due diligence and monitoring by Barclays.[290] The largest fine imposed by the FCA for a lack of compliance with AML obligations. Consequently, the trend of imposing big fines on banks by regulators primarily for weaknesses in their AML defences has led quite a number of banks and other obliged entities withdrawing their services from PEPs, as a result of concerns about the risk of money laundering by said customers. This was referred to by an FCA commissioned research as 'de-risking', where banks remove their services from certain types of customers in order to reduce their compliance cost.[291]

While the intention of AML laws and regulations regarding PEPs are preventive, not criminal in nature, and therefore not intended to stigmatise PEPs, the FATF have often held that refusing a business relationship with such persons based on their PEP status might be seen as contrary to the letter and spirit of AML regulations. Nevertheless, it shows the level of seriousness ascribed to such customers especially in foreign jurisdictions. It is my argument that that this is rarely the case in Nigeria; PEPs and their close associates are sort after and given preferential treatment by banks and other obliged entities who consider them wealthy customers while in total disregard of AML regulations and extant Anti-money laundering laws in Nigeria.

3.5 ANALYSING PEP DEFINITIONS IN THE CONTEXT OF THE NIGERIAN PEP

Many of the provisions of the major international organisations on anti-money laundering controls have rightly metamorphosed into anti-money laundering domestic criminal

[288] Financial Conduct Authority,' FCA fines Guaranty Trust Bank Ltd £525,000 for failures in its anti-money laundering controls' (09 August 2013) <https://www.fca.org.uk/news/press-releases/fca-fines-guaranty-trust-bank-uk-ltd-£525000-failures-its-anti-money-laundering> accessed 10 April 2020

[289] Esoimeme (n262) 15

[290] Financial Conduct Authority,' FCA fines Barclays £72 million for poor handling of financial crime risks' (November 2015) < https://www.fca.org.uk/news/press-releases/fca-fines-barclays-£72-million-poor-handling-financial-crime-risks> accessed 23 September 2018

[291] Financial Conduct Authority,' FCA Research into the issue of De-risking' (May 2016) <https://www.fca.org.uk/news/news-stories/fca-research-issue-de-risking> accessed 25 September 2018

legislations in several countries across the world, including Nigeria.[292] Although these initiatives have been a welcome development given that the issue of laundering the proceeds of grand corruption from Nigeria to foreign jurisdictions have been prevalent in modern times; it is this thesis contention that some of the initiatives and definitions have been construed on principles outside the socio-legal context of the Nigerian PEP which makes them difficult to be implemented in Nigeria. An analysis of these AML legislations and regulations that have transcended into domestic AML legislations in Nigeria will be provided in chapter five. However, for the purpose of this chapter, consideration is given to why some of these initiatives and definitions might be difficult to implement in the Nigerian context.

In this section, the thesis shall proceed to analyse some of the contentious issues and challenges surrounding the identification of PEPs and money laundering as it concerns Nigeria. Established institutions such as the African Development Bank[293] buttresses this thesis assertion, which argues on the imperative of taking the peculiarities of the Nigerian context into consideration when developing initiatives and strategies for combating money laundering.

3.5.1 *FAMILY AND CLOSE ASSOCIATES OF POLITICALLY EXPOSED PERSONS*

In light of the fact that FATF sets the benchmark for effective legal, regulatory and operational measure for combating money laundering, it is necessary to assess its inclusion of family as part of the definitions of PEPs. The inclusion of family members and close associates has been a challenge for regulated entities.[294] The Recommendation is silent about the scope of this phrase. Although family members are not expressly defined in the definitions of PEPs, they are required to be subjected to increased scrutiny to the extent that they entail increased risks. Firstly, due to the sheer complexity of gathering and maintaining a comprehensive and up to date information for so many officials, relatives and friends, the expectation that large, medium sized and even small regulated entities will be able to determine the true family members of PEPs in some overseas state is patently absurd.[295] This is because family and close associate

[292] Oke (n248)

[293] African Development Bank,' Bank Group strategy for the prevention of money laundering and terrorist financing in Africa' (May 2007) <www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000012-EN-STRATEGY-FOR-THE-PREVENTION-OF-MONEY-LAUNDERING_01.pdf> accessed 13 August 2018

[294] Indira Carr, 'Corruption, Development, Financial Institution and Politically Exposed Persons in (eds), *White Collar Crime and Risk (*Palgrave Macmillan 2018) 2.4

[295] Andrew Haynes,' Money Laundering: From failure to Absurdity' (2008) 11 Journal of Money laundering Control 303

are fluid, and may change significantly overtime.[296] This presents significant, if not insurmountable challenges especially for small and medium size obliged entities.

Secondly, the concept of family still represents a significant problem. The average family has classically been understood as a nuclear family. However, the typical family can no longer be the exact social expectation as divorce, remarriage, cohabitation of couples and births outside marriage constitutes changing realities of the current times.[297] Confusion can arise as to the influence that particular types of family members generally have by virtue of how broad the circle of close family members tends to be. This point becomes relevant because, in some jurisdictions, the number of family members considered close enough as to have influence may be small (e.g. parents, siblings, spouses/partners).[298] In other jurisdictions they maybe large.

While family in most foreign jurisdictions are defined by blood where only immediate nuclear family members are considered close enough within the context of PEPs definition; in other countries like Nigeria it can equally be defined by culture. Who constitutes a family member depends upon the circumstances; however, given the nature of the extended family in many African societies, such individuals may be difficult to identify.[299] There are communities in Nigeria were being affiliated with another individual by virtue of having ethno-cultural links and by being a native of the same local government is still seen as family, even though they have different genetic heritage, may fit the description of family members.

For this reason, if the verification of a customer's family is restricted to only those with blood ties, it could have the effect of excluding a whole number of significant people who could potentially carry the same level of risk as those recognised as family members. In as much as it can be argued that if culture is given prominence over the certainty entailed with blood ties, this could possibly open the floodgates to a peculiar situation where an avalanche of people will need to be investigated and scrutinized. Thus, it might not be a productive way of utilising resources, especially for small and medium regulated entities.[300]

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[296] FATF,' Politically exposed persons: Recommendation 12 and 22' (June 2013) <http: www.fatf-gafi.org> accessed 10 April 2018

[297] Rahul Sharma,' The Family and Family Structure Classification Redefined for the Current Times' (2013) 2 Journal of Family Medicine and Primary Care 306

[298] Mariana Pargendler,' The Rise and decline of Legal families' (2012) 60 The American Journal of Comparative Law 1043

[299] John Hatchard, *Combating Money Laundering in Africa: Dealing with the Problem of PEPs* (Edward Elgar Publishing 2020) 19

[300] Oke (n248)

Therefore, as a result of lack of guidance from FATF as to who constitutes family which might be different in various jurisdictions, it might be problematic for financial institutions such as banks to determine those that constitutes family, especially in jurisdictions where this concept might include an array of persons. Considering that the supposed family member may not even have the same surname as the person to whom they are supposedly related. These are some of the issues as it relates to family within the Nigerian context. Although the narrow definition of family members may be justified on the basis of a reduction in the potential target group for PEP AML compliance, it is over simplistic in its understanding of the complexity of family relationships throughout the world, especially in developing countries like Nigeria.

As a result of the prevalence and complexities of money laundering activities in Nigeria, including those who perpetuate the act, one wonders if FATF Recommendations is impactful enough to guide and safeguard the financial systems in Nigeria from abuse. Extant Nigerian laws are equally silent as to coverage of those that constitutes family or close associates. Nevertheless, family members and family affiliation are important ingredients in Africa's social life, and even more so in the life of a PEP. Therefore, from the foregoing, the issue of family is one which can be complicated, especially when lack of guidance is provided by FATF.

3.5.2 *THE DISCREPANCIES IN THE PERIOD FOR WHICH A PERSON REMAINS A PEP*

Equally important is the question of how long within which PEPs maybe categorised as a PEP. Whether such status is erased at the end of the tenure of such PEPs? International standards like the FATF Recommendations and UNCAC do not impose any time frame for considering when a PEP ceases to be considered a PEP after leaving office. However, the new European Union Fourth Anti-money laundering Directive states that where a PEP is no longer entrusted with a prominent public function, obliged entities shall, for at least 12 months, be required to consider the continuing risk posed by that PEP until such a time as that person is deemed to pose no further risk specific to a PEP.[301]

Whether a person ceases to be a PEP upon leaving office is unclear. Whilst their opportunities for corruption and money laundering are often diminished, maintaining a check on the legitimacy of their source of wealth and that of their family is arguably necessary to ensure that there is no abuse of any remaining influence.[302] Although in some circumstances, it might not

[301] Directive 2015/849 of the European Parliament and of the council, Article 22

[302] John Hatchard, *Combating Money Laundering in Africa: Dealing with the Problem of PEPs* (Edward Elgar Publishing 2020) 20

be appropriate to consider an individual a PEP after leaving office, most PEPs such as Presidents of countries and other senior public officials who have held important positions in government can retain influence long after the expiration of their tenures.[303] This creates a possible potential for corruption. Because of the prevalence of grand corruption in Nigeria, it becomes necessary that a high level of scrutiny with regards PEPs may be warranted even after leaving office. To point out, it is somewhat infeasible that former Presidents or Heads of Governments such as Governors will lose influence within 12 months of leaving power in Nigeria.

It is my argument that many cultural and political factors determine the duration of power and influence held by PEPs in Nigeria. In many cases, the influence held by PEPs outlasts the term in office by years, and misappropriated public funds do not become legitimate after a certain time period. To elaborate, most senior PEPs like Presidents and Governors that are powerful positions in Nigeria have an overbearing tendency of determining who succeeds them in office. In order to cover their tracks, suppress evidence, and maintain relevance in the scheme of things; incumbent PEPs often try as much as possible to install a successor through acts of electoral malpractice. Many PEPs in Nigeria believe they have absolute power to control and impose their candidate as successors in Nigeria.[304] The implication of this is that most Nigerian PEPs still wield enormous powers whilst out of office, and they continue to be influential in the running of the government that succeeds them. This includes a demand for return on investments expended on their chosen successor.

In addition, government contractors have been known to lobby former PEPs due to their influence to advocate for them with their successors in awarding huge government contracts in their favour; while such PEP gains vast amounts of public funds as commission from such dealings. [305] This also explains the vicious cycle of grand corruption in Nigeria. In a country like Nigeria characterised by weak, corrupt institutions and a lack of free and fair elections[306]; it is not feasible due to the influence that most PEPs can retain even after leaving office to have obliged entities perform their due diligence on these officials for such a short period like 12 months after leaving office. The arguments that it would be disproportionate to consider an

[303] Greenberg and Gray (n243) 31
[304] Nichodemus Ejimabo,' Understanding the impact of Leadership in Nigeria: Its Reality, Challenges, and Perspectives' (2013) SAGE Journals 14
[305] Agbiboa (n3)
[306] Osinakachukwu Nwokeke and Jawan Jayum,' The Electoral Process and Democratic Consolidation in Nigeria' (2011) 4 Journal of Politics and Law

individual a PEP after leaving office might be plausible for countries where grand corruption is not widespread, and due to their stringent implementation of laws, PEPs sparingly engage in acts of corruption.

However, this argument becomes impractical taking into consideration the peculiarities of the Nigerian PEP that can possibly retain enormous influence after leaving office. A former PEP who has been de-categorised as a PEP for being low risk can remain silent for a period of time without exhibiting traits that may require such person being kept as politically exposed. Consequently, such person may thereafter start the process of laundering the wealth illicitly acquired while in public office while financial institutions would not be obliged to file suspicious transactions reports as required when dealing with such customers.

Greenberg gives credence to the above points through findings from field research that corrupt PEPs still indulge in laundering illicit funds gotten corruptly even after leaving office.[307] Greenberg argued that this can arise from attention placed on them whilst in office, and thus most corrupt PEPs might wait until the expiration of their tenures before laundering illicit funds. In fact, some PEPs, due to the influence they might retain, continue to receive payments after leaving office.[308] Such problem is largely intensified the shorter the time the PEP continues to be treated as a PEP. Greenberg helpfully suggests and this thesis adopts this reasoning that the handling of such a person by those in the financial institutions and designated non-financial businesses and professions (lawyers, real estate agents, casinos, dealers in precious metals and stones et cetera)[309] should consider the ongoing PEP status of their customers on a case-by-case basis, using a risk-based approach to ascertain the level of risk involved by carrying on a business relationship with former PEPs, and not on prescribed time limit.

3.5.3 *ISSUES RELATING TO THE INTERNATIONAL DISPARITIES IN THE CATEGORISATION OF PEPS*

Another difficulty that arises from the concept of PEPs is the issue of the distinction between domestic PEPs and foreign PEPs. The FATF considers foreign PEPs high risk customers and requires the application of enhanced due diligence measures to PEPs who reside in a foreign jurisdiction or in a third country, thus, limiting the scope of their definitions and requirements to only PEPs outside of their jurisdiction.[310] The idea that foreign PEPs are high risk compared

[307] Greenberg and Gray (n243) 31
[308] ibid
[309] FATF Recommendation 22
[310] FATF,' Politically Exposed Persons: Recommendation 12 and 22' (June 2013) <http: www.fatf-gafi.org> accessed 11 April 2018

to domestic PEPs is linked to two ideas. Firstly, as the case with developed countries, domestic PEPs are considered less corrupt compared with foreign PEPs, and there is no need to apply enhanced due diligence standards to their domestic PEPs.[311]

Secondly, foreign PEPs are more likely to conceal the proceeds of corruption using financial services in foreign jurisdictions because they are not well known and have greater opportunity of concealing their identity.[312] There are strong arguments that gives support to the inclusion of domestic PEPs. Domestic PEPs can possess more corrupt opportunities as foreign PEPs and therefore can launder misappropriated public funds locally or internationally (e.g. through real estate). Coupled with the fact that historically, money laundering scandals and corruption cases involving domestic PEPs have been extensive and continuing especially in countries like Nigeria where domestic PEPs often engage in massive corruption.

Issues regarding the inclusion of domestic PEPs in the PEPs definition have been controversial. This problem is found in both developed and developing countries such as the example provided below on members of parliament (MPs) in the UK. The implication of the distinction between domestic PEPs and foreign PEPs, and the exclusion of junior and middle ranking PEPs poses a risk exposure with regulated entities saddled with dealing with these individuals. The use of the phrase ‘‘in a foreign country’’ by FATF has little significance within the context of domestic circle where the PEPs operate. Such definition might serve as a useful guide for a United Kingdom domiciled financial institution dealing with PEPs who are domiciled outside the United Kingdom.

However, if such definition is employed in the Nigerian context, it would be of little significance to a Nigerian financial institution and other regulated entities in identifying PEPs domestically. Rather, such definition would be useful in the Nigerian context in dealing with PEPs who reside in a foreign jurisdiction like the United Kingdom. In essence, the ramification of this is that a Nigerian financial institution and other regulated entities that are desirous of complying and fulfilling its domestic AML compliance obligation may not find the FATF recommendation useful. Using FATF Recommendations as yardstick for proper and efficient implementation of AML laws, it will be practically absurd for Nigerian financial institutions and other regulated entities to focus their attention and resources on foreign PEPs, leaving out

[311] Chaikin and Sharman (n9) 103
[312] ibid

domestic PEPs who rampantly engage in laundering the proceeds of corruption to foreign jurisdictions.

To emphasise, a case in hand that provides an example why both domestic and foreign PEPs should be considered high risk customers for AML purposes was the expenses claim that broke out in the British Parliament in 2010. In the United Kingdom, members of parliament are entitled to claim expenses, including the cost of accommodation, wholly and exclusively incurred for the performance of their parliamentary duties.[313] This privilege was abused by some MPs who falsely claimed expenses from taxpayer's money through false mortgage applications and rent claims with most MPs involved resigning while being asked to return such illicitly acquired public funds. Some of the MPs include Elliot Morley, Margaret Morgan and Jim Devine[314]. These instances point to the fact that implementing such recommendation in a country like Nigeria would be unworkable if FATF Recommendations are adhered to. Despite the fact that domestic PEPs in some jurisdictions are seen as low risk elements to corruption and money laundering, all PEPs whether domestic or foreign should be treated as high risk individuals for AML purposes.

Given the fact that corruption and money laundering are global problems that are often transnational in nature, and given that collective action is required to combat these phenomenon; if developed countries do not require enhanced scrutiny of their domestic PEPs why should developing countries not follow their example and apply the same minimum due diligence standards to their own domestic PEPs? This in itself is contrary to measures designed to mitigate money laundering risks by PEPs. These discrepancies have contributed to a lack of implementation of effective PEP controls which has led to low-level compliance with global PEP regulations.[315] Therefore, whether or not a PEP is a domestic or foreign PEP, these measures in the first place were designed to mitigate the increased money laundering risk associated with high risk customers like PEPs are.

Furthermore, from the examples provided in the previous chapter, Nigeria provides a quintessential example why no preference with regard to the distinction between foreign PEPs

[313] House of Commons,' The Green Book: A guide to members allowance' (July 2009) < https://www.parliament.uk/documents/commons-finance-office/greenbook.pdf> accessed 10 October 2018
[314] The Telegraph,' How the telegraph investigation exposed the MPs expenses scandal day by day' (May 2009) < https://www.telegraph.co.uk/news/newstopics/mps-expenses/5324582/How-the-Telegraph-investigation-exposed-the-MPs-expenses-scandal-day-by-day.html> accessed 10 October 2018
[315] Emmanuel Senanu and others,' The determinants of anti-money laundering compliance among the Financial Action Task Force (FATF) member states' (2018) 26 Journal of Financial regulation and compliance 442

and domestic PEPs should be accorded to any group of PEPs. Despite the fact that corruption is more prevalent in some countries, especially developing countries as evidenced by Transparency International's CPI, domestic PEPs are still susceptible to corrupt opportunities as foreign PEPs as shown by the expenses scandal in the United Kingdom. Therefore, if corruption is to be fought effectively, measures of accountability should apply to both domestic and foreign PEPs.

3.5.4 *EXCLUSION OF JUNIOR AND MIDDLE RANKING PEPs*

In addition, another issue worthy of examination is the exclusion of junior and middle ranking officials from the definition and categorisation of PEPs by FATF and the UNCAC. The FATF definition and categorisation of PEPs expressly states that the definition is not intended to cover junior and middle-ranking PEPs. This is suggestive of the fact that the major concern of the international AML system is largely to combat grand corruption by senior PEPs having prominent public functions. It is a well-known fact that junior and middle ranking PEPs who have significant responsibility in dealing with public resources may be prone to corruption, especially when their salaries are low and other opportunities to engage in corrupt activities presents itself.[316]

In Nigeria, certain public offices such as permanent secretaries in federal ministries, state commissioners, local government chairmen, directors of parastatals are all public office that can be classified as middle and junior ranking PEPs because they are not conventionally considered as having prominent public functions. However, in Nigeria, the amount of financial misappropriation that have been wreaked by PEPs holding those positions have been as immense as those classified by FATF as senior PEPs. Moreover, in Nigeria, state powers lie in governmental institutions; these institutions more often than not are manned by individuals considered junior and middle ranking PEPs who wield enormous powers. Some have enriched themselves by misappropriating public funds.[317]

For instance, a former Chairman of Pensions Commission, Abdulrasheed Maina, his son Faisal Maina, and their companies are currently standing trial for embezzling civil servants' pension which affected about 141,790 civil servants. Mr Maina is being arraigned by the EFCC who

[316] Chaikin and Sharman (n9) 97
[317] Eme (n170) 31

instituted a 12-count charge bordering on embezzlement and money laundering.[318] Investigations done by the EFCC states that Maina is allegedly complicit in diverting 2billion pensions fund in the office of the Head of Service of the federation into his personal bank account. At the time of writing, Maina jumped bail and remains at large.[319]

Excluding junior and middle ranking PEPs in the definition and categorisation of PEPs despite the inherent corruption and money laundering risk they pose, FATF has failed to consider local and political factors peculiar to certain jurisdictions like Nigeria. In Nigeria, junior and middle ranking PEPs are equally prone to embezzling and misappropriating public funds just like those considered by FATF as holding prominent or important public office. Therefore, in practice, if FATF Recommendations on PEPs is adhered to and followed in Nigeria, it would be unhelpful and thus, unworkable in Nigeria.

3.6 CHALLENGES CONFRONTING THE IMPLEMENTATION OF LAWS ON PEPS IN NIGERIA

Despite the efforts put forward by international and domestic legislation to strengthen the fight against money laundering, enormous deficiencies and constraints limit the efficacy of the AML legal framework on PEPs in Nigeria. This section seeks to examine some of the major conundrums that impedes effective implementation of anti-corruption and anti-money laundering laws against Nigerian PEPs.

3.6.1 *Immunity of Certain Public Office Holders (Constitutional constraint):*

One unique legal problem that PEPs present is that of legal immunities. In Nigeria, no criminal or civil lawsuit can be brought against some PEPs on the basis that they are protected by constitutional immunities. While certain PEPs are in office, there is no realistic opportunity for domestic law enforcement agencies to act when they suspect diversion of public funds and financial crimes. The constitutional immunity is an issue that has generated a lot of controversy in Nigeria. By the provision of s.308 of the Nigerian constitution, no civil or criminal proceedings shall be instituted or continued

[318] Economic and Financial Crimes Commission,' N2bn Fraud: Court Admits more evidence against Maina' (18 March 2020) <https://www.efccnigeria.org/efcc/news/5641-n2bn-fraud-court-admits-more-evidence-against-maina> accessed 10 July 2020

[319] Economic and Financial Crimes Commission,' Abdulrasheed Abdullahi Maina' (March 2020) <https://www.efccnigeria.org/efcc/wanted/1533-abdulrasheed-abdullahi-maina> accessed 10 July 2020

against certain public officials, such as the President, Vice-President, Governors and Deputy Governors until the expiration of their tenures in office.[320]

The implication of this provision is that court proceedings against the abovementioned persons renders such proceedings, civil or criminal, null and void and of no effect.[321] Nigerian Presidents, Vice Presidents and a plethora of Nigerian Governors constitute the bulk of those engaged in corruption and money laundering. Yet, those occupying those positions cannot be prosecuted because of the immunity clause in the constitution. This provision has raised profuse contestation especially in the light of the defiant and corrupt attitudes of Nigeria's federal and state chief executives. From examples provided in the previous chapter, offences bothering on corruption and money laundering in Nigeria are perpetrated by PEPs holding those positions, while the immunity accorded these PEPs presents an opportunity for evading prosecution.

Some scholars canvass for the removal of the immunity clause enshrined in the constitution because its retention appears to be in conflict with the fight against grand corruption.[322] Ebenezer argues that the goal should be to ensure that public officials if found culpable of corrupt practices while in office be prosecuted once it is discovered. That way, grand corruption can be curtailed. In contrast, opponents of its removal anchor their argument on the grounds that said public officials need not be encumbered by a spate of litigations.[323] This is because litigations are capable of distracting them from properly conducting the affairs of the state efficiently as a result of attending to court proceedings which often might be vexatious.[324] They also argue that the removal of the clause may serve as a viable tool in the hands of the opposition seeking to destabilise these officials.

Although the positions of the two opposing divides have their substance, this thesis accepts the views of those calling for its removal. This is because the protective shield of constitutional immunity as a legitimate instrument and defence of corruption and

[320] The Constitution of the Federal Republic of Nigeria 1999 (as amended), s308
[321] *Industrial & Commercial Serving Nigeria Ltd v Balton BV* [2003] 8 NWLR (Pt 822) 223
[322] Olaoye Ebenezer,' The Significance of the immunity clause for Democratic consolidation in Nigeria' (2012) 6 African Journal of Criminology and Justice Studies 89
[323] Albert (n82)
[324] ibid

money laundering by PEPs, and the unlawful transfer of Nigeria's wealth into personal accounts for onward transfer to foreign jurisdictions has gotten so frequent and alarming that it defeats the very concept of good governance in Nigeria. The immunity clause has overwhelmingly continued to serve as conduit pipes that aid PEPs in siphoning Nigeria's wealth without the fear of being prosecuted. Notably, the cases of former Governors James Ibori, Diepreye Alamiesigha and Joshua Dariye already discussed in the previous chapter depicts the shortcomings of the immunity clause.

Despite sufficient evidence of misappropriation of public funds and money laundering against these PEPs while in office, law enforcement in Nigeria were precluded from prosecuting them because of the immunity clause.[325] In the Ibori case, despite most of his assets being frozen in the United Kingdom and several evidence linking Ibori to crimes bothering on money laundering by the UK authorities, Ibori could not be tried for allegations of corrupt practices because of the cloak of immunity which he enjoyed. These examples illustrate the challenges faced by law enforcement in corruption related money laundering cases.

In order to effectively fight grand corruption among public officials, this thesis is of the opinion that the immunity clause must be to be expunged from the Nigerian constitution. It is this thesis argument that sparring a sitting President or Governor who commits a crime till the end of his tenure gives room for the manipulation of evidence, the compromise of witnesses, and the perversion of the cause of justice. Efforts to recover stolen assets from PEPs are usually frustrated by the complications caused by the change in the character and nature of such assets as a consequence of the difficulties inherent in waiting until the expiration of their tenures. Such period can enable a PEP erase evidence.[326]

The immunity clause is one of the reasons why it is difficult to enforce AML laws in Nigeria. For instance, where a regulated entity such as banks in compliance with their AML obligations discovers money laundering activities involving PEPs granted immunity, even if such information is passed to law enforcement, necessary actions

[325] Anna Markovska and Nya Adams,' Political corruption and money laundering: Lessons from Nigeria' (2015) 18 Journal of Money Laundering Control 169

[326] Jean-Pierre Brun and Kevin Stephenson, *Asset Recovery Handbook: A Guide for Practitioners* (The World Bank 2011) 29

cannot be taken due to this constitutional constraint of the immunity clause. Consequently, implementation becomes difficult given that the same PEPs who have been categorised as high-risk customers in FATF Recommendations are still the same individuals protected by the law.

Another justification for expunging the immunity clause is that they violate the fundamental principle that all persons are equal before the law.[327] A Governor or President who steals or embezzles public funds without prosecution because of immunity is no different from a government minister who also commits the same act, but can face prosecution by virtue of having no immunity. Both have committed crimes which can have a devastating effect on those who they govern.

To further contextualise the analysis on this point, the concept of immunity is not new or limited to Nigeria and most of her public officials. Immunity for public officials also exist in the United States of America, although such immunity does not cover the large number of public officials like in Nigeria. Also, US Presidents do not have absolute immunity like Nigerian Presidents. In the US, the Supreme Court has consistently held in cases such as *Nixon v Fitzgerald* and *Clinton v Jones,* that Presidents deserve some type of immunity from civil lawsuits for officials acts undertaken while he or she is President.[328]

The court reasons that immunity is necessary to protect the President from excessive interference with their responsibilities. Furthermore, the office of legal counsel in the Justice Department has stated that while the Vice President and other officials are not immune from federal indictment and criminal prosecutions, the President is unique and thus entitled to immunity from indictment and criminal prosecution while in office. [329]

Although Presidents have uniformly testified or produced documents in criminal proceedings when called upon to do so by the courts. The only remedy would be for the President to be subject to the impeachment process in cases of abuse of power, and that upon removal, be subjected to criminal prosecution. To buttress this facts, immunity prevented the prosecution of a former US President, Donald Trump, from

[327] Albert (n82)

[328] The Economist,' Donald Trump faces an array of legal trouble when he leaves office' (The Economist, 17 January 2021) < https://www.economist.com/united-states/2021/01/17/donald-trump-faces-an-array-of-legal-trouble-when-he-leaves-office> accessed 29 July 2021

[329] ibid

charges bothering on financial crimes relating to investigations from the Manhattan District attorney; as well as other crimes such as campaign finance violations during his tenure as President.[330] Thus, the issue of immunity is not just a Nigerian issue, established and developed nations also have immunity issues.

This thesis is of the opinion that, rather than have absolute immunity from prosecution which is an excessive protection of PEPs that have been subjected to abuse in Nigeria, what is sought to be achieved through that section can be best achieved if such immunity is qualified and only covers the official acts of the office holder and not absolute immunity. There is no justification for public officials who misappropriate public funds to enjoy immunity from prosecution while in office, especially considering the high levels of abuse of office by Nigerian PEPs. Until this is done, corrupt PEPs who engage in mind-boggling theft and laundering of public funds will keep retaining the benefit of proceeds of corruption at the expense of the governed.

3.6.2 *Politically Exposed Persons having the legislative powers to enact Anti-corruption and financial crime laws*

Combating corruption and money laundering requires a state or country to have in place an effective legal and regulatory frameworks relating both to preventing and to criminalising these offences.[331] Where there is an interference and a degree of political control over the law making process, this can frustrate and ensure that necessary anti-corruption and anti-money laundering legislations or regulations are either delayed or so ineffective that it reduces the effectiveness of the legal regime meant to fight corruption and money laundering.[332]

As corruption continues to negatively impact all aspects of Nigeria's developmental agenda, it is imperative that Nigeria becomes responsive to both domestic and international pressures to confront corruption with all possible strategies available. One of such strategies which is paramount and indispensable is the promulgation of laws to combat the menace of grand corruption and money laundering. This is also inclusive of

[330] The Economist,' Donald Trump faces an array of legal trouble when he leaves office' (The Economist, 17 January 2021) < https://www.economist.com/united-states/2021/01/17/donald-trump-faces-an-array-of-legal-trouble-when-he-leaves-office> accessed 29 July 2021

[331] Hatchard (n196)

[332] ibid

repealing outdated extant laws to conform to modern day realities as a result of new and evolving approaches in confronting this phenomenon.

By virtue of the observance of the rule of national sovereignty, the fight against corruption and money laundering has often been domesticated in Nigeria.[333] Thus, while international organisations and institutions like the World Bank and FATF have continued to champion the need to combat corruption and money laundering, such initiatives can only serve as catalyst for domestic institutions to confront these phenomenon.

Having said this, it is pertinent to state that although a broad based coalition of actors, particularly the three arms of government (executive, legislature and the Judiciary) are crucial for achieving progress in combating corruption, the role of the legislature particularly appears all encompassing and salient.[334] This is because the legislature is the main institutional anchorage provided for in the constitution to make laws to combat corruption.[335] There appears to be a convergence of views not only among international organisations, but also among other scholars that the legislature/national assembly's stand in good stead to curb corruption.[336]

Hence, the legislature, constrained only by the constitution have the authority to enact and repeal any law they wish. In achieving this purpose, they can create other institutions and frameworks to assist it and the government in the discharge of this duty thereby creating the necessary legal frameworks to prevent and curb corruption and financial crime. s85 of the Nigerian constitution vests power on the Nigerian legislature to, inter alia-

(a) Make laws with respect to any matter within its legislative competence and correct any defects in existing laws; and

[333] Mojeed Olujinmi and Yinka Fashagba,' The legislative and Anti-Corruption crusade under the Fourth Republic of Nigeria: Constitutional imperatives and Practical Realities' (2010) International Journal of Politics and Good Governance

[334] Rick Stapenhurst and others, *The Role of Parliament in curbing corruption* (World Bank Institute Publishing, 2006) xi

[335] Olujinmi and Fashagba (n333)

[336] Stapenhurst (n334)

(b) Expose corruption, inefficiency or waste in the executive or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.[337]

The first area where effective anti-corruption war may be waged by the legislature is combating corruption and money laundering through the law-making process. It is against this background that the role of the legislature in a highly corrupt society like Nigeria may be appreciated. The Nigerian National assembly have often been criticised for being weak and incapable of effectively utilising its law-making powers to curb corruption and money laundering.[338] This is evident by its refusal to pass most anti-corruption bills in Nigeria. For instance, the National assembly refused to pass an executive bill for the establishment of special courts with the exclusive jurisdiction to try corruption cases.[339] The bill was aimed at helping the courts who are often over-burdened with other cases to speed up trials of corruption cases in order to obviate undue delays in the determination of such cases.

While the foregoing constitutional powers suggest that the legislature could pass laws that could effectively combat corruption, the personal gain to be derived by members of the national assembly in Nigeria often override the imperative to tackle grand corruption and money laundering. Perhaps, more than any reason, the Nigerian national assembly has been home to series of scandals and allegations of large-scale corruption and money laundering perpetuated by same individuals who have the mandate to fight these offences through making laws. It is argued that that this has undermined and indeed crippled the capacity of the national assembly to serve as anti-corruption agents. In Nigeria, the political will of legislators to fight corruption and money laundering is almost non-existent or weak because the legislators do not perceive fighting corruption to be in their best interest.[340]

Equally important is the fact that legislature asserts some form of control over the AML law enforcement agencies by exploiting their constitutional powers of confirming the appointments of the heads of enforcement and regulatory agencies made by the President. To emphasise, in response to the determination of the government to extend the anti-corruption fight to the

[337] The Constitution of the Federal Republic of Nigeria 1999 (as amended), s85
[338] Ifreke Inyang,' Falana reveals how National assembly refused to pass special corruption court bill' *Daily Post* (21 September 2017) < http://dailypost.ng/2017/09/21/falana-reveals-national-assembly-refused-pass-special-corruption-court-bill/> accessed 23 October 2018
[339] ibid
[340] Ocheje (n93)

National assembly, the legislators have often threatened to leverage their powers of approval and confirmation of government's nominees by refusing to approve or confirm nominees regardless of their suitability for the positions.[341] The aim of such actions is to frustrate investigations of financial improprieties by the AML enforcement institutions against suspected members of the National assembly.

A recent example is the refusal to confirm the executive's nominee for head of the premier anti-corruption body in Nigeria, the EFCC on two occasions. Based on anecdotal evidence, it is generally suspected that the opposition to the confirmation was motivated by the fear that the new head of the enforcement institution had an uncompromising stance against Nigeria's corrupt elite.[342] Several legislators, many of whom were themselves former State Governors who lost immunity from prosecution are under investigation or facing charges for serious corruption and money laundering offences. In fact, on numerous occasions legislators have attempted to pass a law that confers legal immunity on themselves.[343]

A few concise examples of senators being tried for allegations of corruption and money laundering would help drive home the point.

Danjuma Goje: A former Governor of Gombe State is being tried by the EFCC for charges relating to corrupt practices and money laundering before a Federal High Court in Gombe.[344]

Joshua Dariye: A former Governor of Plateau State is being tried by the EFCC on allegations of embezzling public funds while still in office before a High Court of the Federal Capital Territory.[345]

Adamu Abdullahi: A former Governor of Nasarawa State is being prosecuted by the EFCC for alleged corrupt practices, misappropriation of public funds and money laundering offences while in office before a Federal High Court in Lafia.[346]

Abdul-Aziz Nyako: The son of former Governor of Adamawa State, who is also a senator in Nigeria is being prosecuted alongside his father and five companies which allegedly served as conduit pipes for the illegal diversion of public funds on a 37-count charge of criminal

[341] ibid
[342] ibid
[343] Premium Times,' Nigeria lawmakers propose Immunity from prosecution for Saraki, others' (18 June 2016) < https://www.premiumtimesng.com/news/headlines/205506-nigeria-lawmakers-propose-immunity-prosecution-saraki-others.html> accessed 25 October 2018
[344] [2011] FHC/GM/CR/33C
[345] [2007] FCT/HC/81
[346] [2010] FHC/LF/CR/8

conspiracy, stealing, abuse of office and money laundering.[347] This is also a good example on why laws relating to PEPs, their families and close associates are liable to be frustrated by the national assembly. Thus, in Nigeria, those who have benefited from corruption tend to frustrate the promulgation of AML laws.

3.6.3 *Politically Exposed Persons and their influence on financial institutions in Nigeria:*

In as much as the focus of the next chapter is extensively on the AML regimes in Nigeria, it is pertinent, albeit briefly to discuss some of the issues surrounding utilising the AML regime to combat corruption-related money laundering by PEPs in Nigeria. One of those issues includes the influence which PEPs have on financial institutions in Nigeria. Most corrupt PEPs in Nigeria use their influential powers to gain control of financial institutions.[348] Indeed, PEPs may have the resources due to their connections and sophistication to be able to capture a financial institution; and to use this as an avenue to move funds unimpeded to other jurisdictions.

Anti-money laundering laws and regulations require financial institutions to take measures to identify PEPs and report suspicious transactions involving PEPs. Other measures are the application of customer due diligence which is intended to enable financial institutions with an appropriate degree of confidence form a reasonable belief that it knows each customer[349], and enhanced due diligence when dealing with high risk customers. The enhanced due diligence gives financial and designated non-financial institutions a greater understanding of the customer and the associated risk of doing business with such customers.[350]

All these becomes fundamental taking into consideration that when corrupt PEPs obtain the proceeds of corruption through abuse of office, the money is usually moved into the financial system. It has been stated that over 70 percent of the proceeds of corruption and financial crimes passes through financial institutions in Nigeria.[351] For this reason, financial institutions have been put in the front line of money laundering prevention. By asking financial institutions to identify their customers and file suspicious transaction report where they suspect dirty

[347] Kemi Busari,' 13 Nigerian senators face corruption trial' *Premium Times* (27 May 2018) < https://www.premiumtimesng.com/news/headlines/269939-13-nigerian-senators-face-corruption-probe-trial.html> accessed 25 October 2018
[348] Eme (n170) 54
[349] Esoimeme (n262) 11
[350] ibid
[351] Adebayo Adelabu,' Fraud and corruption: The role of Banks and other corporate entities' (Compliance Conference, Lagos, June 2014)

money, the AML regime is effectively asking these institutions to be whistle-blowers for law enforcement agencies.[352]

In spite of several legislations and regulations regarding high risk customers such as PEPs, many of the known cases of illicit financial flows from Nigeria to foreign jurisdictions have been diverted through financial institutions that are not desirous of complying with AML controls as a result of the profit they stand to gain from such customers. In Nigeria, even obvious PEPs with stupendous resources can place public funds in financial institutions without having to resort to any subterfuge.[353] Most financial institutions in Nigeria fail to conduct due diligence to determine the sources of funds and source of wealth of public officials.[354] In most cases they readily accede to PEPs demand for secrecy.[355] This happens frequently despite a raft of AML laws that makes it obligatory for these institutions to perform due diligence and report suspicious transactions.

Too often, PEPs collude with officers of legitimate organisations and financial institutions to perpetuate money laundering, making them complicit in helping PEPs launder their stolen funds. Some financial institutions have been involved in serious omissions and misconduct such as ignoring indications of the possible suspicious origin of funds, not passing relevant information to enforcement agencies.[356] For instance, in the course of investigating and arraigning corrupt PEPs in Nigeria, details have often emerged on how officers of financial institutions aid the corrupt in perpetuating money laundering. In the case of Abdulazeez Nyako, a bank manager admitted to transferring public funds through verbal instructions from said PEP for purposes that were not stated.[357]

Similarly, in the case of Sule Lamido, a former Governor of Jigawa State, the EFCC obtained details of how huge sums of public funds belonging to the state government were moved in and out of 34 bank accounts linked to the Governor and his family members without the banks raising suspicion of such funds.[358] The avoidance of corrupt funds inevitably involves turning down potential lucrative businesses, and not all financial institutions in Nigeria are willing to

[352] Global Witness,' Undue diligence: How Banks do business with corrupt regimes' (March 2009) <https://www.globalwitness.org/documents/14621/undue_diligence_lowres.pdf
[353] Esoimeme (n262) 11
[354] ibid
[355] ibid
[356] Wale Adebanwi,' When Corruption fights back: Democracy and Elite Interest in Nigeria's Anti-Corruption War' (2011) 49 Journal of Modern African Studies 185
[357] Eme (n170) 78
[358] Ibid 81

do this. They focus more on their earnings rather than on their obligations pursuant to AML laws. In Nigeria, unlike in foreign jurisdictions, there is little risk of financial institutions suffering from the repercussion of their acts, such as incurring fines for dealing with corrupt PEPs or withdrawal of licence.

3.6.4 *Protection of PEPs by the Ruling Political elite*

One of the threats to the enforcement of anti-corruption and anti-money laundering laws in Nigeria emanates from the protection of the ruling political elite.[359] The excessive centralisation of power and the pervasiveness of grand corruption in Nigeria has meant that certain PEPs are shielded from prosecution. This is partly because heads of anti-corruption and AML agencies in Nigeria are selected by the government of the day[360], leaving room for political interference and making them largely influential in shaping the direction of the fight against grand corruption and money laundering. There is often an overarching power of influence in the determination of those that should be prosecuted or not. These powers on occasions have meant that the war on grand corruption and money laundering have been a cosmetic exercise in Nigeria.

Most PEPs involved in large-scale corruption and money laundering are usually members of the ruling party or the sponsors of elected officials.[361] For instance, the removal of the former chairman of the EFCC, Nuhu Ribadu, by former President Umaru Yar'adua was as a result of a plot to protect a few privileged PEPs from prosecution.[362] Most PEPs from opposing political parties' defect to the ruling party in order to be protected from prosecution. This was the case involving Godswill Akpabio, former Governor of Akwa-Ibom who had an ongoing money laundering investigation against him which was subsequently dropped when he defected to the ruling party.[363]

These are some of the fundamental issues relating to PEPs in Nigeria, and why making laws even those conforming to FATF standards and other leading organisations aimed at stemming the tide of grand corruption and money laundering is difficult to achieve in Nigeria.

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[359] Adebanwi (n356)
[360] Economic and Financial Crimes Commission (Establishment) Act 2004, s2 (3)
[361] Eme (n170) 56
[362] Tola Odubajo,' The Elite factor in Nigeria's Political-Power Dynamics' (2014) 8 Journal of Studies in Social Sciences 121
[363] ibid

3.7 CONCLUSION

To sum up, the issue of PEPs is an increasingly high-profile subject within the AML sector. As a result of their activities, PEPs have become a specific risk factor in the AML sector because they are considered high risk customers who pose a significant risk of grand corruption and money laundering by the very nature of their positions of authority, which could be prone to abuse especially but not limited to countries where grand corruption is widespread. Hence, the research in this chapter has been focused on examining the subject of politically exposed persons. This chapter has shown that combating the laundering of proceeds of corruption demands a recognition that PEPs are a special case in that they are the most powerful political entities in any society with unique access to state assets and influence over state institutions.

The economic and developmental problems in Nigeria and other countries caused by grand corruption and money laundering by PEPs remain acute. The chapter examined some of the unique challenges associated with PEPs when combating grand corruption and money laundering. As already noted, Nigerian PEPs through examples given in the course of this chapter and the previous chapter represents quintessential examples of why additional scrutiny is required to be conducted on these individuals by financial and designated non-financial businesses and professions.

While it has been a challenge to find an internationally accepted definition of a PEP, the chapter highlighted some of the definitions of PEPs which have been advanced, each with its own distinctive features, with the definitions ranging between a broader and narrower approach to the problem of deciding individuals considered a PEP, whether foreign, domestic, or both. The chapter argued that FATF definition may give the impression that domestic PEPs are less of a risk than their international counterparts and hence, not automatically subject to enhanced due diligence. The chapter argued in this regard that having a distinction between foreign and domestic PEPs is not desirable, because it will be practically absurd for financial institutions in countries like Nigeria to focus their attention and resources on foreign PEPs, leaving domestic PEPs who in Nigeria have rampantly engaged in laundering public funds to foreign jurisdictions.

In addition, given that corruption and money laundering are often transnational in nature, such distinctions in itself is contrary to measures designed to mitigate the risk posed by PEPs. Therefore, if as is clearly the case, the measures prescribed in FATF recommendations

concerning PEPs are there in order to guard against the laundering of the proceeds of corruption, the definition should extend to all PEPs in the appropriate categories, not merely senior ones. Additionally, considering that FATF sets the global benchmark as far as money laundering is concerned; together with the fact that its recommendations are meant to be operational within the unique environment of developing countries such as Nigeria, the chapter argued that some of the principles have been construed outside the socio-legal context of the Nigerian PEP and would be difficult to implement. Whilst these initiatives are commendable, it is widely recognised that the unique nature of Nigeria means that a one size fits all approach to combating money laundering is infeasible. In this regard, the chapter argued that the concept of family represents a problem, inter alia, because of how broad the circle of family members tends to be in countries like Nigeria. The chapter argued that while family in the west and most foreign countries are defined by blood, and usually a narrow knit set up, in other developing countries, it can equally be defined by culture or other ethno-cultural links.

Also examined is the issue of the time within which PEPs maybe de-categorised as PEPs after leaving office. The chapter has stated that while FATF and UNCAC do not impose any time frame for considering when a PEP ceases to be considered, the new EU Fourth ML Directive specifies 12 months. On this the chapter argued that while it might be out of proportion to consider an individual a PEP after leaving office, most PEPs can retain influence beyond 12 months after leaving office. The idea of de-categorising PEPs for a short period of 12 months can pose its own risk, as PEPs who might have acted corruptly whilst in office might have a need to launder such funds; and such risk is intensified the shorter the time the PEP is considered a PEP.

The chapter also explored some of the challenges that impedes enforcement of anti-money laundering laws as it applies to PEPs in Nigeria. The chapter argued for the removal of the immunity clause which have been abused by PEPs and have often frustrated law enforcement officials from prosecuting corrupt PEPs in Nigeria as this law shields most PEPs from civil and criminal prosecution. Likewise, the chapter also discussed PEPs control over the legislative frameworks through the enactment of laws including that of anti-corruption/ant-money laundering laws. The chapter argued that the fight against corrupt practices and money laundering have been frustrated by the refusal of the legislators to pass into law most bills aimed at combating corruption and money laundering because the legislature in Nigeria is populated with PEPs who themselves face several allegations of corrupt practices while serving in other capacities, mostly in the executive branch of government.

The chapter also discussed PEPs and their influence on financial institutions in Nigeria. On this, the chapter discussed how PEPs in Nigeria can use their influential powers to gain control over financial institutions, consequently, aiding corrupt PEPs make use of financial institutions as an avenue to hide the proceeds of corruption and transfer public funds to other jurisdictions. The chapter held that banks in Nigeria have wittingly or unwittingly been complicit in this, as they rarely adhere to extant AML laws/regulations that obliges them to make reports to relevant agencies when they suspect a PEP of using the financial institutions in this manner. Having said these, a detailed analysis of the subject of money laundering and the laws/regulatory frameworks applicable to PEPs in Nigeria constitutes the bulk of the research in the chapters that follows.

CHAPTER FOUR

MONEY LAUNDERING: KEY ATTRIBUTES OF MONEY LAUNDERING AND THE USE OF ANTI-MONEY LAUNDERING REGIMES TO COMBAT GRAND CORRUPTION

4.1 INTRODUCTION

There is literature to the effect that the fight against corruption is inextricably intertwined with that against money laundering.[364] In like manner, the perennial nature of money laundering in Nigeria is inextricably intertwined with corruption perpetuated by politically exposed persons.[365] The link between PEPs, corruption and money laundering is well established. [366] Corruption and money laundering are notoriously persistent in Nigeria notwithstanding the array of laws deployed over the years against these phenomena. Pervasive corruption in Nigeria especially those involving PEPs constitutes a major threat and underlies majority of the money laundering cases reported in recent time. A simple definition of money laundering is to describe it as the conversion, transfer or concealment of illegally obtained money, so that it appears to have come from a legitimate source.[367] Simply put, it is legitimising the proceeds of crime, in this case, corruption.

Both corruption and money laundering habitually occur, with the presence of one almost underlining the other. Chaikin is of the view that corruption and money laundering are symbiotic, not only do they tend to co-occur, but fundamentally, the presence of one tends to create and reciprocally reinforce the incidence of the other.[368] Corruption produces vast amount of illicit funds to be laundered through local and international financial systems, the source and ownership of which needs to be concealed through the act of money laundering. In Nigeria, illicit funds obtained by PEPs from corrupt practices constitutes majority of the funds laundered in Nigeria. The ability to transfer and conceal funds is critical to the perpetrators of grand corruption. Thus, money laundering is an essential part of grand corruption.

Research done by Global Financial Integrity (GFI) held that between 2005-2014, some $182 billion was lost through illicit financial flows from Nigeria to developed countries as a direct

[364] Chaikin and Sharman (n9) 1
[365] Nelson Ojukwu-Ogba and Patrick Osode,' A Critical Assessment of the Enforcement Regime for Combating Money Laundering in Nigeria' (2020) 28 African Journal of International and Comparative Law 85
[366] John Hatchard, *Combating Money Laundering in Africa: Dealing with the Problem of PEPs* (Edward Elgar Publishing 2020) 16
[367] Bennett (n1)
[368] Chaikin and Sharman (n9) 1

consequence of money laundering.[369] In other words the amount of money that is the proceeds of grand corruption from Nigeria is huge. It is apt to say that Nigeria is a major player, at least from the African continent regarding money laundering to foreign jurisdictions. Not only has Nigeria been seen as the money laundering capital of Africa,[370] Nigeria has consistently been on the international illicit financial transactions global watch list,[371] and the FATF have consistently recommended to financial institutions the need to avoid or treat transactions from Nigerian sources with stringent due diligence.

Unsurprisingly, Nigeria is held out as a fantastically corrupt country.[372] Perhaps, inter alia, due to large movement of the proceeds of grand corruption across the globe by Nigerian PEPs, and the inability of successive governments to genuinely tackle these phenomena. These conclusions are well reflected in one of the most compelling evidence of corruption in Transparency International's Corruption Perception Index ratings of Nigeria as among the most corrupt countries on earth.

The ever-changing nature of money laundering threats, facilitated by a constant evolution of technology and of the means at the disposal of corrupt PEPs and other criminals have produced calls by International organisations and institutions like the FATF and World Bank to continue advocating for more stringent laws in combating these activities, especially those perpetuated by PEPs. The focus on dirty money is now firmly entrenched in policy and law enforcement responses to corruption and other crimes. Regular pronouncements are made as to the threat posed by laundering illicit funds such as recent revelations in the Paradise and Panama papers as well as West Africa Leaks[373]; its infiltration into different sectors like banking, real estate; and the role of professional enablers like lawyers and accountants in money laundering. These has once again prompted stakeholders in the AML industry all over the world to advocate for stricter AML laws which could help curtail the flow of illicit financial flows by corrupt PEPs.

Furthermore, corruption-related money laundering shares same traits as the laundering of proceeds of other types of crime, such as cybercrime or fraud, but there are important

[369] Global Financial Integrity, 'Illicit financial flows to and from Developing countries: 2005-2014 (April 2017) < http://www.gfintegrity.org/wp-content/uploads/2017/05/GFI-IFF-Report-2017_final.pdf> accessed 14 November 2018
[370] ibid
[371] Rahmon Olalekan Yussuf,' Anti-money laundering framework in Nigeria: An umbrella with wide leakage' (2017) 66 Journal of law, Policy and Globalization 172
[372] Nakajima (n28)
[373] Kathrin Betz,' Driven out of Paradise: Illicit Financial Flows and Offshore Leaks' (2018) 2 Journal of Anti-Corruption Law 71

differences. In the first place, corrupt PEPs may have certain natural advantages in laundering their stolen resources which is not available to other criminals. On the other hand, corrupt PEPs also face risks in disguising and moving their money which may not be present for other types of criminals. Mere association with large sums of unexplained wealth can be enough to trigger inquiries, as mostly, greater information often exists as to the wealth and income of PEPs as a result of assets and income disclosure requirement which allows more accurate assessment of sources of income of a PEP.

To this end, this chapter focuses on money laundering in the context of corruption. While a great deal of global AML effort is expended towards organised crimes and preventing terrorist financing, those topics are beyond the scope of this chapter. By and large, the chapters objective is to provide a detailed examination of money laundering and the efficacy of utilising the AML regimes as fundamental tools in combating corruption related money laundering. Firstly, the chapter aims to provide the readership with a general narrative of the phenomenon which is money laundering. The chapter discusses the overarching narrative which brought about the development of the law worldwide on money laundering and anti-money laundering; and the creation of a specialised AML international organisation (FATF), whose mandate is to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering and terrorist financing.[374]

Secondly, the chapter considers different definitions of money laundering, both as a legal concept and as a criminal offence under different legislations including Nigeria. Thirdly, the chapter examines the effects of money laundering activities which has significant economic and social consequences for developing countries like Nigeria, such as economic distortions and risk of international sanctions. Fourthly, to combat money laundering, stakeholders must understand how money laundering activities operate for the imperativeness of instituting greater vigilance to prevent same. Thus, the chapter also analyses certain typical stages in the money laundering process, i.e. placement, layering and integration. However, these stages are not an open and shut case in the context of money laundering.

Fifthly, the chapter identifies and examines some of the common methods used in laundering the proceeds of corruption which provides increased opportunities for PEPs to obscure the true nature, ownership and source of funds from law enforcement. This is accomplished by using legal structures (companies), intermediaries (lawyers), and the financial institutions (banks)

[374] Esoimeme (n262)16

because of the extent to which these methods empower PEPs to achieve disconnects from the ownership of such illicit funds. Corrupt PEPs rapidly develop the methodology of corruption and money laundering. The classic methodology of corrupt PEPs placing the proceeds of corruption directly into their own named accounts or that of their immediate family members is apparently now a rarity, hence the usage of corporate vehicles like companies. Companies feature frequently in majority of the cases involving corrupt PEPs in Nigeria as these individuals resort to using companies to conceal their identities when trying to gain access to financial institutions.

Companies are desirable because they are a form of legal person that can own assets, have bank accounts and credit cards in their own right.[375] Additionally, because money laundering is a highly complex industry which can be difficult for criminals to execute on their own, they have become reliant on the services and skills provided by professionals such as lawyers to help launder the proceeds of crime.[376] Some financial institutions(banks) in Nigeria have often been used and some have been complicit in laundering the proceeds of corruption to foreign jurisdictions, despite the fact that a successful AML regime relies heavily on the cooperation of financial institutions. Methods of money laundering have become more sophisticated as the complexity of financial relationships has grown and paths through which funds move worldwide through various channels have multiplied.

Sixthly, the chapter will analyse the nexus between corruption and money laundering. In this regard and as a result of the close linkage, scholars and international organisations echo this chapter's argument concerning the utility of AML regime to combat grand corruption in Nigeria. The chapter argues that the crux of the nexus or relationship between these crimes extends to the fact that these inter-linked problems also have inter-linked solutions; which is that leveraging AML regimes are crucial in combating grand corruption. Essentially, because money laundering is often viewed as the flip side of corruption and other criminal activity, and the close affinity between these crimes, as well as the utility of policy and legal responses developed to fight one type of crime can also be used in dealing with the other. Tracking down and arresting corrupt PEPs successfully is difficult, so AML efforts offer a trail and a means to

[375] Paddy Ireland,' Limited liability, shareholder rights and the problem of corporate irresponsibility' (2010) 34 Cambridge Journal of Economics 837

[376] Olatunde Julius Otusanya,' The Role of Financial Intermediaries in Elite Money Laundering Practices: Evidence from Nigeria' (2012) 15 Journal of money laundering control 58

apply justice that may be more cost-effective than seeking out predicate offences.[377] Predicate offences refer to those offences which generates illicit funds that are capable of being laundered.[378] Ultimately, this chapter argues that AML tools are vital for law enforcement and instructively appears to be a significant tool in the fight against grand corruption. Nevertheless, as it is today, the laws, regulations and institutions that have been put together have yielded disappointing results in Nigeria.

[377] Guy Stessens, *Money laundering: A new international law enforcement model* (Cambridge University Press 2000) 12

[378] Norman Mugaruwa,' Uncoupling the relationship between corruption and money laundering crimes' (2016) 24 Journal of Financial Regulation and Compliance 74

4.2 DEFINITIONS OF MONEY LAUNDERING

As we start our discussion of money laundering, it is fundamental to begin with a clear understanding of money laundering in the literature. This understanding is paramount. There are numerous definitions of money laundering in different jurisdictions, both as a legal concept and as a criminal offence. Money laundering has been defined as the use of money derived from illegal activity by concealing the identity of individuals who obtained the money and converting it to assets that appear to have come from a legitimate source.[379] It is also defined as a process of manipulating illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement.[380] It includes a deliberate, complicated and sophisticated process by which the proceeds of crime are camouflaged, disguised or made to appear as if they were earned by legitimate means. Anti-money laundering scholars define money laundering as the process of disguising the origins of property which has been acquired through criminal conduct.[381] Furthermore, the United Nations Convention against Transnational Organised crime also known as the Palermo Convention defines money laundering as follows:

- The conversion or transfer of property, knowing it is derived from a criminal offence, for the purpose of concealing or disguising its illicit origin or assisting any person who is involved in the commission of the crime to evade the legal consequences of his or her actions.
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that it is derived from a criminal offence.
- The acquisition, possession or use of property, knowing at the time of its receipt that it was derived from a criminal offence or from participation in a crime.[382]

In the same vein, the EU Fourth Money Laundering Directive is also extensive in its definition of money laundering by stating that the following conduct, when committed intentionally, shall be regarded as money laundering:

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[379] John Madinger, *Money laundering: A Guide for criminal investigations* (3rd edn, Taylor & Francis Group 2012) 5

[380] Mugaruwa (n378)

[381] Janet Ulph, *Commercial Fraud: Civil liability, human rights, and money laundering* (Oxford University Press 2006) 124

[382] The Palermo Convention, Article 6(1)

- The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequence of that person's action;
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property knowing that such property is derived from criminal activity or from an act of participation in such activity;
- The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;
- Participation in, association to commit, attempt to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).[383]

Lastly, the Nigerian Money Laundering Prohibition Act 2012, defines money laundering as the conversion or transfer, concealment, disguise, or removal from jurisdiction, acquisition, retention of any fund or property, knowing that such funds or property is, or forms part of the proceeds of an unlawful act, notwithstanding if the various acts constituting the offence were committed in different countries or places.[384] The unlawful act in the provisions of the MLPA encompasses a list of predicate offences which is inclusive of corruption, fraud, terrorist financing, theft, participation in an organised criminal group et cetera.[385] This ostensibly conforms to FATF recommendations which has advised countries to inter alia:

I. Criminalise money laundering;
II. Apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences;
III. Extend predicate offences for money laundering to conduct that occurred in another country when it would have constituted a predicate offence had it occurred domestically; and

[383] Directive 2015/849, Article 1, s3
[384] Money Laundering (Prohibition) Act 2012, s15 (2)
[385] Money Laundering (Prohibition) Act 2012, s15 (6)

IV. Apply effective, proportionate and dissuasive criminal sanctions to natural persons convicted of money laundering.[386]

To input this thesis own definition as it relates to the discourse in this chapter, essentially the conduct generally involves financial institutions being engaged in an arrangement with customers (usually PEPs) that have the effect of facilitating the transfer, retention or control by PEPs of the proceeds of corruption or; aiding and abetting illicit financial flows to other jurisdictions. Notably, a common denominator or an important prerequisite with regards to which there have been a convergence in several statutes defining money laundering is in the use of knowledge as the trigger for the offence.

Although this thesis is not meant to cover 'knowledge' in great detail, it highlights the potential liability of banks and those in the designated non-financial businesses and professions (DNFBP) in corruption and money laundering related cases. In the legal definitions above, the phrase 'knowing that it is derived from a criminal offence' is used repeatedly in different statutes. Knowledge is a paramount element in the offence of money laundering. This inclusion of knowledge in the legal definition of money laundering applies particularly to those in the regulated sector such as banks and those in the designated non-financial businesses and professions.[387] Thus, a person might be considered to have knowledge of money laundering if he knows or has reasonable grounds for knowing or suspecting that another is engaged in money laundering.[388]

Where a financial institution(banks) or those in the DNFBP accepts money knowingly from someone who has stolen public funds, the bank could be held liable for money laundering. The pertinent question that arises is, how is a bank or those in the DNFBP deemed to have knowledge of the surrounding circumstances in relation to the money it receives from customers, particularly high-risk customers like PEPs? In as much as banking and other services provided by DNFBP are profit making business, they are bound by AML laws and regulatory guidelines governing their operations.[389] For instance, in Nigeria, the Central Bank of Nigeria regulates and enforces AML regulations and guidelines to those in the financial

[386] FATF,' International standards on combating money laundering and the financing of terrorism& proliferation: The FATF recommendations- Interpretive Notes to Recommendation 3 (February 2012) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> accessed 08 February 2019
[387] Mugarura (n378)
[388] Proceeds of Crime Act 2002, s330
[389] Mugarura (n378)

institutions.[390] Financial institutions are obligated to perform due diligence by making necessary inquiries and satisfying itself that deposits it is accepting is not tainted proceeds of crime;[391] and are expected to report any knowledge of suspicious transactions to the EFCC.[392] Knowledge could be information discovered during the course of performing due diligence that another person is engaging in money laundering. However, as well shall see, some banks in Nigeria have been culpable of money laundering infractions by non-compliance with AML laws and regulations.

By and large, the literature characterises money laundering as a cycle, the objective of which is to legitimise illicit funds, making them appear clean at the end of the process. The job of the money launderer is to use proven and secret techniques to make money obtained illegally through the commission of a predicate offence appear to have been acquired legitimately. It is pertinent to mention that this thesis takes cognisance of the fact that various predicate offences exists which yields the funds to be laundered. However, this thesis is largely focused on corruption as a predicate offence for money laundering which is prevalent among PEPs in Nigeria. When an unlawful activity such as the misappropriation of public funds in Nigeria generates substantial profit for PEPs, they must find avenues to hide the funds without drawing attention to the underlying corrupt activity which generated such profits. This goal is achieved by changing the form or by moving the money to jurisdictions where it is less likely to attract attention.

Furthermore, money launderers are constrained by laws, especially those governing the operation of the world's financial system. Statutes around the world have been aimed at specifically making the detection of money laundering easier. Among these which will also be considered in this chapter includes, laws relating to currency transaction reporting and more fundamentally, the requirement that banks report suspicious transactions to law enforcement which is critical for law enforcement regarding investigation and possible prosecution of money launderers when necessary.

Money laundering remains a serious challenge in Nigeria as it is a nefarious practice that is mainly committed by individuals such as the elite and politically connected members of the

[390] Money Laundering Prohibition Act 2012, s9(2); CBN (Anti-Money Laundering and Combating the Financing of Terrorism for Banks and Other Financial Institution) Regulation 2018, s3
[391] Money Laundering Prohibition Act 2012, s3 and 6
[392] Money Laundering Prohibition Act 2012, s6

Nigerian society.[393] This does not imply that other criminal activities in Nigeria such as those who engage in cybercrime do not commit money laundering. However, from numerous examples as dealt with in previous chapters, the bulk of this offence is committed by those who are PEPs.

4.3 THE MONEY LAUNDERING PHENOMENON: THE GENERAL NARRATIVE

An overarching narrative informs the development of the law worldwide on money laundering and the growth of the AML industry. It is that dirty money, the proceeds of crime are moving around the world; and that this phenomenon is tremendously harmful and that action in this regard should be prioritised.[394] Realisation dawned that colossal amounts of money generated from, or associated with crime were passing through the financial system. This awareness culminated in the characterisation of money laundering as a threat and galvanised strategies to contain this phenomenon.[395] Money laundering has been fuelled by rapid technological developments and communication that allow money to move anywhere in the world with speed and ease, thus, making the task of combating money laundering more urgent than ever.

The complex electronic technologies used in today's financial services industries more widely, including the internet, have allowed money launderers to develop novel methods that make detection, tracing and recovery more difficult than ever. They also permit the laundering of large quantities of money, more quickly and on an international scale.[396] The size of global money laundering is difficult to be assessed accurately due to methodological difficulties and the clandestine nature of money laundering. Methods such as case studies, proxy variables, and other models all tend to under or overestimate money laundering.[397] Nonetheless, the United Nations office on Drugs and Crime holds that the estimated amount of money laundered globally in one year is 2-5% of global GDP, or $800 billion-$2 trillion US dollars.[398]

The origin of money laundering is imprecise but we know that the activity began to develop on an industrial scale in the United States in the middle part of the twentieth century as criminals, particularly drug traffickers recognised the need to demonstrate that their enormous

[393] Nelson Ojukwu-Ogba and Patrick Osode,' A Critical Assessment of the Enforcement Regime for Combating Money Laundering in Nigeria' (2020) 28 African Journal of International and Comparative Law 85
[394] Peter Alldridge, *What went wrong with Money Laundering Law* (Springer Nature 2016) 6
[395] ibid
[396] Toby Graham, *International Guide to Money Laundering Law and Practice* (2nd edn, Tottel Publishing 2007) 1
[397] John Walker and Unger Brigitte,' Measuring global money laundering: The Walker gravity model' (2009) 5 Review of Law and Economics 821
[398]United Nations Office on Drugs and Crime,' Money Laundering and Globalization' <https://www.unodc.org/unodc/en/money-laundering/globalization.html> accessed 4 February 2019

pools of wealth had been derived from legitimate sources.[399] Furthermore, the criminalisation of money laundering occurred some decades later, again in the US.[400] In an effort to curtail the impact of drugs in America, legislation was promulgated in 1986 that made money laundering a federal crime.[401] The criminalisation of money laundering was a highly novel concept at the time. Given the global interconnectivity of financial services, the criminalisation of money laundering only in the US had limited impact. In 1988 through the vehicle of the UN Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances, all signatory states committed to implement a range of measures including the criminalisation of behaviour that came universally to be referred to as money laundering.[402]

Thus, the first major international agreement to counter money laundering was the Vienna convention. The name alone suggests the limited view of money laundering as a facet of drug trade. Nevertheless, the Vienna convention set down many of the main elements of the current AML regimes. From the early 1990s, international AML efforts experienced a rapid and massive expansion as major international institutions endorsed AML rules and new specialised AML international organisations were created.[403] The most important of these being the creation of FATF in 1990, the first international institution founded specifically to counter money laundering and the most influential body in setting AML standards.[404] Substantively, it was in the1990s that governments realised the value of expanding the scope of money laundering so that the coverage of AML laws were expanded away from the narrow focus on drugs to encompass the proceeds of crime generally.

The rationale was that if it was illegal to handle drug money, it should also be illegal to handle the proceeds of other offences such as corruption, embezzlement and fraud. Therefore, these offences became subject to money laundering legislation. Enhanced legislation has been supplemented by rules requiring financial institutions to obtain and verify customers, including obtaining information on a customer's source of funds and source of wealth, as well as the risks inherent in the nature and background of a customer whether they are politically exposed being one of the most significant risk factors.[405]

[399] Platt (n61) 21
[400] Ibid 22
[401] ibid
[402] Ibid 23
[403] Chaikin and Sharman (n9) 17
[404] ibid
[405] Platt (n73) 23

Furthermore, one of the objectives of the AML industry is stopping criminals from enjoying the proceeds of crime.[406] In this regard, new policies strive to curb crime by taking away the profits of crime rather than simply punishing the individuals who have allegedly committed the crimes.[407] The idea that a person should not profit from crime was instrumental in shaping the crime of money laundering and this has undergone a profound evolution, and also been developed into an independent wrong, with several jurisdictions including Nigeria criminalising money laundering in their extant statutes.[408] This reasoning of not profiting from crime gave rise to a crime of money laundering, and a bureaucracy which is the AML industry; both of which have grown rapidly and in unforeseen ways.[409] Attributed to this growth is the idea that AML tools are critical in combating financial crimes such as corruption and in asset recoveries.

In the past, when the offence of money laundering did not exist, the proceeds of crime was laundered with impunity. Criminals, including those who stole public funds could easily open an account and deposit large sums of money without difficulties, while bank employees would be thrilled at having obtained wealthy new customers. The position is very different now as money laundering is universally regarded as a necessary, if not essential component of criminals who desire to legitimise and conceal stolen resources and such is treated as a serious offence around the world.

According to Alldridge, the one crime whose continued increase is guaranteed is money laundering.[410] From a small and relatively marginal role in the early 1990's, the crime of laundering has become central to law enforcement and has loomed larger and larger in public consciousness. This is also as the activities of terrorists on the 11th of September 2001 acted as milestone events in the history of international AML evolution. This event provided the impetus on the imperativeness of a universal network of combating money laundering and terrorist financing. Consequently, a set of legislative initiatives have been promulgated surrounding increasing transparency in financial institutions as well as updating domestic AML legislations, all of which have been active in the last decades. The term AML/CFT (Anti-Money Laundering and Countering the Finance of Terrorism) is frequently employed in the

[406] Alldridge (n394) 6
[407] Guy Stessens, *Money Laundering: A new international law enforcement model* (Cambridge University Press 2000) 12
[408] Money Laundering (Prohibition) Act 2012, s15
[409] Alldridge (n394) 1
[410] Alldridge (n394) 1

AML sector when carrying out checks on customers for the purpose of detecting and preventing both.[411]

The approach of the international community to both issues can be observed from the assessments of national legal frameworks on AML/CFT conducted by supranational bodies. Some of these bodies include the Organisation for Economic Co-operation and Development (OECD) and the FATF. The FATF originally issued 40 Recommendations on countering money laundering, which has been supplemented by nine Special Recommendations which mainly addresses terrorist financing.[412] It is pertinent to note that the two concepts are distinct to the extent that money laundering is concerned with the origin of the money, whilst terrorist financing is largely, although not exclusively about the destination of the money. As a result of this, there is a new determination to prevent the financial system from being misused by terrorist, and by extension, to other crimes.

In recognition of this phenomenon, laws and regulatory activities have increased substantially and can be expected to increase further, with a vast body of national and international counter-measures to battle against increasingly sophisticated financial criminals.[413] Given these facts, the AML narrative evolves around the seriousness of laundering. Some reasons were given for the criminalisation of money laundering. The thesis briefly highlights these reasons. The first as stated by Alldridge is that laundering is a form of complicity in the predicate offence, whatever the offence is.[414] The second major claim advanced for the criminalisation of money laundering is that it is bad for the financial system because it endangers financial institutions.[415] In other words, the soundness and stability of financial institutions could be seriously jeopardised, thereby eroding the confidence and trust of the public in the financial system.

However, although this proposition may be true, several scholars disagree with this view as such claims are frequently found but difficult to substantiate. According to Erin, no matter how many times this kind of claim is repeated, its plausibility does not increase.[416] Erin posits that even before the advent of the AML regime, no bank or other financial institution was ever

[411] Platt (n73) 21
[412] Financial Action Task force,' FATF IX Special Recommendations' (October 2001) < http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf> accessed 25 January 2019
[413] Alldridge (n394)3
[414] Ibid 18
[415] Erin Lawlor-Forsyth and Michelle Gallant,' Financial institutions and money laundering: A threatening relationship?' (2018) 19 Journal of Banking Regulations 131
[416] ibid

endangered by the fact that they laundered money for criminal clients. There is little or no evidence for such claim that allowing banks to launder money for clients endangers the bank in question or the financial institutions. Therefore, the claim that interventions are required to safeguard financial institutions are fanciful. Additionally, Erin states that despite the global financial crisis in 2007-2008, there was no evidence to suggest that financial institutions were endangered by the activities of money launderers. Rather, financial institutions were endangered by all manner of destructive conduct by bankers and politicians but not money laundering. Thus, Erin contends that the relationship between money laundering and financial institutions can, at times, be ambivalent.

Tailoring this argument to what is obtainable in Nigeria, this thesis agrees with Erin that banks laundering money for corrupt PEPs do not endanger financial institutions in Nigeria where banks have been complicit in the unpatriotic and economically destructive involvement in money laundering. Nigerian banks remain the main conduits for the corrupt to transfer their stolen funds out of Nigeria and they continue to play this role till today.[417] This argument will be expounded upon in the course of this thesis.

Thirdly, there is the claim that laundering is part of capital flight from developing countries.[418] In this regard, cases involving corrupt leaders such as the embezzlement of funds by late Nigerian dictator, Sani Abacha, laundering billions of dollars to foreign jurisdictions triggered the realisation that incredible amounts of money generated from corrupt leaders were passing through the financial system. In response, several measures were promulgated to help curtail the destructive effects of capital flight from developing countries. One of such measures is the FATF Recommendations. The Recommendations require governments and financial institutions to adopt measures such as know-your-customer and other customer due diligence measures and to monitor and report suspicious transactions including all cash transactions above certain threshold amount.[419]

On the whole, one of FATF's early accomplishments was to dispel the notion that money laundering is only about cash transactions. Through several money laundering typologies, FATF has demonstrated that money laundering can be achieved through virtually every

[417] Musonda Simwayi and Wang Guohua,' The role of commercial banks in combating money laundering' (2011) 14 Journal of Money laundering Control 324
[418] Alldridge (n394)18
[419] Gill Martin and Geoff Taylor,' Preventing money laundering or obstructing business? Financial companies' perspectives on know your customer procedures' (2004) 44 British Journal of criminology 582

medium, financial institutions or business; and that methods used to launder proceeds of criminal activities are in constant evolution because criminals would often find alternative channels to launder the proceeds of criminal activities.[420] Therefore, FATF strongly advocates for a proper culture of compliance with standards of AML which creates an environment where it is more difficult for crimes such as corruption to thrive undetected and unpunished.[421]

Much of this section of the chapter has focused on discussing the development of money laundering. The chapter now seeks to delve into the nitty-gritty of the phenomenon of money laundering by providing a detailed examination of the economic and social implications of money laundering, the stages in the money laundering cycle, methods used in laundering the proceeds of corruption in Nigeria, the nexus between corruption and money laundering, as well as the fundamental issue of utilising AML regimes to combat grand corruption in Nigeria.

4.4 THE EFFECTS OF MONEY LAUNDERING ACTIVITIES

Money laundering is a result of any crime that generates profits for the criminals involved, in this case corruption. It knows no boundaries, and jurisdictions where there are weak, ineffective or inadequate AML legislations and enforcement are most vulnerable.[422] As most launderers eventually intend to use the proceeds of their crimes, the ultimate intent is to move funds through the financial systems. Thus, money laundering has several deleterious economic and social consequence on any society or country where it thrives. The negative effects of money laundering as highlighted by several scholars includes the following:

4.4.1 *Increased Exposure to crime and corruption:*

Socially, the effects of the prevalence of engaging in money laundering practices in the minds of citizens is that it creates an impression that crime pays and is profitable. As PEPs continue to benefit from corrupt practices with minimal consequences in Nigeria, it has the effect of eroding the moral fabric of society.[423] The most visible impact upon society in Nigeria is that

[420] FATF,' Methods and Trends: 55 Methods and Trends Publications' < http://www.fatf-gafi.org/publications/methodsandtrends/?hf=10&b=0&s=desc(fatf_releasedate)> accessed 08 February 2019
[421] FATF,' Corruption: A reference guide and information note on the use of the FATF Recommendations to support the fight against corruption' < http://www.fatf-gafi.org/media/fatf/documents/reports/Corruption%20Reference%20Guide%20and%20Information%20Note%202012.pdf> accessed 27 February 2019
[422] Mugarura (n378) 24
[423] Certified Anti-money Laundering Specialist,' Study Guide: CAMS Certification Exam (2012) < http://files.acams.org/CAMS6/CAMS6-Study-Guide-Sample.pdf> accessed 20 February 2019

most public officials are not moved by the desire to serve, but the desire to have access to public funds. These activities facilitate the vicious cycle of corruption. Where money laundering activities go unchecked and criminals are able to retain and enjoy the benefits from the proceeds of crime, it will only perpetuate the problem of the commission of offences that give rise to the illicit funds to be laundered.[424] Additionally, when a country is seen as a haven for money laundering, just as Nigeria is considered the money laundering capital of Africa, it will attract people who commit crime. If money laundering is prevalent, there is more likely to be corruption.

4.4.2 *REPUTATION RISK FOR THE COUNTRY*

As a result of the prevalence of money laundering and corruption which are notoriously persistent in Nigeria due to the colossal resources laundered by corrupt PEPs, this has earned Nigeria the unenviable tag of being seen as the money laundering capital of Africa. A reputation as a money laundering haven can harm development and economic growth in a country.[425] This is because it diminishes legitimate global opportunities from foreign institutions that find the extra scrutiny involved in working with institutions in money laundering havens too expensive.[426]

Additionally, with the increasing infiltration of money laundering activities in Nigeria, along with lack of transparency and high level of corruption, it is often difficult to attract foreign investments which is a contributory factor to economic development in Nigeria. Although developing countries like Nigeria cannot afford to be too selective about the sources of capital they attract, there is a dampening effect on foreign direct investment when a country's financial sectors are perceived to be compromised and under the control and influence of money launderers.[427] Therefore, the negative damaging reputation attributed to money laundering activities reduces legitimate developmental opportunities. On this basis, most developing countries like Nigeria, characterised with high level of corruption, economic and financial instability have frequently failed to attract adequate foreign investment to boost her economic and financial growth.

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[424] ibid

[425] Uyoyou Ogbodo and Ebipanipre Mieseigha,' The Economic Implications of Money Laundering in Nigeria' (2013) 3 International Journal of Academic Research in Accounting, Finance and Management Sciences 170

[426] Certified Anti-money Laundering Specialist (n390)

[427] Financial Action Task Force,' What influence does money laundering have on economic development?' < http://www.fatf-gafi.org/faq/moneylaundering/> accessed 08 March 2019

The dominance of economic and financial crimes in Nigeria, has to a degree, been liable for lack of adequate foreign investment. [428] Thus, once a country's financial sector reputation is damaged, reviving it is very difficult when this could have been prevented with proper AML controls. Therefore, fighting money laundering is an important part of creating a business-friendly environment which is a precondition for lasting economic development.[429].

4.4.3 *RISK OF INTERNATIONAL SANCTIONS*

In order to protect the financial systems from money laundering, several institutions and organisations such as United Nations, the European Union, FATF and other governing bodies may impose and subject countries to sanctions. This is done in order to protect the international financial system from money laundering risks and to encourage greater compliance with AML standards. [430] The FATF maintains a list of jurisdictions identified as high risk and non-cooperative whose AML regimes have strategic deficiencies and are not at international standards.[431] Previously, Nigeria was placed on FATF non-cooperative countries and territories (NCCT) list due to the Nigeria's incapability of dealing with the exploits of money laundering.[432]

In similar vein, on the 13th of February 2019, Nigeria was added to a blacklist of nations by the European Commission that poses global threat to the financial system because of the deficiencies in its AML regimes in relation to controlling financial activities and money laundering.[433] According to the European Commission, the criteria used to blacklist countries includes weak sanctions against money laundering, insufficient cooperation with the EU with regards AML compliance, and lack of transparency regarding the beneficial owners of companies and trust.[434] The move was said to be part of a crackdown on money laundering

[428] Ogbodo and Mieseigha (n425)
[429] ibid
[430] Financial Action Task Force,' High risk and other monitored jurisdictions' < http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)> accessed 08 March 2019
[431] ibid
[432] Ayodeji Aluko and Mahmood Bagheri,' The impact of money laundering on economic and financial stability and on political development in developing countries: The case of Nigeria' (2012) 15 Journal of money laundering Control 442
[433] Jon Stones,' EU adds Saudi Arabia to 'dirty money' blacklist in crackdown on terrorism' (Independent, 13 February 2019) <https://www.independent.co.uk/news/world/europe/eu-saudi-arabia-dirty-money-terrorism-funding-blacklist-panama-nigeria-a8777676.html> accessed 14 February 2019
[434] ibid

activities after several scandals at EU banks such as Danske Bank for its alleged involvement in international money laundering.[435] Apart from reputational damage, inclusion on the list complicates financial relations with the EU. The implication being that there have been calls by the EU on its members to apply enhanced due diligence to business relationships and transactions with natural and legal persons from these jurisdictions in an attempt to persuade them to improve on their AML regimes.

These instances illustrate Nigeria's lacklustre performance and non-compliant disposition towards several measures in combating money laundering which frustrates her ability to remain a reliable international partner in the fight against money laundering. This thesis agrees with the EU and other regulators who continuously blame Nigeria for poor performances with respect to issues of AML controls. This is because there are serious issues with the Nigerian financial system which aids PEPs in capital flight to foreign jurisdictions.

4.4.4 *ECONOMIC DISTORTION AND INSTABILITY*

Money launderers are not mainly interested in profit generation, but rather, in protecting their proceeds and hiding the illegal origin of the funds. As there is no motive to generate profits, money launderers, most often, invest their illicit funds in economic and commercial ventures that do not benefit the economy of the country where such illicit funds are situated.[436] When investing, money launderers in most cases do not necessarily pursue high profit generating investments. Rather, they look for investments that simply allow for the recycling of their illicit proceeds even if it this means taking a low rate of return. Therefore, to the extent that money laundering and financial crime redirects funds from sound investment to low-quality investments that hide their origin, economic growth can suffer.[437]

Furthermore, the exploits of money laundering can also harmfully undermine currencies and interest rates. According to Ayodeji, large capital inflows or outflows adversely affect exchange rates and interest rates.[438] Consequently, this can lead to volatility in exchange and interest rates due to unanticipated cross-border transfer of funds. The cross-border transfer of funds can also be problematic especially for countries like Nigeria that rely on the acquisition

[435] Maira Martini,' Why Danske Bank Estonia appears in so many money laundering scandals' (1 August 2018) <https://voices.transparency.org/why-danske-bank-estonia-appears-in-so-many-money-laundering-scandals-424047fe987c> accessed 07 March 2019
[436] Ogbodo and Mieseigha (n425)
[437] Certified Anti-money Laundering Specialist (n390)
[438] Aluko and Bagheri (n432)

of other currencies such as the US dollar to fulfil her international obligations in satisfying local needs.[439]

The chapter now turns to an examination of certain typical stages in the money laundering process. Strictly speaking, money laundering can be construed as a dynamic three stage process that requires, firstly, moving the funds from direct association with the crime [**placement**]; secondly, disguising the trail to foil pursuit [**layering**]; and thirdly, making the money available to the criminal once again with its occupational and geographic origins hidden from view [**integration**].[440]

4.5 STAGES OF THE MONEY LAUNDERING CYCLE

The ultimate goal of any money laundering activity is twofold: To conceal the predicate offences from which the proceeds are derived, and to ensure that criminals can enjoy their proceeds by investing them and giving them legitimacy.[441] In order to fulfil these ultimate goals, a number of elements have to be attained. These elements include the conversion of illicit cash into asset, the concealment of the ownership or source of the illegally acquired proceeds, and the creation of the perception of legitimacy of source and ownership.[442]

Money laundering often involves a complex series of transactions that are difficult to separate. It depends on the anonymity, speed and complexities to carry out the schemes. Anonymity and complexity are paramount for money launderers as they ensure that illicit funds obtained from predicate offences must have no trace to lead to its origin and to make the job of investigators difficult or even impossible. Thus, the nature of a money laundering cycle entails several stages, and it is common in the literature to see money laundering as occurring in three stages. These three stages can also be found in a widely accepted analysis, according to which most money laundering operations are carried out. These stages can be split into three, namely:

4.5.1 *PLACEMENT*:

Placement, the first stage in the money laundering process starts with the introduction of large cash proceeds of crime into the banking and financial system.[443] This is often accomplished by

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[439] ibid
[440] John Howell, *The Prevention of money laundering and Terrorists Financing* (ICC Commercial Crime Services 2006)2
[441] Guy Stessens, *Money Laundering: A new international law enforcement model* (Cambridge University Press 2000) 83
[442]ibid
[443] Ulph (n381) 132

placing the funds furtively into circulation through formal financial institutions, both domestic and international. It may be done through single or multiple transactions using one or several bank deposits or the purchase of instruments such as bonds or shares.[444] The transnational nature of money laundering means that the proceeds of crime can be transferred quickly across borders and a common technique used at this stage is the separation of the funds into smaller amounts for easy lodgements into various accounts. Many placement mechanisms are directed at positioning the funds in a bank or other regulated sectors and it has been held that such placement of dirty money also relies on businesses that deal heavily in cash, as well as financial institutions of all types.[445]

This is the common situation, although there are exceptions. For instance, a corrupt PEP acquiring an expensive valuable artwork at the price of $100,000 dollars using corruptly obtained money. Consequently, the corrupt money has now passed to the legitimate seller who is oblivious of the origin of the money. Equally important, it is not always necessary to proceed with money laundering in order to use criminally or corruptly obtained resources.[446] Instead, such criminally obtained resources can also be used by criminals for various purposes without the need to launder the money. The money can be used for other illegal activities, like electoral fraud and vote buying practiced by most PEPs in Nigeria during election cycles. If this is the intention, there wouldn't be any need to proceed with placement.

Additionally, most modern-day crimes generate forms of benefit that do not need to be placed into the financial system because they are already in it the moment the crime is committed.[447] For instance, crimes such as cybercrime do not require placement because they sit directly at the heart of the financial system.[448] Placement is only relevant when the money needs to be channelled into a legitimate financial system,[449] considering the fact that financial institutions are somewhat indispensable to those seeking to launder the proceeds of crime. The idea is to move illicit funds from the original source into some other forms that can be further layered

[444] Jonathan McNally,' Money Laundering Methodology' in Toby Graham (eds) *International Guide to Money Laundering Law and Practice* (Tottel Publishing) 2
[445] John Madinger, *Money laundering: A Guide for criminal investigations* (3rd edn, Taylor & Francis Group 2012) 7
[446] Maruf Adeniyi Nasir,' Money Laundering: Analysis on the placement methods' (2016) 11 International Journal of Business, Economics and Law 2289
[447] FATF,' FATF Report: Professional money laundering' (July 2018) < http://www.fatf-gafi.org/media/fatf/documents/Professional-Money-Laundering.pdf> accessed 22 February 2019
[448] ibid
[449] Nasir(n446)

and concealed. The placement stage constitutes part of the foundational stage of the money laundering cycle. Succinctly, some examples of placement techniques include:

a) Commingling of illegitimate funds with legitimate funds such as placing the cash gotten from corrupt activities into legal enterprises[450].
b) Smurfing. This is a term ascribed to money launderers who seek to evade scrutiny from authorities by structuring currency deposits into small amounts and depositing them into various bank accounts in an attempt to evade reporting requirements.[451]
c) Purchasing a series of monetary instruments e.g. cashier's cheque or money orders, which are then collected and deposited into accounts at another location or financial institution.

These examples are in no way exhaustive as the placement techniques have been increasing from time to time.

The placement stage has been held as the most crucial and riskiest stage in the process of money laundering.[452] This is so because it is at this stage that the goal of the money launderer is to introduce the unlawful proceeds into the financial system without attracting the attention of financial institutions or law enforcement through the use of several techniques in the form of breaking down payments, using friends and relatives to achieve their goal.[453] It is also at this stage that detection by the authorities is most likely as it has become harder to introduce large amounts of cash because banks have become more vigilant regarding money laundering activities.

From a regulatory perspective, the placement stage provides ample opportunities for the detection and interception of illicit funds; failing which it becomes extremely difficult to identify such funds as they fall deeper into the economy.[454]As provided by the rules through statutes and regulations, the placement stage have been especially targeted with the introduction of measures such as know your customer requirements for new customers and

[450] Robin Booth and others, *Money Laundering law and Regulation: A practical Guide* (Oxford University Press 2011) 3
[451] Ehi Eric Esoimeme, *The money laundering laws/regulations in Nigeria, United States and United Kingdom* (DSC Publishing) 3
[452] Ulph (n381) 132
[453] Alison Bachus,' From Drugs to Terrorism: The Focus Shifts in the international fight against money laundering after September 11,2001' (2004) Arizona Journal of International & Comparative Law 842
[454] Nasir (n449)

enhanced due diligence for high risk customers such as PEPs, in order to ameliorate the risk of accepting the proceeds of crimes into the financial system.[455]

Typically, in Nigeria, it should be at this stage that banks and other financial institutions desirous of curtailing money laundering should be paying more attention and complying with their statutory obligations of customer due diligence. This is because if Nigerian banks and other financial institutions can adhere to this statutory obligation by paying close attention especially to public officials and reporting where necessary to enforcement agencies and regulators, more PEPs will be deterred from using banks as an avenue to launder stolen resources to other jurisdictions.

In terms of susceptibility to money laundering, the sector that is most exposed to money laundering risks are the banks[456], owning to the size of their institutions, high volume of transactions and high exposure to cross-border transactions.[457] Given that the bulk of stolen Nigerian resources passes through the formal financial and banking system, and the fact that banks remains the ideal medium in terms of remittances abroad under the cover of legitimate transactions, it is fundamental that banks should pay more attention to this stage.

The failure of financial institutions to take adequate steps to identify PEPs at the placement stage has led to corrupt PEPs opening accounts without being detected. For instance, over a number of years, it was discovered that large multinational banks and other financial institutions were opening accounts for Nigerian PEPs without due diligence where they amassed and deposited, either for themselves or on behalf of others vast amounts of illicit funds[458] Banks in Nigeria have been known to be complicit in aiding PEPs launder the proceeds of corruption by turning blind eyes to obvious cases of money laundering from corrupt Nigerian PEPs, right from the placement stage.[459]

Given these facts, it is argued that to effectively combat money laundering, increased vigilance is fundamental to stop or detect money laundering at the placement stage. Greater vigilance at the placement level to help salvage and ensure financial integrity in the financial system in Nigeria is a necessary antidote to the problem of money laundering. This could be achieved if

[455] Money Laundering (Prohibition) Act 2012, s6 (2)
[456] ibid
[457] Donato Masciandaro,' The illegal sector, money laundering and the legal economy: A macroeconomic analysis' (2000) 8 Journal of Financial crime 103
[458] Esoimeme (n262) 11
[459] Sahara Reporters,' Banks and money laundering' (October 2009) < http://saharareporters.com/2009/10/19/banks-and-money-laundering> accessed 19 February 2019

the necessary due diligence measures are adhered to by taking seriously know your customer, customer due diligence as well as enhanced due diligence as vital measures that must be complied with.

4.5.2 *LAYERING:*

As shown above, the idea in the placement stage is to introduce the proceeds of crime into the financial system so that it can be further layered and concealed. Once cash has been successfully placed into the financial system, launderers can engage in an infinite number of complex transactions. Hence the reason why it was argued that the placement stage is crucial in an attempt to prevent money laundering. The process of layering which follows placement is one in which the money launderer would be able to combine the illegal proceeds with legitimate ones.[460] This step is referred to as layering because the layers of financial transactions camouflage the illegal proceeds and obscures the money trail.

It is the stage where the true origin of money is disguised by making the activity difficult to be detected and uncovered. Layering is very important in money laundering because it begins the legalisation of illegal cash.[461] Yasin posits that layering involves separating illicit proceeds from their source by creating complex layers of financial transaction designed to disguise the audit trail and provide anonymity to create confusion and complicate the paper trail.[462] In other words, the funds are passed through so many transactions that it becomes very difficult to establish the original source. This process can occur as often as necessary to enable the launderer distance itself from the source of cash.

In a more complicated scheme, the money launderer will move the funds between a number of accounts in a number of different jurisdictions and through a series of companies to ensure that the trail is as complicated as possible. The paper trail created through this process muddles law enforcements task of determining which funds are illegal and which are not; because the main objective is to confuse any criminal investigation and place as much distance as possible between the source of the illicit resources and their present status and appearance.[463] Basically, the idea is that the more complex the transactions, the more effective the dirty money can ostensibly look clean.

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[460] Bachus (n453)
[461] Friedrich Schneider,' Money laundering: Some facts '(2008) 26 European Journal of law and Economics 387
[462] Norhashimah Mohd Yasin, *Legal Aspects of money laundering from the common law perspectives* (Lexis Nexis 2007) 4
[463] Schneider (n461)

A money launderer who was successful in the placement stage is likely to move to this stage which appears to be more complex. This is the reason this thesis has argued that the first stage in the laundering cycle gives the authorities a good chance to identify the money launderer. This stage can be very complex because identifying the money launderer and the money laundering activity is much more difficult and, in some cases, impossible.

This phase usually consists of a continuous movement of the funds globally and electronically. As Hatchard posits, the laundering process is assisted by the willingness of some states and territories to make themselves highly attractive as off-shore financial centres or secrecy jurisdictions and thus not necessarily over-concerned as to the origin of the incoming funds.[464] Some examples of layering include, but are not limited to

- Investing in real estate and other legitimate businesses.[465]
- Converting the cash placed into monetary instruments.
- Electronically moving funds from one country to another and dividing them into advanced financial options or markets.
- Moving funds from one financial institution to another or within accounts at the same institution.
- Placing money in stocks, and bonds.
- Using shell companies to obscure the ultimate beneficial owner and assets.[466]

These multiple layers render the beneficial owner's connection to money laundering less apparent to investigation. The layers may also allow the owner to plausibly deny ownership or control of such assets if they are discovered. Investigations are particularly complicated when such layers are placed strategically in multiple jurisdictions because no investigating authority will have the legal compulsory power to procure evidence from all parties involved.

4.5.3 *INTEGRATION:*

Having successfully processed the criminal profits through the first two phases, the launderer then moves to the third stage, integration, in which the funds reemerge in the legitimate economy.[467] Therefore, the third and final stage in the laundering cycle is the integration stage whereby the illegal proceeds returns to the economy appearing as legitimate proceeds.[468] It also

[464] Hatchard (n196) 276
[465] Certified Anti-money Laundering Specialist (n408)
[466] ibid
[467] Nasir (n446)
[468] ibid

means supplying apparent legitimacy to illicit wealth through the re-emergence of funds into the economy in what appears to be normal business or personal transactions. At this stage, the illegal proceeds haven been safely placed, mingled with legitimate funds and ready to revert back to the launderer through legitimate means as clean and legitimate funds. This means that the launderer in question has a justification regarding the source of wealth in the event of questioning by law enforcement. Consequently, this muddles law enforcement task of determining which funds are illegal and which are not. The end result of integration is that the proceeds from the illegal means cannot be distinguished from legal ones any longer.[469]

This stage entails using laundered proceeds in seemingly normal transactions to create the perception of legitimacy. The launderer, for instance, might choose to invest the funds in real estate, financial ventures or luxury assets, which are all common techniques used at this conclusive stage of the laundering cycle. By the integration stage, it is exceedingly difficult to distinguish between legal and illegal wealth. This stage provides a launderer the chance to increase his wealth with the proceeds of crime. Integration is generally difficult to spot unless there are great disparities between a persons or company's legitimate employment, business or investment ventures and a person's wealth or company's income or assets.[470] Examples of integration transactions include:

1. Purchasing luxury assets like property, artwork, jewellery or expensive automobiles.
2. Getting into financial arrangements or other ventures where investments can be made in business enterprise.

Thus, the integration stage marks the shift from dealing totally in illicit funds to a state in which the illicit money and legitimate ones begin to mix. This blending together is often done with the creation of legitimate entities used by the money laundering operation on an ongoing basis. Therefore, once this stage is reached, the criminal has a completely legitimate reason for having the funds and such criminal does not need to hide it any longer. In other words, the further the fund or property has progressed in the cycle of placement, layering and integration, the more sophisticated the laundering cycle has been, the more difficult it will be to prove the case against the launderer.

[469] ibid
[470] Certified Anti-money Laundering Specialist (n408)

Each of these stages can be repeated multiple times until the source of funds can no longer be associated with laundered funds.

4.6 *THE THREE STAGE CYCLE NOT AN OPEN AND SHUT CASE*

What is interesting about money laundering is its endless variety. Money laundering cuts across all types of criminal activities, from white-collar crimes, to drug trafficking, to corruption in developing countries.[471] It also occurs in several cycles as examined above, from placing cash in the financial system, to moving money already in that system, whether domestic or international and using all sorts of modern alternatives. However, there are scholars who have argued that although the ways in which money is being laundered today can exhibit some characteristics involved in the three-stage cycle, very often they do not, and in fact, the three-stage cycle involved in money laundering are becoming obsolete.[472]

Firstly, Platt is of the view that the difficulty with using the three stage cycle is that it has the tendency of framing money laundering too narrowly by creating a mental picture of money laundering which encourages the possibility that instances of money laundering in which any or all of the placement, layering, or integration activity that is unidentifiable will be above suspicion, even though it may well in fact constitute money laundering.[473] In order words, it does not reflect the vast varieties of ways in which money is laundered. The fact remains that virtually any financial transaction can be a money laundering offence if the elements of the crime are satisfied, and relatively few of those transactions involve the placement of large sum of money into the financial system, followed by a complex series of transactions designed to conceal its source or ownership.

According to Platt, reliance on this model has the consequence of leading to a disjunction between activities that the law was designed to prevent, and the activity that financial institutions have been attempting to identify and report. Furthermore, Platt argues that whilst the three-stage cycle may suitably apply to the laundering of cash-generative crimes such as drug trafficking, it can be misleading in case of identifying the laundering of non-cash generative crimes such as fraud, bribery, tax evasion and cybercrime; crimes which have become more prevalent in the last two decades.[474] In a fraud case, for instance, the money is

[471] Stefan Cassella,' Towards a new model of money laundering: Is the placement, layering, integration model obsolete?' (2018) 21 Journal of money laundering control 494
[472] Platt (n73) 26
[473] ibid
[474] Ibid 27

often already in the financial system. In such cases, the money laundering offence consist of steps the defendant takes to keep such schemes going.

There are a variety of instances involving the way and manner through which money laundering is perpetuated that bears no resemblance to the usual cycle of money laundering upon which so many practical reliance has been placed by those in the financial institutions and law enforcement. Yet, they would involve serious money laundering activity to which significant liability attaches if and when discovered. Therefore, the uncomfortable reality is that many instances which money is being laundered in plain sight are not reported to regulators or enforcement agencies because of the expectation gap created by the placement, layering and integration model.[475]

Furthermore, Stefan is of the view that one of the problems associated with using the three-stage cycle is largely conceptual.[476] He argues that by focusing on these stages used to launder large sums of money, we limit the scope of both the money laundering statutes and the training of law enforcement agents to only a small part of the money laundering problem. Therefore, a policymaker, legislator, or those in the enforcement agency should be less interested in the stages of money laundering. The concern should be to detect transactions that are suspicious or points towards concealing the proceeds of crime rather than focusing on the placement, layering and integration stage.

In the final analysis, Stefan argues that the stages involved in money laundering does not correspond to what a prosecutor has to prove in a money laundering case. Placement, layering and integration maybe a useful approach during an investigation into a complex series of transactions, but does not form part of what a prosecutor needs to prove in court. Prosecutors will usually focus on the elements of the crime, not on the means by which the crime was committed. In several jurisdictions including Nigeria, the elements of a money laundering offence include the fact that the defendant knew that he conducted a financial transaction and did so with a particular intent, such as to conceal or disguise the money.[477] Thus, during the prosecution of money laundering, prosecutors are not concerned with the three stages, although they can provide circumstantial evidence of knowledge and intent, elements that must be

[475] ibid
[476] Stefan Cassella,' Towards a new model of money laundering: Is the placement, layering, integration model obsolete?' (2018) 21 Journal of money laundering control 494
[477] Money Laundering Prohibition Act 2012, s15

established at trial, rather than focus on whether the facts fits into the placement, layering and integration models.[478]

4.7 LAUNDERING THE PROCEEDS OF CORRUPTION IN NIGERIA

4.7.1 *METHODS USED IN LAUNDERING THE PROCEEDS OF CORRUPTION*

Laundering the proceeds of corruption can take a variety of methods. A range of money laundering methods used by corrupt PEPs have been identified. They include: The use of corporate vehicles such as shell companies, the use of domestic and international financial institutions and the use of financial intermediaries, particularly lawyers.[479] Although these are not an exhaustive list of the methods used in laundering the proceeds of grand corruption as corrupt PEPs and other criminals find more ingenious ways of concealing their illicit funds. However, based on research and case studies involving PEPs laundering the proceeds of corruption, these methods have been the most prevalent when PEPs launder the proceeds of corruption in Nigeria because of the extent to which they empower PEPs achieve disconnects from the true ownership of such illicit funds.[480] These methods are therefore examined below:

4.7.2 THE USE OF CORPORATE VEHICLES (COMPANIES)

Corporate vehicles are legal entities through which a wide variety of commercial activities are conducted. They are an essential and indispensable part of every economy; and have been credited for their immense contribution to rising prosperity in economies.[481] They are instruments through which individuals choose to invest, hold assets or manage wealth. In most cases, corporate vehicles will be used for perfectly legitimate purposes. However, despite the important and legitimate roles they play in global economies, they can also be misused by criminals such as corrupt PEPs to create disconnects between the ultimate beneficial owners,[482] and the companies that are either used in the commission of crimes, the ownership of criminal property or other money laundering schemes.[483] Perpetrators of illicit activities such as corrupt

[478] Cassella (n471)
[479] FATF,' Laundering the Proceeds of Corruption' (July 2011) <https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> accessed 20 March 2019
[480] Emile van der Does de Willebois and others, *The Puppet Masters: How the corrupt use Legal structures to hide stolen Assets and what to do about it* (The World Bank 2011) 10
[481] FATF,' The misuse of corporate vehicles including trust and company service providers' (October 2006) < https://www.fatf-gafi.org/media/fatf/documents/reports/Misuse%20of%20Corporate%20Vehicles%20including%20Trusts%20and%20Company%20Services%20Providers.pdf> accessed 10 April 2019
[482] The term beneficial owner refers to the person who ultimately controls an asset and can benefit from it
[483] Platt (n73)

PEPs prefer to deposit their illicit funds in an account opened under the name of a corporate vehicle rather than their own names.

Various forms of corporate vehicles exist and are all excellent methods to maximise anonymity of ownership as well as to facilitate the movement of illicit funds. These corporate vehicles includes shell companies, trusts and foundations.[484] For the purposes of this section, only companies are examined as corporate vehicles because research from case studies indicates that companies are the most prevalently misused corporate vehicle in grand corruption cases.[485] In the past, corrupt PEPs like Abacha and others hid their involvement with stolen funds through anonymous bank accounts or in fictitious names.[486] This option, however, has become increasingly less available as a result of stringent AML laws that prohibit financial institutions from opening anonymous accounts in fictitious names.[487] Therefore, in order to circumvent the requirements of additional scrutiny, corrupt PEPs have in recent times resorted to using companies to conceal their identities when trying to access financial institutions. This is so because the provision by financial institutions of services that may be used for receiving, holding, or conveying the illicit proceeds of corruption is a critical part of the money laundering process.[488]

The misuse of corporate vehicles, particularly companies by corrupt PEPs and other criminals have placed the issue on the international agenda and contributed to the formulation of international standards on transparency of legal entities. According to FATF, in all three stages of the money laundering process, corporate vehicles can be misused.[489] Thus, the FATF have long noted the role of corporate vehicles in money laundering schemes and as such identified companies as posing great risk for money laundering. This is specifically addressed in FATF Recommendations 10, 22, 24 and 25 which together notes the significance of ensuring transparency of legal entities and identifying the beneficial owner of such entities, while also

[484] Willebois (n480) 33
[485] FATF,' Laundering the Proceeds of Corruption' (July 2011) <https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> accessed 20 March 2019
[486] ibid
[487] Money Laundering (Prohibition) Act 2012, s11
[488] FATF,' Laundering the Proceeds of Corruption' (July 2011) <https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> accessed 20 March 2019
[489] FATF,' The misuse of corporate vehicles including trust and company service providers' (October 2006) < https://www.fatf-gafi.org/media/fatf/documents/reports/Misuse%20of%20Corporate%20Vehicles%20including%20Trusts%20and%20Company%20Services%20Providers.pdf> accessed 10 April 2019

mandating countries to prevent the misuse of legal persons for money laundering by ensuring adequate, accurate, and timely information on the beneficial owner of legal persons.[490]

Furthermore, the unprecedented revelations in the Panama papers involving many PEPs around the world, including Nigerian PEPs, have also reinforced global attention on the potential and real dangers of companies for the purposes of money laundering.[491] In the grand corruption context, it is easy to comprehend why corrupt PEPs may wish to use companies for money laundering. These reasons include:

a) They are a form of legal person that can contract, own assets, have bank accounts and credit cards in their own right.
b) They can be owned and controlled by corrupt PEPs in their own names or through nominees and business associates.
c) They bestow a degree of formality and respectability to activities which if conducted in the name of an individual might appear unusual and thus potentially suspicious.[492]

Additionally, in jurisdictions such as Nigeria, PEPs are subject to public asset disclosure requirements, rules regarding engaging in outside transactions, and a host of other codes of conduct and ethical prohibitions.[493] Coupled with the fact that unlike other criminals, PEPs have their reputation and career at stake if found to be in possession of unexplained wealth. Under the abovementioned circumstances, it is unlikely that a corrupt PEP will take the risk of laundering illicit funds in their own name when there exists a possibility of creating a disconnect using a company instead; especially when such corrupt PEP can utilise a company managed and controlled by a close associate to perform such transactions on his behalf which can seemingly create room for plausible denial.

Under these circumstances, PEPs have a greater desire than others to ensure that illicit funds and criminal assets cannot be linked with or traced back to them, hence the need for utilising companies to conceal their identities which serves as a vehicle to separate the origin of the illicit funds from the fact that the PEP controls it.

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[490] The FATF Recommendations 2012, Recommendation 10, 22, 24 and 25 < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018

[491] Bastian Obermayer and Frederik Obaermaier, *The Panama papers: Breaking the story of how the rich & powerful hide their money* (OneWorld Publications 2016) 2

[492] Platt (n73) 32

[493] Constitution of the Federal Republic of Nigeria, s140,149,185, Part 1 schedule 5

In Nigeria, majority of the grand corruption cases have one common denominator. They rely on companies to conceal ownership and control of tainted assets acquired with the proceeds of corruption. Corrupt PEPs in Nigeria often conduct their illicit transactions through the misuse of companies, usually incorporated in Nigeria or other foreign jurisdictions. Companies have thus been an element of many high-profile grand corruption and money laundering cases in recent years and continue to do so. For instance, when Diepreye Alamieyeseigha, former Governor, Bayelsa State was arrested at Heathrow Airport by the London Metropolitan Police on suspicion of money laundering offences, he was accused of participating in corrupt activities and had enriched himself by tens of millions of pounds worth of internationally held monetary assets and property holdings often registered in the name of companies.[494] According to court records, Alamieyeseigha created at least five companies that separated his name and beneficial interest from the legal ownership and control of various financial and real estate assets. Charged alongside him were the following companies: Solomon & Peters Limited, Santolina Investment Corporation, Pesal Nigeria Limited and Herbage Global services which all pled guilty to twenty-three charges of money laundering. The companies were all found guilty of money laundering and subsequently wound up and had their assets forfeited to the Nigerian government.[495]

4.7.3 THE USE OF INTERMEDIARIES (LAWYERS)

In the same fashion, the use of intermediaries such as lawyers have become one of the frequently used methods in perpetuating money laundering.[496] In this respect, a narrative has emerged within official and academic discourse which is that legal and financial professionals are increasingly playing a critical role in concealing and facilitation of money laundering.[497] Law enforcement organisations and international organisations such as FATF have highlighted this as an increasing problem, suggesting that stringent AML controls placed on financial institutions and the increasingly complex methods of money laundering have led to criminals becoming reliant on the services and skills provided by professionals to help launder their illicit

[494] *Nigeria v Santolina Investment Corporation* [2007] EWHC 437 (Ch)
[495] ibid
[496] FATF,' Money laundering and Terrorist Financing vulnerabilities of Legal professionals' (June 2013) < http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> accessed 10 April 2019
[497] Katie Benson,' Money laundering, Anti-money laundering and the Legal Profession' in Coling King and Jimmy Gurule (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan 2018) 110; Francien Lankhorst and Hans Nelen,' Professional services and organised crime in the Netherlands' (2004) 42 Crime Law and Social change 163

funds.[498] For this reason, this has resulted in the implementation of a variety of legislative and policy measures aimed at preventing professionals becoming involved in money laundering, including their own conscription into AML efforts through rules, responsibilities and obligations.[499] Money laundering is a highly complex and professional industry which is difficult for criminals to execute on their own, hence the need to engage the services of professionals like lawyers. Lawyers possess particular skills and expertise that may be required by criminals who are desirous of concealing the origins of their criminal proceeds. For instance, where it involves the structuring and managing of complex financial transactions which may require their expertise and the knowledge of the financial system and their ability to structure transactions in a way that disguises the origin of criminal proceeds.[500]

Furthermore, one of the key themes running through the academic literature and official discourse on professionals involved in the facilitation of money laundering is their consideration and conceptualisation in the AML sector as 'gatekeepers' to the financial system.[501] Gatekeepers are essentially professionals such as lawyers that protect the gates to the financial system through which potential users of the system including launderers must pass in order to be successful.[502] The rationale for this conceptualisation is that professionals are seen as having the opportunity to furnish access, knowingly or unwittingly to criminals willing to move or conceal illicit funds.[503] Also, due to the fact that they are also responsible for preventing money laundering by virtue of being enlisted as designated non-financial professionals who are mandated to comply with various AML responsibilities such as filing suspicious transaction reports when necessary or face the risk of being complicit in the facilitation of money laundering.[504]

Lawyers by virtue of being classified as designated non-financial businesses and professions for the purposes of AML compliance are expected to combat money laundering by enhancing transparency, accountability, and by developing techniques for curbing illegal money transfers.

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[498] FATF,' Money laundering and Terrorist Financing vulnerabilities of Legal professionals' (June 2013) < http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> accessed 10 April 2019

[499] Benson (n497)

[500] Otusanya (n376)

[501] FATF Report,' Global money laundering & Terrorist Financing Threat Assessment' (July 2010) <https://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf> accessed 10 May 2019

[502] ibid

[503] Benson (n497)

[504] ibid

Lawyers enjoy a high degree of credibility and trust. With this comes vulnerability, for their range of services provides PEPs and other criminals with attractive money laundering opportunities.[505] These include buying and selling real estate, incorporating corporate vehicles to hold assets, managing legal persons or arrangements, managing finances and securities, opening bank accounts to avoid AML controls and executing various financial transactions which can be exploited by individuals wishing to launder illicit funds.[506]

Bell suggests that the use of client account for the movement of criminal proceeds is one of the most important services that lawyers can provide to those who seek to launder dirty money.[507] Bell details a number of cases from various jurisdictions involving lawyers who were prosecuted for accepting criminal money into their firm's client account before moving it to offshore bank accounts, transferring it to shell corporations or returning it to the criminal in the form of cheques. The reason for the movement of criminal proceeds through a lawyer's clients account gives them a sense of legitimacy, which can help circumvent financial institution's AML controls.[508] In some cases this is the result of innocent or unwitting involvement of lawyers.[509] In other cases, it may involve wilful blindness or complicity.[510]

Apart from giving legitimate professional legal advice, lawyers have frequently acted as facilitators in money laundering schemes. They have assisted in establishing legal structures, devised ways to move assets offshore, provide legal opinions on the legality of offshore structures and transactions, acted as nominee directors and shareholders, as well as drafting legal instruments needed to implement these transactions for their clients.[511] More importantly, they have also been implicated in facilitating the flow of public funds stolen from developing countries through structures in western jurisdictions.[512] A quintessential example of the above point involves a British lawyer, Bhadresh Gohil, who was the lawyer of James Ibori, former Governor of Delta state and one of the most prominent Nigerian PEP to be successfully prosecuted for money laundering, albeit by a foreign jurisdiction.

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[505] John Hatchard, *Combating Money Laundering in Africa: Dealing with the Problem of PEPs* (Edward Elgar Publishing 2020) 144
[506] RE Bell,' The prosecution of lawyers for money laundering offences' (2003) 6 Journal of money laundering control 17
[507] ibid
[508] ibid
[509] *Attorney General for Zambia v Meer Care and Desai* [2008] EWCA Civ 1007
[510] *R v Gohil* [2018] EWCA Crim 140
[511] Otusanya (n376)
[512] ibid

Gohil was convicted on a number of counts relating to the laundering of £37million pounds which had been stolen from Delta state by Ibori.[513] He was implicated for the role he played in the money laundering charges against Ibori, where he was recruited and purported to have designed schemes used in the facilitation of stolen public funds from Delta state. Gohil's involvement in the laundering scheme included allowing the use of his firm's client account for the money to pass through, opening other bank accounts to be used for laundering, creating a series of complex financial transactions and setting up companies used to launder stolen funds.[514]

In addition, he assisted in the purchase of a challenger jet at a cost of $20 million and kept Ibori's ownership of the jet a secret by developing a scheme to ensure that ownership of the jet was made as complicated and obscure as possible, using bank accounts and companies registered in various countries. In similar vein, some lawyers in Nigeria have also been implicated in various money laundering schemes that help corrupt PEPs divert and launder the proceeds of grand corruption using their expertise to conceal and promote money laundering and corrupt activities for reasons of personal financial benefit.[515] Money laundering investigations involving Nigerian corrupt PEPs have seen the involvement of lawyers facilitating the corrupt practices of public officials in siphoning and laundering illicit funds both in and outside Nigeria.

A case in point to buttress this fact involves the incumbent President of the Nigerian Bar Association, Paul Usoro, who at the time of writing this thesis is being charged by the Economic and Financial Crimes Commission with a ten count charge on allegation of money laundering.[516] The EFCC's allegation against Usoro relate to concealing the source of, disguising the origin of and retaining in his account the sum of 1.4 billion naira belonging to Akwa-Ibom state government which he reasonably ought to have known formed part of the proceeds of unlawful activity.[517] The EFCC argued that the payment of over 1.4 billion to Usoro from the accounts of Akwa-Ibom state government for unofficial transactions is nothing short of criminal diversion of public funds. This he executed in connivance with the incumbent Governor of Akwa-Ibom State who unfortunately is not listed as a defendant alongside Usoro

[513] *R v Gohil* [2018] EWCA Crim 140
[514] ibid
[515] Otusanya (n376)
[516] *Federal Republic of Nigeria v Paul Usoro* FHC/418C/18
[517] ibid

as EFCC indicated that he is currently constitutionally immune against criminal prosecution.[518] This above case also serves as an example of the reasons why this thesis has argued in previous chapters on the imperativeness of the removal of the constitutional immunity granted to certain public officials in the Nigerian constitution.

Furthermore, in line with the notion that members of the legal profession with their skills and expertise are critical to money laundering schemes and the general concerns about the misuse of their respected status, willingly or unwittingly in the facilitation of money laundering, the FATF is of the view that lawyers should be subject to comprehensive AML obligations.[519] The obligation for legal professionals to comply with AML requirement originates from several case studies which provides evidence of lawyers playing a role in the facilitation of money laundering.[520] Consequently, the FATF recommends by virtue of Recommendation 10, 11 and 22 that lawyers and other designated financial businesses and professions should be required to perform customer due diligence and file suspicious transaction report similar to financial institutions when engaging in certain financial transactions.

Many countries including Nigeria by virtue of s4, 6, and 25 of the Money Laundering (Prohibition) Act 2012 incorporated this requirement and includes lawyers as ‘‘designated non-financial businesses and professions’’ mandated to perform similar functions as financial and designated non-financial institutions regarding adherence to measures like performing customer due diligence on their clients and reporting suspicious transactions to agencies mandated to implement this part of the Act, such as Special Control Unit against Money Laundering (SCUML).[521] In other words lawyers are regulated professionals under the MLPA 2012, which means they have certain obligations and responsibilities with regards the prevention of money laundering and are regulated by designated supervisory bodies to ensure compliance with regulations.

However, the extension of preventive measures of the AML regime to lawyers have received opposition from members of the profession worldwide and has been the subject of considerable

[518] ibid
[519] FATF,’ Money laundering and Terrorist Financing vulnerabilities of Legal professionals’ (June 2013) < http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> accessed 10 April 2019
[520] Stephen Schneider,’ Testing the limits of solicitor-client privilege: Lawyers, money laundering and suspicious transaction reporting’ (2006) 9 Journal of money laundering control 27
[521] Money Laundering (Prohibition) Act 2012, s4,6 and 25

debate, particularly in relation to the duty to report suspicious transactions.[522] Inter alia, lawyers argue that this requirement infringes and undermines the core principles of the legal system, including the attorney-client privilege, the duty of client confidentiality, independence of lawyers, the duty of client loyalty, the general delivery of legal services, and the historical prerogative of state regulation of lawyers.[523]

In Nigeria, there have been legal challenges in relation to measures extending reporting obligations to lawyers.[524] Although legal practitioners by virtue of the MLPA 2012 are considered designated non-financial businesses and professions, things changed drastically when the Central Bank of Nigeria decided to get tough with members of the legal profession by using banking regulations to compel compliance with extant laws by directing banks and other financial institutions through a circular to cease the provision of banking services to designated non-financial businesses and professionals that refuses to register with the SCUML;[525] before establishing new business relationship with them.

This attempt to enforce the said directive against members of the legal profession triggered the institution of an action by the Nigerian Bar association, the highest regulatory body of legal professionals in Nigeria against the federal government and the Central Bank of Nigeria before a federal high court. The NBA sought the following declaratory and injunctive reliefs:

- A declaration that provisions of s5 of the MLPA in so far as they purport to apply to legal professionals are invalid, and null and void
- A declaration that the inclusion of legal professionals on the definition of DNFBP in s25 is inapplicable
- An order of perpetual injunction restraining federal government by itself or acting through its agencies from seeking to enforce the provision of s5.[526]

These reliefs were granted and accordingly, it was decided that the provisions of s5 MLPA 2012 in so far as they purport to apply to legal practitioners were invalid, null and void. It was also decided that the term legal practitioners be struck out from the list of DNFBP. The author

[522] Ndidi Ahiauzu, 'Applicability of Anti-Money Laundering Laws to Legal Practitioners in Nigeria: NBA v FGN & CBN' (2016) 19 Journal of money laundering Control 329
[523] ibid
[524] *Registered Trustees of Nigerian Bar Association v AG Federation & Central Bank of Nigeria* [FHC/ABJ/CS/173/2013
[525] The body that enforces, monitors and supervises the activities and compliance with anti-money laundering laws and regulations as it relates to designated non-financial businesses and professions in Nigeria.
[526] *Registered Trustees of Nigerian Bar Association v AG Federation & Central Bank of Nigeria* [FHC/ABJ/CS/173/2013

of this thesis was privileged to have been involved in this case as one of the counsels for the Nigerian Bar Association when the Central bank of Nigeria, dissatisfied with the decision of the lower court, proceeded to appeal the decision.[527] The decision given by the lower court was upheld on appeal and the case of the CBN was dismissed accordingly.[528]

Therefore, as it stands, the implication of this decision is that lawyers are not required to adhere to AML obligations such as reporting suspicious transactions that are put in place to govern banks, other financial institutions and designated non-financial businesses and professions like accountants and car dealers in Nigeria. Consequently, it falls within the responsibility of the Nigerian Bar Association to regulate the conduct of lawyers sufficiently to prevent and curtail lawyer's involvement in money laundering.

4.7.4 *OTHER JURISDICTIONS*:

As earlier mentioned, the requirement for lawyers to adhere to AML obligations when dealing with their clients such as reporting suspicious transactions has been controversial. Some jurisdictions have also had reasons to challenge similar AML laws mandating lawyers to comply with AML measures when dealing with their clients. For example, in Canada, on the authority of *Canada (Attorney General) v Federation of Law societies of Canada*[529] both the Court of Appeal and the Supreme Court have ruled that AML legislation infringes upon the lawyer-client relationship and is inapplicable to members of the legal profession. The American Bar Association has also resisted the strict application of money laundering laws to its members, particularly the obligation to report suspicious transactions and divulging client details.[530]

Given these points, although it is argued that extending AML preventive measures to lawyers undermines the core principles of the legal profession, such as duty of client confidentiality, it is my position that this argument does not outweigh the importance of legal practitioners from complying with AML obligations. Lawyers are pivotal as far as money laundering is concerned because they offer services which helps launderers conceal their illicit proceeds and add an additional layer of complexity and respectability to their transactions; such as purchase of real estate, establishing corporate structures to hold assets and opening client account to circumvent

[527] I joined the law firm of Wole Olanipekun, Senior Advocate of Nigeria, at the stage when this suit proceeded on appeal; and was among the legal counsel that represented the Nigerian Bar Association at the Court of Appeal

[528] *Central Bank of Nigeria v Registered Trustees of the Nigerian Bar Association* [CA/A/202/2015]

[529] [2015 SCC 7]; [2015] 1 SCR 401 FLSC

[530] Ahiauzu (n522)

AML controls. Without robust AML policies and regulations put in place, lawyers stand the heightened risk of being used to launder the proceeds of crime, especially in a country like Nigeria with the prevalence of grand corruption and money laundering.

The implication of the judgment in Nigeria excluding lawyers from AML compliance is that it falls on the Nigerian Bar Association to regulate the conduct of lawyers regarding AML compliance issues. At present, the extant Rules of Professional Conduct in Nigeria which guides lawyers in their professional capacity does not provide for any rules requiring lawyers to disclose or report any suspicious transactions with their clients.[531] There is also no enforcement mechanism in relation to breach of AML compliance. Thus, it is a significant risk to leave lawyers unregulated for the purposes of AML compliance as this could become a loophole to facilitate the laundering of the proceeds of crime.

4.7.5 THE USE OF FINANCIAL INSTITUTIONS (BANKS)

A common method used in laundering the proceeds of grand corruption is the use of the financial system to harbour or transfer such illicitly gained funds.[532] Financial institutions are essential participant in either the facilitation of money laundering or the retention of the money accrued through corrupt practices.[533] In terms of susceptibility to money laundering, sectors that are mostly exposed to money laundering risks are the banking sector.[534] Unsurprisingly, banks are key players in instances of money laundering not because of the nature of their business, but also because some of the largest cases of corruption related money laundering have been characterised by the involvement of banks.

Global Witness has through its work helped to expose exactly how banks facilitate the capital flight of illicit funds of PEPs. In its report titled *Undue Diligence,* it showcased how PEPs who illicitly capture state resources were helped by some of the leading global banks, including Barclays and HSBC to launder these funds.[535] These reports point out that despite banks being a critical first line of defence, they often fail to uphold the highest level of ethics. For instance,

[531] Rules of Professional Conduct for Legal Practitioners established under the Legal Professionals Act 2007
[532] Ricardo Azevedo Araujo,' Assessing the efficiency of the anti-money laundering regulation: An incentive-based approach' (2008) 11 Journal of money laundering control 67
[533] Platt (n73)
[534] FATF Report,' Laundering the proceeds of corruption' (July 2011) < https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> accessed 10 March 2019
[535] Global Witness, *Undue Diligence: How Banks do Business with corrupt regimes* (Global Witness 2009) 33

Barclays and NatWest banks were culpable of helping convicted Nigerian former Governor, James Ibori, bring proceeds of corruption into the UK.[536]

History is littered with numerous examples of corrupt PEPs who have plundered their state treasuries and laundered same with the help of financial institutions. The most commonly cited examples include Philippines Ferdinand Marcos, Nigeria's Sani Abacha and Zaire Mobatu Sese Seko.[537] Other recent examples abound, particularly in Nigeria on the involvement and complicity of banks aiding the transfer of misappropriated public funds to foreign jurisdictions. Corrupt PEPs who are desirous of laundering illicit funds naturally prefer safer and well trusted channels for concealing and transferring such funds. The ideal medium would be one that not only conceals the funds but could also make remittances to different jurisdictions under the cover of a legitimate transaction. Thus, the only facility with such distinct advantages and possibilities is the financial and banking system.[538]

It has been suggested that banks are the main conduits for corrupt PEPs laundering the proceeds of corruption and they continue to play a pivotal role in the propagation of corruption and money laundering.[539] Their vulnerability to exploitation is largely as a result of the various services they provide, as well as the size of their institution, the high volume of transactions, high exposure to cash based transactions, high geographical coverage and multiple channels of deliveries, making them eminently suitable for the laundering of illicit funds.[540] In addition, the globalisation of financial services in an increasingly integrated financial system permits exposure to cross-border transactions both conveniently and promptly.[541]

Modern financial systems, in addition to providing services to their customers and facilitating legitimate economic activities can also knowingly or unwittingly permit criminals like corrupt PEPs to transfer large amounts of money instantly using different facilities while perpetuating the problem by assisting the very individuals whom they should be prohibiting from using banking services to hide or transfer illicit funds. The difficulty that arises is that the primary function of banks is to make a profit and they may have much money to gain by facilitating

[536] Global Witness, *International Thief Thief: How British Banks are complicit in Nigerian corruption* (Global Witness 2010) 3
[537] Ruben Carranza,' Plunder and Pain: Should Transitional Justice engage with corruption and Economic crime' (2008) 2 International Journal of Transitional Justice 310
[538] Fabian Maximilian Teichmann,' Twelve methods of money laundering' (2017) 20 Journal of money laundering control 130
[539] Ping He,' A typological study on money laundering' (2010) 13 Journal of money laundering control 15
[540] ibid
[541] ibid

money laundering than stopping it.[542] Their role is not to carry out investigatory burdens by policing the financial system. These activities impinge upon banks profit and that is a reality that has to be faced.[543]

When banks establish a business relationship with a person who they know is a PEP, or becomes a PEP in the course of their business relationship and maintains an account in the face of suspicious activity, they encourage the problem of money laundering.[544] This is one of the reasons why banks are crucial, especially in the placement stage of the money laundering process, in which illegal funds or assets are introduced into the financial system.

Furthermore, with the increasing realisation of the pivotal role banks should play in combating corruption by virtue of utilising AML regimes to combat same; together with the role they actually play in reality of being complicit in most laundering instances, the expectation imposed on banks is that they do combat money laundering and help to reduce significantly the opportunities for criminals such as corrupt PEPs to engage in such activities and from using the financial system as conduit for their illegal funds.[545] The effect of AML legislations worldwide requires banks and other regulated entities to police the financial system as well be the first line of defence against money launderers, a role for which they are not traditionally suited given that they are primarily profit-making enterprises.[546]

Thus, it is easy to appreciate their reluctance to embrace laws and regulations which require them to develop a moral core at their own extra expense such as establishing compliance units, purchasing and launching AML software et cetera. In order to overcome this challenge, it is expected that they do this through various measures, including customer due diligence, enhanced customer due diligence in the case of high-risk customers and the filing of suspicious transaction reports.[547] Much of the focus on PEPs to date has been to ensure that they are

[542] Rodmell Graham,' The costs for banks and financial intermediaries of managing corruption and money laundering risk' (2007) 28 The company lawyer 183
[543] Margaret Beare and Stephen Schneider, *Money Laundering in Canada: Chasing dirty and dangerous dollars* (University of Toronto 2007) 214
[544] Platt (n73)
[545] FATF,' Laundering the Proceeds of Corruption' (July 2011) <https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> accessed 20 March 2019
[546] Abdulkareem Ajayi,' Insulating the vaults from the tide of dirty money: Are the floodgates secure' (2010) 13 Journal of Money laundering control 33
[547] FATF Recommendations 2012, Recommendation 10 &20 <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018

subject to enhanced due diligence regarding the source of funds deposited into financial institutions.

To combat the threat of money laundering, the Nigerian AML laws which will be analysed in the chapter that follows require banks and financial institutions to comply with and implement suitable systems of internal controls and policies to identify high risk customers and to report suspicious transactions.[548] However, the Nigerian banking industry have frequently been identified as a high risk sector for money laundering because of their complicity in the unpatriotic and economically destructive involvement in laundering the proceeds of corruption.[549] Banks in Nigeria are known to commit infractions, ranging from failure to undertake statutory due diligence and violations of AML laws.[550] The EFCC have frequently exposed the involvement of several Nigerian banks in aiding PEPs and other government officials perpetuate money laundering. The EFCC in the course of several investigations have noted that most of the huge funds it recovered from corrupt PEPs were uncovered not because banks performed their duty of filing or reporting suspicious transactions, but because they unearthed the various roles banks played in assisting corrupt PEPs commit money laundering in the course of investigating and quizzing suspected corrupt PEPs as a result of several petitions written by concerned citizens and civil society organisations and through whistle blowing.[551]

The reality in Nigeria is that despite AML laws, money laundering continue to thrive and remain attractive to corrupt PEPs in Nigeria and the fundamental issue regarding banks in Nigeria is that they unfortunately serve as conduits and repositories of laundered money; and many if not all instances of corruption and money laundering by corrupt PEPs who have either retained or transferred their stolen wealth offshore for personal benefit have continued to do so through services provided to them by banks.[552] This can be explained by the fact that corrupt PEPs who are high net-worth individuals signal greater profits for banks in Nigeria and thus, banks are beneficiaries of laundered money, making them appear profitable which is part of the reason they often turn a blind eye to even obvious cases of money laundering by known PEPs in Nigeria.[553] Worryingly, the situation is such that to banks, the potential benefits of

[548] Money Laundering (Prohibition) Act 2011 s2,5 and 6
[549] Otusanya (n376)
[550] ibid
[551] ibid
[552] ibid
[553] ibid

aiding corruption and money laundering far outweigh the potential risks of fine or prosecution by law enforcement in Nigeria.[554] For this reasons, it makes it less difficult to explain how vast sums of misappropriated public funds in Nigeria find their way into financial systems of foreign countries despite the AML obligation which require banks to bear an investigatory burden of policing the financial system through the utilisation of AML measures.

To buttress these facts, the immediate past chairman of the EFCC in Nigeria, Ibrahim Magu, during a meeting with managing directors of financial institutions in Nigeria, condemned the increasing wave of illicit financial flows out of Nigeria by accusing 10 unnamed banks of money laundering. In his words, ''It is worrisome to note that in 2018, statistics available to the EFCC shows that out of 28 commercial banks in Nigeria, 10 banks evacuated out of Nigeria the sums of GBP-50,832,560, USD- 8,057,756, EURO-39,986,560 and RAND- 7,500.00 without any cogent reason for such evacuation''[555],with majority of these funds traced to politically exposed persons. The EFCC chairman also expressed concerns about the culture of allowing large transactions without commensurate reporting to the relevant authorities.

Investigations into the activities of some corrupt Nigerian political elite by the EFCC indicted a number of banks in facilitating money laundering by corrupt public officials in Nigeria. For instance, former Governor of Abia State, Orji Kalu operated and used 59 Nigerian and foreign bank accounts. Seven of these banks were in the USA, one in Senegal and other 51 accounts were operated in five Nigerian banks to launder different sums which were the proceeds of corruption with the aim of concealing the nature of the illicit funds.[556] In all, 106 transfers were allegedly made from three accounts belonging to the state government by the former Governor, his mother and a business associate in favour of a company traced to the Governor, Slok Nigerian Limited, which received the sum of 90 million Nigerian naira from the state treasury which were facilitated by local banks with the help of professional bankers.[557]

In the same vein, in the case of the former Governor of Edo State, Lucky Igbinedon, Nigerian banks, Guarantee Trust Bank and Intercontinental Bank Plc were implicated in aiding the former Governor launder $8.9 million at different times to different named accounts which were hosted in banks in the USA.[558] The fact that banks are mandated to bear an investigatory

[554] ibid
[555] Matthew Ogune,' Magu decries Illicit financial flows' (The Guardian, 9 February 2019) < https://guardian.ng/news/magu-decries-illicit-financial-flows-vote-buying-during-elections/>
[556] *Federal Republic of Nigeria v Dr. Orji Uzor Kalu* [FHC/ABJ/CR/56/2007]
[557] ibid
[558] *Federal Republic of Nigeria v Lucky Igbinedion* [FHC/EN/6C/2008]

burden is reflective of the fact that they form a crucial component in the AML industry. In fact, a successful AML regime relies heavily on the cooperation of the financial sector. This is because combating money laundering is fundamentally a problem of information and therefore for a successful attack on money laundering to be sustained, most of the information required emanates from financial institutions such as banks.[559] If they wittingly or unwittingly fail to play their crucial roles of reporting, the effectiveness of the overall system is severely compromised and money laundering will remain an attractive activity, perpetuating corruption and worsening the standard of living of Nigerians.

4.8 THE NEXUS BETWEEN CORRUPTION AND MONEY LAUNDERING

It is pertinent to mention that corruption and money laundering are not the same, but are inextricably connected. They are two important phenomena which habitually occur, with the presence of one almost underlining the other with vicious circles.[560] Money laundering is an essential part of corruption, just as corruption relies significantly on the laundering process, which is essential for the corrupt to enjoy the proceeds of crime. Together, these crimes unarguably cause massive harm especially for developing countries as they have a destructive effect on national economies and human development. Estimated at $1 trillion annually,[561]corruption produces vast amount of illicit funds to be laundered through local and international financial systems; the source and ownership of which need to be concealed through the act of money laundering.

Indeed, many stolen public funds from Nigeria have ended up in foreign jurisdictions through the financial system. Therefore, money laundering offers the platform for those engaged in corrupt activities, such as corrupt PEPs and other criminals alike because it allows for the concealment of the original source of the funds and provides legitimacy for the money launderer and letting them enjoy the benefit from the proceeds of corruption. In order words, while money laundering activities are utilised to hide stolen wealth, the money is the direct result of a criminal activity like corruption. With Nigeria being consistently rated as one of the most corrupt nations in the world, and as money laundering is accurately regarded as corruption's companion, the two are endemic problems in Nigeria and go hand in hand. Corruption is the main predicate offence in Nigeria as far as money laundering is concerned,

[559] Musonda Simwayi,' The role of commercial banks in combating money laundering' (2011) 14 Journal of money laundering control 324
[560] Chaikin and Sharman (n9) 1
[561] United Nations,' Global cost of corruption at least 5percent of World Gross Domestic Product' (September 2018) <https://www.un.org/press/en/2018/sc13493.doc.htm> accessed 26 March 2019

and as such, how Nigeria deals with the scourge is directly linked to the success or otherwise of its anti-money laundering policies.[562]

There are perspectives as to the connection between money laundering and corruption. Some literature argue that without money laundering, there would still be corruption; and the fact that not all bribes received have to be laundered as some cash can be redistributed or simply spent.[563] Although this argument has some plausibility, however, what it fails to spot is the close synergy that exists between the two, as well as the more fundamental fact that anti-money laundering regimes can be crucial in combating corruption. In any event, as the case with corrupt PEPs in Nigeria, a substantial amount of cases involving corrupt PEPs have often involved laundering these funds locally or to foreign jurisdictions.

4.8.1 *MAKING THE CONNECTION*

Ill-gotten gains or corruptly obtained funds do not disappear by themselves. Corrupt PEPs and other criminals need ways to conceal both their identities and the illicit cash that constitutes the proceeds of crime. Thus, the large amount of illicit profit acquired by PEPs has to be masked in order to prevent the confiscation of assets. This is achieved through the process of money laundering. By successfully laundering the proceeds of corruption, the illicit gains may be enjoyed without fear of being detected and confiscated.

Money laundering schemes are inextricably linked to corruption where the latter is utilised either as a means to an end or an end itself. The foregoing linkage was recognised by studies carried out by reputable institutions such as World Bank, United Nations and Asian Development Bank all of which have correlated a close connection between money laundering and corruption and these offences constitute elements of economic crimes.[564] The United Nations recognised the close links between corruption and money laundering which was expressly indicated in the following statement:

> *There are important links between corruption and money laundering. The ability to transfer and conceal funds is critical to the perpetrators of corruption, especially large scale or grand*

[562] Amobi (n5)
[563] Michael Levi,' Money laundering: Private banking becomes less private' in Robin Hodess and Toby Wolfe (eds), *Global corruption report* (Transparency International 2001) 204
[564] Mugarura (n376)

corruption. A high degree of coordination is thus required to combat both problems and to implement measures that impact on both areas.[565]

In the same vein, the World Bank also recognises the close link between these crimes.

> *Corruption and money laundering are a related and self-reinforcing phenomenon. Corruption proceeds are disguised and laundered by corrupt officials to be able to spend or invest such proceeds. At the same time, corruption in a country's AML institutions (including financial institutions and Financial Intelligence Unit's) can render an AML regime of a country ineffective.*[566]

The occurrence and magnitude of these crimes are difficult to measure with any certainty because of the clandestine nature of both crimes, but this thesis recognises that they are serious problems for most countries, especially developing countries. This is so because both corruption and money laundering thrive in an environment of weaknesses in national regulatory and legal environment, characterised by lack of requisite laws and weak enforcement and regulatory institutions. [567] These crimes have attracted the attention of governments, international organisations and the public in general. As a result, these closely linked problems are the targets of a panoply of international policy and legal initiatives.

According to Chaikin, corruption and money laundering are symbiotic, not only do they tend to co-occur, but fundamentally, the presence of one tends to create and reciprocally reinforce the incidence of the other.[568] The link between these crimes is further strengthened by the fact that in almost all cases involving significant corrupt practices across a very large spectrum, the proceeds do usually undergo the money laundering process.[569] Through this process, illegally acquired wealth are given an appearance of legitimacy. Thus, it is during this process that corruption and money laundering in most cases interact and form what could be described as a symbiotic relationship.

Reed and Fontana suggests that although there is undoubtedly a close relationship between corruption and money laundering, corruption can be viewed as a cause and effect of money

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[565] United Nations Office on Drugs and crime,' The Global programme against corruption: UN Anti-corruption toolkit' < https://www.unodc.org/documents/corruption/Toolkit_ed2.pdf> 5 January 2019

[566] World Bank,' Strengthening World Bank Group engagement on governance and anticorruption' (March 2007) < http://www1.worldbank.org/publicsector/anticorrupt/corecourse2007/GACMaster.pdf> accessed 20 November 2018

[567] Mugarura (n378)

[568] Chaikin and Sharman (n9)

[569] Ejike Ekwueme and Mahmood Bagheri,' The intersection of commercial corruption and money laundering: A look at international responses and the adequacy of regulations' (2013) 95 Amicus curiae 19

laundering in one or more ways.[570] Firstly, they are linked as the source of proceeds, i.e. criminal diversion of funds that constitutes illicit funds to be laundered. As stated earlier, that in virtually all cases involving significant corrupt practices, the proceeds do usually undergo the money laundering process. To this end and as several examples have shown, such as Abacha, Ibori and a host of other corrupt PEPs in Nigeria and around the world in which the illicit proceeds of corruption are channelled to bank accounts in local and foreign jurisdictions.

Secondly, corruption impedes the effective implementation of AML measures that have been adopted by interfering with the capacity of mandated institutions to perform their duties, or by corrupting the relevant officials.[571] Where institutions such as banks with AML obligations collude with their clients in order not to fulfil such obligations. For instance, a bank official not filing a suspicious transaction report or turning a blind eye to obvious cases of corruption because they receive bribes from the corrupt individual or are compromised by politicians. Consequently, the implication being that institutions on whose cooperation prevailing AML regimes increasingly rely on can, if corrupted, sabotage effective implementation of AML measures by falsifying information or concealing information from law enforcement in order to conceal the true nature of questionable corruption related transactions.[572]

Having said these, the crux of the close linkage between the two crimes is due to the fact that corruption and money laundering are embedded in each other and thus should be treated as crimes of similar magnitude. For this reason, and as a result of the close linkage, scholars and international organisations support this chapter's argument concerning the utility of AML regimes to combat grand corruption in Nigeria. In this regard, scholars and several international organisations have long suggested that AML measures such as laws and regulations could be used as effective tools to detect, deter and in effect combat corruption.[573] This is because there is a strong belief that mechanisms within the framework of combating money laundering can contribute significantly to the detection of corruption and related offences by providing the

[570] Quentin Reed and Alessandra Fontana,' Corruption and illicit financial flows: The limits and possibilities of current approaches' (2011) < https://www.u4.no/publications/corruption-and-illicit-financial-flows-the-limits-and-possibilities-of-current-approaches-2.pdf> accessed 26 March 2018

[571] ibid

[572] Svetlana Agayeva, 'Examining Anti-bribery and corruption measures in a single framework to combat money laundering and terrorist financing' (ACAMS) < http://www.acams.org/wp-content/uploads/2015/08/Examining-Anti-Bribery-and-Corruption-Measures-in-a-Single-Framework-to-Combat-ML-TF.pdf> accessed 27 March 2019

[573] Barbara Crutchfield George,' Crackdown on money laundering: A comparative analysis of the feasibility and effectiveness of Domestic and multilateral policy reforms' (2003) 23 Northwestern Journal of International law &Business 263

basis for financial intelligence, enhancing international cooperation and recovering assets laundered and hidden in other countries.[574]

4.9 THE CASE FOR UTILISING AML REGIMES TO COMBAT CORRUPTION

Although most of the discussion and analysis of the AML legal framework in Nigeria will be dealt with in the chapter that follows, however, for the purposes of this chapter, it is apposite to examine some of the salient AML measures that can aid in combating corruption. According to FATF, substantial amounts of criminal proceeds are generated from corruption offences.[575] Similarly, Chaikin also posits that because many developing countries have less sophisticated financial crime with much smaller financial sector compared to developed countries, corruption is often the major source of funds to be laundered.[576] These proceeds are often laundered so that it is concealed and yield benefit for corrupt PEPs. Accordingly, much effort is expended by corrupt officials in disguising their identity and the original source of the funds in order that the funds are placed in the financial system.

Given these points, the significance of the nexus or relationship between corruption and money laundering extends to the fact that these inter-linked problems also have inter-linked solutions; which is that AML regimes are crucial in combating corruption. In this respect, scholars believe that money laundering is the flip side of corruption and other criminal activity and the close affinity between these crimes, as well as the utility of policy and legal responses developed to fight one type of crime can also be used in dealing with the other.[577] This proposition finds justification in the following statements made by international organisations which emphasises on the use of AML regimes to combat corruption.

> *Money laundering statutes can contribute significantly to the detection of corruption and related offences by providing the basis for financial investigations. Identifying and recording obligations as well as reporting suspicious transactions, as required by the United Nations Convention against Corruption, will not only facilitate detection of crime of money laundering*

[574] United Nations Office on Drugs and crime,' The Global programme against corruption: UN Anti-corruption toolkit' < https://www.unodc.org/documents/corruption/Toolkit_ed2.pdf> 5 February 2019
[575] FATF,' The use of the FATF recommendations to combat corruption' (October 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf> accessed 20 February 2019
[576] Chaikin and Sharman (n9) 27
[577] ibid 23

but will also help identify the criminal acts from which the illicit proceeds originated. It is therefore essential to establish corruption as a predicate offence for money laundering.[578]

All things considered, because corruption is a crime that is clandestine in nature and one where its victims are usually oblivious of their loss, countering corruption may be viewed essentially a problem of information. Typically, as the case with grand corruption which often involves the transfer of money or assets, the significance of the vast amount of financial information generated and collated in the AML systems with regard to fighting financial crime can be an important measure in combating corruption. This is so because AML measures may be utilised to show that the resources of a corrupt PEP are not commensurate with their declared assets and income, especially in countries like Nigeria where public officials are mandated to declare their assets and liabilities before resuming office.[579] As a result, it is believed that it becomes desirable for AML standards which involves collecting and analysing large quantities of financial data to be employed to combat corruption.

At first, although the AML regime was focused on combating the illicit drug trade, its coverage has been progressively expanded to cover all serious crimes capable of yielding profit to be laundered. The basic pillars of the AML regime if adhered to, has the tendency to unravel corrupt practices by corrupt PEPs. Furthermore, one of the most compelling reasons given for using AML regime to combat corruption is in the degree of overlap whereby meeting international anti-corruption standards largely requires fulfilling international AML standards.[580] This legal overlap can be seen in the 1988 Vienna convention, the 2000 Palermo convention and under Article 23 of the 2003 UNCAC.[581]

Together, these instruments call on state parties to, inter alia, criminalise money laundering as a separate offence, set up systems to apply due diligence to customers of financial institutions, adopt a reporting regime for suspicious transactions, set up financial intelligence units to gather and collate financial data to pass on to law enforcement, apply extra scrutiny to the finances of public officials, and ensuring cooperation among financial authorities and law enforcement. Additionally, Article 7 of the OECD Anti Bribery convention also contain provisions relating to the proceeds of corruption hidden through the process of money laundering, taking

[578] United Nations Office on Drugs and crime,' The Global programme against corruption: UN Anti-corruption toolkit' < https://www.unodc.org/documents/corruption/Toolkit_ed2.pdf> 5 February 2019
[579] Constitution of the Federal Republic of Nigeria 1999, s140
[580] Chaikin and Sharman (n9) 27
[581] United Nations Convention against Corruption, Article 23

cognisance of the need to identify corruption proceeds for the purpose of money laundering .[582] These instruments addresses the process of laundering the illicit resources obtained from engaging in corrupt activities. Collectively, these international instruments are pointers to the fact that if countries are desirous of combating corruption, they must adopt and implement laws, regulations and institutions that together constitute the AML regime.

Notably, the FATF standards by virtue of the 40+9 Recommendations provides a great deal of potential and valuable tools with which to tackle corruption and corruption related money laundering.[583] Because corruption ranks high as one of the most important financial crimes in many countries and perhaps the greatest obstacle to economic development[584], any progress made has the tendency to provide significant benefits to national welfare. The FATF highlights that leveraging AML measures to fight corruption remains a significant avenue in combating corruption. The reason being that they support the detection, tracing, confiscation of corruption proceeds, as well as promote international cooperation in the efforts to do so.[585]

The recommendations also include specific measures which recognises corruption risks, i.e. requiring financial institutions to take stringent actions to mitigate the risk posed by PEPs. Enhancing this potential is the fact that many countries including Nigeria have committed to observing the FATF principles by promulgating AML legislations that reflect FATF principles. Previous cases of corruption have shown that when financial institutions are infiltrated by corrupt PEPs, they become an avenue for laundering the proceeds of corruption. Therefore, it becomes imperative that effective implementation of FATF recommendations is used to protect financial institutions from the risk posed by corrupt PEPs. These measures although not exhaustive assist in ensuring that financial institutions are not complicit and remain free from corrupt PEPs and other criminals in order to prevent them from being used as a vehicle that aid corrupt PEPs in placing the proceeds of corruption in financial institutions. Whether these has translated into producing results in terms of detecting and deterring corrupt PEPs in engaging in money laundering in Nigeria will be analysed in much detail in the next chapter.

[582] Organisation for Economic Co-operation and Development Anti-Bribery Convention, Article 7
[583] FATF,' The use of the FATF recommendations to combat corruption' (October 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf> accessed 20 February 2019
[584] Otusanya (n376)
[585] FATF,' The use of the FATF recommendations to combat corruption' (October 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf> accessed 20 February 2019

In the meantime, some of the most paramount FATF AML recommendations which are useful tools in combating corruption are as follows:

4.9.1 *Customer Due diligence (Recommendation 10)*[586]

As corrupt PEPs require access to financial institution in order to utilise the proceeds derived from corruption, most likely this will go unpunished in situations where the proceeds of corruption are laundered and cannot be tracked back to the individual and underlying activity yielding the profit.[587] The AML requirements strive to ensure that activities within the financial system is linked with a specific and identifiable person. This is one of the reasons why customer due diligence plays an important role for financial institutions and other obliged entities. Customer due diligence is a process of developing a clear knowledge of a customer relationship and checking that customers are who they say they are in order to effectively understand and manage the risk arising from such relationship.[588]

Customer due diligence is considered part of an effective measure to mitigate the risk of money laundering and to support investigations and prosecutions into corruption. Financial institutions are required to verify the identity of customers or any person on whose behalf a customer is acting for and any person who ultimately owns or controls a legal entity. One of the rationales for this is that the use of intermediaries or middlemen to shield or insulate the PEP from unwanted attention can also serve as an obstacle to customer due diligence, hence, it is performed on every customer. Knowledge is what the entire AML compliance regime is built on. In accord with FATF, the cornerstone of a strong AML regime and compliance program is the adoption and implementation of comprehensive customer due diligence policies, procedures and processes for all customers, particularly those that present a high risk for money laundering.[589] The more financial institutions know about its customers, the greater chances of preventing money laundering.

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[586] The FATF Recommendations 2012, Recommendation 10 <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018

[587] FATF,' The use of the FATF recommendations to combat corruption' (October 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf> accessed 20 February 2019

[588] Norman Mugarura,' Customer due diligence mandate and the propensity of its application as a global AML paradigm' (2014) 17 Journal of money laundering control 76

[589] FATF,' The use of the FATF recommendations to combat corruption' (October 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf> accessed 20 February 2019

Under Recommendation 10, financial institutions and designated non-financial institutions are required to undertake due diligence measures in the following instances.

I. When establishing a business relationship with a customer.
II. When they suspect money laundering or terrorist financing.
III. When there are doubts as to the veracity or adequacy of previously obtained customer identification.
IV. When carrying out occasional transactions above applicable designated threshold.

FATF recommends that the measures to be taken in fulfilling the abovementioned requirements include:

a. Identifying customer and verifying their identity using reliable sources.
b. Identifying the beneficial owner of a legal entity and taking reasonable measures as to the verification of the beneficial owner.
c. Understanding and obtaining information on the purpose and intended nature of the business relationship.
d. Conduct ongoing due diligence and scrutiny of business relationship and transactions conducted throughout the course of that relationship to ensure that transactions conducted are consistent with the institution's knowledge of the customer.[590]

Where financial institutions and designated non-financial institutions are unable to comply with these requirements for any reason, they are obliged not to open the account or perform the transactions and terminate such business relationship and also consider making a suspicious transaction report in relation to the customer.[591] Failure or poor levels of compliance in conducting proper customer due diligence can lead to corrupt PEPs opening accounts without being detected while avoiding enhanced due diligence and on-going monitoring. These safeguards help in inhibiting and making it doubly difficult for corrupt PEPs to conduct business anonymously or conceal their business relationships and transactions. Thus, the significance of undertaking customer due diligence allows financial institutions and designated non-financial institutions identify suspicious behaviour which can trigger further investigations.

[590] ibid
[591] ibid

4.9.2 *Enhanced Customer Due diligence*

In regulatory terms, the most essential criteria which should establish immediately whether a potential customer is a corruption risk is whether he is a PEP, which automatically triggers enhanced due diligence procedures. Although not all PEPs engage in corruption and money laundering practices, the tag of being a PEP signifies a heightened risk of money laundering because PEPs have the potential to misuse their positions for personal gain. In its interpretive note to Recommendation 10, FATF acknowledges that there are circumstances where the risk of money laundering is higher and enhanced customer due diligence measures must be taken consistent with the risk identified.[592] This is particularly the case when conducting business relationship with PEPs and other high-risk situations which involves complex or unusual patterns of large transactions which have no apparent economic or lawful purpose.

Enhanced due diligence is a measure which provides a greater level of scrutiny of business relationships and highlights risks that cannot be detected by customer due diligence.[593] The difference between this measure and customer due diligence measure is that CDD is a less meticulous verification process in which financial institutions obtain customer identity and evaluate the risk of the customer. On the other hand, enhanced due diligence is required for customers such as PEPs who are classified as high risk for business transactions.[594] This is because they hold positions that can be potentially abused for corrupt practices. In particular, financial and designated non-financial institutions are mandated to increase the degree and nature of monitoring such business relationship in order to determine whether those transactions or activities appear unusual or suspicious. In relation to high risk customers such as PEPs, in addition to performing normal customer due diligence measures, financial institutions are to observe the following.

(a) Have appropriate risk management systems to determine whether the customer or beneficial owner is a PEP.
(b) Take reasonable measure to establish the source of wealth and source of funds.
(c) Obtain senior management approval for establishing such business relationship.

[592] The FATF Recommendations 2012, Interpretive Note to Recommendation 10< http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018
[593] Esoimeme (n262) 12
[594] ibid

(d) Conduct enhanced ongoing monitoring of business relationship.[595] These requirements also apply to family members and close associates of such PEP by applying extra scrutiny to the activities of PEPs.

The requirement to determine whether the customer or beneficial owner is a PEP is seemingly a difficult task. This is because, with elections taking place at different times, in addition to cabinet changes and the appointment of more individuals into prominent public functions, this task becomes more daunting. This has necessitated financial institutions to use resources and databases that store information, such as websites of government, international organisations and the media.[596] Although the information gotten through these mediums are not the only source for determining if a customer is a PEP, as there is a risk of wrongly assuming that if a name is not in such database, then the client is not a PEP. However, they usually provide information on public office holders and in some cases, their known associates, family members and legal entities. Thus, they complement the traditional due diligence measures and are simply another tool for developing a complete picture of the customer and the inherent risk associated with them.

In addition to this requirement, understanding a customer's source of wealth and source of funds is another fundamental component of the enhanced due diligence obligations that banks must apply to PEP customers.[597] Source of wealth refers to the activities that have generated the total net worth or entire body of wealth of the customer.[598] This information usually gives an indication as to the volume of wealth the customer would be expected to have, and an overall picture of how the PEP acquired such wealth. Information about source of wealth and source of funds is useful for ongoing due diligence purposes as well as to analyse the information for red flags for corrupt PEP activity.[599] When conducting ongoing due diligence, it is paramount for financial institutions to ensure that the level and type of transactions are consistent with the

[595] The FATF Recommendations 2012, Recommendation 12 < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018

[596] Francesco Falco,' AML and politically exposed persons: A good practice recommendations from the Bank of Italy for policies and procedures to be implemented' (2018) 19 Journal of Investment Compliance 31

[597] The FATF Recommendations 2012, Recommendation 12(c) < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018

[598] FATF,' FATF Guidance: Politically exposed persons (Recommendation 12 and 22) (June 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> accessed 09 April 2019

[599] Greenberg and Gray (n243) 49

institutions knowledge of the PEPs source of wealth and funds.[600] The aim is to ensure that the reason for the business relationship is commensurate with what one could reasonably expect from the PEP, given his/her particular circumstances.

Useful tools in verifying the accuracy of the customer's declaration about the source of wealth and source of funds may include publicly available property registers, land registers, asset disclosure registers and other sources of information about legal and beneficial ownership.[601] Specifically, the asset and income declarations that many PEP customers in several jurisdictions who hold prominent public functions are required to disclose is fundamental in this regard. Asset declarations refer to a system where public officials must periodically declare information regarding to their assets, income, liabilities and business interest. In Nigeria, declaration of assets by public officials is not a voluntary exercise. Public officials are mandated by law to declare their assets before and after occupying public offices.[602] This asset disclosures could be instrumental in assessing the PEP customer's risk especially in situations where PEPs conduct business transactions involving huge sums of money that is not commensurate with declared assets of a PEP. Asset disclosures can thus be used for the prevention, detection, investigation and prosecution of corruption.

Furthermore, pursuant to Recommendation 12(b), financial institutions are required to obtain senior management approval for establishing (or continuing for existing customers) business relationship with PEPs.[603] Recommendation 12 does not define or specify the precise level of seniority within a financial institution or designated non-financial institution that would be considered sufficient for being able to approve or maintain a customer relationship with a PEP because such a definition would not be meaningful in all relevant contexts regarding financial and non-financial institutions obligated to perform AML standards. Therefore, what constitutes senior management will usually depend on the size, structure and nature of the financial institution or designated non-financial institution involved.[604]

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[600] FATF,' FATF Guidance: Politically exposed persons (Recommendation 12 and 22) (June 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> accessed 09 April 2019

[601] ibid

[602] Constitution of the Federal Republic of Nigeria, s140,149,185

[603] The FATF Recommendations 2012, Recommendation 12(b) < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018

[604] ibid

The objective is to ensure that more senior level of management is well informed of relationships with PEPs and that financial institutions do not undertake business relationship with PEPs in the absence of adequate controls. By the same token, as part of the enhanced due diligence requirement, once a business relationship has been established with a PEP, financial institutions must conduct enhanced ongoing monitoring of the business relationship.[605]

Ongoing monitoring includes processes to monitor the PEPs transactions and evaluate whether the activity accords with the customer profile and also used in updating a PEP profile.[606] It also entails an overall review of individual PEP customers by senior management. Thus, the process of ongoing monitoring involves combining knowledge of the customer profile, source of wealth and source of funds, in addition to all applicable risk factors with the capacity to evaluate whether the account activity is consistent with these factors.

4.9.3 *Suspicious Transactions Report (Recommendation 20)*[607]

At the heart of an effective AML regime is the requirement that financial and designated non-financial institutions must report suspicious transactions with financial intelligence units. The purpose of suspicious transactions reporting system is ambitious and mirrors the general goals of the AML system, which is to facilitate the detection of underlying predicate offences like corruption, and to prevent criminals from utilising the financial system to launder same, consequently preventing and reducing crime.[608] Suspicious transaction reports (STR) refers to a piece of information generated by financial institutions which alerts law enforcement that certain activity is in some way suspicious and might be an indication of potential money laundering.[609]

These suspicious transactions include transactions surrounded by conditions of unusual or unjustified complexity which appears to have no economic justification or lawful objective, or involves a frequency which is unjustified or unreasonable.[610] FATF Recommendation 20 underpins and governs the reporting of suspicious transactions. It provides: *If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a*

[605] ibid
[606] Greenberg and Gray (n243) 53
[607] The FATF Recommendations 2012, Recommendation 20 < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018
[608] David Chaikin,' How effective are suspicious transaction reporting system' (2009) 12 Journal of money laundering control 238
[609] ibid
[610] Money Laundering (Prohibition) Act 2012, s6

criminal activity, or are related to terrorist financing, it should be required by law, to report promptly its suspicions to the financial intelligence unit. The obligation to file a STR arises regardless of the amount involved, the nature and seriousness of the criminal offence, or whether the reporting entity accepts the business or transactions of the customers. This report plays a critical and central role in a country's AML operational network and in the fight against criminals like corrupt PEPs seeking to launder stolen resources. Often, they can be the first sign of suspicious activity by a corrupt PEP and is an important source of information available to investigators.

While there are no hard and fast rules as to what constitutes suspicious activity, financial institutions are obliged to watch for activities that maybe inconsistent with a customer's source of income or regular business activity. Some examples of instances that constitute suspicious transactions includes depositing or making payments with large amount of cash, situations involving transactions that are unjustifiable or unreasonable, the movement of money through a series of accounts with no apparent business purpose, purchases which are inconsistent with known income.[611] Due to the volumes of transactions conducted daily by financial institutions, proper due diligence may require financial institutions to gather further information regarding a customer or his transactions before deeming it suspicious and filing a suspicious transactions report. [612] In practice, FATF states that suspicious transactions report have uncovered corruption activities, triggered corruption investigations, and has been used to support ongoing financial investigations of corrupt activity.[613]

Fundamentally, the reporting requirement removes some of the barriers which makes it difficult for banks and other obliged entities to divulge information to relevant law enforcement agencies, such as the rules on confidentiality and disclosure that previously impeded investigations. [614] In general, financial institutions have a duty to keep their customer information confidential, and may have a more general fiduciary duty to act in their customer's best interest; in addition to banking secrecy laws.[615] A common objection raised by some is that the fight against corruption and money laundering has impacted upon the rights of individuals and financial institutions. This may be true. The customer's right to confidentiality,

[611] FATF,' The use of the FATF recommendations to combat corruption' (October 2013) < http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf> accessed 20 February 2019
[612] ibid
[613] ibid
[614] Chaikin and Sharman (n9) 52
[615] Ibid

not to mention the principle of banking secrecy long valued in many jurisdictions including Nigeria have been gradually eroded to the point where banking secrecy in the context of compliance with the AML regime has now been effectively outlawed.

The obligations to report suspicious transactions supersedes the confidentiality requirement.[616] The above finds justification by virtue of FATF Recommendation 9, which states that countries are to ensure that financial institutions secrecy laws do not inhibit the implementation of their AML regimes.[617] The Nigerian Money Laundering Prohibition Act clearly provides for a derogation of any privacy or confidentiality requirement when dealing with money laundering matters, making it compulsory for financial and designated non-financial institutions to comply with the provisions of the act in its totality. The Act states that 'banking secrecy or preservation of customer confidentiality shall not be invoked as a ground for objecting to the measures set out in subsection (1) and (2) of this section or for refusing to be a witness to facts likely to constitute an offence under the Act'[618] This provision empowers law enforcement and regulators against the problems associated with secrecy and confidentiality in the provision of banking services. This is a step in the right direction as bank's role in propagating corruption and money laundering is inexcusable.

FATF Recommendation 21 provides additional safeguards in this regard by stating that financial institutions, their officers and employees should be protected by law from criminal or civil liability for breach of any restriction on disclosure of information imposed by any legislative, regulatory or administrative provision if they report their suspicions in good faith to the financial intelligence units, even if they did not know what the underlying criminal activity was and regardless of whether illegal activity actually occurred.[619] The purpose of Recommendation 21 is to ensure that financial institutions are given legal protection when they file STR, provided they have acted in good faith even if they are mistaken as to their suspicions.

The difficulties of balancing the legal and regulatory obligations of filing STR's under law with contractual obligations to customers has led to legal challenges in court; most notably in

[616] ibid
[617] The FATF Recommendations 2012, Recommendation 9 < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018
[618] The Nigerian Money Laundering (Prohibition) Act 2012, s13(4)
[619] The FATF Recommendations 2012, Recommendation 21 < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 9 November 2018

Shah v HSBC,[620] where the bank faced significant claim for damages after submitting STR to the National Crime Agency (NCA) while the customer faced losses due to delays in consent being obtained from the NCA. While these challenges have not been successful, they highlight potential liability to financial institutions when filing STR to regulatory and enforcement authorities. The courts have held that banks could be required to adduce evidence of its money laundering suspicions and prove these were genuine in order disprove any evidence of bad faith.[621] Thus, it remains important for financial institutions and those in the regulated sector to have documented audit trail of the firms suspicions which may assist both in establishing the reasonableness and genuineness of the reported suspicion.

In the UK, financial institutions and those in the regulated sector are given extra protection under s.338 of the Proceeds of Crime Act 2002 where 'authorised disclosure' is made in good faith.[622] Financial institutions are now mandated to make suspicious transactions report where necessary without fear of going against banking secrecy or confidentiality rules. In addition, countries that require suspicious transactions report also prohibits disclosing the filing of such report to the individual who is subject of the report. For instance, in Nigeria, financial institutions are prohibited from intimating or disclosing to the owner of the funds involved about reports they are required to make.[623] Such unlawful disclosures in Nigeria attracts a two-year term of imprisonment.[624]

Therefore, one of the most important aspect of the role of a financial institution in the fight against money laundering is in reporting suspicious transactions to the authorities for investigation. This report can be an instrumental AML tool in fighting grand corruption by providing the basis for investigations into the transactions of corrupt PEPs. However, although extant legislations provide for reporting of suspicious transactions, the utilisation of this preventive strategy to curb the menace of money laundering in Nigeria is questionable due to serious under reporting of suspicious transactions. Especially in light of the size of capital flight from Nigeria to other jurisdictions. Therefore, unless money laundering is addressed, crimes like corruption that generate illicit proceeds will continue to flourish because there is a symbiotic relationship between money laundering and corruption. Non-compliance and poor enforcement of AML legal framework in Nigeria can be attributed to the reason of the

[620] *Shah v HSBC* [2012] EWHC 1283
[621] ibid
[622] Proceeds of Crime Act 2002, s338(4A)
[623] Money Laundering (Prohibition) Act 2012, s16(a)
[624] Money Laundering (Prohibition) Act 2012, s16 (2a)

prevalence of grand corruption in Nigeria. This forms the core of this thesis argument in the chapter that follows while analysing the effectiveness of Nigeria's AML legal framework as it relates to politically exposed persons.

4.10 CONCLUSION

To summarise, an analysis of the money laundering and anti-money laundering phenomena has been the primary focus of this chapter. The chapter began by discussing the general narrative and objectives of money laundering and anti-money laundering industry. From a small and relatively marginal role in the early 90's, the chapter stated that money laundering was considered to be intrinsically linked with organised crime such as drug trafficking, however, it has been extended to encompass several predicate offences such as corruption and other criminal offences that generates illicit funds to be laundered. Additionally, the idea that a person should not profit from crime was largely instrumental in shaping the crime of money laundering and a bureaucracy which is the anti-money laundering industry, both of which have grown rapidly.

Furthermore, the deductions from research is that money laundering do have significant economic and social effects. Thus, the chapter examined some of the economic and social effects of money laundering activities in Nigeria, ranging from economic distortions and instability, increased exposure to crime and corruption, as well as the risk of international sanctions. Likewise, this chapter analysed some certain typical stages in the money laundering process such as the placement, layering and integration stage. In this regard, the chapter argued that to effectively combat money laundering, it is fundamental to stop or at least detect it at the placement stage to salvage any potential havoc that it portends on the economic growth of a country and prevent financial institutions from being used to facilitate money laundering. This is because it is at this stage that criminals introduce illicit funds into the financial system, making it a crucial stage in intensifying efforts in detecting the illicit funds as well as the perpetrators before it becomes a more complex situation.

To combat money laundering activities, it is essential for the authorities and enforcement agencies to keep abreast with the latest methods adopted by corrupt PEPs in laundering the proceeds of corruption. At the present time, it is unlikely that a corrupt PEP will take the risk of laundering illicit funds in their own name when there exists a possibility of creating a disconnect and concealing same through various methods; especially given that assets and wealth of PEPs could be ascertained by virtue of PEPs being subject to public asset disclosures and rules regarding engaging in outside transactions. To this end, the chapter examined some of the common methods employed in money laundering such as the use of corporate vehicles or legal structures such as companies, the use of intermediaries like lawyers, and the use of

financial institutions. At this instance, the chapter held that that nearly all cases of grand corruption in Nigeria have one thing in common. They rely on companies to conceal ownership and control of tainted assets and to circumvent the requirement of additional scrutiny in gaining access to financial institutions. In many high-profile corruption cases, corrupt PEPs often conduct their illicit transactions through the misuse of companies, usually incorporated in Nigeria or in safe havens in foreign jurisdictions. Asides from aiding the corrupt concealing their identities, companies are desirable for these individuals because they can own assets in their own name, have bank accounts and credit cards just like any person as well as bestow a degree of formality and respectability to activities which if conducted in the name of an individual might appear unusual and potentially suspicious.

Equally important, this chapter has demonstrated that professionals such as lawyers are used to launder the proceeds of corruption because of the unique powers and privileges they enjoy. The chapter have explained that complex methods of money laundering have led criminals becoming reliant on the services and skills provided by professionals to help launder their illicit funds. The chapter also highlights instances which shows that lawyers have been implicated in facilitating the flow of public funds stolen from developing countries through structures in western countries. They assisted in establishing legal structures, provided client account, provided legal opinions on the legality of offshore structures, and devised ways to move assets and drafting legal instruments needed to implement these transactions. For instance, Bhadresh Gohil, who was the lawyer of convicted former Governor of Delta State, James Ibori who helped in facilitating the laundering of £37million stolen by Ibori from Delta State.

Additionally, the chapter held that in light of the fact that lawyers provide services potentially useful to money launderers, they were subject to AML requirements through their participation in observing customer due diligence and transaction reporting regimes as done by financial institutions and designated non-financial institutions. This was the case as provided under the Nigerian Money Laundering Prohibition Act. However, this had received strong opposition from members of the profession who through the Nigerian Bar Association successfully challenged their inclusion to comply with AML requirements as it infringes on their sacrosanct privilege relationship. As it stands in Nigeria, it falls on the NBA to regulate the conduct of lawyers regarding issues relating to facilitating money laundering. The implication being that a key component of the AML regulated sector in Nigeria has been expunged from a fundamental requirement of adhering to AML legal requirement which can seemingly help in combating corruption. This chapter argued that exempting lawyers from AML obligations

could potentially create a significant gap in the coverage of AML adherence which can lead to corrupt PEPs utilising the services of lawyers to provide credibility to transactions involving illicit funds.

Furthermore, corrupt PEPs who are desirous of laundering illicit funds prefer safer and well trusted channels for concealing such funds. In this regard, the chapter explained that banks provide the ideal medium for not only concealing funds, but making remittances to different jurisdictions under the cover of a legitimate transaction. Thus, included in the discourse of methods used in laundering the proceeds of corruption, the chapter identified banks as the main conduits for corrupt PEPs laundering the proceeds of corruption in Nigeria. The chapter posited that Nigerian banking industry have frequently been identified as a high-risk sector for money laundering because of their complicity in aiding the transfer of misappropriated public funds to foreign jurisdictions. They are known to commit infractions and a lack of compliance with extant AML laws, especially when it comes to transactions with PEPs. Part of the reason why Nigeria was blacklisted by the FATF and the European Union for non-compliance with AML regimes. The chapter held that this can be explained by the fact that corrupt PEPs who are high net-worth individuals signal greater profits for banks in Nigeria.

In the final analysis, the chapter has clearly delineated the close links between corruption and money laundering offences which are inextricably linked as the latter is an essential part of the former because it allows for the concealment of the original source of the funds and provides legitimacy for the money launderer letting them benefit from the proceeds of corruption. At the heart of this link is the close synergy that exist between the two and the more fundamental fact that constitutes the core argument of this chapter. It was argued that mechanisms within the framework of combating money laundering can contribute significantly to the detection of corruption by providing the basis for financial intelligence and investigations because AML measures may be utilised to show that the resources of a corrupt PEP are not commensurate with their known income as public officials.

These measures which the chapter examined includes customer due diligence, enhanced customer due diligence, and the more salient measure which is the transaction reporting requirements. The chapter explained that customer due diligence which is considered part of an effective measure to mitigate the risk of money laundering is a robust money laundering counter measure which is designed to make banks and other financial and designated non-financial businesses and professionals to properly assess the risk posed by potential money

launderers and to prevent unsuitable individuals from exploiting financial institutions for criminal purposes. In particular, this measure strives to ensure that activities within the financial system is linked with a specific and identifiable person.

Also examined is the enhanced customer due diligence measure which is specifically reserved for high risk customers where the risk of money laundering is high such as PEPs. The chapter explained that this measure helps financial institutions develop a complete picture of high-risk customers and the inherent risk associated with them. Understanding their source of wealth and source of funds is a fundamental component of this measure as this information gives an indication as to the volume of wealth the PEP would be expected to have, and an overall picture of how the PEP acquired such wealth. This helps to detect to financial institutions transactions associated with PEPs which involves complex or unusual pattern of large transactions with no apparent economic or lawful purpose or activities that may be inconsistent with a PEP's source of income or regular business activity.

Lastly, the chapter held that the most paramount measure of an effective AML regime is the requirement that financial and designated non-financial professionals and business must report suspicious transactions to the authorities. The chapter argued that suspicious transactions plays a critical and central role in a country's AML operations and in the fight against corruption. The chapter explained that this report can be the first sign of suspicious activity by a corrupt PEP and can help uncover corrupt practices, trigger corruption investigations and can be used to support ongoing financial investigations of corrupt activity, which can lead to the freezing, confiscation and possible prosecutions for money laundering.

The strict application of these measures is meant to reveal illegitimate sources of funds and trigger investigations by relevant stakeholders. With this in mind, the overarching aim of the chapter that follows is to provide an in-depth analysis of the Nigerian AML legal framework as an avenue to combating grand corruption, and their efficacy vis-à-vis the prevalent nature of capital flight from Nigeria and how these laws have performed in deterring corrupt PEPs launder the proceeds of corruption.

CHAPTER FIVE

EXAMINING AND CRITICALLY ASSESSING THE ANTI-MONEY LAUNDERING LEGAL AND INSTITUTIONAL FRAMEWORK IN NIGERIA:

5.1 INTRODUCTION

The preceding chapter chronicled money laundering and the strength of utilising the AML regime to combat corruption related money laundering. Flowing from this, this chapter aims to critically and holistically assess the Nigerian AML legal frameworks and the utilisation of the AML regime in combating the prevalent offence of corruption related money laundering in Nigeria. As shown in chapter four, the money laundering activities of politically exposed persons (PEPs) in Nigeria highlights the significance of employing AML measures to curtail this phenomenon.

The menace of corruption and money laundering committed by PEPs have remained an intractable challenge in Nigeria,[625] with significant impact on development, economic and social well-being of Nigerians. Over the years, public funds in Nigeria have been stolen on an industrial scale by corrupt PEPs who often launder same through financial centres in foreign jurisdictions such as London, USA, Switzerland and other offshore financial centres perceived by corrupt PEPs to be less zealous in making their jurisdictions hostile to receiving illicit funds.[626] In fact, between 2014-2015, the staggering sum of $37 billion was laundered into London alone from Nigeria.[627] Money laundering among PEPs resonates deeply in Nigeria and the threats have become more pronounced, notwithstanding the promulgation of laws and regulations.

Laws have been enacted, institutions have been established for the paramount objective of preventing and combating money laundering.[628] The extant legal, regulatory and institutional responses to money laundering in Nigeria are based on and mirror internationally agreed

[625] Ogba Ojukwu and Patrick Osode,' A Critical Assessment of the Enforcement Regime for Combating Money Laundering in Nigeria' (2020) 28 African Journal of International and Comparative Law 85

[626] PEPS such as General Sani Abacha, James Ibori, Lucky Igbinedion and a number of public officials discussed in the course of this thesis have been culpable of laundering stolen public funds to these countries; with countries such as Switzerland still repatriating these stolen funds.

[627] The Guardian,' Nigeria not seeking a Cameron apology but wants its assets back' < https://www.theguardian.com/politics/2016/may/11/nigeria-not-seeking-cameron-apology-wants-assets-back> accessed 4 February 2019

[628] Money Laundering Prohibition Act 2012; Economic and Financial Crimes Commission 2004 and the Nigerian Financial Intelligence Unit Act 2018 are laws promulgated to combat corruption and money laundering in Nigeria

standards such as FATF Recommendations to combat money laundering. It is pertinent to reiterate that FATF Recommendations constitute the bedrock of the global AML standard and form the basis for regulating the global financial system. The combination of both international and domestic AML laws, whether in the form of soft laws such as FATF Recommendations or formally legally binding legislations in Nigeria have been geared towards affirmatively preventing the ability of corrupt PEPs and other criminals from utilising financial institutions to launder the proceeds of crime, including corruption. This is accomplished by laying emphasis on following the money trail with the help of those in the regulated sector such as banks to help detect and identify money launderers; for the easier it is to launder public funds, the more likely it becomes for public officials to engage in corrupt practices.[629]

The legal frameworks in Nigeria constitutes laws, regulations and institutions domesticating the AML regime in Nigeria. Nevertheless, despite the legal regimes in existence to combat money laundering in Nigeria, they have not translated into practical successes in the fight against money laundering. The long-term results have not always been encouraging and the utility of AML regime have not yielded adequate results. The legal frameworks are generally weak as they largely exist on paper. Enforcement of AML legislations has been ineffective, resulting in very few prosecutions and even fewer number of convictions of PEPs engaged in money laundering activities.[630]

The weaknesses in the enforcement of laws that constitutes the AML legal regime can also be attributed to a diverse number of contributing factors such as the existence of immunity clause in the constitution, lack of comprehensive legal framework, weak law enforcement agencies susceptible to executive pressure, and long delays in the dispensation of justice within the criminal justice system in Nigeria.[631] These factors have hindered the ability of the legal and institutional frameworks to tackle the prevalence of money laundering by corrupt PEPs and has culminated in Nigeria being designated as, and blacklisted as a jurisdiction with money laundering concern.[632] Designating a country as a jurisdiction with money laundering concern

[629] Nasir (n446)
[630] Human Rights Watch,' Corruption on Trial: The Record of Nigeria's Economic and Financial Crimes Commission' (25 August 2011) < https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission> accessed 26 April 2019
[631] Anna Markovska and Nya Adams,' Political corruption and money laundering: Lessons from Nigeria' (2015) 18 Journal of Money Laundering Control 169
[632] As already highlighted in chapter 3, Nigeria was designated a jurisdiction of money laundering concern by the European Commission

because of the deficiencies in its AML regime provides an insight on the ineffectiveness of the country's AML regime.

Primarily, financial institutions (Banks) and designated non-financial businesses and professions (DNFBP) play a significant role in combating money laundering as it is near impossible for the AML regime to be successful without the banking industry's strict compliance with AML laws. This is because illicit funds will normally be introduced into the financial system through this channel as they provide services that are somewhat indispensable to money launderers. These attractions provide plausible reasons why banks are subjected to stringent legal measures designed to prevent, suppress and curtail the passage of proceeds of crime through their institutions.[633]

Yet, case after case reveal financial institutions complicity and failure to adhere to the AML regime giving corrupt PEPs continued and unabated access to the financial system to launder the proceeds of corruption.[634] Based on the fact that a successful AML regime rely heavily on the cooperation of financial institutions to prevent money laundering, the difficulty as will be seen is that it may be more beneficial dealing with wealthy corrupt PEPs by facilitating money laundering than stopping it. Based on the foregoing, banks will constitute the main focus in this chapter when examining and assessing the effectiveness of the AML regime in Nigeria.

According to Adeniyi, a major antidote to the menace of money laundering lies not only in the availability of laws, but also in mechanisms that would guarantee an effective implementation of such laws.[635] Laws and systems of control may be put in place, but it is the human element that operate them. In Nigeria, the problem is not only with the existing law, but that of implementation of the law to achieve desired objective of combating money laundering. Based on these propositions, this chapter focuses on critically examining the legal and institutional frameworks aimed at tackling the menace of money laundering in Nigeria with a view to assessing the effectiveness of the various laws, enforcement mechanisms and their impact in the fight against money laundering particularly as it relates to PEPs.

[633] De Dios M,' The sixth pillar of Anti-money laundering compliance: Balancing effective enforcement with financial privacy' (2016) 10 Brooklyn Journal of Corporate Law 495
[634] Wale Odunsi,' How Nigerian Banks Aid Money Laundering: Nuhu Ribadu' *Daily Post* (13 December 2017) < https://dailypost.ng/2017/12/13/nigerian-banks-aid-money-laundering-nuhu-ribadu/> accessed 19 March 2020
[635] Nasir (n446)

There is no in doubt that Nigeria has most of the required laws on its statue books, yet it suffers from profound difficulties in terms of implementation and enforcement. This chapter contends that the challenges militating against the efforts to combat money laundering in Nigeria is not lack of appropriate legal framework, but in ineffective and inefficient implementation of extant legal frameworks to achieve desired objectives of combating money laundering. In assessing the AML legal frameworks, a general determination can be made on the effectiveness of these extant frameworks. There have been several discussion about the level of effectiveness of Nigeria's AML regime. Some scholars have attributed the problem to weak compliance within financial institutions.[636] Others blame enforcers and regulators for not doing enough to prevent money laundering, while some have attributed the problem to the cost of compliance imposed on financial institutions.[637]

This chapter will attempt to determine the effectiveness of the extant AML regime through indirect indicators such as assessing the impact of suspicious transaction reports in deterring and detecting money laundering, its impact in facilitating investigations, and whether it has impacted on prosecutions. In addition, this chapter will be looking at several cases of alleged failure of financial and DNFBP to maintain effective AML compliance. Compliance is a key element in any AML legal regime across the world, but Nigerian compliance regimes seems ineffective in stopping or detecting the free flow of corrupt funds domestically and those laundered to foreign jurisdictions. The AML laws places obligations on those in the regulated sector to establish and maintain effective compliance regimes to prevent their entities from being used for financial crime.

Having said that, the overarching aim of this chapter is to critically assess the effectiveness of the legal and institutional frameworks for combating money and their efficacy vis-à-vis the prevalent nature of corruption related money laundering in Nigeria. The objective is to review the adequacy and effectiveness of these legislations and how they have performed in detecting and deterring corrupt PEPs from laundering the proceeds of corruption. In achieving this purpose, the chapter lays emphasis on some notable pieces of legislation which includes: *Money Laundering (Prohibition) Act 2012(MLPA), Economic and Financial Crimes Commission (Establishment) Act 2004 (EFCC), Central Bank of Nigeria (Anti-money*

[636] Olajide Olamide, *Guide to Anti-money laundering in Nigeria* (Independently Published) 10
[637] Antoinette Verhage,' Supply and Demand: Anti-Money Laundering by the Compliance Industry' (2009) 12 Journal of Money Laundering Control 371

laundering and combating the financing of terrorism in Banks and other financial institutions in Nigeria) Regulation 2018.

The chapter finds and posits that the laws relating to AML in Nigeria are not effective in disrupting money laundering. In order to add substance to the chapter, the chapter offers an original perspective on the efficacy of the Nigerian AML regime by eliciting the views of stakeholders such as law enforcement and prosecutors through interviews in the course of this research. It must be pointed out that though interviews conducted for the purpose of this research has its limitations in that it only considers the views of a few law enforcement officials and prosecutors at the frontline of combating financial crime in Nigeria, they were sufficient in expressing an informed opinion of the impact of the AML laws in Nigeria; as well as buttressing arguments in the course of this thesis.

Furthermore, the chapter looks at other challenges that influences or hinders the viability of proper implementation of AML laws in Nigeria. Fundamentally, the chapter considers the suitability of utilising the criminal justice system as currently practiced in Nigeria as the only avenue to seek redress in instances of corruption related money laundering committed by powerful public officials; given the delays and difficulties faced by the prosecution in discharging the burden of proof in criminal cases for offences like money laundering which is clandestine in nature. How these laws hold up within the context of combating money laundering is worthy of a considered examination. In the end, the aim is to ensure that analysis of the legal frameworks in Nigeria will throw up viable recommendations towards further strengthening Nigeria's AML regime.

5.2 THE NIGERIAN AML REGIME: A HISTORICAL EVOLUTION

As several countries have implemented AML laws and collaborated on global, regional and multilateral action, combating money laundering has become a modern-day priority.[638] Nigeria's earliest significant legislative measure against money laundering commenced in 1989 when it promulgated the National Drug Law Enforcement Decree[639] to ostensibly combat drug-trafficking related money laundering and to conform to the Vienna Convention.[640] The Act focused predominantly on drug related crime to the exclusion of other money laundering predicate crimes. This was followed by the Money Laundering Decree of 1995 enacted under military rule.[641] At the time, the aim of these laws, inter alia, was to make certain that a documentary trail is left in all transactions conducted through banks with the goal of preventing and haunting down money launderers who at that time were predominantly drug traffickers.

The ineffectiveness of these laws to effectively combat money laundering, together with the country's lack of political will culminated in Nigeria being blacklisted and placed on the Non-Cooperative Countries and Territories by FATF in 2001.[642] Consequently, in response to being blacklisted due to its AML deficiencies; and to cooperate with FATF, Nigeria enacted the Money Laundering (Prohibition) Act 2004. The 2004 Act had a number of far-reaching provisions relating to money laundering in Nigeria, but it also had a number of loopholes and inadequacies which militated against its effectiveness. The renowned case of *Federal Republic of Nigeria v James Ibori*[643] brought to the fore the weakness inherent in the 2004 Money Laundering Act.[644]

The question for determination by the court in the course of Ibori's trial was the interpretation of s14 of the MLPA 2004 using the *ejusdem generis rule.* The ejusdem generis rule is a rule of statutory interpretation which states that general words in a statute which is followed by

[638] William Gilmore, *Dirty Money: The Evolution of International measures to counter Money Laundering and the Financing of Terrorism* (3rd edn, Council of Europe Publishing 2004) 13
[639] Now NDLEA Act 2004
[640] Ayodeji Aluko and Mahmood Bagheri,' The impact of money laundering on economic and financial stability and on political development in developing countries: The case of Nigeria' (2012) 15 Journal of money laundering Control 442
[641] ibid
[642] ibid
[643] FHC/ASB/IC/09 (Unreported)
[644] Nlerum Okogbule,' Combating money laundering in Nigeria: An appraisal of the money laundering Prohibition Act 2004' (2007) 28 Statute Law Review 156

specific words must be construed as referring only to the class of things identified by the specific words.[645] Succinctly, the relevant portion of s14 of the Act is reproduced hereunder:

> Any person who coverts or transfers resources or properties directly or indirectly from illicit traffic in narcotic drugs and psychotropic substances or any other crime or illegal act with the aim of concealing or disguising the illicit origin of resources commits an offence under this section and is liable on conviction to a term of not less than 2 years.[646]

The court in interpreting this section held that 'any other' crime or illegal act contained in the section was only restricted to the proceeds of crime from narcotic drugs and psychotropic substances. In other words, corruption and other money laundering offences within the purview of s14 could not have been construed ejusdem generis with offences of drugs and psychotropic substances. Since the charge against the erstwhile Governor does not contain drug related offence, it would be improper to apply the section in this circumstance. The court held further that for a charge to be sustained, prosecution must link such funds to those directly or remotely made or obtained in the course of illicit traffic in narcotics and psychotropic substances. This decision which was not appealed became the locus classicus in the definition of the scope of money laundering in Nigeria until the advent of the MLPA 2011which was amended in 2012 in order to rectify the deficiencies of the previous law.

Furthermore, another major development in Nigeria's AML history took place in 2004 with the establishment of the Economic and Financial Crimes Commission vested with the powers to enforce money laundering legislations, and to investigate cases of money laundering and other financial crimes.[647] Since its inception, the commission has recorded, albeit, minimal success in several areas of its mandate, such as securing convictions of corrupt PEPs and other criminals engaged in economic and financial crimes in Nigeria.

Currently, the extant money laundering law in Nigeria is the Money Laundering (Prohibition) Act 2012 which essentially supersedes and improved upon previous versions of money laundering legislations in Nigeria.[648] The Act makes comprehensive provisions to prohibit the laundering of the proceeds of crime and the financing of terrorism. It also expands the scope of supervisory and regulatory authorities so as to address the challenges faced in the

[645] Prabir Bhattacharyya,' The Rule of Ejusdem Generis: A novel interpretation and its socio-legal impacts' (2015) 66 Labor Law Journal 159
[646] Money Laundering Prohibition Act 2004, s14
[647] Economic and financial crimes commission (Establishment) Act 2004, s1
[648] Money Laundering (Prohibition) Act 2011

implementation of AML regime in Nigeria. However, despite the minimal success Nigeria has achieved in tackling money laundering, there are still fundamental problems in Nigeria's AML regime which has not deterred corrupt public officials from laundering the proceeds of Nigeria's stolen resources to other jurisdictions. Previous and current attempts that have been made to address money laundering are regularly upset by the dynamism of the crime itself and lack of proper implementation of AML laws.

This is evident in the incessant upsurge in the number of corrupt PEPS being investigated for money laundering, and some convicted in foreign countries on charges of money laundering usually from committing the predicate offence of corruption. This is indicative of two things: That these laws are not sufficient enough to deal with the problem, or they are not adequately implemented. This chapter attempts to answer these questions.

5.3 EXTANT ANTI-MONEY LAUNDERING LEGAL FRAMEWORK IN NIGERIA

This section focuses on the AML legal frameworks in Nigeria. One of the issues that arises in ensuring that regulated entities such as banks appropriately detect illicit financial flows and take adequate steps to detect and deter money laundering while ensuring that money launderers are identified and sanctioned is whether the extant AML legal frameworks as presently constituted in Nigeria contain provisions that can properly assist financial institutions and their compliance officers in playing their crucial role. This section shall adumbrate the components of Nigeria's AML legal regime. It is intended in this section to examine the provisions of these laws. Thereafter, the chapter shall proceed to its core, whether the legal regimes have been effective in deterring and detecting the movement of the proceeds of corruption in Nigeria. The specific legislations that criminalises and prohibits the laundering of the proceeds of crime in Nigeria are as follows:

- Money Laundering Prohibition Act 2012
- Economic and Financial Crimes Commission Act 2004
- Central Bank of Nigeria (Anti-money Laundering and combating the financing of terrorism in Banks and other financial institutions in Nigeria) Regulation 2018

5.3.1 MONEY LAUNDERING PROHIBITION ACT 2012

The MLPA 2012 is the overarching AML legislation in Nigeria promulgated to promote effective and consistent implementation of legal, regulatory and operational measures for combating money laundering. This legislation aligns Nigeria with various aspects of FATF

40+9 Recommendations and other international instruments on combating money laundering and the financing of terrorism. It contains provisions for the prohibition of the laundering of proceeds of crime. Furthermore, the MLPA 2012 expands the scope of the supervisory and regulatory authorities in order to address the challenges faced in implementing AML laws in Nigeria.[649]

The Act creates a framework for a wider customer identification system and highlights provisions detailing the obligations of financial and designated non-financial businesses and professions in preventing money laundering in Nigeria. In a nutshell, the aim of the Act is achieved by:

1. Enforcing disclosure by those in the regulated sector who come across suspicious transactions in the course of their business or professional activities.
2. Penalising those who render assistance to money launderers such as PEPs
3. Facilitating investigation on those who commit money laundering offences and avoiding the money launderers being notified of an interest in their activities.[650]

The MLPA 2012 is divided into three parts namely: *Prohibition of money laundering (Part I), Offences (Part II), Miscellaneous (Part III).* This section will be focusing on the most salient provisions of the Act pertinent to this research.

5.3.2 KEY AML PROVISIONS FOR FINANICIAL AND DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS IN NIGERIA

The Nigerian AML regime places certain statutory obligations on financial and designated non-financial businesses and professions to implement and comply with AML laws. Top among the list of measures are the Customer Due Diligence requirements (CDD), Record Keeping and Reporting Requirements which have a high degree of usefulness for law enforcement and making it difficult for the proceeds of crime to enter the financial system without creating a paper trail. This section examines those key responsibilities.

5.3.3 CUSTOMER DUE DILIGENCE AND ENHANCED DUE DILIGENCE FOR PEP'S

In light of the fact that financial institutions need to ensure that they have adequate controls and procedures in place in order to know their customers and adequately monitor criminal

[649] Aniedi Ikpang,' A Critical Analysis of the Legal Mechanisms for Combating Money Laundering in Nigeria' (2011) 1 African Journal of Law and criminology 116

[650] Ibrahim Abubakar,' Overview of key sections of Nigeria's money laundering Prohibition Act 2012' (2018) 4 International Journal of Law 49

financial activities, the first critical step which financial institutions are mandated to perform is the customer due diligence measures. Customer Due Diligence (CDD) is a process of developing a clear knowledge of a customer relationship and checking that customers are who they say they are in order to effectively understand and manage the risk arising from such relationship.[651] The CDD is one of the most fundamental AML measures.

Not only does it serve as the first line of prevention against the commission of money laundering,[652] it also prevents the placement of illicit funds into the financial system by helping ascertain the source of wealth and source of funds of customers.[653] With a strong due diligence process that identifies customers and legal beneficiaries before a customer relationship is established, a bank can reduce the risk associated with money laundering to the barest minimum. By virtue of the MLPA 2012, financial and designated non-financial businesses and professions must ensure that they have appropriate customer identification and due diligence procedures in place.[654]

These rules and procedures ensure that financial institutions maintain adequate knowledge of their customers and their customer's financial activities. The CDD requirements are also known as 'Know Your Customer' rules. The MLPA 2012 enumerate situations when CDD shall be undertaking by financial institutions. It includes, when:

a) Establishing business relationships
b) There is a suspicion of money laundering
c) Carrying out occasional transactions that are wire transfers
d) Carrying out occasional transactions above the applicable threshold including transactions carried out in a single operation or several operations that appear linked.[655] This particular provision is necessary to preclude those who deposit funds by way of structuring in bits in order to evade the threshold provided by law. This is known as smurfing which is still categorised as a suspicious transaction which must be reported to the Nigerian Financial Intelligence Unit (NFIU).[656]

[651] Norman Mugarura,' Customer due diligence mandate and the propensity of its application as a global AML paradigm' (2014) 17 Journal of money laundering control 76
[652] GIABA,' Know Your Customer-Due Diligence measures and Financial inclusion in West Africa: An Assessment Report' (June 2018) < https://www.giaba.org/media/f/1062_FInal%20KYC-CDD%20Assessment%20Report%20Published.pdf> accessed 10 January 2020
[653] Abubakar (n365)
[654] Money Laundering Prohibition Act 2012, s3
[655] Money Laundering Prohibition Act 2011, s3 (2)
[656] Money Laundering Prohibition Act 2012, s6

In adhering to the above requirements, a financial institution shall

a) Identify a customer, whether permanent or occasional, natural or legal person or any form of legal arrangement using identification documents, data or information bearing his names and photograph or any other identification documents as maybe prescribed by relevant regulations.
b) Identify a customer's address by presenting originals of receipts issued within the previous three months by public utilities or any documents as the regulatory authorities may from time to time approve.[657]
c) Identify the beneficial owner and take reasonable measures to verify the identity of beneficial owner using relevant information or data obtained from a reliable source.[658] This provision if adhered to beams its focus on PEPs and other launderers who hide under corporate structures such as companies to hide and launder the proceeds of crime. As stated in chapter four, corporate vehicles have become a necessary tool for PEPs in laundering the proceeds of corruption due to their ability to hide their identities under corporate structures. Financial institutions are now required to go as far as identifying and understanding the beneficial owners of corporate structures in order to unearth those who control these structures to make sure they are not being used for money laundering purposes.

More significantly, the MLPA 2012 provides for enhanced due diligence (EDD) measures which must be taken to manage and mitigate high risks. These high risks include customers that are PEPs. Thus, in the case of PEPs, in addition to CDD above, financial institutions shall:

a) Put in place appropriate risk management systems
b) Obtain senior management approval before establishing and having any business relationship with the PEP.[659]

In as much as the identity and business profile of all customers should be established, there are cases in which particularly rigorous customer identification and verification procedures are required. This is particularly true of relationships with individuals who hold or have held important public functions. Notably, some of the noticeable failures of the MLPA 2012 is the absence of some additional necessary requirements for enhanced due diligence for the

[657] Money Laundering Prohibition Act 2011, s3 (2b)
[658] Money Laundering Prohibition Act 2011, s3
[659] Money Laundering Prohibition Act 2011, s3 (4)

treatment of PEPs. Juxtaposing this provision on PEPs with FATF Recommendation 10, as well as international best practices, a noticeable exclusion under the MLPA 2012 when conducting EDD on PEPs is the requirement that financial institutions must 'Take reasonable measures to establish the source of wealth and source of funds' and also 'conduct enhanced ongoing monitoring of the business relationship' with PEPs.[660] This is a major lacuna in Nigeria's AML regime, especially when viewed against the background that the most damaging and prevalent money laundering activities are perpetrated by PEPs.[661]

Enhanced due diligence is a measure which provides a greater level of scrutiny of business relationships and highlights risks that cannot be detected by customer due diligence.[662] The practice of taking reasonable measures to understand the source of wealth and source of funds of PEPs is a fundamental component of EDD obligations that banks must apply to PEP customers.[663] This is aimed at determining the origin of funds used by PEPs, evaluating the consistency of PEPs transactions within financial institutions and contributing to the customer's profile that banks use as the baseline when conducting enhanced ongoing monitoring.[664] At the first contact with PEPs, financial institutions should by law conduct an exhaustive examination of the origin of the funds used in the business relationship based on information provided by the customer or any other source.[665]

This is to make sure that PEPs who are high risk customers are not using corruptly obtained funds to conduct such business relationship. There are a variety of tools to establish source of wealth and source of funds. In this regard, declarations of assets and income of public officials which includes source of wealth and business activities is important. In Nigeria, public officials are mandated by law to file such declarations. Such requirements should allow compliance officers in charge of EDD to add to the evaluation of PEPs.

With regard to conducting ongoing monitoring of the business relationship, this has also been excluded in the MLPA 2012. Best practices require that once a business relationship has been established with PEPs, banks must conduct enhanced ongoing monitoring. Ongoing monitoring includes processes to monitor PEPs transactions and evaluate whether the activity accords with

[660] FATF Recommendations 2012, recommendation 12
[661] Abdulkareem Ajayi,' Insulating the vaults from the tide of dirty money: Are the floodgates secure' (2010) 13 Journal of Money Laundering Control 33
[662] Esoimeme (n262) 12
[663] FATF Recommendation 2012, recommendation 12(c)
[664] Francesco Falco,' AML and Politically exposed persons: Good practice recommendations from the Bank of Italy for policies and procedures to be implemented' (2018) 19 Journal of Investment Compliance 31
[665] ibid

the customer profile.[666] It is necessary to ensure proper monitoring of PEPs at least annually and greater than that carried out for other customers. This is so because this measure provides relevant information relating to the status of a PEP, and whether such PEP is still entrusted with such position which can be gathered by reviewing documentation and information already held by the financial institution.

When banks conduct ongoing monitoring of a business relationship, they may come across patterns that are difficult to explain, triggering further inquiry into the customer's background. These measures which have been excluded in Nigeria's AML legislation could help financial institutions in terms of determining and evaluating PEPs funds in order to be prevent their institutions from being used by corrupt PEPs to launder the proceeds of corruption. This is paramount given the prevalent nature of illicit financial flows from Nigeria to other jurisdictions by corrupt PEPs.

5.3.4 *SOME DIFFICULTIES IN IMPLEMENTING CDD IN NIGERIA*

The CDD requirements are mandatory and crucial. Nevertheless, implementing a comprehensive CDD is difficult in Nigeria due to some bottlenecks. Customer identification and verification remain major obstacles to CDD implementation in Nigeria.[667] A key challenge in implementing CDD relates to the lack of robust identification infrastructure in Nigeria.[668] Firstly, in relation to the challenge of identification is the issue of inappropriate or inadequate addressing systems. There are no postcode systems which means that customers address is identified through landmarks such as hospitals etc. The lack of proper addressing system makes the process of CDD daunting on financial institutions and increases cost on these institutions in the performance of their AML obligations since they would have to conduct physical visitations.[669]

Secondly, obtaining public utilities documents in Nigeria can be challenging. Public utilities connote services provided for the public, example an electricity, water or gas supply. This is relevant because public utility document is a fundamental requirement which constitutes part of the prerequisite processes by financial institutions prior to the establishment of a business

[666] Greenberg and Gray (n243) 40
[667] Abubakar (n650)
[668] GIABA,' Know Your Customer-Due Diligence measures and Financial inclusion in West Africa: An Assessment Report' (June 2018) < https://www.giaba.org/media/f/1062_FInal%20KYC-CDD%20Assessment%20Report%20Published.pdf> accessed 10 January 2020
[669] Emmanuel Sotande,' Impediments affecting the curbing of illicit financial flows of organised crime in developing economies' (2019) 26 Journal of Financial Crime 5

relationship. Today in Nigeria, fixed telephone lines are almost extinct and the common mobile telephone services[670] which are substantially pay as you go with no issuable receipt to establish evidence of particular residential address.[671] Electricity bills are now replaced with prepaid metering systems where electricity consumer only buys credit and receipt are no longer necessary. Water bills are also not common in Nigeria with citizens substantially relying for water through personalised boreholes with no receipt.[672]

These issues contribute to the obstacles of effective CDD regime in Nigeria. Evidence from a published mutual evaluation report done by the Inter-Governmental Action Group Against Money Laundering in West Africa, a FATF style regional body indicate that CDD frameworks are poor in Nigeria, hence Nigeria is non-compliant on FATF Recommendation on CDD.[673]

5.3.5 REPORTING REQUIREMENTS

The MLPA 2012 requires the filing of certain reports. These reports include reporting of International transfer of funds, Currency Transaction Report (CTR) and Suspicious Transaction Report (STR). Although these reports can be paramount in disrupting money laundering, the most significant report for the purpose of disrupting money laundering is the suspicious transactions reports. Suspicious transaction reports refer to a piece of information generated by financial institutions which alerts law enforcement that certain activity is in some way suspicious and might be an indication of potential money laundering.[674]

5.3.5.1 *Duty to Report International Transfer of Funds*

The MLPA makes it mandatory to report to the Central Bank of Nigeria and the Securities and Exchange Commission any transfer to or from a foreign country of funds or securities by a person or body corporate of a sum exceeding $10,000 or its equivalent within 7days from the date of the transaction.[675] Furthermore, this section also provides for the declaration of cash or negotiable instruments in excess of $10,000 or its equivalent to the Nigerian Custom Service who shall report any declaration to the CBN and Nigerian Financial Intelligence Unit.[676]

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[670] Such as MTN, GLO, 9mobile.
[671] Abubakar (n650)
[672] ibid
[673] GIABA,' Know Your Customer-Due Diligence measures and Financial inclusion in West Africa: An Assessment Report' (June 2018) < https://www.giaba.org/media/f/1062_FInal%20KYC-CDD%20Assessment%20Report%20Published.pdf> accessed 10 January 2020
[674]
[675] Money Laundering Prohibition Act 2011, s2
[676] Money Laundering Prohibition Act 2011, s2 (4)

Failure to make this declaration or report on conviction forfeits the undeclared funds in its entirety or to imprisonment of not less than 2years or both.[677]

The consideration of making it mandatory to report international transfer of funds is an attempt to detect those who try to utilise financial institutions to launder illicit funds to other jurisdictions. In the same vein, the consideration of making it mandatory to declare cash or other instruments in excess of $10,000 is to identify those who might prefer physical transportation of cash through airports or other borders rather than utilising financial institutions to launder illicit funds and risk being detected.[678]

5.3.5.2 *Duty to report Suspicious Transactions Reports*

One of the most salient provisions in the MLPA 2012 is outlined in s6. It provides thus:

> Where a transaction involves a frequency which is unjustifiable or unreasonable; is surrounded by conditions of unusual or unjustified complexity; it appears to have no economic justification or lawful objective; or where in the opinion of the financial or designated non-financial businesses and professions involves terrorist financing or is inconsistent with the known transaction pattern of the account or business relationship, that transaction shall be deemed to be suspicious and the financial institution shall seek information from the customer as to the origin and destination of the funds, the aim of the transaction and the identity of the beneficiary.[679]

Therefore, in the area of surveillance of certain financial transactions and mandatory disclosures by financial institutions, the Act made strict provisions aimed at preventing money laundering in Nigeria. Nigerian AML laws requires banks to make a STR where the identity of the persons involved in the transaction, or the transaction itself, or any other circumstances concerning that transaction gives reason to suspect that the transaction involves proceeds of unlawful activity. The mandatory obligation to report arises where there is suspicion that funds involved in the business relationship are connected to a money laundering offence or the proceeds of crime. Chaikin is of the view that one of the reason financial institutions face in implementing STR is because it is often unclear what constitutes suspicion.[680] According to

[677] Money Laundering Prohibition Act 2011, s2(5)
[678] Abubakar (n650)
[679] Money Laundering Prohibition Act 2011, s6
[680] David Chaikin,' How effective are suspicious transaction reporting systems' (2009) 12 Journal of Money Laundering Control 238

Gold and Levi, suspicion is usually aroused by the sheer size of the transactions in relation to the known financial circumstances of the customer.[681]

The word 'suspicion' is not explicitly defined under the MLPA 2012. For this reason, it would be relevant to refer to two decisions of the UK Court of Appeal which considered the meaning of suspicion. In *R v Da Silva,*[682] the appellant appealed against her conviction for facilitating her husband's retention or control of proceeds of his criminal conduct, knowing or suspecting that her husband was or had been engaged in criminal conduct or had benefited from it. In dismissing the appeal, the court held that the essential element in suspicion was that the defendant had to think that there was a possibility which was more than fanciful that the relevant facts existed. Therefore, vague feeling of unease would not suffice.

In the same vein, in *K Ltd v NatWest Bank,*[683] K appealed against the bank's refusal requiring the respondent bank to comply with payment instructions given by K Ltd. The respondent bank declined payment because it made a suspicious activity report to the UK financial intelligence Unit that the money was criminal property. In dismissing the appeal, the court applied the test set out in Da Silva's case and affirmed that the person must think there is a possibility, more than merely fanciful, that the relevant facts exist, and this suspicion must be of a settled nature. Furthermore, the MLPA is equally silent as to what constitutes unusual, unreasonable or unjustified complexity. It appears that conditions of unusual or unjustified complexity could be inferred by reference to the type and nature of the intended transaction or activity and its apparent goal.[684]

For Nigerian Banks, as a result of the fact that it is somewhat impossible to describe all forms of suspicious transactions conclusively in legislation, the Nigerian Financial Intelligence Unit (NFIU) as part of its mandate to provide guidelines to reporting entities on ways of detecting the occurrence of money laundering in financial and designated non-financial businesses and professions provided the following examples on some patterns of suspicious activity.

[681] Michael Levi and Michael Gold, *Money Laundering in the UK: An appraisal of suspicion-based Reporting* (University of Wales 1994) 88
[682] [2006] EWCA Crim 1654
[683] [2006] EWCA Civ 1039
[684] Abubakar (n650)

5.3.5.3 EXAMPLES OF SOME COMMON PATTERN OF SUSPICIOUS TRANSACTION OR ACTIVITY

- Transactions that are not commensurate with the stated business type or that are unusual and unexpected in comparison with the volume of similar business operating in the same locale.
- Unusually large volumes of wire transfer
- Transactions being conducted in burst of activities within a short period of time, especially in previously dormant account
- A sudden increase in turnover on an account without any acceptable explanation
- The operation of an account essentially to transfer large sums to or from foreign jurisdictions, when the person or company activities do not appear to justify such movements.[685]

It appears that these examples provide some guidance for a basis of suspicion. However, since suspicion is a subjective fact based on decisions in Da Silva and NatWest Bank, it can be said that identifying suspicious transactions is not an easy task. The Act goes on to state that a financial institution shall immediately report any STR to the EFCC and NFIU by drawing up a written report containing all relevant information together with the identity of the principal and where applicable of the beneficiary or beneficiaries.[686]

Upon receipt and acknowledgment of this, the chairman of EFCC, Governor of CBN or his authorised representatives shall place a stop order not exceeding 72 hours.[687] If the origin of the funds cannot be ascertained within the stoppage period of the transaction, the EFCC or authorised persons may request for an order of the Federal High Court to block the funds.[688] The requirement that financial institutions should make a disclosure to the authorities of transactions that they consider unusual and suspicious is the most proactive approach to fighting money laundering and is the government's main weapon in the battle against money laundering and other financial crimes.[689] An in depth assessment of STR systems in Nigeria is provided later in this chapter.

[685] Nigerian Financial Intelligence Unit,' Guidance to Reporting Institutions on Preparing a complete suspicious transaction/activity Report and filing electronically to Nigerian Financial Intelligence Unit' (December 2014) < https://www.nfiu.gov.ng/images/Downloads/downloads/narrative.pdf> accessed 27 November 2019
[686] Money Laundering Prohibition Act 2011, s6 (2)
[687] Money Laundering Prohibition Act 2011, s6 (5b)
[688] Money Laundering Prohibition Act 2011, s6 (7)
[689] Mark Sutherland Williams and others, *Proceeds of Crime* (4th edn, OUP 2013) 520

5.3.5.4 MANDATORY DISCLOSURES/CURRENCY TRANSACTION REPORT

Another duty which is equally important but probably not as fundamental as STR is the duty to report Currency Transaction Reports (CTR). The CTR requirement requires financial and designated non-financial businesses and professions to report any cash transactions that exceed a certain monetary threshold. This requirement applies to deposits, withdrawals and transfers. Under the MLPA 2012, the scope of the disclosure requirement makes it mandatory for Financial and designated non-financial businesses and professions to report to the NFIU in writing within 7 days any single transaction, lodgement or transfer of funds in excess of

a) N5,000,000 or its equivalent, in the case of an individual or;
b) N10, 000,000 or its equivalent, in the case of a body corporate.[690]

These disclosures are generally referred to as Currency Transactions Reports. Financial institutions are expected to file this report even if it involves individuals conducting legitimate transactions that falls within the threshold. Scholars are of the view that in the context of preventing money laundering, especially those relating to high risk customers, STRs possesses more probative value than CTRs.[691] This is so because, STRs are usually filed when there is suspicion of attempted money laundering, while CTRs are filed for every transaction that exceeds the statutory monetary threshold.

Thus, there could be thousands of CTRs in any given year to make effective use of them. Although CTRs can be useful to law enforcement in certain broad analytic to identify financial crime.[692] According to NFIU, the volume of CTR filed each year is significantly greater than all other statutory reports combined which financial institutions are expected to file.[693] However, the NFIU is of the opinion that despite the volume of CTR filings, they are still an important AML measure because they make it difficult for criminals to get their illicit proceeds into financial institutions, and when they do, it affords law enforcement a way to follow the money and detect criminal activities.[694]

[690] Money Laundering Prohibition Act 2011, s10
[691] Courtney Linn,' Redefining the Bank Secrecy Act: Currency reporting and the crime of structuring' (2010) 50 Santa Clara Law Review 407
[692] ibid
[693] Interview with Leonard Uzoma, Detective Superintendent, Nigerian Financial Intelligence Unit (Abuja, 20July 2019)
[694] Ibid

5.3.5.5 *RECORD KEEPING/PRESERVATION OF RECORDS*

The fight against money laundering places emphasis on following the money. This is because audit trails permit law enforcement to trace financial transactions to criminals.[695] The MLPA obliges financial and designated non-financial businesses and professions with record keeping requirements. It states that they shall provide and keep at their disposal the record of all transactions carried out by a customer for a period of 5years after carrying out the transaction or making of the report.[696]

The Act also mandates these entities to keep records of customer identification for a period of 5years after the closure of the account, or the severance of relations with the customer. The requirement of financial institutions keeping records of transactions is fundamental in the context of AML. These records could potentially serve as audit trails both for banks and law enforcement when the need arises in aiding criminal investigations and possible prosecution of money launderers. Also, they can help uncover the whereabouts of laundered funds as corrupt PEPs tend to launder illicit funds to foreign jurisdictions.

5.4 THE CRIMINAL OFFENCE OF MONEY LAUNDERING UNDER MLPA 2012

The MLPA 2012 is the premier statute that criminalises money laundering offence in Nigeria. Part II of the MLPA 2012 contains actual money laundering offences. It extends criminal culpability to anyone involved in money laundering in any of its various forms. Additionally, the offence applies extra-territorially if the acts constituting the offence were committed in different countries or places.[697] Section 15 of the MLPA makes it a money laundering offence for any person or body corporate in or outside Nigeria, to directly or indirectly:

(a) Conceal or disguise the origin of;
(b) Convert or transfers;
(c) Remove from the jurisdiction; or
(d) Acquires, uses, retains or takes possession or control of any fund or property, knowingly or reasonably ought to have known that such fund or property is, or forms

[695] Ronald Pol,' Anti-money laundering effectiveness: Assessing outcomes or ticking boxes?' (2018) 21 Journal of Money Laundering Control 215
[696] Money Laundering Prohibition Act 2012, s7
[697] Money Laundering Prohibition Act 2012, s15(2)

part of the proceeds of an unlawful act; commits an offence of money laundering under this Act.[698]

The provisions of section 15(2) (a) –(c) above are disjunctive and not conjunctive. It follows that an offender could be charged for merely concealing the source of funds. Likewise, it also appears that merely removing from the jurisdiction without more would suffice to ground a charge. The scope of s15 is broad. Concealing or disguising criminal property makes it broader as it applies to those who receive criminal property. As a result of its wide scope, s15 catches not only those engaging in money laundering but also financial intermediaries and institutions (Banks and lawyers) who aid and facilitate corrupt PEPs and other criminals launder the proceeds of crime. Thus, laundering one's own proceeds is just as much money laundering, as similar activities performed by someone else, notably professional launders on behalf of another who committed the predicate or underlying offence.

The unlawful act or predicate offence which is needed to sustain a money laundering charge comprises criminal acts specified in the act or any other law in Nigeria. The MLPA 2012 defined unlawful activity using a long list of criminal activities which includes: corruption, fraud, participation in an organised criminal group, racketeering, illicit trafficking in narcotic drugs and psychotropic substances etc.[699]

5.4.1 *RETENTION OF PROCEEDS OF CRIMINAL CONDUCT*

Also, the MLPA 2012 makes it a criminal offence for any person who-

a) Conceals, removes from jurisdiction, transfers to nominees or otherwise retains the proceeds of a crime or an illegal act on behalf of another person knowing or suspecting that other persons to be engaged in a criminal conduct or has benefited from a criminal conduct or conspiracy, aiding, etc.; or
b) Knowing that any property either in whole or in part directly or indirectly represents another person's proceeds of a criminal conduct, acquires or uses that property or possession of it commits an offence under this Act.[700]

[698] Money Laundering Prohibition Act 2012, s15 (2)
[699] Money Laundering Prohibition Act 2012, s15 (6)
[700] Money Laundering Prohibition Act 2012, s17

5.4.2 *CONSPIRACY/AIDING AND ABETTING THE COMMISSON OF ML OFFENCE*

In accordance with the MLPA 2012, it is also an offence to conspire to commit any of the money laundering offences in section 15 and 17. Therefore, the act holds that it is an offence to conspire with, aid, abet or counsel any person to commit an offence. It is also a criminal offence punishable under the Act to attempt to commit a money laundering offence, or being an accessory to an act.[701]

5.4.3 *INGREDIENTS OF THE MLPA 2012 OFFENCES*

In *Udeogu v FRN,*[702] the courts have held, inter alia, that to sustain a charge of money laundering, the prosecution must establish that the accused converted or transferred money or property; that the sum of money was derived directly or indirectly from the participation in an unlawful activity, and that the conversion or transfer was done with the aim of concealing or disguising the illicit origin of the money or aiding any person involved to evade the illegal consequences of his action. Proving money laundering cases is a herculean task because it requires a prior establishment of a predicate offence before the money laundering aspect can be established.

In this respect, the court in *Daudu v FRN*[703] held that money laundering must be accompanied by a predicate offence which is an illegal act that yields the funds sought to be laundered as clean money. It is difficult or near impossible to prove money laundering without a predicate offence in Nigeria. For instance, where a PEP is charged with a money laundering offence, the prosecution is duty bound to show that the resources laundered were derived from a particular illegal or unlawful activity before a prima facie case can be established. Not just Nigeria, in other jurisdictions such as the United Kingdom under the Proceeds of Crime Act 2002 (POCA), for each of its principal money laundering offences, the Crown has to prove that the laundered proceeds constitutes criminal property.[704]

Criminal property as defined under POCA refer to property that constitutes a person's benefit from criminal conduct.[705] A criminal conduct is all conduct which constitutes an offence in any part of the UK.[706] Flowing from this, the court in *R v Anwoir,*[707] held that on a money

[701] Money Laundering Prohibition Act 2012, s18
[702] (2016) 9 NWLR 27
[703] (2018) 10 NWLR 169
[704] Proceeds of Crime Act 2002, s327,328 and 329
[705] Proceeds of Crime Act 2002, s340
[706] Proceeds of Crime Act 2002, s340(2)
[707] [2008] EWCA Crim 1354

laundering charge, the Crown has to prove the type of offending that gave rise to the criminal property. In other words, the Crown has to prove the underlying predicate offence that brought about the criminal property.

Also, to prove conspiracy to commit money laundering, the prosecution must present evidence in respect of every essential element needed to establish the offence.[708] The conspiracy is complete if there are acts on the part of an accused person which lead the court to the conclusion that he and others were engaged in accomplishing a common objective.

5.4.4 *ESSENTIAL ELEMENT OF MONEY LAUNDERING OFFENCES IN NIGERIA*

To establish the above money laundering offences in Nigeria, the requisite mental element which the prosecution is required to prove is 'knowledge'. The MLPA 2012 requires a person prosecuted for money laundering to have knowledge of the funds or property's criminal origin when practising the prohibited conduct of money laundering. In other words, the alleged perpetrator of money laundering should be sufficiently aware that a prior crime occurred which resulted in the proceeds of crime that he/she is laundering. As already seen above from case law, it is difficult to prove money laundering without a predicate offence/unlawful activity in Nigeria. Specifically, the MLPA refer to the words 'knowing or ought to have known that such property represents the proceeds of an unlawful conduct'.

In *Kalu v FRN,*[709] the courts have held that the accused must have knowledge at the time of conversion or transfer that funds or property are criminal proceeds. The knowledge at the time of conversion or transfer shall be applied with intent either of concealing or disguising the illegal origin of such property or helping any person who is involved in the commission of the offence to evade legal consequences of their actions. The offender must also be aware that the consequences of these conducts will be the concealment or the disguise of the true nature, source, location, disposition with respect to the proceeds of crime.[710]

Furthermore, within the context of financial and designated non-financial businesses and professions, there are issues regarding instances where the knowledge of the circumstances of the laundering activity should take place. This occurs mainly because money laundering is often a continuous criminal offence and not always committed instantaneously.[711] Situations

[708] *Okoh v State* (2014) LPELR 22589
[709] (2014) 1 NWLR 479
[710] ibid
[711] Roberto Durrieu,' Rethinking money laundering offences: A global comparative analysis' (DPhil thesis, University of Oxford 2012)

could arise where banks do not know the funds criminal origin at the initial stage or at the time of receipt of criminal funds; but subsequently have knowledge later during the time the conduct of laundering takes place. Roberto Durrieu pays special attention to this possibility, taking as an example the case of a corrupt PEP who deposits the proceeds of corruption in a bank.[712]

Therefore, an employee or officer of a bank who receives the deposit of illicit funds and later becomes aware that the money is derived from unlawful activity such as corruption; the question that arises is: At what point is the officer of the bank committing the crime of money laundering? At the point he received the deposit of the funds or after becoming aware of its origin? Roberto concludes that the officer of the bank would be committing a crime of money laundering at the time he/she becomes aware that the received money was derived from the commission of a crime and still decides to undertake the transaction. However, in the context of financial and designated non-financial businesses and professions, there are steps to be taken in order to avoid criminal liability.

To this end, an officer of the bank is expected to take appropriate action to prevent the laundering of the proceeds of crime in the form of submitting a suspicious transaction report to the appropriate authority as soon as the officer becomes aware of possible money laundering activity. It is left for the law enforcement to ascertain the origin of the funds. Failure to discharge this obligation to law enforcement, the officer could be accused of committing the crime of money laundering if it is proved to have been committed with the connivance of or attributable to any neglect on the part of the officer.[713] Therefore, on this basis, filing an STR would be a decisive evidence when proving the innocence of the officer of the bank.

5.5 ECONOMIC AND FINANCIAL CRIMES COMMISSION ACT 2004

Another notable piece of legislation which is equally fundamental in the grand scheme of fighting money laundering and corruption in Nigeria is the EFCC Act 2004. This Act provides for the establishment of the EFCC, a government institution charged with the responsibility of co-ordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes in Nigeria.[714] The EFCC sits at the core of Nigerian AML regime and is the central co-ordinating law enforcement body

[712] ibid
[713] ibid
[714] Economic and Financial Crimes Commission (Establishment) Act 2004, s1

dealing with money laundering in Nigeria. The EFCC Act provides the legal and institutional framework for the enforcement of all financial crime law in Nigeria.

The catalyst for the establishment of the legislation creating the EFCC was the need to combat corruption and money laundering, and to mark a paradigm shift from earlier, weaker anti-corruption rhetoric by creating a robust and exhaustive legislative and institutional anti-corruption approach.[715] The act empowers the EFCC to the collection of all reports relating to suspicious financial transactions, investigate and prosecute all financial crimes in Nigeria which includes money laundering, and the initiation and execution of measures that would lead to the identification, tracing, freezing, confiscation and seizing of proceeds of crime and assets derived from corruption and other unlawful activities.[716]

The EFCC Act has 47 sections, divided into seven parts. The seven parts cover the following topics: Establishment of EFCC (section 1-5); functions of the commission (section 6-7); staff of the commission (section 8-13); offences (section 14-27); Asset forfeiture (section 27-34); financial provisions (section 35-37); and miscellaneous provisions (section 38-47). This section is only concerned in discussing the 'offences' aspect of the legislation. More importantly, this section seeks to examine the effectiveness of the EFCC and how it has fared in fulfilling its criminal enforcement mandate.

5.5.1 *OFFENCES UNDER THE EFCC ACT*

The offences created under the EFCC Act is somewhat similar to those also created under the MLPA 2012. For instance, section 17 of the Act mirrors section 17 of the MLPA 2012 on the retention of proceeds of a criminal conduct. It states that:

- A person who whether by concealment, removal from jurisdiction, transfers to nominees or retains control of proceeds of crime on behalf of another knowing that the proceeds are a result of criminal conduct OR
- Knowing that any property represents another's proceeds of an economic crime, acquires or uses that property commits an offence is liable on conviction to a term not less than 3years or fine equivalent to 100 percent of the crime or both.[717]

[715] Emilia Onyema and others,' The Economic and financial crimes commission and the politics of ineffective implementation of Nigeria's anti-corruption policy' (2018) Anti-corruption evidence working paper < https://ace.soas.ac.uk/wp-content/uploads/2018/11/ACE-WorkingPaper007-EFCC-Nigeria.pdf> accessed 28 January 2020

[716] Economic and Financial Crimes Commission (Establishment) Act 2004, s6

[717] Economic and Financial Crimes Commission (Establishment) Act 2004, s17

In like manner, section 18 of the EFCC Act is also similar to section 15 of the MLPA 2012. It provides thus:

- A person who engages in the conversion, transfer of property knowing that such property is derived from any offence under this act
- Engages in the concealment or disguise of the true nature, source, location, disposition, movement, knowing that such property is derived from any offence under the act commits an offence is liable on conviction to a term not less than two years and not exceeding three years.[718]

5.5.2 EXAMINING THE POTENCY OF THE EFCC IN THE FIGHT AGAINST MONEY LAUNDERING

The activities of the EFCC in combating corruption and money laundering are within the legal framework that spells out its powers and functions. The extent of the performance of the commission in discharging her responsibilities on fighting corruption and money laundering goes a long way to determine the effectiveness of Nigeria's AML legal framework in general. Since its establishment in 2004, Nigeria has witnessed tremendous increase in the activities of the EFCC wielding its enormous powers on individuals who engage in economic and financial crimes in Nigeria. The EFCC have been instrumental in charging and prosecuting senior political leaders, as well as recovering and repatriating significant resources illicitly stolen and laundered by corrupt PEPs belonging to the Nigerian state. This includes the arraignment of over 50 nationally prominent political figures such as former Governors, Ministers and Senators, on charges bothering on abuse of office, theft of public funds, money laundering; and the recovery of some $11 billion dollars stolen and laundered through financial institutions.[719]

Statistically, the EFCC investigated a total of 15, 124 petitions between 2010 and 2016 which is the equivalent of 41.5% of all petitions received (36,442).[720] In terms of criminal prosecutions filed in court, the EFCC filed a total of 2,460 cases, securing only 568 convictions, representing 3.75% of investigated cases and a conviction rate of 23.09%. However, the vast majority of these convictions can be categorised as low or mid-level economic and financial crimes such as advance fee fraud (obtaining by false pretence), criminal conspiracy, forgery and currency counterfeiting, rather than the convictions arising from the embezzlement of

[718] Economic and Financial Crimes Commission (Establishment) Act 2004, s18
[719] Osayemwenre Omoroghomwan,' An appraisal of the activities of economic and financial crimes commission on the administration of criminal justice in Nigeria' (2018) 11 Acta Universitatis Danubius 174
[720] Onyema (n715)

public funds and money laundering.[721] Thus, cases of grand corruption involving colossal sums of public funds and particularly prosecutions involving PEPs are rare.

Several money laundering cases against the political elite have made little progress in court. Some scholars suggest that the inefficiencies of the Nigerian legal system prevents the EFCC from fulfilling its mandate, with the EFCC itself associating some of its challenges to judicial hostility and delays in court.[722] Granted that the Nigerian justice system is slow, overburdened and without specialist anti-corruption judges;[723] together with the fact that senior lawyers also employ delay tactics to elongate cases that take more than a decade to conclude, thereby frustrating the prosecution of corrupt PEPs on money laundering charges. While these are valid arguments, in addition to a range of external obstacles such as lack of political will, the agency has also managed to damage some of its own prosecutions through error and incompetence.[724]

The EFCC in Nigeria is widely known and criticised for its penchant for high profile arrest and public invitations of prominent suspects before a criminal investigation is complete,[725]given room for corrupt PEPs to undermine the underlying investigations by hiding or destroying evidence. The expectation of law is that before a person is arrested, investigations should have been done and completed in preparation for possible charges. The consequence of this being that investigations are done through media trials to impress the public but cannot stand the test of evidence in court. Furthermore, there is some evidence that appears to suggest that the EFCC is not immune from political pressures, with some scholars having linked the falling rates in prosecution of corrupt PEPs to such interests and selective prosecution.[726]

In essence, one of the reasons for the EFCC's failure regarding investigations and convictions of corrupt PEPs is that the EFCC appears to lack absolute independence.[727] In a purely structural sense, the EFCC is deeply vulnerable to control from the executive which reduces its effectiveness; and is often seen as an arm of the incumbent government without an independent

[721] ibid
[722] IO Babatunde and AO Filani, 'The Economic and Financial Crimes Commission and its role in curbing corruption in Nigeria: Evaluating the success story so far' (2016) 2 International Journal of Law 14
[723] Bright Bazuaye and Desmond Oriakhogba,' Combating Corruption and the role of the Judiciary in Nigeria: Beyond rhetoric and crassness' (2016) 42 Commonwealth Law Bulletin 125
[724] Adetayo Olaniyi,' Anti-Corruption Strategies for Balanced Development: A Case Study for Economic and Financial Crimes Commission (EFCC)' (2019) 5 Advanced Journal of Social Sciences 52
[725] ibid
[726] Emmanuel Obuah, 'Combating Corruption in a Failed State: The Nigerian Economic and Financial Crimes Commission (EFCC)' (2010) 12 Journal of Sustainable Development in Africa 27
[727] Olaniyi (n724)

mandate.[728] There is an overbearing influence of government presence in the activities of the EFCC making the commission highly influenced by politics, which can rarely discharge its statutory duties without interference.[729] This lack of independence can be traced to its institutional architecture as its principal officers are appointed by the President.[730]

Due to its close relationship with the executive branch that appoints its chairman, there is a tendency for their powers to be used as tools of victimization, persecution and prosecution of perceived enemies of the government of the day. As a result, there is an increased propensity that the chairman will be reluctant to proceed with corruption and money laundering investigations against the President and his political affiliates who belong to the ruling political party. According to Ezeonu, it is believed that the EFCC is often used as a tool for persecuting political opponents, and that court trials and charges by the commission relating to the prosecution of PEPs are subject to who the government of the day wants to be tried and charged.[731]

It is pertinent to also note that a provision which further constricts the independence of the commission is one which empowers the President to remove the chairman of the commission where the President is satisfied that it is not in the interest of the public that the individual continues in office.[732] In other words, the commission's chairman enjoys no security of tenure and can be removed at any time by the President without any consultation or approval from the National Assembly. This power to remove the chairman who heads the most powerful anti-graft institution dealing with corruption and money laundering by the President is subjective. What would satisfy the President that it is not in the interest of the public for the chairman to continue in office is nowhere defined in the Act.

As a result of the powers of the President to appoint and dismiss the chairman of the commission, this gives the President sufficient latitude to interfere in the functioning of the EFCC. Therefore, allegations of investigations based on the directives of the President are not uncommon. As put by an EFCC prosecutor, Festus Keyamo, 'Whoever is the EFCC chairman,

[728] Human Rights Watch,' Corruption on Trial: The Record of Nigeria's Economic and Financial Crimes Commission' (25 August 2011) < https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission> accessed 26 April 2019
[729] Olaniyi (n724)
[730] Economic and Financial Crimes Commission (Establishment) Act 2004, s2(3)
[731] Ifeanyi Ezeonu,' Violent Fraternities and Garrison Politics in Nigeria's Fourth Republic: Lessons from the University of the South' in Neovi Karakatsanis and Jonathan Swarts (eds), *Political and Military Sociology* (Routledge 2016)
[732] Economic and Financial Crimes Commission (Establishment) Act 2004, s3(2)

he cannot go beyond the wish of the President. If he does, he would be removed the next day. At the end of the day, anyone who is the chairman will have to read the body language of the President to do what he wants'[733]

A quintessential example of the above point involved a former chairman of the EFCC, Farida Waziri, who claimed in her new book that she was sacked from office because of her zero tolerance for corruption.[734] According to the former chairman, she was removed from office by former President, Goodluck Jonathan, because of her refusal to back down from the probe of some corrupt PEPs for financial crimes and money laundering. Waziri stated that she had been pressurised from the Presidency not to go after certain powerful politicians but refused to be compromised; going against the Presidential directive which subsequently led to her removal. The lack of independence and political interference are core reasons why the EFCC have not performed credibly. This is also the reason many money laundering cases against corrupt PEPs have made little progress and why the AML regime in Nigeria has been largely ineffective to deal with illicit financial flows from public officials.

Asides political interference and lack of independence, another factor that contributes to the ineffectiveness of the EFCC's mandate in combating money laundering is operational incapacity caused by insufficient funding.[735] The effectiveness of the EFCC is also determined by its internal organisation and continued training of professionally qualified personnel. Without funding, the EFCC cannot function effectively to deliver on its mandate to fight graft. Funding is essential in investigating and successfully prosecuting money launderers. Investigating corruption and money laundering involving PEPs is capital intensive and needs funding to achieve diligent prosecution of cases. Corrupt PEPs have the wherewithal and resources to get the best legal services and turn the tide against the EFCC in the court of law.

EFCC's annual report for 2015 identified as one of its operational challenges the dearth of consistent training of officers to meet the exigencies that are peculiar to the ever-changing nature of economic and financial crime.[736] In similar vein, EFCC's 2016 report also states that 'training is essential because it equips officers with the requisite skills and information on best

[733] Human Rights Watch,' Corruption on Trial: The Record of Nigeria's Economic and Financial Crimes Commission' (25 August 2011) < https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission> accessed 26 April 2019
[734] Friday Olokor,'Ex-EFCC boss renders account in book' Punch (4 February 2020) < https://punchng.com/ex-efcc-boss-renders-accounts-in-book/> accessed 11 February 2020
[735] Onyema (n715)
[736] ibid

practices in law enforcement. If we are to succeed in the fight against corruption, training must be adequately funded'.[737] The commission has stated that it has been largely dependent on the assistance of donor partners to train its staff. This weaknesses in training further manifests in the failure of the EFCC to conduct thorough investigation, resulting in the dismissal or acquittal of corrupt PEPs in criminal prosecutions.

It is somewhat evident that over the years, the commission has fallen short of its potential with limited successful record of accomplishment. This thesis is of the view that the commission cannot objectively fight money laundering by corrupt PEPs if their operations are guided by political motivation and interference. In order for the commission to achieve and surpass its achievement of prosecuting those engaged in laundering the proceeds of corruption, absolute independence is required. This can be achieved by amending the EFCC Act to remove the power of appointment and removal of the chairman of the commission from the hands of the President who is a PEP and leader of the ruling party with so much interest to protect. Such appointment powers can be given to the Chief Justice of Nigeria on the recommendation of the National Judicial Council preferably.

5.6 Central Bank of Nigeria (Anti-money Laundering and combating the financing of terrorism in Banks and other financial institutions in Nigeria) Regulation 2018

Banking regulations refers to the processes and procedures adopted by banking regulators to oversee, regulate, monitor or control the activities of banking institutions.[738] These processes define the parameters within which banks should operate and are subjected to certain requirements, guidelines and restrictions aimed at promoting transparency and compliance with extant AML laws in Nigeria. Nigeria's AML regulatory framework consists of regulatory and supervisory bodies empowered by their establishment acts and other AML laws to supervise financial institutions in their operational activities. Primarily, the Central Bank of Nigeria (CBN) is the apex regulatory and supervisory body of the banking sector in Nigeria.[739] In exercise of the powers conferred on the CBN by virtue of Banks and Other Financial

[737] ibid

[738] Muhammed Tawfiq Ladan,' Recent trends in regulating money laundering and terrorism financing in the banking, insurance and capital market sectors of the financial economy of Nigeria: Role of the financial regulators' (3-Day National conference on money laundering in Nigeria, Abuja, December 2013) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363529> accessed 20 February 2020

[739] CBN Act 2007, s51

Institutions Act 2004 (BOFIA),[740] the CBN introduced regulations for financial and designated non-financial businesses and professions to prevent money laundering in the country.

CBN (AML) Regulation 2018 is the extant AML regulation in Nigeria which amends CBN (AML) Regulation 2013. The regulation essentially sets out systems and models to shield banks from being utilised as a channel to launder illicit funds, perpetrate fraud and different types of monetary crimes; as well as conduct their respective business in accordance with extant AML laws in Nigeria. Basically, the CBN regulation imposes certain requirements relating to Customer Due Diligence, policies and procedures, controls and record keeping amongst other things. Furthermore, the regulation allows the CBN to enforce AML measures, provide guidance, support implementation and enforce compliance by financial institutions. Also, the CBN regulation rectifies some of the deficiencies not taking into consideration in the MLPA or EFCC Act by promulgating extensive provisions to curtail illicit financial flows and to penalise those in the regulated sector who aid money launderers.

In this respect, the regulation stipulates fines on banks, their directors and other key officials for money laundering infractions. This is so because, to deter the use of financial institutions for money laundering, sanctions should be applicable not only to financial institutions and designated non-financial businesses and professions, but also their directors and senior management who are complicit in aiding money launderers.

The core objectives of this regulation is:

- To provide AML compliance guidelines for financial institutions under the regulatory purview of the CBN as required by relevant provisions of the MLPA.[741]
- To enable the CBN to diligently enforce AML measures and ensure effective compliance by financial institutions.

In terms of structure and content, the CBN Regulation contains 133 Regulations which are divided into thirteen parts and three schedules. Likewise, in terms of scope, the regulations cover the relevant provisions of the MLPA in key areas of the AML regime such as monitoring and filing of suspicious transaction reports, various reporting requirements and record keeping requirements et cetera.

[740] Banks and other Financial institutions Act 2004, s51 (1)
[741] CBN(AML/CFT) Regulation 2018, s1

5.6.1 *CARDINAL PROVISIONS UNDER CBN REGULATION 2018*

Due to the extensive coverage of this regulation pertaining all aspects of AML in financial and DNFBP, it is infeasible because of space to examine all of its provisions. Instead, this section highlights the most salient regulations regarding obligatory steps and sanctions which must be taken by financial institutions to prevent money laundering especially from high risk customers such as PEPs.

5.6.1.1 *Suspicious Transaction Report*:

In Regulation 9 and 31 respectively, a financial institution shall identify and file suspicious transaction reports to the Nigerian Financial Intelligence Unit where funds or assets are suspected to have been derived from a list of predicate offences which includes corruption, participation in organised criminal group, illicit trafficking in narcotic drugs and psychotropic substances and other predicate offences under the MLPA 2012.[742] The regulation states that financial institutions be alert to the various patterns of conduct that are known to be suggestive of money laundering, such as transactions involving a frequency which is unjustifiable, unreasonable or is inconsistent with the known pattern of the account or business relationship.[743]

5.6.1.2 *Verification of Beneficial ownership*

The term beneficial owner is conventionally used in AML context to refer to the person who has an interest in or ultimate control over assets,[744] and who tries to conceal this fact through the misuse of corporate vehicles. This definition was developed in the context of banks and other financial institutions dealing with prospective high-risk customers while having an obligation to establish the identity of their potential customer's beneficial owner before carrying out any transaction on its behalf. As part of this thesis's analysis of grand corruption cases involving PEPs in chapter four,[745] the main type of legal structure used by corrupt PEPs to conceal their identities and beneficial ownership is the company, due to its ability of masking their identities.

[742] CBN (AML/CFT) Regulation 2018, s9 and 31
[743] ibid
[744] Emile van der Does de wille bois and others,' *The puppet masters: How the corrupt use legal structures to hide stolen assets and what to do about it* (The World Bank 2011) 18
[745] Chapter four analysis on the use of companies by PEPS to launder the proceeds of corruption

The MLPA in its section 3 vaguely requires financial institutions as part of their identification of customers to identify a customer whether natural or legal person.[746] However, the regulation expands this measure in Regulation 15 by requiring financial institutions to understand the nature of customers business and its ownership structure.[747] This is done by identifying and verifying the natural persons who have ultimate controlling interest in a legal person or identify and verify natural persons that exert control through ownership interest. Unlike the MLPA, such an improved focus on companies and beneficial ownership in the fight against money laundering is justifiable when one looks at the patterns of misuse.

5.6.1.3 *Enhanced due diligence*

In regulation 16, a financial institution shall perform EDD for higher risk customers, business relationship for PEPs, legal persons or arrangements that are personal assets-holding vehicles.[748] Where PEPs have been identified, the regulation mandates them to obtain senior management approval before establishing business relationship and shall render monthly returns on all their transactions to the CBN and NFIU.[749] They are also required to perform enhanced on going monitoring of the relationship with PEPs and in the event of any transaction which is abnormal, shall flag the account and immediately make a STR to the NFIU.

An important aspect of the EDD which was not taken into consideration in the MLPA but which the regulation rectifies is that financial institutions must take reasonable steps to establish source of wealth and source of funds of customers identified as PEPs.[750] This is a crucial aspect in determining and making sure that funds which a PEP transacts with are not the proceeds of corruption. Banks are expected to utilise available means of verification such as asset declarations which is a legal requirement for public officials before assumption of office. This is to make sure that banks have reasonable knowledge of the assets and wealth of a PEP in order that they can make an informed decision regarding transactions in the course of their business relationship.

5.6.1.4 *Penalties for violating the Regulation*

The CBN exercises a supervisory role over banks and other financial institutions in order to determine whether there has been an infraction of any of the AML laws in Nigeria to determine

[746] Money Laundering Prohibition Act 2012, s3
[747] CBN (AML/CFT) Regulation 2018, s15
[748] CBN (AML/CFT) Regulation 2018, s16
[749] CBN (AML/CFT) Regulation 2018, s18(4)
[750] CBN (AML/CFT) Regulation 2018, s18(3)

the seriousness and nature of the infractions, and to consider applicable sanctions. In this regard, to preclude any aberrations in banking activities and comply with extant AML laws, penalties have been imposed for violating the provisions of this regulation. Failure to comply attracts appropriate sanctions in accordance with the provisions of the MLPA.[751] The MLPA in s15 and 16 provides for fines or terms of imprisonment or both upon committing money laundering or aiding and abetting money laundering activities which ranging from not less than seven years but not more than fourteen years prison sentences. Additionally, financial institutions that contravenes the regulation shall be subjected to non-monetary and financial penalties and also sanctions by the CBN which comprises of revocation or suspension of its operating licence.[752]

5.7 A CRITICAL ASSESSMENT OF THE EFFECTIVENESS OF THE AML LEGAL FRAMEWORK IN DETECTING AND DISRUPTING THE PROCEEDS OF CORRUPTION IN NIGERIA

In the light of this section's intention to assess the impact of the legal frameworks on money laundering in order to test its effectiveness, it is desirable to understand the meaning of effectiveness of legislation. Effectiveness of legislation expresses the extent to which a law can achieve its purpose, and is considered the primary expression of legislative quality.[753] The effectiveness test examines whether/how legislation has been applied and what its results have been. According to FATF, in the context of AML, effectiveness is the extent to which financial systems and economies mitigate the risk and threat of money laundering.[754] This could be in relation to the intended result of a given law or implementation of specific set of AML measures to mitigate the risk of money laundering.[755]

Furthermore, effectiveness can also be determined by examining the extent to which the law in practical terms successfully performs the functions it is designed for. This could be determined by:

- The purpose of the legislation which sets the benchmark for what the legislation aims to achieve.
- How the law will achieve its desired results

[751] CBN (AML/CFT) Regulation 2018, s34
[752] CBN (AML/CFT) Regulation 2018, s34(3)
[753] Maria Mousmouti,' The effectiveness test as a tool for law reform' (2014) 2 IALS law review 5
[754] FATF,' Methodology for Assessing Technical compliance with FATF Recommendation and the effectiveness of AML/CFT systems' (October 2019) <https://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> accessed 9 December 2019
[755] ibid

- The practical/real life results of legislation.[756]

Therefore, if the law fails practically to achieve the purpose for which it was promulgated, the law becomes ineffective. The purpose of the promulgation of AML regimes in Nigeria is to help curtail the prevalence of money laundering by identifying and tracking the movement of funds deposited in or transmitted into or out of Nigeria, primarily, through financial institutions. In achieving this laudable objective, banks and other designated non-financial businesses and professions are mandated by law to properly identify persons conducting transactions with them, maintain records of transactions which serves as a paper trail for when the need arises, and more importantly, file reports such as suspicious transaction reports when they have knowledge or suspect money laundering.

The pressing question is how banks have performed in the light of these obligations in Nigeria? For the purpose of assessing the effectiveness of Nigeria's AML regime, this section focuses significantly on financial institutions (Banks), and their compliance with such laws in detecting, disrupting and deterring the prevalent use of their institutions by PEPs to launder the proceeds of their unlawful activity which is usually in the form of corruption. Evaluating the extent to which banks comply with the AML regime in Nigeria will potentially indicate the effectiveness or otherwise of the AML law in disrupting money laundering. To provide a preliminary insight into the effectiveness of Nigeria's AML regime, Nigeria has frequently been designated a jurisdiction with strategic deficiencies in her AML regime partly because of large volumes of transactions involving proceeds of crime passing through its financial sector.[757] The European Commission's recent inclusion of Nigeria in its blacklisted countries is capable of supporting a conclusion about the ineffectiveness of Nigeria's AML regime in disrupting the flow of the proceeds of crime.[758]

From this thesis's arguments in the preceding chapter, the AML regime when it works well is one of the greatest tools to combat grand corruption. The problem is the acts or omissions by others, usually banks which by negligence or recklessness impede the smooth running of an intrinsically good regime. This scenario is unfortunately the case with Nigerian banks. The prevalence of money laundering by corrupt PEPs can be attributed to the failure or inability of

[756] Mousmouti (n753)
[757] European Commission,' European Commission adopts new list of third countries with weak anti-money laundering and terrorist financing regimes' (13 February 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_781> accessed 5 January 2020
[758] ibid

banks to comply with AML measures,[759] despite a raft of AML laws and regulations which require financial institutions to perform certain mandatory requirements.

As we shall see, several banks in Nigeria have been implicated for aiding PEPs launder the proceeds of misappropriated public funds or omitted to implement AML measures to detect, uncover and thwart money laundering through their systems. Such failure or omission to implement these measures are offences that are punishable under MLPA 2012 and CBN Regulation 2018. According to the Inter-Governmental Action Group against Money Laundering in West Africa, Nigerian banks involvement in money laundering has to be seen in the context of Nigeria's description as one of the most corrupt countries in the world where pervasive corruption provides a free territory for money laundering.[760]

5.8 THE IMPACT OF THE ANTI-MONEY LAUNDERING REGIME IN NIGERIA AND THE EFFECTIVENESS QUESTION

The need to disrupt the flow of the proceeds of crime generally gave rise to the promulgation of laws and regulatory activities relating to money laundering.[761] By disrupting money laundering, corrupt PEPs and criminals are prevented from enjoying their illicit wealth and cutting the source of financing further criminal activities. Understanding the impact and ability to measure the impact of the AML legal and regulatory regime against the prevalent scale of money laundering in Nigeria, especially by PEPs will enable the determination of the effectiveness of the law relating to money laundering.

To effectively detect and disrupt money laundering, the overall efficiency of the practices through which the law is implemented is crucial. At this stage of the chapter, it will be apposite to effectively assess the effectiveness of the Nigerian AML legal framework through the lens of Professor Reuter and Truman's two-pillar structure (**prevention** and **enforcement**) which essentially depicts the measures for detecting and disrupting illicit financial flows.[762] According to Professor Reuter, the prevention pillar is designed to deter criminals from using financial institutions or gatekeepers (lawyers) to launder the proceeds of crime. In like manner, the enforcement pillar is designed to punish criminals including those who aid or facilitate

[759] Interview with Leonard Uzoma, Detective Superintendent, Nigerian Financial Intelligence Unit (Abuja, 20July 2019)
[760] GIABA,' Anti-money laundering and combating the financing of Terrorism: Nigeria' (May 2008) <https://www.giaba.org/media/f/299_Mutual%20Evaluation%20Report%20of%20Nigeria.pdf> accessed 5 March 2020
[761] Alldridge (n394) 1
[762] Peter Reuter and Edwin Truman, *Chasing Dirty Money: The Fight Against Money Laundering* (Peterson Institute for International Economics 2004) 45

money laundering when they have facilitated the successful laundering of those proceeds despite the prevention efforts.[763]

The prevention pillar consists of measures such as performing strict ***customer due diligence*** *and* ***reporting requirements*** such as filing suspicious transaction reports. On the other hand, the enforcement pillar consists of: ***investigations, punishment, sanctions*** and ***prosecution.***[764] The significance of the components of these pillars is that CDD is intended to limit criminal access to financial institutions, reporting requirements alert authorities to activities that may involve attempts to launder proceeds of crime, while prosecutions and sanctions punish money launderers, gatekeepers and institutions that fail to implement the AML laws.

Therefore, while the preventive pillar largely represents legal requirements and practices that are required to be established at first instance to disrupt corrupt PEPs or their associates from using financial institutions or professional intermediaries to launder proceeds of corruption, the enforcement pillar represents legal measures and practices that can be used to assist regulators or law enforcement to trace or track the launderers and those who might have facilitated the laundering for the purposes of prosecution, the confiscation and recovery of such illicit proceeds.[765]

The prevention pillar in particular plays a significant role in disrupting money laundering because the pillar should serve as the obstacle to criminals intending to launder the proceeds of crime. Concerns as to the workability of the AML regime can be based on the effectiveness of the preventive measures in the AML legal framework. It is only when laundering has occurred or has been attempted that the enforcement pillar kicks in. The success of the enforcement pillar of the AML regime partly depends on the efficiency of the preventive pillar.

As shown above, Nigeria has satisfactory laws and regulations that encompasses Professor Reuter's two-pillar structure. However, the critical problem might be attributable to an ineffective implementation, enforcement and punishment regime; challenges that must be addressed in order to achieve desired objective of combating money laundering. While these challenges remain, the general view on Nigerian AML law is that the regime is ineffective.[766] One of the most compelling evidence to buttress this point comes from the EFCC chairman

[763] ibid
[764] ibid
[765] ibid
[766] Ibrahim Abubakar,' An Appraisal of Legal and Administrative Framework for Combating Terrorist Financing and Money Laundering in Nigeria' (2013) 19 Journal of Law, Policy 26

who acknowledged that the AML regimes are not working as expected when he accused 10 banks of aiding money laundering by PEPs.[767] The next section makes use of some of the components of the two-pillar structure to access the effectiveness of Nigerian AML regime.

5.8.1 HOW EFFECTIVE ARE SUSPICIOUS TRANSACTION REPORTING SYSTEMS IN NIGERIA?

An indispensable element of the AML regime in Nigeria and around the world is the requirement that financial institutions and designated non-financial businesses and professions file suspicious transaction reports with their respective financial intelligence units. Arguably, this is the most fundamental practical aspect of the role of financial institutions in the fight against money laundering.[768] The law as already examined is explicit under the suspicious transaction system over the power it gives financial institutions. In addition to carrying out proper checks on the identity of their customers, banks are required to be watchful of suspicious activity, and to report suspicious activities that might involve money laundering to the authorities.

According to scholars, there is little evidence that preventive measures have reduced money laundering. This is particularly true with respect to suspicious transactions reports where they have raised serious doubts as to whether they are actually effective in catching money launderers.[769] Statistics collected in the course of investigations from NFIU suggest that few successful investigations are developed from suspicious transaction report. A plethora of investigations and prosecutions into the activities of PEPs strongly uncover the active involvement of banks in facilitating money laundering by corrupt PEPs.[770] Given the vast sums of illicit financial flows from Nigeria, in order to follow the trail of corrupt PEPs, law enforcement require access to key financial information in the form of STRs, which is often not readily available from commercial banks in Nigeria.[771] The pertinent question to ask is: If banks are compliant with the AML laws and regulations, why are vast sums of stolen public funds moving through the Nigerian banking system undetected and unreported?

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[767] Eniola Akinkuotu,' Magu Accuses Banks of Aiding Looters' (Punch, 29 July 2017) <https://punchng.com/magu-accuses-banks-of-aiding-looters/> accessed 10 January 2020

[768] Julia Braun and others,' Drivers of suspicious transaction reporting levels: Evidence from a Legal and Economic Perspective' (2016) 2 Journal of Tax Administration 95

[769] Richard Gordon,' Losing the war against dirty money: Rethinking Global standards on preventing money laundering and terrorist financing' (2011) 21 Duke Journal of Comparative and International Law 21

[770] EFCC V FAYOSE &ANOR [FHC/L/CS/871/2016]

[771] Interview with Jerry Ushaka, Principal Detective Superintendent, Nigerian Financial Intelligence Unit (Abuja, 20 July 2019

With almost every case in the aftermath of investigations conducted by the EFCC, there has been a finding that if banks were proactive and vigilant in their compliance obligations of filing STR, some of the illicit financial flows from corrupt PEPs could have been averted.[772] Instead, as will be seen from examples below, investigations reveal how corrupt PEPs use banking facilities to hold and/or transfer stolen public funds without banks filing STR which is mandatory by virtue of extant AML laws.

These investigations continue to expose how Nigerian banks routinely failed or neglected to report transactions with PEPs which they should have deemed irregular or unusual and thus, should have been reported in disregard of their statutory obligations. At the heart of the problem is a tension between banks basic business model of taking deposits, processing transactions and making profit, and their legal and moral obligation to turn down and report funds they suspect to involve money laundering.[773] This creates a major problem for banks. On the one hand, failure to report STR is an offence under AML laws in Nigeria.[774] On the other hand, if they report suspicious transactions, they might lose wealthy clients who are usually PEPs in Nigeria.[775] For law enforcement authorities, banks are considered to be a fundamental source of valuable information for detecting money laundering.

Nonetheless, from the bank's perspective, the main reason for their existence is to make as much profit as possible. Hence, their commercial interests are totally distinct from that of law enforcement authorities. This is very difficult for banks given their main purpose is profitability. Therefore, it is easy to an extent to appreciate their reluctance to embrace laws and regulations which require them to be vigilant and report suspicious transactions at their own extra expense. Regardless of profit making and having regard to the enormous financial crime in Nigeria especially with PEPs, the consequences of giving corrupt PEPs unfettered access into the financial system to launder the proceeds of corruption without filing STRs is huge. Money laundering by PEPs on the Nigerian state has resulted in dire consequences on majority of her citizens living in abject poverty. On this note, banks can be said to be part of the problem.

[772] Interview with Chile Okoroma, Director of Public Prosecutions, Economic and Financial Crimes Commission (Abuja, 22nd July 2019)
[773] Global Witness Organisation,' Banks and Dirty Money: How the Financial system enables State Looting at a Devastating Human Cost' (Global Witness Limited 2015) 16
[774] Money Laundering Prohibition Act 2012, s6 (9)
[775] Aspalella Rahman,' The Impact of Reporting Suspicious Transactions Regime on Banks' (2013) 16 Journal of Money Laundering Control 159

More frequently, several high-profile cases in Nigeria have put a spotlight on the banking sectors vulnerability to money laundering. There is considerable support for the view that there is serious under reporting of suspicious transactions by banks in Nigeria. According to Jerry Ushaka, an interviewee attached to the Nigerian Financial Intelligence Unit, a government agency whose mandate includes the receipt and analysis of STRs from banks, the effectiveness of the Nigerian STR systems is questionable because of serious lack of compliance with the reporting of STR by financial institutions in Nigeria.[776] During the interview, Jerry raised concerns that the potential benefit the STR system provides in fighting illicit financial flows in Nigeria go largely unrealised because of infractions and poor compliance with this preventive measure. He posited further that compliance responsibility placed on banks rarely yield any value in disrupting money laundering or in assisting law enforcement start investigations into potential cases of money laundering.

Furthermore, the above has been giving credence by a former chairman of the EFCC who in a keynote address confirmed that several money laundering cases happen in Nigeria with the active connivance of banks and their employees.[777] He stated further that Nigerian banking system is prone to abuse by corrupt elements as investigation reveal that several incidences of money laundering by PEPs occur with the active involvement of banks. It is rare to come across an investigation that was instigated by the reporting of STR. Most of the huge funds recovered by the EFCC from corrupt PEPs were transferred out of the country through officials of the banks and these activities were not brought to the attention of the EFCC or NFIU.[778]

Rather, the EFCC unearthed various roles played by banks in the course of investigations originating from petitions by various groups which brought about the discovery of the active participation of banks in facilitating money laundering through outright disregard of reporting suspicious funds and transactions.[779] In other words, the ability and inability of banks to successfully fulfil their role in curbing money laundering has been a major discovery in a number of money laundering investigations. For instance, one of the most compelling evidence that confirms how banks abdicate or fail to discharge their mandatory obligation to report

[776] Interview with Jerry Ushaka, Principal Detective Superintendent, Nigerian Financial Intelligence Unit (Abuja, 20 July 2019

[777] Wale Odunsi,' How Nigerian Banks Aid Money Laundering: Nuhu Ribadu' *Daily Post* (13 December 2017) < https://dailypost.ng/2017/12/13/nigerian-banks-aid-money-laundering-nuhu-ribadu/> accessed 19 March 2020

[778] Interview with Jerry Ushaka, Principal Detective Superintendent, Nigerian Financial Intelligence Unit (Abuja, 20 July 2019

[779] ibid

suspect funds brings into focus the corruption and money laundering activities of Nigeria's immediate past First Lady, Mrs Patience Jonathan.

According to a charge filed by the EFCC against Mrs Jonathan, a PEP, based on its findings, the EFCC was able to establish a prima facie case against Mrs Jonathan for retaining the proceeds of corruption contrary to s15 and 17 of the MLPA 2012.[780] The charge sheet claimed that the funds traced to Mrs Jonathan's Skye Bank accounts totalling $22,353,076.71 were the proceeds of corruption.[781] She is alleged to have opened various bank accounts in Nigeria using her name, fictitious names, and four shell corporations which were fraudulently incorporated and used to launder the proceeds of corruption. It was revealed in this case that huge sums of money from suspicious sources hit the account of the Mrs Jonathan without the bank filing a STR to the authorities for investigation.

In particular, revelations from investigations confirmed that Skye Bank employees whose names featured in this case were complicit by allowing these accounts to be used to launder huge sums without filing STR. At the point when these transactions were made, can it be said that Skye Bank reported the illicit transactions in a timely fashion to the appropriate authorities as required by s6 of the MLPA 2012 and the CBN Regulations 2018? If Skye Bank complied with the CDD and EDD requirements as examined, those accounts would not have been opened to begin with. Additionally, even where the accounts were opened, STR should have been filed and reported when huge funds which should have triggered suspicion began to be deposited into the accounts, especially from a high-risk customer.

During my interview with Super-intendent Leonard Uzoma, an officer of the NFIU, he confirmed that one of the paramount reasons financial institutions fail to adhere to AML measure of filing STR when they suspect money laundering is because they are beneficiaries of laundered funds which helps keep them afloat.[782] These laundered funds in essence make them appear profitable. Leonard confirmed that the difference between legal proceeds and proceeds of corruption is not based on their physical attributes but legal interpretation. Consequently, the proceeds of corruption are a good source of investment for banks.[783]

[780] FHC/L/C5/1233/16
[781] FHC/L/C5/1233/16
[782] Interview with Leonard Uzoma, Detective Superintendent, Nigerian Financial Intelligence Unit (Abuja, 20July 2019)
[783] ibid

Next, in another trial involving a former Governor of Ekiti State who is standing trial alongside his company, Spotless Investment Limited on an 11-count charge bordering on money laundering to the tune of N2.2 billion naira. In the course of the trial, one of the prosecution witnesses, an official of Zenith Bank Nigeria, a bank used for money laundering; while being led in evidence narrated to the court how the bank received N1.2 billion naira from an aide of the Governor, Abiodun Agbele.[784] On taking receipt of the money, the former Governor's aide supplied bank accounts into which the money was to be lodged. The imperative question to ask from the court proceedings is that, after receiving such vast sums exceeding their statutory reporting threshold, why did Zenith Bank not report such huge figures to the authorities in the form of filing STR?

According to Leonard, banks in Nigeria are not desirous of filing STRs and complying with other AML measures especially when it involves PEPs, for fear of driving a high net-worth customer to their competitors.[785] They are more interested in protecting the secrecy of their high net worth customers who are usually PEPs than reporting to law enforcement agencies. Leonard alluded to the fact that of the existence some unethical practices carried out by banks, such as to scout for bank deposits from PEPs, and to provide advice to PEPs regarding smurfing/structuring of funds to evade reporting requirement created under AML laws. This practice gives room for the attraction of proceeds of corruption. Banks have built businesses around laundering money for government officials and high net-worth PEPs. It is instructive to note, that Lawrence Akande, a banker who also testified during the trial admitted that his bank solicited patronage from the former Governor. He told the court that 'as a person of high network' his bank sought patronage from him.[786]

A number of other investigations that led to the prosecution of PEPs also indicated a number of banks in facilitating money laundering through non-compliance with reporting STR. For instance, Former Governor Joshua Dariye laundered illicit funds with the help of several Nigerian Banks who facilitated the movement of various sums which represented the proceeds of corruption without filing an STR.[787] The role of Guarantee Trust Bank was also highlighted during the UK trial and conviction of James Ibori through which he laundered millions of pounds. In all these cases, the STR was not instrumental in stopping the movement of proceeds

[784] EFCC V FAYOSE &ANOR [FHC/L/CS/871/2016]
[785] Interview with Leonard Uzoma, Detective Superintendent, Nigerian Financial Intelligence Unit (Abuja, 20July 2019)
[786] FHC/L/C5/1233/16
[787] EFCC V Joshua Dariye [FHC/CR/85/2007]

of corruption, or in helping law enforcement initiate criminal proceedings against corrupt PEPs. Rather, majority of EFCC discoveries into the illicit financial flows of corrupt PEPs were done after receiving petitions from citizens.[788] Despite banking laws designed to flag the movement of large sums of money by both private individuals and public officials, their families and close associates, Nigerian banks rarely help in disrupting money laundering but assist criminals to circumvent AML controls.[789]

5.8.2 EVALUATION REPORTS ON STR SYSTEMS IN NIGERIA

As shown above, the effectiveness of Nigerian STR system is questionable due to financial institutions non-compliance with AML laws. A further compelling evidence on the ineffectiveness of Nigeria's banking institutions poor compliance regime is based on an assessment of Nigerian STR regime by FATF Mutual Evaluation Report.[790] An important mandate of the FATF is the mutual evaluation report of its member jurisdiction. Generally, the analysis of evaluation report plays a significant role in triggering reforms necessary to bring a legal system in line with FATF standards and increase number of STRs filed. A mutual evaluation involves an examination of a jurisdiction's institutional framework, AML laws and regulations.[791] They also review the capacity, implementation and effectiveness of the AML systems to deter money laundering.

A jurisdiction's compliance is given a rating according to four levels namely: Compliant, Largely Compliant, Partially Complaint and Non-compliant. Unsurprisingly, the latest mutual evaluation report rated Nigerian compliance with CDD and STR as non-compliant. This rating was given to Nigeria by FATF due to serious questions as to the effectiveness of Nigerian STR systems because of lack of reports from financial institutions even in the face of illicit financial flows. [792]

According to a 2017 and 2019 CBN Economic Report, major infractions were observed in majority of commercial banks AML systems which fail to meet a number of compliance requirement specified by law. For instance, it was observed that in 2017, banks failed to

[788] Interview with Chile Okoroma, Director of Public Prosecutions, Economic and Financial Crimes Commission (Abuja, 22nd July 2019)
[789] ibid
[790] GIABA,'Mutual Evaluation: NIGERIA' (May 2015) < https://www.giaba.org/media/f/932_7th%20FUR%20Nigeria%20-%20English.pdf> accessed 10 January 2020
[791] ibid
[792] ibid

conduct STR even in situations which clearly qualified for such reports to be filed.[793] The 2019 Economic Report which conducted examinations of twenty seven commercial banks in Nigeria guided by the statutory provisions of the MLPA 2012 also found serious AML deficiencies during the examination, such as outright failure by banks to comply with the STR systems and lack of proper due diligence during PEPs on boarding process.[794] This means that banks fail to take into consideration the fact that PEPs are high risk customers and ignore the law as examined above which requires, inter alia, senior management approval and having a degree of knowledge as to their source of wealth and source of funds.

According to the NFIU, in as much as most commercial banks in Nigeria are not always compliant with filing these reports, the STR systems among banks in Nigeria are still riddled with weaknesses that contribute to its ineffectiveness. From its annual reports made available on the NFIU portal, non-reporting of reportable transactions, late submission of reports, under-reporting of STRs, non-compliance with PEP reporting format all constitute notable weaknesses with the STR regime among commercial banks in Nigeria that gives rise to illicit financial flows passing through their systems.[795] From research and interviews, the effectiveness of the Nigerian STR regime is weak and ineffective given the low number of STR, especially in light of the size of illicit financial flows from Nigeria through financial institutions.

To demonstrate, in 2015, the NFIU received from banks a total of 1,932 STRs. According to the NFIU, apart from the fact that most of the STRs filed by banks were substandard, none of these STR's were PEP related.[796] This is despite the fact that through subsequent investigations, vast sums of public funds were laundered out of Nigeria to foreign jurisdictions by PEPs through commercial banks in Nigeria in 2015. Similarly, in 2014, 2,180 STR's were filed by commercial banks, none of this was PEP related.[797] Likewise, in 2013, 1,064 STR's filed with none relating to PEPs.[798] In 2019, a total of 12,457 STR's were filed by commercial banks in Nigeria, a significant increase from previous years, although majority were in relation to other

[793] Central Bank of Nigeria,' Economic Report for the First Half of 2019' < https://www.cbn.gov.ng/Out/2019/RSD/HALF%20YEAR%202019%20-%2017072019.pdf> accessed 3 February 2020
[794] ibid
[795] Nigerian Financial Intelligence Unit,' Activity Report 2014' < https://www.nfiu.gov.ng/images/Downloads/downloads/activity.pdf> accessed 4 March 2020
[796] Nigerian Financial Intelligence Unit,' Activity Report 2015' < https://www.nfiu.gov.ng/images/Downloads/downloads/activityreport2015.pdf> accessed 4 March 2020
[797] Nigerian Financial Intelligence Unit,' Activity Report 2014' < https://www.nfiu.gov.ng/images/Downloads/downloads/activity.pdf> accessed 4 March 2020
[798] Nigerian Financial Intelligence Unit,' 2013 Progress Report' <https://www.nfiu.gov.ng/images/Downloads/downloads/NFIU-2013-REPORT.pdf> accessed 4 March 2020

economic and financial crimes.[799] This leads to the possible conclusion that the number of STRs, particularly those relating to PEPs does not seem to be consistently proportional to the amount of illicit financial flows taking place in Nigeria.

The lack of action in terms of reporting PEP related STRs by banks leaves one to believe that there is great flexibility in terms of the way banks can choose to enforce AML measures. But this is not the case. The law is explicit that all suspicious transactions, particularly those relating to PEPs must be reported because of the damage these high-risk persons could cause.

Therefore, the problem is not in the law per se, but in its implementation which has been poor. These failings are all intrinsically linked to the reason of ineffectiveness of AML laws in Nigeria. Few would disagree with the basic tenet that the STR system can be said to be effective if a sufficient proportion of the reports made as a result of extant legislation can be shown to contribute to positive law enforcement outcomes.[800] The law in Nigeria requires banks to mandatorily file these reports, however, from the foregoing, banks do not comply with the laws, and STRs rarely leads to positive law enforcement outcomes. Therefore, no matter how cogent the AML laws are, the absence of a strong desire to adhere to the law especially by financial institutions is bound to have a nullifying effect on such laws. It is the absence of compliance that accounts for why funds are stolen and successfully laundered in the first place.

5.9 ENFORCEMENT AND SANCTIONS RELATING TO MONEY LAUNDERING OFFENCES IN NIGERIA

In line with Professor Reuter's two pillar structure, enforcement, sanctions and prosecution are among the components of the enforcement pillar used to deter the facilitation of money laundering. In the context of this research, it also helps the thesis use these components as a yardstick to assess the effectiveness of the Nigerian AML legislation to ascertain if enforcement and sanctions regime serves as a deterrent for those who launder and facilitate money laundering. An assessment of prosecution, as part of the enforcement component in assessing Nigerian money laundering regime for PEPs comes later in this chapter.

By virtue of the MLPA 2012, several government institutions share the role of enforcing money laundering laws and regulations in Nigeria.[801] These institutions/agencies also derive

[799] Nigerian Financial Intelligence Unit,'2019 Annual Report' < https://www.nfiu.gov.ng/Home/DownloadFile?filePath=C%3A%5CNFIU%5Cwwwroot%5Cdocuments%5Car2_F8754Z> accessed 19 December 2020

[800] Miriam Goldby,' Anti-Money Laundering Reporting Requirements imposed by English Law: Measuring effectiveness and gauging the need for reform' (2013) 4 Journal of Business Law 367

[801] Money Laundering Prohibition Act 2012, s21

their enforcement powers from their various enabling Acts creating them. They include the EFCC,[802] NFIU,[803] and the CBN.[804] But the main institution mandated with enforcement of money laundering laws in Nigeria is the EFCC since they also possess prosecutorial powers for money laundering related offences unlike the NFIU and the CBN.

Together, these institutions enforce the money laundering laws. Firstly, by having the mandate to receive and analyse critical financial information from banks in relation to STR's and other AML measures. Secondly, they can demand, obtain and inspect the books and records of financial and designated non-financial businesses and professions to confirm compliance with the provisions of the Act. Lastly, they have the powers to sanction and prosecute anyone culpable of committing the offence of money laundering in Nigeria.[805] Nevertheless, it is one thing for a law to be on the statute books, and it is another to enforce it. Scholars are of the view that the failure of the AML legal framework in combating money laundering starts with the failure of the agencies responsible for enforcing the laws.[806] Nasir also posit that the difficulty in entrenching an effective check on money laundering through banks hinges more on ineffective enforcement.[807]

In view of the prevalence of illicit financial flows from Nigeria, one could be tempted to conclude that Nigeria has been incredibly apathetic regarding the enforcement of money laundering laws particularly against PEPs. From interviews conducted with officials of the EFCC and NFIU with the aim of eliciting and confirming certain facts, such as the prevalence of money laundering by public officials, the enforcement of money laundering laws has been poor. In the course of interviewing Chile Okoroma, a Director of Public Prosecutions attached to the EFCC,[808] he confirmed that there was an incessant upsurge in the rate of money laundering involving PEPs in Nigeria.

According to Chile, although the precise scale is unknown given that money laundering is complex, clandestine and could involve several methods, investigations done by the commission over the years has helped shed light on the enormity of the problem. The reason

[802] Economic and Financial Crimes Commission (Establishment) Act, s6
[803] Nigerian Financial Intelligence Unit Act 2018, s4
[804] Central Bank of Nigeria Act 2007, s51
[805] Money Laundering Prohibition Act 2012, s21
[806] Ogba Ojukwu and Patrick Osode,' A critical Assessment of the Enforcement Regime for Combating Money Laundering in Nigeria' (2020) 28 African Journal of International and Comparative Law 85
[807] Maruf Adeniyi Nasir,' The Viability of Recent Enforcement Mechanism to Combat Money Laundering in Nigeria: An Overview' (2019) 22 Journal of Money Laundering Control 417
[808] Interview with Chile Okoroma, Director of Public Prosecutions, Economic and Financial Crimes Commission (Abuja, 22nd July 2019)

given was that most of the individuals who vie for elective offices are not moved by the desire to serve, but to have access to public funds and so you have a political atmosphere where more public officials engage in embezzling public funds and laundering same to foreign jurisdictions.[809]

Furthermore, on the issue of enforcement of AML laws, the interviewee responded by stating that AML laws are being enforced but public officials still find ways to commit the offence. This is so because, due to the complex nature of money laundering, PEPs device several means of aiding them launder the proceeds of corruption, such as hiding their identities under corporate structures, as well as utilising the services of close associates and intermediaries such as senior lawyers to hide the proceeds of corruption. These enforcement challenges have been made worse by the fact that legal practitioners in Nigeria who often help PEPs launder proceeds of crime by virtue of their legal services are exempted from complying with the MPLA as a regulated sector who should also be filing certain reports when they suspect money laundering.

These new techniques make it challenging for the commission to effectively enforce the law as it is extremely difficult to trail the ultimate beneficial owners of companies who possesses the same power of a natural person to transact with financial institutions.[810] More importantly, confirming what this thesis discovered from research, Chile stated that one of their greatest obstacles or challenges faced in successfully enforcing the AML laws is banks complicity in assisting PEPs launder the proceeds of corruption and their lack of compliance with their statutory responsibilities. Most banks do not keep record of their transactions with PEPs or even refuse to share vital information in a timely manner to assist the commission prevent the illegal transfer of state resources. Without this information, law enforcement would not be in a position to act swiftly regarding transactions that are suspicious or that conceal money laundering activities. These culminates in the poor number of prosecutions and convictions for money laundering which does not seem to be proportional to the amount of illegal financial activity taking place among PEPs. In order to be successful in money laundering cases in court, evidence-based prosecution is needed and this vital evidence comes in the form of financial information from bank through the filing of STR's.[811]

Disclosures by the interviewee revealed that other challenges which hampers enforcement has been the issue of insufficient funding, training and capacity of the commission to effectively

[809] ibid
[810] ibid
[811] ibid

discharge its mandate.[812] This is the era of electronic information and technological innovation which provides PEPs and other criminals with new opportunities for money laundering. It also provides a novel means of combating the problem of financial crime. Evidence gathering through the use of social media affords law enforcement with a potential effective supplement to more labour intensive and time-consuming operations. It follows that Nigeria must develop capacity building, enhancing the skills of investigators through staff training and ensure that the commission has the technological ability to pursue cases of money laundering conclusively.[813] Proper funding is needed for the investigation and prosecution of financial crime which is capital intensive and requires a considerable amount of resources. This is because the dynamics of money laundering requires law enforcement to be adequately equipped to be able to handle the complexities of money laundering activities.[814] This affects enforcement as there is little incentive and operational funds available to fight money laundering.

Asides these contributory factors that pose some challenges to the commission which hinders proper enforcement of the AML laws in Nigeria, other factors that also have significant effect on the enforcement of AML laws on PEPs in Nigeria includes: Lack of independence of the commission which arises from political interference from external forces, as well as the issue of selective prosecution. To find out, this thesis tried to elicit certain information from Precious Onyeneho, an investigating officer with the commission on the impact of political interreference on the enforcement of AML laws against PEPs. [815]

Precious stated that after conducting investigations linking certain PEPs to money laundering, charges are brought, however, in most cases, involving PEPs, the government through the Attorney General and Commissioner for Justice who is a political appointee discontinues cases of PEPs accused of money laundering and other crimes by issuing a nolle prosequi.[816]

By the provision of s174 of the Nigerian Constitution, the Attorney General of the Federation (AGF) has the power to

[812] ibid
[813] ibid
[814] ibid
[815] Interview with Precious Onyeneho, Investigating Officer, Economic and Financial Crimes Commission (Abuja, 22nd July 2019)
[816] ibid

a. Institute and undertake criminal proceedings against any person before any court in Nigeria
b. To take over and discontinue any such proceeding that may have been instituted by any authority
c. To discontinue at any stage before judgment is delivered any such proceedings which may have been instituted by any person or authority.[817]

In exercising this power, the AGF is required to have regard to the public interest, the interest of justice and the prevention of the abuse of the legal process.[818] The courts have held that the powers of the AGF as entrenched in the Constitution is absolute and not subject to review by a court of law.[819] This wide discretion has often been abused on several occasions. Although the interviewee did not give out names, a recent example brings to fore how these wide powers has been utilised to discontinue money laundering cases against PEPs. For instance, in the trial of a former Governor of Gombe Sate who the commission in exercising its prosecutorial powers preferred a 21-count charge of misappropriation and laundering of N25billion (naira) while in office as Governor.[820]

After years of prosecution, the commission suddenly withdrew from the trial in June 2019 to allow the AGF take over and discontinue the case without explanation. It is believed that the discontinuation of the trial was politically motivated. In exercising such powers, the AGF is required to have due regard to the public interest, the interest of justice and to prevent abuse of legal process.[821] Discontinuing the trial of a PEP accused of stealing such vast sums of public funds does seem to be done in the public interest, nor in the interest of justice. Rather, it frustrates the enforcement of AML law against PEPs.

Additionally, there are also circumstances where existing law inhibit proper enforcement of AML laws against PEPs in Nigeria. This has been touched upon in a general context in chapter two and three,[822] involving the immunity granted to most public officials from prosecution during their tenure in office. On this, the thesis through interviews sought the views of Precious who confirmed that immunity granted to most public officials frustrates the commission's

[817] Constitution of the Federal Republic of Nigeria 1999, s174
[818] Constitution of the Federal Republic of Nigeria 1999, s174(3)
[819] Ezomo v Attorney General Bendel State [1986] 4 NWLR 448
[820] Economic and Financial Crimes Commission,' AGF Took over Goje's N5bn Corruption Case: Evoked Nolle Prosequi' (July 20, 2019) < https://efccnigeria.org/efcc/news/4615-agf-took-over-goje-s-n5bn-corruption-case-evoked-nolle-prosequi> accessed 25 February 2020
[821] Constitution of the Federal Republic of Nigeria 1999, s174 (3)
[822] Discussed extensively in Chapter 2

efforts to combat money laundering, the same individuals who indulge in corruption related money laundering in Nigeria. On various occasions, the commission could have credible intelligence on incumbent Governors who launder the proceeds of corruption. However, although investigations could be carried out, charges could not be brought because of the immunity granted to the holders of such office. At the point of exiting power and losing immunity, it becomes much difficult to enforce such laws on them as evidence could be lost and witnesses become unavailable.

This thesis agrees with dissenting voices who stand opposed to immunity clause under the Nigerian Constitution, because it has often been manipulated to promote injustice, impunity and corruption. Immunity helps corrupt PEPs by over protecting them from prosecution even in the face of committing corruption and money laundering offences with public funds while in office. This is contrary to the legal framework of AML legislations. This thesis submits that until these challenges are addressed, the enforcement of the laws on AML especially against PEPs is not likely to thrive; and in the grand scheme of things, the fight against money laundering is unlikely to succeed. Based on the foregoing, the AML enforcement in Nigeria has proven to be weak and ineffective.

5.9.1 *Sanctions:*

As money laundering becomes more complex and sophisticated, financial institutions are increasingly faced, first, with the risk associated with money laundering, second, the need to comply with AML laws and ultimately, with the risk of becoming sanctioned as a result of participating, or unintentional facilitation of money laundering.[823] While some banks will be willing to comply with the AML laws, others will not for various reasons, leaving a window for money launderers to operate. In view of this, there is the need for regulators and law enforcement to act against erring banks. In the past few years, fines and settlements have been paid out by a number of global banks for breaching AML rules and allowing their institutions to be used for money laundering. For instance, FinCEN imposed a fine of twenty-five million dollars, the largest penalty ever brought against a US financial institution for wilful violations of the AML programme and suspicious activity reporting requirement. Riggs allowed several transactions involving several corrupt governments to go through in total disregard for its AML

[823] Nobanee Haitham,' Anti-money laundering disclosures and banks performance' (2018) 25 Journal of Financial Crime 95

obligation.[824] Likewise, the Financial Conduct Authority, fined Guarantee Trust Bank (UK), a subsidiary of a Nigerian bank five hundred and twenty-five thousand pounds for failings in its AML controls and its handling of the proceeds of crime.[825]

The FATF recommends under Recommendation 35 that countries should ensure that there is a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, available to deal with natural or legal persons that fail to comply with AML requirements. Sanctions should be applicable not only to financial institutions, but also to their directors and senior management.[826] By virtue of s6(9) MLPA 2012, financial institutions who fail to file STRs when they suspect money laundering are liable on conviction to a fine of one million naira for each day during which the offence continues.[827] As seen from examples provided, the banking industry in Nigeria has somewhat proved to be inherently complicit in facilitating money laundering among PEPs in Nigeria, thus, necessitating deterrent action.

With the prevalent nature of vast illicit financial flows aided by financial institutions in Nigeria, there is the contention that the sanctions and punishment regime as created by law has not been stringent enough to serve as a deterrent against financial institutions who fail to comply with AML rules by allowing their institutions to be used to launder the proceeds of corruption. There is literature to the effect that sanctions will succeed as deterrence if the outcome of such sanctions outweigh the benefits derivable from non-compliance.[828] In Nigeria, the benefits of violation seemingly outweighs the cost or fine for non-compliance. Most banks do not see any commercially justifiable reasons to comply with the AML laws in Nigeria. The penalties and sanctions regimes even seem to be incentives for violation of anti-money laundering laws in Nigeria.

In accordance with the MLPA, banks are simply asked to pay a fine one million naira (roughly two thousand three hundred pounds) for each day during which the offence continues compared

[824] Financial Crimes Enforcement Network,' FinCEN Assesses $25 million Civil Money Penalty Against Riggs Bank' (May 13, 2004) < https://www.fincen.gov/news/news-releases/fincen-assesses-25-million-civil-money-penalty-against-riggs-bank-na> accessed 17 April 2020

[825] Financial Conduct Authority,' FCA fines Guaranty Trust Bank (UK) Ltd 525,000 for failures in its anti-money laundering controls' (September 2013) <https://www.fca.org.uk/news/press-releases/fca-fines-guaranty-trust-bank-uk-ltd-£525000-failures-its-anti-money-laundering> accessed 8 April 2020

[826] FATF,' The FATF Recommendations 35' (February 2012) <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 31 October 2018

[827] Money Laundering Prohibition Act 2012, s6(9)

[828] Mitchell Rita,' Building an Effective US-UK Sanctions Compliance Programme: What are the Key Components?' (2019) 3 Journal of Financial Crime 171

to what they stand to gain from facilitating or aiding corrupt PEPs launder millions of dollars. The case of Mrs Jonathan illustrates this point as it is unlikely that the sanctions regime as provided by the MLPA will serve as a deterrent from helping her launder over twenty-two million dollars. In any event, the usual occurrence is that, rather than prosecuting and sanctioning the enablers of money laundering, very often law enforcement and the prosecution prefer having them as witnesses in various money laundering cases before the courts as seen in the cases assessed above.

It must be remembered that based on FATF recommendations, countries are to ensure that they have effective and dissuasive sanctions for natural and legal persons who fail to comply with AML laws. Flowing from this, and having regard to the Nigerian sanction's regime and international best practices, it is this thesis submission that the Nigerian sanctions regime for non-compliance is tenuous. The sanctions provided by law do not fit the level of damage which could be caused by aiding PEPs launder public funds.

Juxtaposing the sanctions provision of the MLPA with that of other jurisdictions which could serve as models for the enforcement and punishment of money laundering, it shows that the MLPA's sanction is too lenient and does not serve as a deterrent to banks and their officers who help corrupt PEPs launder the proceeds of corruption. For instance, in the United Kingdom, under the Proceeds of Crime Act, those in the regulated sector such as banks who are guilty of not filing STR or who do not make the required authorised disclosure to enforcement and regulatory authorities as soon as practicable when they suspect money laundering are liable on summary conviction for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both,[829] and on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or both.[830] This seems a more dissuasive sanction in terms of deterrence for officers of banks engaging in money laundering than that provided by the MLPA. The unsatisfactory money laundering controls are still rife among Nigerian banks, which suggest that sanctions are not having the desired effect.

It is this thesis position, that while prosecuting those suspected of stealing public funds is necessary, law enforcement should also focus more attention on the enablers of money laundering. PEPs cannot do it alone, they are often assisted by institutions or intermediaries to circumvent AML control mechanisms. It is the officers of the banks that enable those in power

[829] Proceeds of Crime Act 2002, s334
[830] Proceeds of Crime Act 2002, s334 (2) (b)

to continue to steal and divert public funds to the detriment of Nigerians who cannot afford such diversion of public funds to private pockets. Therefore, due to the frequent involvement of officers of financial institutions in Nigeria in facilitating money laundering of PEPs, it is apposite that the MLPA be amended to include more stringent punishments that fits the crime, such as up to a year in prison on summary conviction; and on conviction on indictment, such officer be imprisoned for a term of not less than seven years but not more than fourteen years imprisonment. This would send a strong message that officers of such banks would face the same culpability as a corrupt PEPs seeking to launder public funds. Therefore, adequate and stringent sanctions for non-compliance with money laundering standards is essential in the establishment of efficient reporting of money laundering activities in Nigeria.

5.9.2 *PROSECUTION OF PEPS AND THE JUDICIAL PROCESS UNDER THE CRIMINAL JUSTICE SYSTEM IN NIGERIA*

Another critical component of the AML regime which could be used in assessing the overall effectiveness in terms of success or failure of the law in Nigeria is in the area of prosecutions and convictions of PEPs charged with corruption related money laundering offences in Nigeria. Not only has the enforcement and sanctions regime been poor, the prosecution and conviction of PEPs charged with money laundering and other related offenses has been significantly low compared to the high number of illicit financial flows by PEPs in Nigeria.

There appears to be a consensus on the fact that the pursuit of effective enforcement of laws on money laundering and the punishment of offenders who commit the offence of money laundering remains one of the best weapons for deterrence.[831] At the same time, several international legal instruments on money laundering supports facilitating the investigation, criminalisation and prosecution of money laundering offences.[832] This emphasis perhaps reflects the popular view that the most effective way of combating money laundering is the use of the criminal law.[833] In the context of AML, the main role of the criminal law in combating money laundering is to prosecute offenders, as well as the confiscation and forfeiture of criminal assets if found guilty.

[831] Ogba Ojukwu and Patrick Osode,' A Critical Assessment of the Enforcement Regime for Combating Money Laundering in Nigeria' (2020) 28 African Journal of International and Comparative Law 85
[832] United Nations Convention Against Corruption, Article 23; United Nations Vienna Convention, Article 3 (1) (b)
[833] Hatchard (n196) 147

Yet, in practice, the number of successful prosecutions and convictions of corrupt PEPs charged with money laundering offences using the criminal law in Nigeria is reportedly low, and does not seem to be proportional to the huge number of PEPs alleged by law enforcement institutions to have stolen public funds and laundered same through complicit financial institutions. To successfully prosecute those who indulge in criminal diversion of public funds and money laundering, it is essential to have an efficient and robust criminal justice system for the administration of justice. This is regarded by many as fundamental because the investigation of crime, arrest of alleged offenders, their trial and punishment occur within the sphere of the criminal justice system.[834]

One of the themes that emerged from interviews with law enforcement personnel involved in the investigation and prosecution of money laundering, was the view that there are significant challenges associated with prosecuting PEPs for money laundering under the Nigerian criminal justice system. These challenges include delays in the dispensation of justice, manipulation of the judicial process by defence lawyers and lack of trained judicial officers in handling money laundering and financial crime related matters.[835] These challenges hamper and frustrate the prosecution of PEPs for money laundering offences in Nigeria.

Furthermore, delays have reportedly become an attribute of the Nigerian criminal justice system that has perverted the course of justice in prosecution of PEPs for money laundering offences.[836] Money laundering cases involving PEPs linger for such a long time that the purpose of achieving deterrence and recovering laundered public funds is lost as cases drag on indefinitely, while PEPs facing serious charges are left to use the proceeds of such crime to frustrate the judicial process.[837]

It is usually an onerous task to successfully prosecute PEPs because of the deliberate obstruction of the court process by defence lawyers representing PEPs who rely on delay tactics to either truncate the trial process or completely undermine it. Legal strategies such as the filing of frivolous applications, applying for questionable injunctions are all sought by defence lawyers who do not plan to provide defence on the merit of the case, but on technicalities and

[834] Bright Bazuaye and Desmond Oriakhogba,' Combating Corruption and the Role of the Judiciary in Nigeria: Beyond Rhetoric and Crassness' (2016) 42 Commonwealth Law Bulletin 125

[835] Interview with Chile Okoroma, Director of Public Prosecutions, Economic and Financial Crimes Commission (Abuja, 22nd July 2019)

[836] Nasir Maruf Adeniyi and Others,' Money Laundering: The Paradox of Deterrence Mechanism' (2016) 11 International Journal of Business, Economics and Law 45

[837] Interview with Chile Okoroma, Director of Public Prosecutions, Economic and Financial Crimes Commission (Abuja, 22nd July 2019)

other techniques to delay trial.[838] It is not unusual in Nigeria for corrupt PEPs to suddenly develop significant physical or mental health problems that frustrates the trial of their case. Preliminary objections are usually employed to delay trials.[839] This is so because with preliminary objections, once raised, should be determined first before the courts can take further steps in the proceedings. Very often, the ruling on that issue takes anywhere from six months to a year after the commencement of the main action. If overruled, the appeal process may take years before the issue is resolved.

The practice of manipulating the legal system to truncate the trial of PEPs was condemned by the Supreme Court in *Joshua Dariye v FRN.*[840] In this case, the appellant who was charged with laundering N1.2 billion naira while he was Governor of Plateau State filed a preliminary objection against the jurisdiction of the trial court. Although the application was dismissed by both the trial court and Court of Appeal, the trial was stalled for 8years because of further appeals to the Supreme Court. In dismissing the appeal at the Supreme Court, the court condemned the delay tactics as an unfortunate practice in the fight against financial crime in Nigeria.

These loopholes in the law and procedure has enabled defence lawyers to become masters in dilatory tactics making it difficult to reach closure of any kind in many money laundering cases. Judicial officers have on various occasions, allowed lawyers use these obstacles which weigh favourably for PEPs in money laundering prosecutions.[841] Judges have granted applications restraining law enforcement from investigating and prosecuting PEPs for money laundering.[842] There have been scores of former Governors, Ministers and other PEPs whose money laundering trials have stalled in different courts across Nigeria and dragged on for years with little or no progress made.

For instance, Former Governor Saminu Turaki of Jigawa State has been standing trial for more than 10 years. He is being charged on a 32-count charge bordering on corruption related money laundering of N36 billion public funds.[843] Former Governor Gbenga Daniels of Ogun State,[844] and Chimaroke Nnamani of Enugu State have been standing trial for misappropriation of public

[838] ibid
[839] Adeniyi (n836)
[840] (2015) 10 NWLR 1267
[841] Interview with Chile Okoroma, Director of Public Prosecutions, Economic and Financial Crimes Commission (Abuja, 22nd July 2019)
[842] Bazuaye and Oriakhogba (n819)
[843] *FRN V Saminu Turaki* [FHC/ABJ/CR/86/07]
[844] *FRN v Gbenga Daniel* [AB/EFCC/02/11

funds and money laundering offences for more than 10 years.[845] Governor Danjuma Goje was being prosecuted for corrupt practices and money laundering offences before his case was discontinued abruptly by the incumbent Attorney General Abubakar Malami.[846] Former Governor Alao-Akala of Oyo has been standing trial for more than 10 years on charges which border on corrupt enrichment and money laundering of N11.5 billion while in office.[847]

Former Governor Rasheed Ladoja of Oyo State is facing trial for alleged misappropriation of funds and laundering the sum of N4.7 billion while in office.[848] Late Former Governor of Nasarawa State, Aliyu Akwe Dome was standing trial on a 10-count charge preferred against him for laundering N8 billion state funds before he became deceased.[849] It is instructive to note that these cases which commenced more than a decade ago have not been concluded due to interlocutory appeals filed to Supreme Court arising from the trials. A host of others PEPs which could not be included for space have been standing trial for money laundering and other related matters without any progress.[850]

In reality, it was anticipated that the introduction of the MLPA 2012 as examined earlier would lead to a greater number of successful prosecutions of PEPs involved in money laundering offences because of its improved provisions for prosecuting money laundering offences. This is also complemented by the EFCC Act which empowers judges to give money laundering cases accelerated hearing and to adopt measures to avoid unnecessary delays.[851] In addition, the Administration of Criminal Justice Act 2015 which is intended to fast track criminal trials by prohibiting delay tactics are all statutory legislations that should enable speedy trials and dispensation of justice in corruption related money laundering cases.[852]

Despite these provisions, it takes years for cases to be successfully prosecuted and this has led to significantly low conviction rates in cases involving PEPs. That said, there has been some high-profile PEPs convicted for money laundering. In terms of numbers, the sum total of convicted PEPs on corruption and money laundering charges is underwhelming. Since the promulgation of the MLPA 2012, only 5 high profile cases have been successfully concluded

[845] *FRN v Chimaroke Nnamani* [FHC/L/09C/2007
[846] *FRN v Alhaji Danjuma Goje* [FHC/GM/CR/33/2011
[847] *FRN v Otunba Alao-Akala* [1/5EFCC/2011]
[848] *FRN v Rasheed Ladoja* [FHC/L/336C/08
[849] *FRN v Aliyu Akwe Doma* [FHC/LF/CR/34/2011]
[850] Such as Nenadi Usman, former minister of Finance standing trial on a 17-count charge of laundering N4.6 billion public funds. Others include Mohammed Adoke, former AGF also standing trial for ML related offences.
[851] Economic and Financial Crimes Commission (Establishment) Act 2004, s19 and 40
[852] Administration of criminal Justice Act 2015, s396

out of over 100 PEPs arraigned for money laundering and related offences;[853] with just 3 convictions secured in 13 years despite widespread cases of PEPs engaging in money laundering.

They include the convictions of former Governor of Abia State, Orji Uzor Kalu and his companies who were convicted in December 2019 and sentenced to 12years imprisonment after 12 years of trial for criminal diversion of public funds and money laundering.[854] However, the Supreme Court of Nigeria in a unanimous judgment on May 8, 2020, overturned the judgment of a Federal High Court which had earlier convicted the former Governor on the ground that, Justice Mohammed Idris, who delivered the judgment was already sworn in as a Justice of the Court of Appeal at the time of the judgment and could not act in the capacity as a High Court judge.[855] The Supreme Court directed the case to be reassigned for trial de-novo.

Also, former Governor of Plateau State, Joshua Dariye, was convicted and sentenced to 10years in prison for misappropriation of nine million dollars of public funds and money laundering.[856] In the same vein, former Governor of Taraba State, Jolly Nyame was convicted after being found guilty of criminal diversion of public funds and money laundering.[857] The other two cases involving ex-Governors were ended after the EFCC entered a plea bargain with the defendants.[858]

The other high-profile conviction of a Nigerian PEP occurred in a foreign jurisdiction. This was the case of former Governor of Delta state, James Ibori, who was convicted and sentenced to 13 years in prison after pleading guilty to ten counts of money laundering to the tune of two hundred and fifty million pounds at London's Southwark Crown Court.[859] In light of the assessment of prosecutions of PEPs brought under the MLPA 2012 and other relevant legislations prohibiting corrupt practices, this thesis takes the view that the legal frameworks

[853] Economic and Financial Crimes Commission,' High Profile Matters Being Prosecuted by EFCC' < https://efccnigeria.org/efcc/images/HIGH%20PROFILE%20CASES%20BEING%20PROSECUTED%20BY%20THE%20EFCC%20FOR%20%20%20%20%20%20%20AG.pdf> accessed 5 May 2020; EFCC,' Ongoing High-profile cases 2007-2010' < https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Ibori_Nigeria_EFCC_High_Profile_Cases.pdf> accessed 5 May 2020

[854] *FRN v Orji Uzor Kalu* [FHC/ABJ/CR/56/07

[855] *Orji Uzor Kalu v Federal Republic of Nigeria* [SC/622c/2019]

[856] *FRN v Joshua Dariye* [FCT/HC/CR/81/07

[857] FRN v Jolly Tevoru Nyame [FCT/HC/CR/82/2007

[858] Bright Bazuaye,' Combating Corruption and the Role of the Judiciary in Nigeria: Beyond Rhetoric and Crassness' (2016) 42 Journal Commonwealth Law Bulletin 125

[859] *R v Ibori* [2013] EWCA Crim 815

have proved to be inadequate and ineffective in deterring PEPs from committing corruption related money laundering offences in Nigeria.

5.10 IS THE CRIMINAL LAW SUFFICIENT IN THE PROSEUCTION OF CORRUPT PEPS IN NIGERIA?

Crucially, this thesis takes the stand that the challenges in the prosecution of PEPs in Nigeria calls into question the propriety of utilising the conventional criminal law as the main tool to combat money laundering as currently practiced in Nigeria. Firstly, money laundering by its very nature is difficult to prove beyond reasonable doubt due to its complexities. As demonstrated in previous chapters, the complex nature of money laundering and the sophisticated techniques and strategies employed by PEPs to obscure the proceeds of corruption results in cases that are extremely complex and difficult to investigate and prosecute.

As seen in *Udeogu v FRN* earlier discussed, proving money laundering is a herculean task as the prosecution is required to prove a predicate offence before the money laundering aspect can be established. In other words, its criminality derives from a predicate crime which has already taken place prior to the incidence of the money laundering crime being detected. In proving the money laundering offence in Nigeria, the prosecution must prove that the accused converted or transferred money or property; that the conversion was done with the aim of concealing or disguising the illicit origin of the funds, and that the funds or property which was the subject of the transaction was as a matter of fact the proceeds of crime or unlawful activity.[860]

Prosecutors would have to consider the challenges in establishing specific elements of both a predicate offence (such as criminal diversion of public funds) and the money laundering offence to the required standard of proof. It must be remembered that money laundering cases require thorough investigation in order to obtain credible evidence. This is usually obtained from financial institutions as proof of evidence in a money laundering trial. Apart from the fact that banks in Nigeria seldom comply with the law by providing timely information to law enforcement, the investigative machinery and capacity of law enforcement agencies in Nigeria is not robust enough to conduct proper investigations to detect highly sophisticated methods employed by PEPs in concealing and laundering the proceeds of corruption. Also, as elicited from interviews, the investigation of money laundering cases raises funding issues for law enforcement in Nigeria.

[860] *Udeogu v FRN* (2016) 9 NWLR 27

Secondly, the likelihood of conviction has to be considered. By virtue of the conviction-based forfeiture practiced in Nigeria, a conviction must be secured prior to triggering confiscation or forfeiture orders.[861] This means that if a PEP gets convicted, the criminal assets are forfeited to the Federal Government of Nigeria. On the other hand, if not convicted, the assets revert back to the PEP.[862] However, the fact that a PEP escapes conviction does not necessarily mean that there was no prima facie evidence to secure a conviction. But the nature and challenges inherent in the Nigeria's criminal justice system makes it extremely difficult to obtain convictions in majority of cases involving high net-worth PEPs charged with money laundering offences.

Convictions are often difficult to secure as money laundering cases involving high net-worth PEPs tend to take so much time, and have often carried a very low prospect of conviction. In this respect, a corrupt PEP may benefit from the lengthy delays in the dispensation of justice, which could lead to possible dissipation of assets. Therefore, an accused PEP found guilty of stealing and laundering public funds may escape conviction; and much of the deterrent effect that the perceived likelihood of prosecution might provide could be lost and the proceeds of corruption retained to the detriment of Nigerians.

Although technicalities should not be an obstacle in achieving justice in corruption related money laundering cases or any other case, clinging onto the conventional criminal prosecutions is no longer feasible in combating corruption related money laundering in Nigeria. There is the problem of evidence gathering. Without evidence, law enforcement would find it challenging to prosecute PEPs even in the obvious cases of corrupt enrichment and laundering of proceeds of corruption. Presumption of innocence and standard of proof are all principles that confer undue protection to corrupt PEPs and expose the administration of criminal justice to manipulation in Nigeria.

For the reasons advanced, and to address these weaknesses which would help enhance and reinforce the current legal framework in the disruption of money laundering especially among PEPs in Nigeria, this thesis advocates for the introduction of the Unexplained Wealth Order (UWO) in Nigeria. The UWO is considered a more focused and robust legal framework underpinned by civil law administration which is in line with civil based forfeiture regimes. Under this regime, concentration of effort is expended on confiscating the proceeds of

[861] Economic and Financial Crime Commission Act 2004, s30
[862] Economic and Financial Crime Commission Act 2004, s33

corruption or confiscating and forfeiting assets acquired with the proceeds of corruption; as opposed to arraigning offenders and waiting for years to secure a conviction which is often elusive. This can be a more persuasive and pragmatic approach in solving the ubiquitous nature of money laundering by PEPs in Nigeria.

Confiscation and forfeiture orders are the primary means through which criminals maybe deprived of the proceeds of crime. The eventual goal being to deprive them of the use of such assets and to disrupt and deter further criminal activity.[863] The ultimate aim of corrupt PEPs and money launderers is the enjoyment of ill-gotten funds or assets. It is not uncommon in Nigeria to see PEPs and other public officials owning assets that are way beyond their known legitimate earnings. The surfacing of unexplained wealth raises the suspicion as to the legitimacy of the sources of such wealth.[864]

[863] Sherene Alicia Murray-Bailey,' Money Laundering control: The missing link in Trinidad and Tobago' (2019) 22 Journal of Money Laundering Control 694
[864] Criminal Finances Act 2017, s1 (UK)

5.11 CONCLUSION

To sum up, the crux of this chapter, ab initio, has been to examine and assess the effectiveness of the Nigerian AML legal and institutional framework in detecting and deterring money laundering by PEPs in Nigeria. In seeking to combat money laundering, Nigeria enacted AML laws modelled on a series of international standards. The chapter examined Nigeria's AML legal, regulatory and institutional frameworks and finds that they are satisfactory when tested with international standards from FATF and other international legal instruments. This is because they have satisfactory provisions for the prohibition of the laundering of the proceeds of crime, as well as highlighting the obligations of financial institutions and designated non-financial institutions in preventing money laundering.

However, the chapter also finds that Nigeria suffers from profound difficulties in implementation and enforcement of its AML regime. Generally speaking, a successful AML regime should result in the relentless disruption of money laundering activities, reveal illegitimate sources of funds, trigger investigations and possible prosecution and recovery of assets from those responsible for the misappropriation and conversion of public funds. It would equally dissuade those seeking to undertake money laundering activities from doing so. But the continued prevalence of money laundering, especially by PEPs exemplifies the weakness and lack of enforcement of AML laws in Nigeria.

Although a considerable number of AML scholars contest the effectiveness of the Nigerian AML regime, the strength of this research was in its utilisation of interviews with stakeholders of the AML industry in Nigeria, notably, the EFCC and NFIU. The research was key in confirming some gaps in the enforcement and implementation of AML laws in Nigeria with respect to PEPs. After a careful examination of these laws, the chapter progressed by attempting to determine the effectiveness of the extant AML regime in detecting and deterring the laundering of the proceeds of corruption.

The chapter focused on financial institutions (banks) because they are used frequently by corrupt PEPs when introducing the proceeds of corruption to be laundered. Financial institutions act as the first line of contact or defence in facilitating or disrupting money laundering through several measures as promulgated under extant AML laws in Nigeria. But the findings of this thesis are that the involvement of banks in money laundering activities of PEPs in Nigeria and their non-compliance with AML laws are largely part of the reasons for the ineffectiveness of the AML regime in Nigeria. This was substantiated with several cases of

financial institutions failure to maintain effective compliance in the form of filing timely STR's which notifies law enforcement of potential money laundering activities.

The ability to detect and report suspicious transaction reports which is arguably the most fundamental requirements in the AML regime has been poor in Nigeria. Usually, the moment huge and suspicious large cash transactions are positively detected, especially when they involve high risk customers like PEPs, it should be reported mandatorily. The chapter was able to show that banks do not report huge transactions conducted by PEPs through their institutions to law enforcement for expedient resolution. This failure in credible reporting by the banks have been a major pitfall for AML regime in Nigeria. Yet, the sanctions and punishment regime as created by law for failing to comply has not been stringent or dissuasive enough to serve as a deterrent against banks who facilitate the commission of money laundering offences. The benefit of violation seemingly outweighs the benefit derivable from non-compliance.

Furthermore, the analysis of expert interviews together with research from the literature conducted for this research work revealed some weaknesses and challenges militating against proper enforcement and implementation of AML laws in Nigeria. This was conformed and attributed to a diverse number of contributing factors such as weak law enforcement institutions, an ineffective criminal justice system, and lack of a comprehensive legal framework. Additionally, the chapter revealed that there are circumstances where existing law inhibit the effectiveness of prosecutions by law enforcement, such as the power of the AGF, a government appointee to discontinue money laundering cases, as well as the immunity from prosecution granted to most public officials in Nigeria.

Successful prosecution of PEPs and their subsequent inability to return to public office, followed by confiscation and forfeiture of assets acquired with the proceeds of crime is a plausible option. However, in practice there are challenges associated with prosecuting PEPs under the criminal justice system in Nigeria. These challenges were discussed and includes delays in the dispensation of justice, especially in high profile cases and the manipulation of the judicial process by defence lawyers. These challenges hamper and frustrate the successful prosecution of PEPs for money laundering offences and the recovery of the proceeds of corruption. PEPs are individuals who have the resources to drag cases indefinitely and perpetually.

All things considered, the chapter finds that the legal frameworks and indeed the criminal law approach is insufficient to prevent and combat the problem of money laundering by PEPs in

Nigeria. An assessment of the effectiveness of these frameworks targeting PEPs in Nigeria causes this thesis to conclude that the AML legal frameworks in Nigeria are ineffective and does not in any significant way deter potentially corrupt PEPs from engaging in corrupt practices. The thesis in the next chapter proposes a different approach to asset recovery built around civil law which complements and increase the effectiveness of existing AML regime built around the criminal law in Nigeria.

Preventing money laundering by engaging in serious and effective asset recovery regime which does not require a criminal conviction before assets are recovered from PEPs would be an effective response to the prevalence of corruption related money laundering by PEPs. In civil regimes, a PEP suspected of acquiring assets or retaining the proceeds of corruption must prove, on the civil standard of proof that such property was not obtained with the proceeds of corruption.

Grand corruption may constitute a significant proportion of the resources of states. The resources stolen by public funds are ultimately used to acquire assets such as real estate and other valuable assets. Recovering such criminal assets which is above the known legitimate income of a PEP suspected to have stolen public funds would be an effective approach in combating corruption related money laundering in Nigeria; because it makes it difficult for PEPs to profit from the proceeds of corruption. The adoption of this approach in Nigeria will invariably improve the recovery of the proceeds of corruption which can help spur development for the benefit of Nigerians.

CHAPTER SIX

TOWARDS A NEW LEGAL MODEL IN THE FIGHT AGAINST GRAND CORRUPTION AND MONEY LAUNDERING IN NIGERIA

6.1 INTRODUCTION

The previous chapter has extensively evaluated and assessed the effectiveness of various AML legislations targeting corrupt PEPs in Nigeria. The chapter concluded by affirming that AML legal frameworks in Nigeria are ineffective and does not in any significant way deter corrupt PEPs from engaging in corrupt practices and money laundering activities. This conclusion, however, does not mean that every aspect of the AML laws as they are today in Nigeria are not working and therefore the AML regime should be abandoned altogether. Rather, this chapter argues for a paradigm shift in approach to corruption related money laundering offences, transitioning from a reactive conviction-based asset confiscation to a proactive non-conviction based civil forfeiture regimes. It is pertinent to state that the arguments in the course of this chapter does not intend to decriminalise money laundering, or delegitimise any of the extant conviction based legislative provisions. In practice, a combination of criminal sanctions and civil remedies is often the most effective strategy for seeking to recover the proceeds of crime.[865]

This chapter presents legal frameworks that could help reinforce the law and practice relating to financial crime in Nigeria. The colossal scale of grand corruption and money laundering perpetuated in Nigeria by PEPs has continuously created a huge governance deficit that has in turn, created negative consequences which have worsened the socio-economic and political situation in Nigeria.[866] These thefts divert valuable public resources from addressing abject poverty and fragile infrastructure present in Nigeria. Consequently, Nigeria is plagued with the risk, threats and damage resulting from the misappropriation and laundering of public funds by corrupt PEPs. These risks have long been an inherent challenge in Nigeria's political system, thereby affecting the nation in an adverse manner.[867]

[865] John Hatchard, *Combating Money Laundering in Africa: Dealing with the Problem of PEPs* (Edward Elgar Publishing 2020) 182

[866] Abdullahi Shehu,' Key Legal issues and challenges in the Recovery of the Proceeds of Crimes: Lessons from Nigeria' (2014) 3 International Law Research 1

[867] Rawlings Akonbede,' Understanding Corruption in Nigeria and its Implications to National Security and Sustainable Development' (2013) 10 Journal of Humanities and Social Sciences 60

To put that into context, it is not unusual to see individuals who enter public service from humble beginnings emerge tremendously wealthy within a short period of time as a result of misappropriation of public funds. The prevalence of these acts perpetuated by public officials in Nigeria has attracted significant local and international attention due to the fact that these acts have led to a developmental problem of the greatest magnitude in Nigeria. Nigeria currently experiences difficulties in implementing effective AML regimes. From research conducted in this thesis, Nigeria is presently shackled by inadequate and outdated legislations. In this regard, a significant factor undermining the effectiveness of AML regimes in Nigeria is the difficulty in prosecuting corruption and money laundering offences.

The approaches reflected in the extant statutory provisions have enabled corrupt PEPs to retain illicitly acquired wealth and have left law enforcement in Nigeria with restricted capacity to locate or confiscate the proceeds of corruption. Public funds continue to get stolen at a much faster pace than it is being recovered. At present, little can be done to act swiftly on highly suspicious wealth of PEPs and other criminals in Nigeria unless there is a legal conviction for a predicate offence. This system has produced a mere trickle of results against a torrent of corrupt funds being stolen and laundered by Nigerian PEPs. The extant legislation in place require a person to be prosecuted and convicted to justify the confiscation or forfeiture of the proceeds of corruption.[868]

However, the conventional criminal law approach of prosecutions and conviction-based asset recovery have proved to be inadequate in tackling corruption and money laundering in Nigeria. This is so because of the challenges posed by evidential burden of proof, delay tactics by defence lawyers and other legal technicalities that have hindered proper prosecution and conviction of PEPs engaged in unlawful acts. Criminal cases involving corrupt public officials dwell more in the realms of technicality than that which seeks to achieve substantial justice.

Fundamentally, the true limits of the traditional conviction-based confiscation arise from various factors, among which are the difficulty to first secure the criminal conviction of an identified person, then the necessity to prove the nexus between the property subject to confiscation and the offence the defendant was convicted for.[869] In other words, successful

[868] Economic and Financial Crimes Commission (Establishment) Act 2004, s20

[869] Michael Fernandez-Bertier,' The confiscation and recovery of criminal property: A European Union state of the art' (2016) 17 Journal ERA Forum 323

prosecutions of money laundering offences require proof that the laundered funds were the proceeds of crime.

But, as Murray posits, money laundering is clandestine in nature as it is usually organised in a manner which ensures no direct links between the predicate offence and the laundered money, thus, making it extremely challenging to meet the high standard of proof required in criminal proceedings.[870] Moreover, the challenges faced by law enforcement in Nigeria when investigating these offences such as lack of human, technical, and material resources have considerably affected proper investigations needed to prove money laundering offences in Nigeria. It is therefore perturbing that PEPs continue to acquire assets far above their legitimate income emboldened by the deficiencies in the Nigerian criminal justice system.[871]

All things considered, the ease and speed with which public funds are misappropriated and laundered from Nigeria to other foreign jurisdictions necessitates a paradigm shift from the criminal law which has become inadequate to win the war against corruption and money laundering. The measures with which to fight money laundering and recover the proceeds of corruption needs to constantly evolve. As a result of the problems of the conventional criminal justice system and the difficulty in proving cases beyond reasonable doubt, it has become imperative to shift from an exclusive criminal prosecution of financial crime to a non-conviction-based recovery regime which is not focused on *in personam* (against the person) but an action in *rem* (against assets and illicit funds).[872]

In other words, a complementary framework built around civil recoveries in Nigeria is fundamentally necessary to increase the effectiveness of existing money laundering legal frameworks. At the present time, it has now been realised that one of the crucial ways in reducing crime is the delivery of civil justice where it was previously thought it was the use of criminal sanctions and punishments.[873] The reality and extent of corruption and money laundering, and the involvement of powerful public officials calls for a more creative use of the civil law, especially in consideration of the difficulties encountered with criminal jurisdiction. Utilising civil jurisdiction in the pursuit of justice against corrupt PEPs is

[870] Kenneth Murray,' In the shadow of the dark twin-proving criminality in money laundering cases' (2016) 19 Journal of Money Laundering Control 447
[871] Yussuf (n356)
[872] Fernandez-Bertier (n869)
[873] Yussuf (n356)

potentially an effective weapon whose value is yet to be explored within Nigeria's legal framework.

The focus of financial crime control is now tilting towards civil forfeiture of criminal assets. They do not replace criminal prosecutions and confiscations, but they complement them by attacking the economic base of criminals.[874] Thus, effective asset recovery regimes based on non-conviction-based asset confiscation and forfeiture play a crucial role as one of a wide and coordinated range of measures to tackle both financial crimes like money laundering and corruption.[875] The non-conviction based asset forfeiture is a legal mechanism that provides for the restraint, seizure and forfeiture of stolen assets without the need for a criminal conviction.[876]

It is pertinent to state that forfeiture and confiscation are often used interchangeably. They have become strategic weapons that are being deployed to disrupt and dismantle the economic infrastructure of criminals or corrupt PEPs. Confiscation is said to be justified by a principle deeply ingrained into law, that no individual should be permitted to become unjustly enriched from unlawful activity in general and from crime in particular.[877] If those who take part in crime know that they are likely to be stripped of every profit they make, then the desire to enter into crime will be diminished.[878] These principles form the foundation for laws around the world aimed at confiscating the proceeds of crime.[879]

In recent years, an emerging global trend of introducing legislation to use civil procedures against criminal assets have surfaced and have been constantly evolving.[880] Frustrated with the alarming problem of corruption and money laundering perpetuated by PEPs, governments and international organisations have been devising creative and aggressive legal measures to combat corruption. The trend has been to progressively focus on the illicit assets rather than

[874] Emile Van Der Does De Willebois,' Using Civil remedies in Corruption& Asset Recovery cases' (2013) 45 Case Western Reserve Journal of International Law 615
[875] Theodore Greenberg and Others, *Stolen Asset Recovery: A Good Practice Guide for Non-Conviction Based Asset Forfeiture* (The World Bank 2009) 13
[876] Ibid 1
[877] Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal laundering and Taxation of the Proceeds of Crime* (Hart Publishing 2003) 45
[878] Ibid
[879] David Lusty,' Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5 Journal of Money Laundering Control 345
[880] Anthony Kennedy,' Designing a civil forfeiture system: An issue list for policymakers and legislators' (2006) 13 Journal of Financial Crime 132

the person as a way to combat the inefficiency of traditional responses of the criminal justice system to financial crime.[881]

The introduction of the unexplained wealth order (UWO), a relatively recent development in confiscation and forfeiture jurisprudence is one of such measures which is designed to confiscate, seize and recover the unexplained increase in the wealth of a public official. The UWO targets the significant increase in the assets of a PEP that he/she cannot reasonably explain in relation to their lawful income; essentially deeming a PEPs unexplained accumulation of asset to be a form of corruption.[882] A growing number of jurisdictions around the world have progressively turned towards non-conviction based civil forfeiture regimes by introducing the UWO. Such laws have operated with significant success in Ireland, Australia, and recently, the United Kingdom because the state does not have to first prove a criminal offence, as is generally the case in conviction-based forfeitures.[883] The state, in effect, is pursuing criminal law objectives in the civil forum, absent the procedural safeguards inherent in criminal proceedings. This became critically fundamental as it has become difficult for law enforcement agencies to obtain criminal convictions even in obvious cases of criminal enrichment.

This chapter intends to make salient, significant and cogent arguments that the future of money laundering control in Nigeria lies in the use of non-conviction based civil forfeiture regimes, which are more potent in disrupting and disgorging illicit criminal proceeds than the conviction-based forfeiture regimes provided under the criminal law. The aim is to outline the debate surrounding the non-conviction-based approach, to consider how this approach is utilised. Fundamentally, the chapter employs a comparative international approach by analysing the practical application of the Unexplained Wealth Order in two selected jurisdictions, namely, Ireland and the United Kingdom in order to assess their application and evaluate their effectiveness.

Furthermore, under the parameters of this study, the choice of these jurisdictions is because they are both common law legal systems like Nigeria and are well established democracies with effective law enforcement and judiciary, which are key ingredients for application and

[881] Fernandez-Bertier (n869)
[882] Jeffrey Boles,' Criminalising the problem of Unexplained Wealth: Illicit enrichment offence and human rights violations' (2014) 17 New York University Journal of Legislation and Public Policy 835
[883] Tom Serby,' Follow the money: Confiscation of Unexplained Wealth laws and sports fixing crisis' (2013) 1 International Sports Law Review 2

effective use of UWO. In addition, the chapter identifies a range of obstacles and challenges which must be taken into consideration when contemplating introducing UWO in Nigeria so as to learn lessons.

Nigeria is yet to enact legislation that sets out a system for confiscating the proceeds of crime in the absence of a criminal conviction through civil courts. There is also no legal framework that sets out power to seize and forfeit cash through a civil process, even where there are reasonable grounds to suspect that such funds is the proceeds of crime.[884]

Acknowledging the serious problems of grand corruption and money laundering and the need for improved mechanisms to combat their devastating impact, this thesis would be recommending that Nigeria considers the promulgation of civil forfeiture laws modelled on the Unexplained Wealth Orders as a stand-alone legal framework to combat corruption and money laundering perpetuated by PEPs. The UWO provides a more direct route to enforceability.[885] The chapter contends that PEPs involved in grand corruption in Nigeria have greater fear for the loss of the assets acquired than fears concerning the loss of their liberty. Therefore, this thesis is of the view that a legal framework which hinges on taking the profit out of crime by recovering the proceeds has the indispensable ingredient for an effective sanction regime.

[884] Ehi Eric Esoimeme,' Institutionalising the war against corruption: New Approaches to assets tracing and Recovery' (2020) 27 Journal of Financial Crime 217

[885] Thomas-James Dominic.' Unexplained Wealth Orders in the Criminal Finances Bill: A suitable measure to tackle unaccountable wealth in the UK' (2017) 24 Journal of Financial Crime 178

6.2 MAIN APPROACHES TO ASSET RECOVERY/FORFEITURE REGIMES

Every year, enormous sums of public funds are misappropriated and laundered illegally from Nigeria. The unfortunate result is that these funds are exploited for the benefit of a few corrupt officials and are generally used to purchase expensive items such as luxury vehicles, real estate, art and other assets of value.[886] While financial crimes like money laundering and corruption are damaging to all countries, their effects are particularly felt in developing countries such as Nigeria because they negatively affect the quality and accessibility of public services, provision of infrastructure and erodes public confidence in government. However, one way to counter these acts is to recover and return stolen assets to their rightful owners or jurisdiction of origin.[887]

The rhetoric of modern confiscation/asset recovery laws rests on few premises. They are that criminals are motivated by profits and they should be hit where it hurts. Also, that significant proceeds may derive from crime and are therefore available for recovery. In addition, that the traditional forms of law enforcement are not effective within the scope of acquisitive crimes.[888] Asset recovery refers to the process by which proceeds of crime are identified, traced, seized, confiscated and returned to their rightful owners such as a State. Asset recovery is a fundamental principle in the Anti-money laundering jurisprudence. The asset recovery regime and the AML framework both contribute towards creating a hostile environment for criminals, and limit the assets available to them.

Generally speaking, there are several statutory mechanisms used internationally that allow for asset recovery. These mechanisms are generally achieved using two distinct methods, namely, conviction-based asset forfeiture and non-conviction-based asset forfeiture. They share the same objective which is forfeiture of stolen public funds or assets, but differ significantly in the procedure used to forfeit assets. Thus, the modest aim of this section is to examine these main approaches to asset recovery for better understanding of the unexplained wealth order. It is also pertinent to mention that the second mechanism is of particular interest in this chapter.

[886] Peter Leasure,' Asset Recovery in Corruption cases: Comparative analysis identifies serious flaws in US tracing procedure' (2016) 19 Journal of Money Laundering Control 4
[887] ibid
[888] Fernandez-Bertier (n869)

6.2.1 *CONVICTION-BASED ASSET FORFEITURE*

According to various international legal instruments and conventions, countries are required to develop the necessary domestic legal measures for asset recovery by taking the greatest extent possible within their legal systems that enable them recover the proceeds of crime.[889] The conviction-based asset forfeiture is one of such measures to recover stolen assets. Here, the issue of asset forfeiture is treated as part of the criminal prosecution process by generally requiring an actual criminal charge as a prerequisite to the restraint of suspected proceeds of crime, and a criminal conviction as a prerequisite for the confiscation of proceeds of crime.[890] The requirement of a criminal conviction means that all of the enhanced procedural protections of the criminal process apply, including, inter alia, the presumption of innocence and the heightened criminal standard of proof beyond reasonable doubt must first be established. Thereafter, confiscation of proceeds of crime can occur as part of the sentencing process.[891]

For example, following his conviction in the United Kingdom for money laundering in 2012, James Ibori, former Governor of Delta State, Nigeria, was sentenced to 13 years imprisonment. In addition to the conviction, the UK authorities brought confiscation proceedings for the recovery of the proceeds of corruption amounting to $50 million.[892] The rationale here is obvious, criminalising the conduct from which illicit proceeds are made does not adequately punish or deter an offender. Even if convicted, criminals will still be able to enjoy the proceeds of crime, either personally, or through family members and associates.[893] Therefore, without post-conviction confiscation and forfeitures, the perception would still remain that there is an incentive to crime and that crime pays.

Importantly, the conviction-based forfeiture is an *in personam* order, an action against the person rather than *in rem,* against property.[894] In Nigeria and most other countries, asset recovery or forfeiture can only occur after a criminal conviction.[895] No confiscation can be ordered without declaration of guilt by a competent court of law. This thesis is of the view that it has become challenging to view the recovery of the proceeds of unlawful activity as part of the criminal justice process, as such, justifiable only on the basis of a prior finding of guilt

[889] United Nations Convention against Corruption, Article 31
[890] Lusty (n879)
[891] Jean-Pierre Brun and Others, *Asset Recovery Handbook: A Guide for Practitioners* (The World Bank 2011) 9
[892] John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar Publishing Limited 2014) 318
[893] Council of Europe, *Impact Study on Civil Forfeiture* (Council of Europe 2013) 11
[894] Greenberg (n875) 13
[895] Economic and Financial Crimes Commission Act 2004, s20

according to the criminal standard of proof. It is unconscionable for a corrupt PEP to unjustly enrich himself at the expense of the society, while the only recourse the state has is to prove the commission of a crime against such PEP. In Nigeria, in so many grand corruption cases involving public officials such as Governors, proving cases beyond reasonable doubt has been extremely difficult even in obvious cases where there has been a significant increase in the asset and wealth of a public official he/she cannot reasonably explain.

As it stands, conviction-based forfeiture laws as provided in the extant legal frameworks in Nigeria have been inadequate, having a negligible effect that has resulted in the recovery of only a limited proportion of the vast public funds misappropriated and laundered by PEPs each year. Fundamentally, the true limits of the traditional conviction-based forfeitures come from various factors, among which are the difficulty to first secure the criminal conviction of the accused, then the necessity to prove the nexus between the property subject to confiscation and the offence he was convicted for.

According to Adetunji, this procedure has failed to adequately combat corrupt practices and money laundering in Nigeria because the criminal process is slow, tortuous, expensive and inadequate to secure the conviction of corrupt public officials who are often more highly sophisticated than law enforcement agencies in Nigeria.[896] When considering facts such as the constitutional protection of the accused in a criminal process, the vast resources at the disposal of an accused which is used in assembling the best legal experts often used to exploit the weaknesses of the criminal justice system in Nigeria; thereby keeping the case in abeyance. Also, the logistics involved in prosecuting high net-worth PEPs by law enforcement agencies with limited resources, and the pervasive corruption of the institutions of government.

Furthermore, with the advancement in technology and globalisation, criminals are increasingly able to distance themselves from the underlying predicate offence so that there is no sufficient evidence to demonstrate actual criminal participation on their part, thereby placing the proceeds of crime beyond the reach of conviction-based laws, which enables public officials retain the proceeds of corruption.[897] Financial crime prosecution often involves lengthy and complex proceedings which may eventually result in a failed prosecution in Nigeria.

[896] Adetunji Adeoye Johnson,' A comparative analysis of the control of financial crime from the perspective of the UK, the USA and Nigeria' (DPhil thesis, Institute of Advanced Legal Studies, University of London 2016)
[897] Lusty (n879)

This is so because of the technical hurdles that arises from the intricacies of different money laundering strategies and methods. To demonstrate, the vast majority of grand corruption cases in Nigeria have involved the use of corporate structures to disguise assets, and such corporate structures continue to substantially hinder the tracing of stolen assets; as well as frustrate law enforcements ability to link such proceeds beyond reasonable doubt to an accused. Money continues to get stolen, and it gets stolen at a much faster pace than it is being recovered in Nigeria.

The difficulty in obtaining evidence in corruption and money laundering cases, the need to secure a criminal conviction to enable the removal of assets has led to a vicious cycle and has failed to impact upon those at the pinnacle of stealing public funds. This has meant that PEPs who have assets and funds beyond their legitimate earnings through corrupt practices remain unpunished. Against this background, conviction-based forfeiture is not suitable in respect of public officials as it entails a level of technical complexity and procedural hurdles that often frustrates the whole process especially in corruption related money laundering offences. As a result, this route has proved not to be a viable option in Nigeria. It is this thesis's argument that it is time for change in approach to addressing the prevalence of the offences of corruption and money laundering in Nigeria.

6.2.2 NON-CONVICTION BASED ASSET FORFEITURE (NCBAF)/CIVIL FORFEITURES

The power of PEPs to undermine the criminal justice process in Nigeria, coupled with other practical challenges in conviction-based asset forfeiture creates the need to adopt alternative approaches.[898] Introducing a system of non-conviction-based asset forfeiture is therefore of paramount importance. Non-conviction-based asset forfeiture sometimes called civil forfeitures is a more suitable measure allowing for the restraint, seizure and forfeiture of stolen assets without the need for a criminal conviction.[899] The NCBAF regime treats the question of asset forfeiture as a completely separate issue from the imposition of a criminal punishment, with proceedings conducted in civil courts, according to civil standards of proof (balance of probabilities) and civil rules of procedure.[900] It uses the civil standard of proof as the prevailing benchmark. Fundamentally, it also shifts the onus of proof onto the defendant who must prove the lawful origins of his/her assets. This is so because, proceedings are directed against assets

[898] John Hatchard, *Combating Money Laundering in Africa: Dealing with the Problem of PEPs* (Edward Elgar Publishing 2020) 182
[899] Greenberg (n875) 13
[900] Lusty (n879)

that are believed to have been acquired with the proceeds of crime. In other words, it is an action that targets assets itself (in rem), and not against the individual (in personam), as in criminal cases.[901]

The NCBAF procedure is considered more intrusive and better suited to counter increasingly well organised and sophisticated criminal activity, particularly financial crime.[902] A short survey reveals that this approach has proven effective in numerous jurisdictions. In the United States, the Department of Justice in 2008 confiscated $1.2 billion, 67% came from non-conviction-based confiscation ($804million) and only 33% from confiscation following a criminal conviction ($400 million).[903] The purpose of the NCBAF is to hit the criminal where it hurts most. Assets which could be confiscated and forfeited from corrupt PEPs in a NCBAF includes, monetary and non-monetary assets such as real estate, private jets, oil vessels, schools, hotels, exotic cars, jewellery and other income generating instruments.[904]

One of the main attractions of the NCBAF from a law enforcement and prosecution stand-point is the absence of requirement of any prior conviction before initiating confiscation proceedings.[905] Confiscation can be ordered within the course of less vigorous judicial procedures than criminal proceedings since the only burden for the prosecuting authority is to demonstrate on the balance of probabilities that the assets were acquired with the proceeds of unlawful activity.[906] Importantly, the NCBAF is paramount in a variety of contexts, as in the following instances.

6.2.2.1 EXTOLING THE VIRTUES OF NCBAF/CIVIL FORFEITURE REGIMES

- The accused is so powerful that a criminal investigation or prosecution is unrealistic or impossible.
- There is insufficient evidence to proceed with criminal prosecution
- The accused has been acquitted of the underlying criminal offence as a result of lack of admissible evidence or a failure to meet the burden of proof. However, while there may be insufficient evidence for a criminal conviction beyond reasonable doubt, there still

[901] Michelle Gallant, *Money Laundering and the Proceeds of Crime* (Edward Elgar 2005) 89
[902] Collin King,' Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-Conviction-Based Asset Forfeiture' (2012) 16 International Journal of Evidence & Proof 337
[903] Stefan Cassella,' The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime' (2008) 11 Journal of Money Laundering Control 8
[904] ibid
[905] Fernandez-Bertier (n869)
[906] ibid

could be sufficient evidence to show that assets were derived from unlawful activity (corruption) on a balance of probabilities. [907]

Not only is the NCBAF important in the above-mentioned contexts, it is also advantageous for the following reasons:

i. They represent a better deployment of resources to target criminals with significant property which cannot be explained by legitimate income.
ii. The NCBAF/civil forfeitures do not fall foul of the principle of double jeopardy rule or res judicata and therefore an action for a NCBAF order is available where an earlier criminal prosecution has been unsuccessful.[908]
iii. The criminal law principle of autrefois acquit has no application in NCBAF procedure since they are civil proceedings.
iv. The burden of proof is reversed, thus, there is a presumption of criminality simply on the basis that there is unexplained wealth.
v. Civil forfeiture laws require law enforcement/prosecutors exercising the power to bring a case to establish that, on the balance of probabilities, the asset is derived from unlawful activity.
vi. Evidence of a specific offence is unnecessary
vii. The NCBAF is more flexible in that the innocence of the defendant is immaterial, therefore law enforcement or prosecuting agencies can circumvent a failed prosecution to forfeit asset belonging to an accused whose guilt could not be established.
viii. In a NCBAF, so far as the asset of a criminal can be identified, the death, flight, or whereabout of the accused will not impede civil forfeiture.[909]
ix. Given the ever-increasing access to banking and the speed within which money is moved across jurisdictions, the quick removal of assets and disposal of property wherever they may be located is becoming easier to facilitate through this procedure.[910]

6.2.2.2 INTERNATIONAL SUPPORT FOR NCBAF

In recent years, a number of multilateral and international organisations have recommended NCBAF. The United Nations Convention against Corruption (UNCAC) is the ground-breaking

[907] Greenberg (875) 15
[908] Council of Europe, *Impact Study on Civil forfeiture* (Council of Europe 2013) 12
[909] Anthony Gray,' The Compatibility of Unexplained Wealth provisions and Civil Forfeiture regimes with Kable' (2012) 12 Queensland University of Technology and Justice Journal 18
[910] Kevin Stephenson and Others, *Barriers to Asset Recovery: An analysis of the key Barriers and Recommendations for Action* (The World Bank 2011) 66

convention on asset recovery and it explicitly identifies asset recovery as its fundamental principle. The UNCAC sets the path for a new generation of legal instruments prescribing confiscation and forfeiture of the proceeds of crime for countries to develop the necessary domestic legal measures for asset recovery.[911] The UNCAC requires state parties to consider taking such measures as maybe necessary to allow confiscation of property without a criminal conviction in cases in which the offender cannot be prosecuted by reasons of death, flight, absence or in other appropriate cases.[912] UNCAC speaks specifically of the embezzlement of public funds and the laundering of embezzled public funds and obligates a requested state party to return confiscated property to the requesting state party without the need for a conviction.[913] The UNCAC addresses the problem encountered in the past, whereby states could provide legal assistance and cooperation in criminal matters, but not in civil cases.[914]

The UNCAC proposes the NCBAF as a tool for all jurisdictions to consider in the fight against corruption. In similar vein, the Financial Action Task Force (FATF) recommends countries to enable their competent authorities to consider adopting measures that allow laundered property, proceeds of instrumentalities to be confiscated without requiring a criminal conviction to the extent that such a requirement is consistent with the principles of their domestic law.[915] To ensure that foreign confiscation orders are recognised and enforced in the widest range of circumstances, Recommendation 38 requires countries to have the authority to be able to respond to requests made on the basis of non-conviction based proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.[916] According to FATF, so many jurisdictions are overly reliant on a conviction in the origin country. This becomes problematic because, in nearly all recent cases of grand corruption, the detection and investigation of criminal activity of heads of government occurred only after there was a change of government, specific corrupt individuals fell out of favour, or there was widespread public outcry after wrongdoing was publicly exposed. There is no realistic opportunity to investigate and prosecute them for financial crimes, hence the need for non-conviction-based asset forfeitures.[917]

[911] United Nations Convention against Corruption, Article 53
[912] United Nations Convention against Corruption, Article 54
[913] United Nations Convention against Corruption, Article 57
[914] Greenberg (n875) 19
[915] FATF Recommendations 2012, Recommendation 4
[916] FATF Recommendation 2012, Recommendation 38
[917] FATF,' Specific Risk factors in Laundering the Proceeds of Corruption: Assistance to Reporting Institutions (June 2012) < http://www.fatf-

FATF states that non-conviction-based confiscation may be implemented in the context of criminal laws and proceedings, or through a separate system or law outside criminal proceedings. The NCBAF legislations have received judicial approval in many foreign jurisdiction. For instance, in *Gogitidze & Ors v Georgie*[918], the European Court of Human Rights (ECHR) held that proceedings for confiscation such as the NCBAF which do not stem from criminal conviction or sentencing proceedings do not qualify as a penalty, but rather represent a measure of the control of the use of property and cannot amount to the determination of a criminal charge within the meaning of Article 6 of the ECHR.

In similar vein, in *Butler v United Kingdom,*[919] the court noted that NCBAF was a measure not to be compared to a criminal sanction since it was designed to take away the profit of unlawful activity. Also, in *Simon Prophet v the National Director of Public Prosecution,*[920] the South African constitutional court decided that there was no need to prove any crime in NCBAF suspected to be the proceeds of crime. It further stated that NCBAF provides a unique remedy used as a measure to combat organised crime.

This support underscores the importance of the NCBAF. While being encouraged by the UNCAC and FATF, adapting national law to create a legal basis for NCBAF is not mandatory on state parties. Some jurisdictions such as United Kingdom, Ireland, Australia and Canada have all promulgated laws in support of NCBAF.

6.2.2.3 MAIN CRITICISMS AGAINST NCBAF

Despite its positives, the NCBAF is viewed by some as an assault on due process, with most criticism revolving around its constitutional dangers since it involves lifting of constitutional protection for the accused, lowering of procedural safeguards, and the potential to encroach on human rights with respect to right to own properties.[921] Although the issue of human rights is discussed in more detail below, it should be said that this has been considered by courts in different jurisdictions which has upheld the constitutionality of the NCBAF regime.[922]

gafi.org/media/fatf/documents/reports/Specific%20Risk%20Factors%20in%20the%20Laundering%20of%20Proceeds%20of%20Corruption.pdf> accessed 10 April 2020

[918] *Gogitidze & Ors v Georgie* App no 36862/05 (ECtHR, 12 May 2015)

[919] *Butler v United Kingdom* App no 41661/98 (ECtHR) 27 June 2002)

[920] [2006] ZACC 17

[921] Martin Collins and Colin King,' The disruption of crime in Scotland through non-conviction-based asset forfeiture' (2013) 16 Journal of Money Laundering Control 379

[922] *Gilligan v CAB* [2001] IESC 82

The overarching consensus is that the NCBAF is compatible with the rights to own property and other human rights on the basis that the rights are qualified and not absolute, thus, they are capable of being subject to interference, provided such interference is proportionate.[923] Opponents of this regime argue that by operating under the guise of a civil process, the state is able to impose criminal punishment without the requirement of establishing guilt on the part of the individual.[924] In the same fashion, other criticisms of the NCBAF includes the fact that procedural safeguards, such as the criminal standard of proof and the presumption of innocence are sidestepped. Granted that some of the criticism of the NCBAF are valid, they do not outweigh the importance and the benefits of stripping criminals off stolen assets.

In view of the above analysis, it is apt to mention that extant Nigerian legislations on confiscation and forfeiture of the proceeds of crime are disjointed and only relate to conviction-based forfeitures which encourages delays in criminal prosecutions and has continued to be a major obstacle to proper enforcement of the Nigerian AML regime. The NCBAF laws is today one of the key missing links to Nigeria's fight against corruption and money laundering.

The promulgation of the NCBAF will broaden the measures available to combat corruption and money laundering and to exact some measure of justice. If Nigeria had NCBAF laws, it would have aided the recovery of a significant number of illicit assets acquired by PEPs with the proceeds of corruption. It is for the reasons advanced that this thesis proposes a more pragmatic option of utilising civil forfeiture regimes to ensure a successful interdiction of proceeds of corruption by promulgating a stand-alone legal framework which is in line with non-conviction-based forfeiture procedures.

The Unexplained Wealth Order (UWO)**,** which is a relatively new development in NCBAF legal regime would strive to curb financial crimes by depriving corrupt public officials and other criminals of any significant increase in their assets that is not reasonably corroborated by their lawful income. The UWO is a more fruitful endeavour than looking at corruption related money laundering offences as isolated incidents that can be dealt with by the application of criminal sanctions.

6.3 THE UWO AS A VIABLE OPTION IN PURSUIT OF CRIMINAL ASSETS

A good number of academic scholars have done research in relation to addressing the problem of corruption and money laundering activities in Nigeria by proposing means to combat it.

[923] ibid
[924] Collins and King (n921)

Although the literature covers a wide range of such research, the course of action most often discussed is criminal sanction, possibly because of the corrosive effect of these acts to society. The criminal law expresses the society's disapproval of corrupt practices and aims at punishment.[925] In as much as these arguments are valid and understandable, none has given focus to the imperative of using the Unexplained Wealth Order to combat such crimes in Nigeria. The UWO has been heavily promoted as a potential weapon in the state's arsenal against the destructive crimes of corruption and money laundering.

6.3.1 WHAT ARE UNEXPLAINED WEALTH ORDERS?

Firstly, UWO follow a non-conviction-based model. They are seen as a drastic measure which is a relatively recent development in confiscation and forfeiture jurisprudence. Their primary objective is to deprive criminals from acquiring or benefiting from unlawful activities.[926] In short, they place significant explanatory demands on any high net worth individual, company or trust to provide a detailed account of how they obtained assets which law enforcement has reasonable cause to suspect may have been acquired from the proceeds of criminal conduct.[927]

Theoretically, the UWO can be described as the legal mechanism through which unexplained wealth which has been adjudged to represent the proceeds of criminal activity by the court are confiscated and forfeited to the State.[928] The term unexplained wealth is the significant increase in the assets of a public official that he/she cannot reasonably explain in relation to his/her lawful income; effectively deeming a public officials unexplained accumulation of significant assets to be form of corruption.[929] Implicit in this operation lies the assumption that the apparent increase in wealth enjoyed by a PEP may be the only signal that corrupt acts have transpired.

Importantly, the UWO legal framework is free-standing and does not require there to be any precursor or parallel civil or criminal proceedings before an application can be made to the court. In terms of their scope, the UWO is predicated on the assumption that where there is a disparity between a person's assets and income, he is presumed to have obtained those assets

[925] Emile Van Der Does De Willebois,' Using Civil Remedy in Corruption and Asset Recovery Cases' (2013) 45 Case Western Reserve Journal of International Law 615
[926] Boles (n882)
[927] Dominic (n885)
[928] ibid
[929] Anthony Gray,' The Compatibility of Unexplained Wealth provisions and Civil Forfeiture regimes with Kable' (2012) 12 Queensland University of Technology & Justice Journal 18

unlawfully.[930] It is important to realise that a primary target for attack if corruption and money laundering are to be combated is the money and assets of corrupt PEPs.[931]

Fundamentally, the UWO compels a person to explain the provenance of specific assets to an enforcement agency within a time frame. It places a rebuttable presumption on the asset holder that the assets in question were funded by criminality to which the individual can obviate by providing an explanation as to the legitimate source of asset.[932] The burden of proving that the wealth is lawfully obtained is on the respondent. The veracity of the respondent's explanation and any document provided will be carefully and invariably scrutinised by law enforcement. This would be aided by the fact that considerable amount of information will be available to verify against the persons explanation such as through asset declarations that are made mandatory for public officials in Nigeria before the assumption of public office.

Evidentially, the civil test in an UWO proceeding is that on the balance of probabilities, the court has to be satisfied that allegations by law enforcement regarding unexplained wealth acquired through unlawful conduct are correct unless the respondent proves otherwise.[933] The penalty would be civil, not criminal, and as such would be brought against assets, rather than pursuing criminal charges against an individual. One of the rationales for the UWO is that PEPs are usually adept at concealing the proceeds of corruption. Unless they are called upon to explain the source of their asset, it will be extremely difficult and often impossible to identify the proceeds of corruption.[934]

According to Lusty, in many cases of corruption related money laundering, it is often practically impossible for law enforcement or prosecution to trace the proceeds of corruption to the predicate offence and establish the precise level of a PEPs lifestyle being financed by corrupt practices.[935] Hence the importance of an UWO proceeding which require the respondent to explain how funds or assets in excess of income was acquired. The respondent remains silent as his own peril.

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[930] Jonathan Grimes and kingsley Napley,' Analysis of Unexplained Wealth Orders: Insight and Analysis' (2017) 1355 Tax Journal 12
[931] Boles (n882)
[932] Dominic (n885)
[933] Anthony Gray,' The Compatibility of Unexplained Wealth provisions and Civil Forfeiture regimes with Kable' (2012) 12 Queensland University of Technology & Justice Journal 18
[934] David Lusty,' Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5 Journal of Money Laundering Control 345
[935] ibid

Under this regime, the inability of the defendant to explain and prove the legitimate source of his wealth triggers a presumption that such assets might have been acquired with the proceeds of crime.[936] This will result in the property being presumed to be recoverable property. This is a significant weapon for law enforcement authorities in the sense that the financial information provided in an answer to a UWO might otherwise have taken longer to gather or may not have been obtained at all.[937]

In particular, the fundamental elements that make the UWO powerful and compelling are numerous. Firstly, they require a lower standard of proof. Secondly, the reversal of the burden of proof. Thirdly, there are less onerous rules relating to the admissibility of evidence. Fourthly, that a range of persons and corporate entities can be targeted as respondents.[938] Fifthly, the ability to forfeit property without the need to identify an underlying criminal offence. Lastly, the fact that the court may order the confiscation of illegally obtained assets following proceedings which are not subject to either a finding of a criminal offence or the conviction of the person accused.[939]

There are some practical factors that justify placing the burden of proof on a respondent regarding the lawful origin of property in an UWO proceeding. The general non-existence of direct evidence relating to the derivation of proceeds of crime has been problematic for law enforcement and prosecutors.[940] Some argue on policy grounds for the legitimacy of the reverse burden of proof provisions by maintaining that respondents should bear the burden to address the origins of the disproportionate assets given that the details about the actual acquisition of property, including sources of funds used to acquire such property are likely to be within the knowledge of the respondent.[941] The reverse burden of proof is a paramount feature of the UWO regime as it helps to circumvent the evidentiary problem of proving the participation of powerful public officials in the underlying unlawful activities which gave rise to such wealth.

Placing the burden of proof on the respondent to provide an explanation for suspected assets acquired with the proceeds of crime is a departure from the principle that lays the burden of

[936] Dominic (n885)
[937] Proceeds of Crime Act 2002, s362C
[938] John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar Publishing Limited 2014) 329
[939] Dominic (n885)
[940] Anthony Gray,' The Compatibility of Unexplained Wealth provisions and Civil Forfeiture regimes with Kable' (2012) 12 Queensland University of Technology & Justice Journal 18
[941] David Lusty,' Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5 Journal of Money Laundering Control 345

proof on the state to prove the guilt of the accused beyond reasonable doubt[942], as enshrined in the extant laws of most countries. However, in exceptional circumstances such as the prevalence or threat of a particular crime, such as financial crime, it is justifiable to permit a degree of departure from the normal principle of prosecution proving guilt beyond reasonable doubt,[943] for the sake of ease of proof, and in circumstances where the relevant information may be only within the asset holder's knowledge that assets held were not acquired with the proceeds of crime. In many cases, the only way of determining legitimate sources of funds for a property is by having its owner provide evidence.[944] In this respect, the state has to adopt the most effective and human right compliant means of recovering the proceeds of crime.[945]

Furthermore, the UWO is far reaching as it can be executed against the estate of the respondent in cases where the order is made after the death of the respondent.[946] This prevents the family and associates of the corrupt PEP from benefiting from the proceeds of crime. Also, the fact that corporate entities can be targeted as respondents is also a crucial factor because many criminals and corrupt PEPs in Nigeria hold their illicit assets in the names of companies to conceal the true ownership of such assets. These features give law enforcement greater latitude and a greater chance of forfeiting the proceeds of corruption. They have been crucial in making the UWO easier to implement and thus, a crucial weapon in the States arsenal against grand corruption and money laundering.

Based on the above analysis, the UWO is seemingly a proportionate and measured response to the destructive problem of corruption and other financial crimes without the need to invoke the powers of the criminal law which may; as we have seen in the course of this thesis, created a wave of uncertainty as a result of delay tactics, wave of appeals, and other technicalities used to forestall cases in Nigeria. Furthermore, there is still a gap where law enforcement and prosecutors cannot satisfy the necessary evidential burden to successfully convict powerful PEPs in Nigeria. The UWO has the potential to produce evidence to enable law enforcement agencies take recovery actions against the assets of corrupt PEPs acquired with stolen public funds.

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[942] *Woolmington v DPP* [1935] UKHL 1

[943] Adetunji Adeoye Johnson,' A comparative analysis of the control of financial crime from the perspective of the UK, the USA and Nigeria' (DPhil thesis, Institute of Advanced Legal Studies, University of London 2016)

[944] Aine Clancy,' Proving the Dough: National Crime Agency v Baker & Ors' (2020) 84 Modern Law Review 168

[945] Anthony Kennedy,' Justifying the Civil Recovery of Criminal Proceeds' (2004) 12 Journal of Financial Crime 16

[946] Marie Freckleton,' The Unexplained Wealth Order: A boost for Trinidad and Tobago's fight against money laundering' (2020) 23 Journal of Money Laundering Control 509

Building on the concepts behind confiscation and forfeiture, some jurisdictions have enacted the UWO to circumvent some of the challenges encountered in prosecuting financial crimes and to heighten the fight against financial crime by making it much easier for law enforcement to identify, seize and confiscate assets of criminals. These legislations have been influenced by a number of factors including political, social, legislative and economic context.[947] Though it might be tough to evaluate the effectiveness of the UWO regime, conclusions can be drawn on the basis of indicators that show the impact of this regime.[948] In Ireland, both anecdotal and statistical evidence point to the fact that the Proceeds of Crime Act and the Criminal Asset Bureau[949] have had a positive impact in attacking proceeds of crime successfully which has drastically reduced criminal activities in Ireland.[950]

The pertinent question is, how does the concept of UWO look like in practice? To understand this, a practical illustration of its operation would be gleaned from the United Kingdom and Irish models of the UWO regime which make provisions for legal procedures for the treatment and confiscation of proceeds of crime.

6.3.2 COMPREHENSIVE ANALYSIS OF THE UNEXPLAINED WEALTH ORDER IN IRELAND AND UK

The gradual emergence of legal framework providing for UWO against criminal assets can be detected. Countries such as Ireland[951], Australia,[952] Colombia[953], and the United Kingdom[954] are few legal systems that have ventured in the direction of introducing such legislation. Other countries such as Italy who enacted the UWO legislation have faced constitutional and legal challenges by virtue of their courts declaring that shifting the burden of proof to the accused violates the Italian constitution.[955]

The promulgation of the UWO in these jurisdictions is a result of the rise in corruption and money laundering activities perpetuated by criminals able to hide the proceeds of crime from

[947] Anthony Kennedy,' Designing a Civil Forfeiture system: An issues list for policymakers and legislators? (2006) 13 Journal of Financial Crime 132
[948] Booz Allen Hamilton,' Comparative Evaluation of Unexplained Wealth Orders' (237163, United States Department of Justice 2012) < https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf> accessed 2 September 2020
[949] The Criminal Asset Bureau is a law enforcement agency in Ireland established with powers to focus on the illegally acquired assets of criminals involved in serious crime.
[950] Hamilton (n948)
[951] Proceeds of Crime Act 1996; Criminal Asset Bureau Act 1996
[952] Proceeds of Crime Act 2002
[953] Civil Asset Forfeiture Law (Law 793) of 2002
[954] Criminal Finances Act 2017
[955] Hamilton (n948)

law enforcement authorities, thereby making criminal prosecution more difficult. This necessitated the creation of aggressive new legal powers and new capabilities for law enforcement to enable the relentless disruption of money laundering and financial crime in these jurisdictions.

6.4 UNEXPLAINED WEALTH ORDERS IN THE UNITED KINGDOM

Over the past few years, concerns over the UK's vulnerability to money laundering and terrorist financing had become part of mainstream public discourse. London had been recognised as a prime destination for money launderers due to its status as a preeminent financial centre, a fantastic property market and the ease of purchasing and holding London properties using shell corporations. [956] The use of high-end London real estate market as a vehicle for money laundering by foreigners became a major concern. According to a 2016 report conducted by Transparency International, it was said that there were gaps in the UK's legal framework being exploited by corrupt individuals and companies.[957]

The report details how prominent PEPs, oligarchs and wealthy foreigners have acquired valuable assets in the UK with the proceeds of crime.[958]An example given by Transparency International was that of a corrupt official who had stolen their country's health care budget and can easily buy a house in London with the proceeds of corruption. Case studies provide an indication of the scale of illicit funds and assets flowing through the United Kingdom, particularly involving Nigerian politically exposed persons.

- In the case of General Sani Abacha and his associates, an estimated $780m of public funds in Nigeria was laundered through UK banks.[959]
- Former Governor of Delta State, James Ibori, is estimated by UK law enforcement agencies to have embezzled $150m of public funds in Nigeria. It is reported that Ibori bought a house in Hampstead, North London, for $2.2m and another property in Dorset for $311,00.

[956] Peter Sproat,' Unexplained Wealth Orders: An Explanation, Assessment and set of Predictions' (2018) 82 Journal of Criminal Law 232
[957] Transparency International,' Empowering the UK to Recover Corrupt Assets' (2016) < https://www.transparency.org.uk/sites/default/files/pdf/publications/March2016_UWO.pdf> accessed 18 September 2020
[958] ibid
[959] ibid

- Former Governor of Bayelsa State, Diepreye Alamieyeseigha, was found to own properties in London worth $10million.[960]

Although the clandestine nature of money laundering makes it difficult to quantify, the Home Office estimated in 2017 that the scale of money laundering in the UK exceeds $90 billion a year.[961] This staggering figure has meant that the UK government have been quick to support aggressive actions in the form of changes to the money laundering and counter-terrorist financing framework in order to make the UK a hostile territory for money launderers as a result of the social and economic costs of money laundering in the United Kingdom.

In view of these facts, the anti-money laundering landscape in the UK received a significant boost following the promulgation of the Criminal Finances Act 2017 which amended the Proceeds of Crime Act substantially.[962] Notably, one of the fundamental changes in the Act was the introduction of the Unexplained Wealth Order into the UK legal system. Their arrival makes the UK one of the few common law jurisdictions to have a UWO framework, alongside Ireland and Australia.[963]

The introduction of the UWO expresses a clear intent by the UK government to put the civil powers to freeze and forfeit cash and assets derived from unlawful conduct to greater use. This is in light of the concern about those involved in grand corruption, with corrupt public officials billed as primary targets of the UWO framework.[964] The order provides prescribed enforcement authorities as we shall see with the power to require an individual to explain the origin of his assets that appear to be disproportionate to his income, where the person is inter alia, a politically exposed person, or suspected of being involved in serious crime in the UK or in foreign jurisdictions. Scholars are of the view that the emphasis of the UWO regime would seemingly suggests that the application of the criminal law will no longer be the first port of call for law enforcement authorities responding to financial crimes in the UK[965]

[960] ibid
[961] Home Office,' Economic Crime Factsheet' (2017) < https://homeofficemedia.blog.gov.uk/2017/12/11/economic-crime-factsheet/> accessed 20 September 2020
[962] Criminal Finances Act 2017, s1
[963] Hamilton (n948)
[964] Jonathan Fisher and Anita Clifford, *The Criminal Finances Act 2017* (Taylor & Francis 2019) 27
[965] Anusha Aurasu,' Forfeiture of Criminal Proceeds under Anti-Money Laundering Laws' (2018) 21 Journal of Money Laundering Control 104

6.4.1 PROCEDURE FOR APPLYING FOR UWO IN THE UNITED KINGDOM

In detail, the procedure for applying for UWO in the UK is commenced by an application made by an enforcement authority to the High Court.[966] The application may be made without notice;[967] to prevent the property from being dissipated. The application must specify or describe the property in respect of which the UWO is sought and identify the respondent whom the authorities believe holds the property.[968] Fundamentally, the application would urge the court for an order compelling the respondent to explain the following:

a) The nature and extent of their interest in the property,
b) Explaining how they obtained property (Including how any costs incurred in obtaining it were met),
c) Where the property is held by trustees of a settlement, provide details of the settlement as maybe specified in the order.[969]

In order to obtain a UWO in respect of property, the enforcement authority must satisfy the court that several requirements enumerated below have been met. Thereafter, the court may make such an order if it is satisfied that there are reasonable grounds to believe the following:

6.4.2 REQUIREMENTS FOR GRANTING OF UWO

I. The respondent holds the property[970]; the value of which is greater than $50,000[971]
II. That there are reasonable grounds for suspecting that the known sources of the respondents lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.
III. That the respondent is a **politically exposed person**
IV. There are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime whether in the UK or elsewhere.[972]

[966] Proceeds of Crime Act 2002, s362A (1)
[967] Proceeds of Crime Act 2002, s362I (1)
[968] Proceeds of Crime Act 2002, s362A (2)
[969] Proceeds of Crime Act 2002, s362A (3)
[970] Holding in this sense means holding an interest in it. An interest means any legal estate or equitable interest or power.
[971] The value threshold applies to the entire pool of property
[972] Proceeds of Crime Act 2002, s362(1)-(4)

Flowing from the above-mentioned requirements, the high court may grant an order, provided it is satisfied that each of the requirements for making the order are fulfilled. Once the order is made, the burden shifts onto the respondent to demonstrate that their property is legitimate and produce information in support.[973] The language used in the legislation indicates that the court retains discretion over granting the order, having determined whether there were reasonable grounds to believe that property was acquired with the proceeds of crime.[974] The court has held that where the Crown seeks to prove that property derives from criminal conduct, it must be such as to give rise to the irresistible inference that it can only be derived from crime.[975] This is to emphasise to enforcement authorities the need to present a compelling evidential basis in making applications for orders capable of impacting upon individual rights.[976] Section 362 POCA 2002 refers to 'may' as opposed to 'must' or 'shall':

> The High Court may, on application made by an enforcement authority, make an UWO in respect of any property if the court is satisfied that each of the requirements for the making for the order is fulfilled''.[977] Such discretion must be exercised having regard to the human rights and fundamental freedoms of the person against whom the order is sought. [978]

6.4.3 APPLICANTS WHO CAN APPLY FOR AN UWO

Pursuant to the provisions of POCA, the enforcement authorities who have the power to make an application to the High Court for the purposes of UWO include:

- National Crime Agency;
- Her Majesty's Revenue and Customs;
- The Financial Conduct Authority;
- Director of Serious Fraud Office
- Director of Public Prosecutions.[979]

[973] Proceeds of Crime Act 2002, Part 5
[974] *National Crime Agency v Baker* [2020] EWHC 822
[975] ibid
[976] Aine Clancy,' Proving the Dough: National Crime Agency v Baker & Ors' (2020) 84 Modern Law Review 168
[977] Proceeds of Crime Act 2002, s362A (1)
[978] *National Crime Agency v Hajiyeva* [2020] EWCA 108
[979] Proceeds of Crime Act 2002, s362(7)

6.4.4 THE RAMIFICATIONS OF AN UWO

COMPLIANCE AND NON-COMPLIANCE TO AN UWO:

Where the UWO is issued, the respondent must truthfully explain the provenance of the property that is the subject of the order within the specified time in the order.[980] In cases where the respondent fails without reasonable excuse to comply with or respond to all the requests for information set out in the order, severe consequences attach. Being a court order, breach could expose the respondent to proceedings for contempt of court. More importantly, the legislation expressly triggers a draconian presumption that the property is recoverable property for the purposes of any proceedings taken in respect of the property, unless the contrary is shown.[981] Recoverable property in this regard means property obtained through unlawful conduct. This would allow law enforcement to commence civil recovery action against the property. Conversely, should the respondent comply or purport to comply with the requirements imposed by an UWO, then the enforcement authority must determine if any enforcement or investigatory proceedings ought to be taken.[982] The veracity of the explanation and any document provided is assessed by the enforcement authority with a view to forfeiture proceedings.

Furthermore, if the enforcement authority decides that no further proceedings ought to be taken in relation to property, then it is incumbent on the authorities to notify the high court of that fact as soon as reasonably practicable. A determination must be done within 60 days starting with the day of compliance.[983] Equally important, whereas UWO is not a criminal indictment, it is an offence for a person, in purported compliance with a requirement imposed by the UWO; to knowingly or recklessly make a statement that is false or misleading.[984] Such an offence is punishable by a maximum of two years imprisonment on indictment, and a maximum of six months imprisonment on summary conviction.[985] It is instructive to note that the UWO is not intended to deprive persons of their lawful property. Accordingly, there are measures for the UWO to be revoked in cases where the evidence exonerates the respondent.

[980] Proceeds of Crime Act 2002, s362A (6)
[981] Proceeds of Crime Act 2002, s362C (2)
[982] Proceeds of Crime Act 2002, s362D (2)
[983] Proceeds of Crime Act 2002, s362D (3)
[984] Proceeds of Crime Act 2002, s362E (1)
[985] Proceeds of Crime Act 2002, s362E (2)

6.4.5 EXTRA-TERRITORIAL EFFECT OF UWO

Firstly, extraterritorial jurisdiction is the ability of a court to exercise jurisdiction over individuals or property located outside the geographical confines of the jurisdiction in which the court is located.[986] For an asset recovery regime to be effective, it is fundamental that courts in victim countries[987] have the authority to enter orders affecting proceeds of crime located beyond their borders. This is so because of the speed with which assets can move from one country to another; which requires forfeiture laws to be as active as the criminals who generate such proceeds in order to preserve assets before they are dissipated or hidden.

Increasingly, jurisdictions are enacting laws to enable them enforce forfeiture orders in foreign jurisdictions. Such laws typically permit the exercise of extraterritorial jurisdiction if certain conditions are met, such as that the acts giving rise to forfeiture occurred within the territorial jurisdiction of the court and an established connection between the jurisdiction and the assets. In the UK, as an additional measure to enhance the effectiveness of the law, the new UWO legislation carry significant extraterritorial reach. This is underscored by the ability to use this tool against a person and property located abroad.[988]

By virtue of s362A POCA, the UWO may be ordered against property located outside the UK. In similar vein, the person who is to respond to a UWO can also be located anywhere.[989] When read together, there are clear and compelling policy reasons for such an approach. The proceeds of crime are seldom held in one country and are often placed in countries where recovery is difficult.[990] Criminals or corrupt PEPs may also decide to invest their wealth in the UK even if such illicit funds is derived wholly from unlawful conduct which occurred in a foreign country while not being resident in the UK. For instance, a number of Nigerian PEPs have been known to invest the proceeds of crime wholly generated from corrupt practices in Nigeria by purchasing properties and other expensive assets in the UK.[991]

With this in mind, the legislation expressly recognises that in instances where a respondent to a UWO is suspected of serious criminal activity, the conduct need not have taken place in the

[986] Greenberg (n875) 97
[987] A victim country is a country where funds are stolen from.
[988] Proceeds of Crime Act 2002, s322S
[989] Proceeds of Crime Act 2002, s362A
[990] Jonathan Fisher and Anita Clifford, *The Criminal Finances Act 2017* (Taylor & Francis 2019) 4.47
[991] James Ibori, Joshua Dariye and Diepreye Alamieseigha are some examples of Nigerian PEPs convicted in the UK for corruption related money laundering.

UK.[992] Additionally, s362S provides that if the high court makes an UWO in respect of any property, and the enforcement authority believes that property is in a country outside the UK, the enforcement authority would have the power to send a request via the Secretary of State to the government of the receiving country to secure that any person is prohibited from dealing with the property; and for assistance in connection with the management of the property, including with securing its detention, custody or preservation.[993] The requested state will however determine whether the order is valid for execution under its domestic law.

6.4.6 RETROACTIVE EFFECT OF UWO

Another key point to mention about the beauty of the UWO is in its retroactive effect. A retroactive statute is one that operates backwards, by attaching legal consequences to acts that took place before the statute was enacted.[994] The retroactive applications of forfeiture laws against the proceeds of crime acquired before the promulgation of such laws is paramount. The rationale behind this is that if the laws are not retroactively enforceable, then criminals would be given the opportunity to profit from acts that were illegal at the time they were committed. Some have argued that the retroactive application of forfeiture laws may appear to be in conflict with the prohibition on passing *ex post facto* laws, a general rule under the constitutional laws of most countries which prohibits the application of a criminal punishment to an act that did not constitute a criminal offence at the time it was committed.[995]

On the other hand, proponents of retroactive laws generally do so on the premise that they are necessary evils in specific or limited circumstances, especially in terms of dealing with serious crimes, such as corruption.[996] In the context of non-conviction-based asset forfeiture laws that have been applied to forfeit the proceeds of crime generated and acquired before enactment of the law, the issue has been contested and has withstood judicial scrutiny. The courts have held that the retroactive application of forfeiture laws is constitutional as forfeiture laws are not criminal or penal in nature, but instead a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets from unlawful act.[997]

Moreover, NCBAF is not dependent on a criminal conviction, and because criminals never had a vested right to properties they acquire with the proceeds of crime, NCB legislations can be

[992] Proceeds of Crime Act 2002, s362
[993] Proceeds of Crime Act 2002, s362S (4)
[994] Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford Scholarship Online 2006) 21
[995] Greenberg (n875) 44
[996] Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford Scholarship Online 2006) 1
[997] Hamilton (n948)

retroactively applied without offending the basic law.[998] As a consequence of the retroactivity of the UWO laws in the UK, not only are money launderers becoming nervous about acquiring UK assets, they are also concerned about assets that they may have acquired long ago with the proceeds of crime. In practice, nothing stops the enforcement authorities from seeking UWO in relation to any qualifying assets regardless of when they were acquired.[999]

6.4.7 THE PRACTICAL APPLICATION OF UWO IN THE UK

In practical terms, UWO impose a burden on respondents where there is an apparent disconnect between their lifestyles and their sources of wealth to establish that their assets were legitimately acquired, often in circumstances where the relevant information may be only within the knowledge of the asset holder. In order to demystify the procedure of the UWO, it is pertinent to understand how it works in practice; for any law is only as good as its implementation. In practice, these simple steps apply.

- A PEP, such as a President or Governor, has been alleged to have misappropriated vast amount of public funds having committed an unlawful conduct such as corruption into private accounts. To hide the proceeds of such crime, he launders it and decides to buy multi-million-dollar properties in the UK and possibly other foreign jurisdictions.
- These assets are seemingly far beyond the annual salary of a PEP based on their salaries. These allegations are brought to the knowledge of the relevant enforcement authority. After conducting investigations, law enforcement brings an application before a high court judge who gives notice of a UWO if satisfied that the respondent is likely to be the owner of suspicious wealth beyond his means if all the following requirements are met;
    a. The respondent is a PEP and there are reasonable grounds to suspect their involvement in serious crime
    b. The respondent's known source of income is insufficient to obtain the asset
    c. The value of the asset is greater than $50,000

Having faced serious concerns about those involved in grand corruption laundering the proceeds of crime in the UK, and the significant difficulties which prevented enforcement authorities from confiscating and forfeiting properties from overseas criminal suspects unless

[998] Greenberg (n875) 46
[999] Simon Bushell,' Unexplained Wealth Orders and the Stable Door' <https://www.signaturelitigation.com/unexplained-wealth-orders-lawyers-simon-bushell/> accessed 20 September 2020

they have been convicted of a crime in their home country; the breadth of tools now available to the UK enforcement authorities has significantly improved their ability to tackle corruption and money laundering in the UK. In this respect, it is suggested that corrupt PEPs, oligarchs and wealthy foreigners who have acquired valuable assets with the proceeds of crime are billed as primary targets of the UWO framework.[1000]

6.4.8 UWO'S THAT HAVE BEEN GRANTED IN THE UK: THE CASE OF ZAMIRA HAJIYEVA

The National Crime Agency (NCA) and other enforcement authorities have now had two years to avail themselves of this tool and it is now reaping substantial rewards. Within the first months of its promulgation in the UK, the NCA applied for and was granted an UWO in respect of multi-million-pound properties totalling $22 million, the first to be made under the POCA.[1001] The High Court in granting the order was satisfied that the requirements of the Act had been met, including that the respondent's husband was a PEP. The respondent in this case, a PEP, Mrs Zamira Hajiyeva and the wife of a former chairman of International Bank of Azerbaijan whom the NCA alleged had obtained their wealth through grand corruption.[1002]

Mr Hajiyeva was charged and convicted of various offences including misappropriation, abuse of office, large-scale fraud and embezzlement and was sentenced to 15years imprisonment in Azerbaijan.[1003] In the UK, the case against the respondent brought by the NCA was founded on her being the beneficial owner of identified properties in Knightsbridge London and a golf course in Berkshire totalling $22 million. Coupled with this fact, the NCA revealed through its investigations that Mrs Hajiyeva had spent a reported $16 million in Harrods despite having no identifiable source of income to obtain such properties.[1004]

The respondent in this case appealed to the Court of Appeal in order to discharge the UWO.[1005] Her appeal focused on two primary arguments. Firstly, that her husband was not a politically exposed person for the purpose of s362B (4c) of the Proceeds of Crime Act. Secondly, that reliance upon her husband's conviction in Azerbaijan to establish the source of her wealth was misplaced because her husband's conviction was as a result of an unfair trial. In dismissing the appeal, the court upheld the definition of a PEP as adopted by Mr Justice Supperstone that she

[1000] Jonathan Fisher and Anita Clifford, *The Criminal Finances Act 2017* (Taylor & Francis 2019) 4.2
[1001] *National Crime Agency v Zamira Hajiyeva* [2018] EWHC 2534
[1002] *ibid*
[1003] *ibid*
[1004] Dominic Casciani,' Woman in 16million Harrods spend loses wealth seizure challenge' (BBC, 5 February 2020) < https://www.bbc.co.uk/news/uk-51387364> accessed 1 October 2020
[1005] *Hajiyeva v National Crime Agency [2020]* EWCA Civ 108

was a PEP because she was a family member of Mr Hajiyeva. On the second ground, the court of appeal held that Mr Hajiyeva's conviction supports grounds for reasonable suspicion that the known source of income was insufficient for the purpose of obtaining property; as a state employee between 1993 and 2015, it is very unlikely that such a position would have generated sufficient income to fund acquisition of property.[1006] For this reasons, the appeal was dismissed.

Following this Court of Appeals decision which interpreted the statutory regime of the UWO, including firmly placing the burden of proof on the respondent,[1007] and not restricting the definitions of a PEP, judicial guidance have been given and this would likely open the floodgates for more UWOs. With these developments in statute and case law, the consequences for those targeted can be severe. The Hajiyeva case brings into focus the effectiveness of the UWO in compelling high net worth individuals suspected of committing crimes like corruption to provide information on their income that law enforcement might otherwise not obtain. The NCA has categorically stated that the UWO presents more opportunities to recover assets and it has concluded investigations on a number of individuals who own assets in the United Kingdom believed to have been acquired with the proceeds of crime in which it might be appropriate to engage the use of an UWO.[1008]

6.4.9 CHALLENGING THE UWO

The fact that UWO is a useful tool does not mean that every application is factually, evidentially and legally sound. The intention of parliament in promulgating the Act was not to deprive persons of their legitimate property. This is where the opportunity for challenges arises, and there are measures for the UWO to be revoked in cases where evidence exonerates the respondent.[1009] On a discharge application, the application may, for instance, choose to explain to the court how they lawfully obtained the property and adduce evidence of sufficient means drawn from income sources. Satisfactory explanations may turn on evidence that the property was a gift or inheritance.

Challenges to an UWO can be brought on certain grounds, one of which is that the requirements for making an UWO have not been made out.[1010] This was the case in *National Crime Agency*

[1006] ibid
[1007] ibid
[1008] National Crime Agency,' NCA secures Unexplained Wealth Orders for prime London property worth tens of millions' (29 May 2019) < https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-orders-for-prime-london-property-worth-tens-of-millions> accessed 20 September 2021
[1009] Proceeds of Crime Act 2002, s362R
[1010] *National Crime Agency v Baker* [2020] EWHC 822

v Baker, which involved a successful challenge to three UWOs on this basis, resulting in their discharge. In this case, the NCA sought UWO in respect of London properties worth $80 million owned by the grandchildren of a former President of Kazakhstan, which was held by offshore companies. On the facts, the court held that the properties were not a product of unlawful conduct as argued by the NCA and found that it had been rebutted by cogent evidence that the properties had been acquired with legitimate funds;[1011] once the wealth or income is explained, the basis for a UWO falls away.

Furthermore, the court held that the use of complex offshore corporate structures or trusts was not, in itself, a ground for believing that they have been setup for money laundering purposes; holding that there had to be some additional evidential basis for such belief. Based on these facts, the high court discharged the UWO. The Court of Appeal has recently refused the NCA's application for permission to appeal the discharge of the UWOs in this case as the case did not offer any real prospect of success. Despite this drawback and considering that the courts role is to oversee whether or not the application for the making of the UWO is lawful and justified; they remain an aggressive new legislation that gives enforcement authorities new capabilities to enable the relentless disruption of criminal assets in the UK.

All things considered, this thesis takes the position that the UWO would have a considerable deterrent effect on those who launder public funds or the proceeds of crime to the UK. They are intrusive and require a respondent to answer questions, disclose confidential information in respect of sensitive financial matters while being supported by the power of forfeiture for non-compliance.

6.5 THE UNEXPLAINED WEALTH ORDER IN IRELAND

Not just the UK, but also Ireland has since promulgated the Unexplained Wealth Order. In Ireland, unexplained wealth laws reversing the burden of proof onto the respondent to justify the lawful origin of property was introduced in two laws, namely: *Proceeds of Crime Act 1996 (POCA) as amended in 2005 and Criminal Asset Bureau Act 1996 (CAB).* The POCA and CAB form the basis for the Irish two-pronged approach to tackling illicit wealth. With the introduction of these laws, Ireland became one of the first countries in Europe to enact the UWO. The POCA sets out the legislative framework that enables the state to attack proceeds of crime while CAB establishes the institutional framework to support its implementation.[1012]

[1011] ibid
[1012] Hamilton (n948)

The introduction of these legislations was felt necessary in Ireland on the grounds that it was an imperative response to the threat of serious and organised crime. [1013]

Fundamentally, one of the key factors most paramount to Ireland's UWO is the Criminal Asset Bureau.[1014] The CAB is a well-resourced multi-disciplinary agency whose members are from different agencies with staff from the police, prosecutors, revenue commission and social welfare with access to a large database through which the CAB can compare citizens assets to income.[1015] Their primary function is to use all legal remedies available to the state in pursuance of targeted criminal assets.[1016] This gives the CAB the ability to proactively identify individuals with unexplained wealth. In addition, the Irish High Court appoints a judge, assisted by a special registrar, to work solely on forfeiture cases for a period of at least two years. This provides CAB with direct and speedy access to the courts and a judge knowledgeable in forfeiture laws.[1017]

Furthermore, several elements make the Irish POCA unique. Firstly, it can be applied to any property acquired before or after the Act came into effect. Secondly, the state is not required to establish a nexus between a specific offence and the property subject to forfeiture. Thirdly, the burden of proof shifts to the respondent to show legitimacy of the property sought to be frozen.[1018]

6.5.1 PROCEDURE FOR APPLYING FOR UWO IN IRELAND

The first stage in the UWO regime in Ireland involves an application for interim freezing order. It is governed by s2 of POCA.[1019] This is made on an ex-parte basis, the rationale being to ensure that assets cannot be removed from jurisdiction pending a full hearing involving all parties.[1020] The High Court may grant an ex-parte interim freezing order against property once it is satisfied that all the requirements as stated in the Act are met by the authorised officer of

[1013] Natasha Reurts,' Unexplained Wealth Laws: The Overseas Experience' (2017) <http://www.lexology.com> accessed 28 September 2020
[1014] Hamilton (n9348)
[1015] Criminal Asset Bureau Act 1996, s8
[1016] Criminal Asset Bureau 1996, s5
[1017] Hamilton (n948)
[1018] Florence Keen,' Unexplained Wealth Orders: Global Lessons for the UK ahead of Implementation' (2017) < https://rusi.org/sites/default/files/201709_rusi_unexplained_wealth_orders_keen_web.pdf> accessed 25 September 2020
[1019] Proceeds of Crime Act 1996, s2
[1020] *CAB v Base Garage Supplies Ltd* [2013] IEHC 302

CAB. The applicant (CAB) bears the initial evidentiary burden of proof and must show by the civil standard of proof, the following.[1021]

6.5.2 REQUIREMENTS FOR GRANTING UWO IN IRELAND

a. That a person is in possession or control of specified property
b. That the property constitutes, directly or indirectly, proceeds of crime.
c. That the value of the property is not less than $10,000.[1022]

If the court is satisfied that these requirements have been met, the court grants an interim freezing order which would be in force for a period of 21 days to prevent the property from being dissipated.[1023] The interim order will notify parties, or any other person who may be affected by it, of the freezing of property, as well as any other conditions or restrictions considered necessary. Next, the second stage involved when granting UWO in Ireland is the interlocutory order for which the same conditions in (a-b) applies.[1024] Whilst this is described as interlocutory order, the section 3 hearing is to be regarded as the trial of the action. Interlocutory orders are orders that are issued by a court during the pendency of a case.[1025] Here, the applicants present a comprehensive overview of the respondent's lifestyle and engagement in criminal conduct. [1026] This order is granted if the court is satisfied that reasonable grounds exist to suspect that property is the proceeds of crime,[1027] unless any person can make an application to have this order discharged or varied.[1028]

The court will issue a discharging order if the respondent is successful in proving that the property subject to the order is not the proceeds of crime or that that its value is less than $10,000. The legislation explicitly provides a safeguard that the court shall not make the orders if it is satisfied that there would be risk of serious injustice.[1029] Section 3(3) POCA is primarily designed to allow a respondent argue that CAB's case is inaccurate and that property targeted was legitimately sourced.[1030] In the same vein, by virtue of s9 POCA, the court is empowered to issue on order compelling the respondent to file an affidavit disclosing all properties and

[1021] Proceeds of Crime Act 1996, s8 (2)
[1022] Proceeds of Crime Act 1996, s2(b)
[1023] Proceeds of Crime Act 1996, s5
[1024] Proceeds of Crime Act 1996, s3
[1025] Timothy Glynn,' Discontent and Indiscretion: Discretionary Review of Interlocutory Orders' (2001) 77 Notre Dame Law Review 175
[1026] *FJMcK v AF and JF* [2002] 1 IR 242
[1027] Proceeds of Crime Act 1996, s3(3)
[1028] Proceeds of Crime Act 1996, s6
[1029] Proceeds of Crime Act 1996, s3(1)
[1030] Proceeds of Crime Act 1996, s3(3)

income he/she owns or possesses and their sources during such period not exceeding 10 years from the day the proceedings were initiated.[1031]

The interim and interlocutory phase in Ireland present a transition to the final phase which is actualised with the disposal order.[1032] For the court to issue a disposal order, the interlocutory order must be in place for no less than seven years.[1033] In the course of this time, any person who can satisfy the court that property is not the proceeds of crime can have it lifted. If no such order has been granted during the seven years, the CAB can seek a disposal order effectively extinguishing anybody's right to the property.[1034] The court may grant the disposal order directing that property be transferred to the Minister for Finance or such other person as the court may determine.[1035] It is pertinent to mention that the statute does not foresee any sanction if the respondent does not comply. However, the inherent powers of the court apply, whereby a person can be held in contempt of court, or, if he/she provides false information, can be charged with an offense.[1036]

Importantly, the Irish regime applies retroactively making property acquired before or after the introduction of the Act vulnerable to confiscation.[1037] In like manner, POCA also ensures that the proceeds of foreign criminality would be covered by the scope of the legislation where such proceeds have been used to acquire assets in Ireland. This was not the case when POCA was initially enacted as the courts had on several occasions held that the Act did not include proceeds derived from offenses in foreign jurisdictions.[1038] However, the POCA was amended in 2005 to include the proceeds of foreign offences that were held at any time in Ireland. Equally important, the amendment of POCA in 2005 was critical in remedying a number of deficiencies of the original Act. For instance, one element that affected CAB's efficiency is that an interlocutory order must be in effect for seven years. The amendment now provides for a consensual disposition of assets much earlier than the seven-year period.[1039]

[1031] Proceeds of Crime Act 1996, s9
[1032] Proceeds of Crime Act 1996, s4
[1033] Proceeds of Crime Act 1996, s4(1)
[1034] Proceeds of Crime Act 1996, s4(4)
[1035] *Murphy v Gilligan* [2011] IEHC 464
[1036] Hamilton (n948)
[1037] Greenberg (n875) 162
[1038] *McK v D* [2004] 2 ILRM 419
[1039] Proceeds of Crime (Amendment) Act 2005, s7

6.5.3 ASSESSING THE EFFECTIVENESS OF THE UWO REGIME IN IRELAND

After years of implementation of POCA and CAB in Ireland, there are a number of studies that evaluates its effectiveness. This thesis adopts a study conducted by Boos Allen Hamilton for the United States Department of Justice, wherein the author comparatively evaluated the Unexplained Wealth Order regimes in selected jurisdictions with particular focus on Ireland in order to inform policymakers on a number of issues when contemplating the introduction of UWOs in the US.[1040]

Hamilton's study of the effectiveness of Irish's POCA and CAB involved, interviewing people and agencies directly involved with the UWO regime who were able to express informed opinions on the impact of the Act. Those interviewed include former and current representatives of the CAB, defence lawyers, academics and police. The CABs yearly annual report is also instrumental in this regard as it helps in reviewing the number of successful applications and total value of assets forfeited to the State by the CAB.

According to Hamilton, both anecdotal and statistical evidence suggests that POCA and CAB, with its extensive powers have had a positive impact in reducing criminal activities, particularly financial crime in Ireland. The data on the number of cases commenced, orders made, as well as successful application of the cases show that CAB has continued to work consistently in disrupting the proceeds of crime and is doing so successfully.[1041] This is also as interviewees expressed the prevailing view of law enforcement authorities stating with certainty that POCA has had a significant impact on dismantling and disrupting serious profitable crime in Ireland, particularly offences relating to financial crime. Furthermore, research and reports point to a very high success rate in UWO proceedings in Ireland, with this success attributed to CAB's efforts in conducting investigations that led to confiscations of criminal assets in Ireland.[1042]

Statistically, from 1998 through 2005, the CAB made 107 applications for interim order, 110 applications for interlocutory order, which have resulted in 68 disposal orders forfeiting criminal assets to the State. Available data from CABs annual reports states that from 2005-2015, the value of assets forfeited under section 4 POCA to the State after legal processes was $941,550, 239.[1043] Under section 3, eleven cases before the High Court resulted in forfeiture

[1040] Hamilton (n948)
[1041] ibid
[1042] ibid
[1043] Criminal Asset Bureau, 'Annual Report 2015' <http://www.justicee.ie/en/JELR/CAB_Annual_Report_2015.pdf/Files/CAB_Annual Report_2015.pdf> accessed 25 September 2020

of assets, the value of $7,225,092.98 in 2015.[1044] In 2018, the number of assets which an order was obtained increased from 100 assets in 2017 to 150 assets in 2018. Thirty cases commenced in 2018, the largest number of cases commenced in a single year by the Bureau resulting in the forfeiture of $8,393,582.30.[1045] In 2019, the value of assets frozen was $1,559,726 was transferred to the Minister for Finance after forfeiture.[1046]

These figures are broadly typical for the Republic of Ireland, and while they may not appear to be substantial, they are high compared to asset recovery in other jurisdictions.[1047] The Irish approach to attacking the proceeds of crime is regularly used as an exemplar of best practice in other jurisdictions, both common law and civil law, such as Australia, France, South Africa and the United Kingdom when developing non-conviction-based forfeiture legislations in their countries.[1048]

As has been noted in the course of this chapter, although the UWO has been seen as a radical and drastic law which has been effective in confiscating and forfeiting criminal assets to the state without the requirement of a criminal conviction, their retention has been subject to a wave of criticisms by both academics and legal practitioners because they involve fundamental departures from the normal legal processes and an extraordinary intrusion of state powers. Unsurprisingly, a number of legal challenges have ensued which is dealt with in the section that follows.

6.6 CONCERNS RELATING TO CONSTITUTIONAL AND HUMAN RIGHTS LAW IN UWO

According to human rights scholars, the promotion and protection of human rights is essential to the fulfilment of all aspects of an anti-corruption and AML strategy; however, this goal is in tension with the enactment of UWO statues.[1049] In as much as the UWO regime have been widely embraced and promoted by law enforcement officials, they are viewed with scepticism

[1044] ibid
[1045] Criminal Asset Bureau,' Annual Report 2018' < https://www.cab.ie/wp-content/uploads/2019/10/CAB-Annual-Report-2018-Reduced.pdf> accessed 25 September 2020
[1046] Criminal Asset Bureau,' Annual Report 2019' < http://www.justice.ie/en/JELR/CAB_Annual_Report_2019.pdf/Files/CAB_Annual_Report_2019.pdf> accessed 25 September 2020
[1047] Florence Keen,' Unexplained Wealth Orders: Global Lessons for the UK ahead of Implementation' (2017) < https://rusi.org/sites/default/files/201709_rusi_unexplained_wealth_orders_keen_web.pdf> accessed 25 September 2020
[1048] Hamilton (n948)
[1049] Jun Tang and Lishan Ai,' Combating money laundering in transition countries: The inherent limitations and practical issues' (2010) 13 Journal of Money Laundering Control 215

and criticism by human rights groups and lawyers who consider the UWO a drastic response to financial crime.[1050]

Consequently, issues have arisen in relation to their compatibility with various articles and conventions on human rights, particularly in connection with certain civil rights such as the right to own property. As a result, the UWO have not been without a plethora of legal challenges regarding their operation as courts in different jurisdictions where they have been promulgated have been called upon to interpret the constitutionality of the UWO legislations. Human rights challenges have been abundant but unsuccessful. The key arguments and concerns advanced while challenging the UWO legislations merit further attention.

1. In Ireland, POCA has been labelled radical and a disproportionate response to crime and has been challenged on the grounds that it is a de-facto criminal law, not civil law, violating basic constitutional principles and depriving respondents of traditional criminal law safeguards.[1051]
2. Furthermore, there are some concerns that the provisions of UWO dispense with presumption of innocence, the bedrock of human rights; the right to silence, the principles of fair hearing and the privilege against self-incrimination because they require the respondent to disclose critical information relating to ownership of assets.[1052]
3. It has been equally submitted that the UWO legislations has the tendency to arbitrarily deprive people of their property, thereby eroding the right to own property.
4. Additionally, many contend that the reversed burden of proof on the accused to put forth evidence demonstrating the legitimate origin of the assets in issue encroach upon fundamental rights that protect the defendant.
5. Scholars also argue that the UWO amounts to convicting people of offences on a lower standard of proof while circumventing the protections of the criminal law.
6. Equally important is the argument that the UWO has retrospective effect against the rule of law of most jurisdictions which prohibits a person from being penalised if the conduct was not an offence before the enactment of a new legislation.[1053]

[1050] Fernandez-Bertier (n869)
[1051] *Gilligan v CAB* [1997] 1 IR 526
[1052] Colin King,' Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Asset Bureau' in Katalin Ligeti and Michele Simonato (eds), *Chasing Criminal Money: Challenges and Perspective on Asset Recovery in the EU* (Hart Publishing 2017) 12
[1053] Constitution of the Federal Republic of Nigeria 1999, s4(9)

7. Finally, opponents of the UWO legislation believe that power vested in the state are too far-reaching and create a gross imbalance of power between the state and the respondent. Thus, there is a risk that it may be subjected to abuse and used as an instrument of political vendetta.[1054]

Despite these arguments and criticisms, the UWO legislation has withstood constitutional scrutiny when challenged in court. Courts in different jurisdictions have addressed each of these arguments in turn and in light of judicial expositions have upheld the constitutionality of the UWO legislations. For instance, in South Africa, the court upheld as constitutional a number of challenges made on non-conviction-based asset forfeiture including rights to fair trial, silence, presumption of innocence and the right not to be arbitrarily deprived of property.[1055] South African court rulings recognise that UWO as a critical tool for recovering proceeds of corruption since conventional remedies to fighting financial crime have failed.

In Ireland, on the authority of *Gilligan* v *CAB*[1056], Irish court recognised POCA's far reaching character, but went further to consider it an appropriate measure against the sophisticated methods of operation adopted by criminals. With regards to issues bothering on human rights, the courts have also made pronouncements in support of the UWO. Firstly, on the issue of property rights, there is considerable authority to the effect that civil recovery proceedings do not constitute an unjustified breach of property rights.[1057]

The courts have held that the right to property is not absolute but qualified ,therefore, deprivation of property is permitted where the law is in pursuit of a legitimate purpose, such as in the interest of the common good; where it is in accordance with the law such as confiscation of property consequent to an order of a court of competent jurisdiction.[1058] In other words, the state is entitled to encroach on property rights by imposing forfeiture to recover assets acquired with the proceeds of public funds.

Secondly, with regards to the issue of fair trial as it relates to the UWO, the court have held that so long as the alleged owner of the property is not liable to be criminally convicted in the process and he is given adequate hearing notice and opportunity to explain the means of

[1054] Yussuf (n371)
[1055] *National Director of Prosecutions* v *Prophet* [2006] ZACC 17
[1056] [1997] 1 IR 526
[1057] *Director of Asset Recovery Agency* v *Jia Jin He and Dan Dan Chen* [2004] EWHC 3021
[1058] ibid

acquisition of the property, the right to fair hearing has not been violated.[1059] The court also held regarding fair trial that such orders were the states response to the need to recover from those who seek to benefit from crime, the proceeds of unlawful act. In the United Kingdom, on the authority of *Gale v Serious Organised Crime Agency*[1060] the first time the Supreme Court in the UK considered civil forfeiture legislation and the tension between fundamental human rights to a fair trial, presumption of innocence, the burden and standard of proof contained within civil forfeiture laws which allows for the finding of a criminal act on the civil standard and therefore capable of circumventing criminal procedural safeguards. Gale was decided on the basis of POCA 2002, which introduced civil forfeiture in its present form into English law where law enforcement may bring civil proceedings to recover the proceeds of unlawful act even if there has been no criminal conviction.

The Supreme Court made it clear that although the commission of criminal offences had to be proved to the criminal standard, that could be distinguished from cases where property was in the hands of an alleged offender and he had not adequately explained how he acquired it. The Supreme court confirmed that civil forfeiture proceedings, and by extension, the UWO are not criminal proceedings in nature designed to penalise any person; therefore, the presumption of innocence and the burden of proof beyond reasonable doubt does not apply. The court went further to state that the procedure and the rules of evidence involved for making and implementing UWO are civil rather criminal and under the control of a civil court. The object and focus of the proceeding are recovery of assets and profits, not imposition of criminal punishment.

The UWO has survived many constitutional challenges and continues to be implemented successfully.

6.7 THE NECESSITY OF ENACTING THE UWO IN NIGERIA

In Nigeria, corrupt political elites are one of the most significant obstacles to economic development and good governance.[1061] Grand corruption and money laundering has grown exponentially over the years, and with this growth has come an increase in underdevelopment and poverty. Steps to tackle this menace has proved unsuccessful as most corruption and money laundering cases against high level PEPs have stalled in court for years. Most PEPs charged

[1059] *Walsh v Director of Asset Recovery* [2005] NICA 6
[1060] [2011] UKSC 49
[1061] Yussuf (n371)

with corruption and money laundering have already spent more years standing trial than they would have spent in prison if convicted for these offences[1062]; meanwhile assets purchased with the proceeds of corruption remains in their possession. They retain the benefit while the society suffers as a result of diverting public funds which would have been used for the public good.

Acknowledging the serious problems of grand corruption and money laundering perpetuated by PEPs and the need for enhanced mechanisms to combat their devastating impact in Nigeria, this thesis recommends the urgent promulgation of the UWO in Nigeria. Given the very large amount of proceeds of corruption flowing from Nigeria, together with low asset recovery rate and the limited and unrealistic timeframe for achieving effective suspicious transaction report for meaningful investigations on corrupt PEPs, the UWO would be a welcome development in Nigeria. The power of confiscation/forfeiture is a fundamental tool for taking the profit out of corruption and money laundering. Based on the ever-increasing rampancy of grand corruption and money laundering, the UWO would be a decisive development in the scrutiny of PEPs who have amassed significant unexplained wealth by virtue of being in public service.

Although Nigeria have in place legal framework for confiscation of criminal proceeds after a criminal conviction, the avenues for recovering the proceeds of crime through civil courts have, however, not been established within Nigeria's legal framework. It has therefore become imperative that there is an urgent need for a more focused and robust legal framework underpinned by civil law administration.

The extant conviction-based approach to money laundering in Nigeria has been grossly insufficient and have failed to have an impact upon those at the pinnacle of stealing public funds. Criminalising money laundering, together with criminal sanctions and punishment is no longer substantially disruptive for PEPs who steal and launder public funds in Nigeria. Moreover, slow criminal justice system in addition to technical complexities involved in the criminal justice system have been a major challenge to the enforcement of AML laws in Nigeria. The conviction-based asset recovery statutes in Nigeria is now out-dated and are likely to be of little value in practice. Consequently, grand corruption and money laundering has flourished while PEPs in Nigeria continue to acquire assets far above their legitimate income emboldened by the deficiencies in the criminal justice system. It is therefore imperative to deploy a more versatile tool that does not supplant but transcends the narrow confines of criminal jurisdiction.

[1062] For instance, former Governor of Abia State, Orji Uzor Kalu and have been standing trial since 2007 for diverting public funds.

It has been this chapter's argument that only a paradigm shift away from criminal to tougher civil forfeiture options can effectively address the problem of PEPs engaging in grand corruption and the laundering of the proceeds of crime. To reiterate, there are numerous reasons that call for recourse to or a paradigm shift to civil forfeitures. This includes difficulty in obtaining evidence to prove cases of corruption and money laundering beyond reasonable doubt and the possibility of a failed prosecution. Civil forfeitures or confiscation without conviction is one of the strategic weapons that are being deployed to disrupt and dismantle the economic infrastructure of criminals.[1063] Therefore, it is paramount to have a legal framework which hinges on taking the profit out crime by recovering criminal proceeds.

Accordingly, the scope of UWO as currently applied in the UK and Ireland as analysed can be adopted in Nigeria in order to facilitate confiscation and forfeiture of assets acquired with the proceeds of corruption without a formal criminal conviction. The UWO is one that can address the particularly topical issue of corruption and money laundering on the one hand, and the failure of conventional criminal law to stem the tide of these phenomenon. Furthermore, the value of the UWO is also not limited to civil recovery. The information provided in response to the order could trigger an investigation into the conduct of financial institutions and regulated professionals such as banks and lawyers.

This is because these regulated entities are crucial and indispensable to public officials who are desirous of laundering the proceeds of corruption. As has been noted, the desire to maintain wealthy clients and maximise profit makes it extremely difficult for regulated persons such as banks in Nigeria to place priority on AML compliance, and this comes at the expense of disrupting money laundering. The implication of UWO is that it could expose complicit banks to huge fines or withdrawal of licence if it is found that they aided PEPs launder the proceeds of corruption.

To allow corrupt PEPs enjoy the profit of their crimes have offended the sense of justice of Nigerians. It is therefore submitted that Nigeria needs to introduce a law that would provide a clear framework for the use of non-conviction-based laws to help law enforcement to be increasingly effective in recovering illicit assets and the proceeds of corruption. This thesis strongly believes that removing unexplained wealth from the hands of corrupt public officials is one way of disrupting money laundering and fighting corruption.

[1063] The UK and Ireland's UWO is an example of this assertion

In this respect, it is submitted that enacting the UWO to the Nigerian legal framework would strengthen the laws tackling corruption and money laundering and it would aid the recovery of a significant number of illicit assets acquired by PEPs with public funds without a formal criminal prosecution or conviction of PEPs. This thesis of the opinion that laws of this nature if applied successfully, remove the financial incentive to commit financial crimes and they do so more effectively than the current conviction-based system currently practiced in Nigeria.

The law can be seen to be effective in so far as the corrupt PEPs are stripped of their assets. Because corrupt PEPs tend to place greater value on the money and assets rather than time in prison, a well-known law enforcement strategy consists of taking the profit out of crime.[1064] The UWO could be an important and powerful tool in the effort to tackle corruption and money laundering. It will permit the state to go after illicit assets that are the proceeds of corruption rather than the person which has often resulted in stalled or failed prosecutions.

Introducing the UWO legislation in Nigeria would go a long way in controlling, interrupting, and recovery of proceeds of corruption and financial crime, and help in changing the perceived existing culture of corruption and money laundering which has become prevalent by PEPs in Nigeria.

6.8 CHALLENGES WHICH MAY BE ENCOUNTERED IN ADOPTING THE UWO IN NIGERIA

Nigeria is a member state and signatory to the UNCAC. Article 54 enjoins state parties to consider taking measures as may be necessary to allow confiscation of property suspected to be the proceeds of unlawful activity without a criminal conviction.[1065] Whilst the promulgation of the UWO which is in line with NCBAF is imperative in Nigeria and would go a long way in aiding the recovery of significant public funds stolen and laundered by PEPs, there could be potential challenges which this sort of legislation might encounter. In other jurisdictions as highlighted in this chapter, some of the main challenges directed at the UWO/NCBAF legislations which might also be encountered in Nigeria revolves around its constitutionality and the potential to encroach on human rights with respect to right to own property and right to fair hearing.

One of the rights guaranteed by the constitution in Nigeria is the right to property. Under the constitution, every citizen of Nigeria shall have the right to acquire and own immovable

[1064] Yussuf (n371)
[1065] United Nations Convention against Corruption, Article 54

property anywhere in Nigeria.[1066] However, parliament envisaged that an unqualified and unrestrained property right would breed all forms of corrupt or illegal practices. Thus, the constitution enumerates legitimate circumstances when the enjoyment of that right can be validly interrupted by law. It includes, inter alia:

- For the imposition of penalties or breach of any law, whether under civil process or after conviction for an offence.
- Relating to the execution of judgements or orders of court.[1067]

In *Dangabar v FRN,*[1068] the court noted that although every Nigerian has the right to acquire and own property anywhere in Nigeria, the practice of depriving a person from dealing with assets suspected to be the proceeds of crime is not unconstitutional because the right to own property is not absolute. It follows from court decisions that NCBAF would not constitute an unjustified breach of property rights in Nigeria and would be compatible with the rights to own property on the basis that the rights are qualified and not absolute.

Another challenge which the UWO legislation might encounter is the potential violation of traditional criminal law safeguards, such as the right to fair hearing. Fair hearing is captured under s36(1) of the Nigerian constitution which holds that, 'In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time.'[1069] S36(2) of the same constitution also states that 'Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law inter alia:

- Provides for an opportunity for the persons whose rights may be affected to make representations to the administering authority before that authority makes the decision affecting that person.[1070]

In Nigeria, the right to fair trial as it relates to forfeiture proceedings have come before the courts in instances where the EFCC have sought interim and final forfeiture orders pursuant to their powers of confiscation and forfeiture provided under s29 and 30 of the EFCC Act

[1066] Constitution of the Federal Republic of Nigeria 1999, s43 &44
[1067] Constitution of the Federal Republic of Nigeria 1999, s44 (2)
[1068] (2014) 12 NWLR 575
[1069] Constitution of the Federal Republic of Nigeria 1999, s36(1)
[1070] Constitution of the Federal Republic of Nigeria 1999, s36(2)

2004.[1071] The courts have noted that it is empowered to grant application for interim forfeiture and final forfeitures in respect of money or property suspected to be proceeds of unlawful activity.[1072] In this respect, the court have noted that it is a condition precedent to the order being made that the person against whom the order is made be simultaneously given notice of the order commanding him to show cause within the time specified by the court why property should not be forfeited to the Federal government of Nigeria. Forfeitures are only ordered after the defendant is heard having been notified of such orders within the time allowed. If the defendant has been given notice and the opportunity to show cause (explain) the source of the assets, it means that his right to a fair hearing has not been violated.

Furthermore, another issue that can arise with the enactment of the UWO is the reverse burden of proof on the accused to explain the provenance of his wealth. One of the biggest challenges to the recovery of the proceeds of corruption in Nigeria has been establishing the nexus between suspicious assets, and a specific offence.[1073] The requirement to establish this link is a pre-requisite to the confiscation of assets in Nigeria. However, the enactment of the UWO can make it easier to recover stolen assets without the need to prove a predicate offence and with fewer procedural requirement. To achieve this, the UWO reverses the burden of proof on the respondent to prove how he/she came about such wealth in question. Recently, the Supreme Court of Nigeria had the opportunity to decide on the issue of burden of proof with respect to unexplained wealth.[1074] The court held that proving money laundering cases is a herculean task because it requires the establishment of a predicate offence. To obviate this problem, a remedy was introduced by statutorily inferring money laundering from not only the conduct of the defendant, but his lifestyle which is similar to the Proceeds of Crime Act 2002 of the UK.

Under s36(5) of the constitution, the law establishes and guarantees the suspect's right to be presumed innocent until he is proved guilty. It also provides legitimate circumstances that will justify a legislation that imposes on citizens the burden of proving particular facts. In the context of forfeiture, it was held that the respondent being in the best placed position to know the provenance of his assets, be required to prove such facts.[1075] By virtue of s19(3) of the MLPA 2012, if an accused is in possession of pecuniary resources or property which is

[1071] Economic and Financial Crimes Commission Act 2004, s29&30
[1072] *Jonathan v FRN* (2019) SC.41/2018
[1073] *Daudu v FRN (2018) 10 NWLR 169*

[1074] *Jonathan v FRN* (2019) SC.41/2018
[1075] ibid

disproportionate to his known income, or be obtained an accretion to his pecuniary resources or property, the burden of giving satisfactory account of how he made the money or obtained the accretion shifts to him.[1076] The prosecution is relieved of the burden of having to prove that the money found in the account of the accused is proceeds from unlawful activity.

Therefore, under Nigerian law and decided case law, there is nothing unusual or unconstitutional in imposing on the respondent the burden of proving particular facts, i.e., that the funds sought to be forfeited are not proceeds of unlawful activities. Other issues relate to implementing such laws in Nigeria, particularly on politically exposed persons. For instance, the immunity clause is one which can frustrate the implementation of the UWO on certain PEPs. As earlier mentioned, Presidents, Vice Presidents, Governors and Deputy Governors are constitutionally immune from criminal or civil proceedings; despite the fact that a substantial amount of corruption related money laundering cases have been perpetuated by these persons in Nigeria. Based on the fact that the UWO is civil in nature, this can frustrate its implementation on PEPs in Nigeria.

This thesis has argued that the immunity clause be expunged from the constitution because it strengthens the culture of impunity and protects PEPs from accountability for their crimes while in office. The immunity clause seems like a constitutional licence to steal. Nevertheless, there are still a host of senior PEPs not covered by the immunity clause which can be caught by the UWO legislation; besides, those who are covered by immunity can be caught by the UWO when their tenure in office expires.

Given the vast assets held by corrupt PEPs in Nigeria acquired with the proceeds of corruption, their return is matter of the highest priority. By focusing on the assets, they can provide AML enforcement authorities with an effective and efficient means to recover the proceeds of crime, particularly as no predicate offence needs to be established.

In the final analysis, it is necessary that this thesis provides a nuanced presentation of the potential role of the UWO in addressing the challenges of grand corruption in Nigeria beyond the challenges in the criminal justice system. Just a few years ago, it would have been unthinkable to have a situation where, with no proof of criminal activity, let alone a charge or a conviction, an individual could be compelled to provide authorities with detailed information as to their finances. This is now the reality with the UWO legislation. Criminals have continued

[1076] ibid

to show that they are way ahead of not just law enforcement, but financial institutions. However, the UWO could ameliorate some of the problems earlier discussed in this thesis.

Firstly, the UWO will enable law enforcement to be significantly more alert to money laundering saving time, energy and resources incurred in investigating financial crimes. Secondly, the promulgation of UWO would warrant banks and others in the regulated sector to sharpen their scrutiny of PEP client. This is because an investigation into alleged financial crime of a PEP could expose the involvement of banks in aiding such PEP launder the proceeds of corruption as a result of their failure to file a suspicious transaction report where necessary. This could in turn warrant heavy fines on such banks or the withdrawal of their licence in extreme cases of lack of compliance with AML laws.

Recently, the chairman of EFCC disclosed in a meeting for members of the association of chief audit executives of banks in Nigeria that the EFCC will start holding banks liable for fraud and money laundering pertaining to financial deposits, where there are established cases of complicity with those seeking to launder the proceeds of crime through their institutions; mandating banks to know the source of wealth and source of funds of their customers, particularly PEPs.[1077] The promulgation of the UWO can provide a legal framework which could make this task easier for the EFCC to identify financial institutions who aid PEPs and other financial criminals launder the proceeds of crime.

Furthermore, the UWO would help tackle judicial corruption. As mentioned earlier, empirical studies on the issue of judicial corruption are by the nature of things very difficult to come by. Yet, the weight of anecdotal evidence and indeed disciplinary history within the justice sector in Nigeria is indicative of a deep problem. The importance of a frontal and determined attack on this growing problem is fundamental. It is the view of this thesis that the promulgation of UWO would make judicial officers less inclined to corruption as it would be easier to ascertain a situation where a judge is living above his/her means as their salaries and allowances are quantifiable. Corruption is most likely to occur where incentives outweigh risks. This legislation would detect, prevent, and limit the opportunities and increase the risk of detecting financial crime.

[1077] Kingsley Nwezeh,' EFCC to hold banks liable in fraudulent deposits' (25 August 2021) < https://www.thisdaylive.com/index.php/2021/08/25/efcc-to-hold-banks-liable-in-fraudulent-deposits-from-sept-1/> accessed 28 August 2021

Lastly, it is trite that an effective judiciary is a powerful weapon against corruption. Based on the fact that courts have the final determination whether or not to grant the UWO on the application of relevant law enforcement agents, it is my view that taking these cases to federal high court judges in Nigeria will be suitable based on the antecedence and integrity of judges at the federal high court level who are much more independent when compared to state high court judges as they are not appointed by state Governors and therefore not under political influence or pressure as witnessed in most high-profile cases in Nigeria.

Furthermore, this thesis subscribes totally to calls being made by members of the legal profession as well as law enforcement agencies for the creation of specialised anti-corruption courts.[1078] This has emerged as a response to legal reform for faster and better justice system due to the frustration, complexity and difficulty in prosecuting corruption cases; especially those involving high profile corruption and money laundering cases. Specialised courts refer to a court system where judges with special knowledge and expertise in a particular area of law, such as economic and financial crimes (corruption, money laundering, cybercrime) dispenses justice as it relates to those areas of law within their competence speedily and efficiently, often through streamlined procedures, as well as higher quality and more consistent decisions in complex areas of law.[1079] It is expected that designated corruption court judges would be persons of integrity and high moral standard with impeccable track record as there are still judges in Nigeria who make up their mind to dispense justice regardless of who is involved. This is an option that will be a welcome development and that which would give effect to laws such as the unexplained wealth orders.

[1078] Fatima Waziri,' A case for the establishment of specialized corruption courts in Nigeria: A Panacea for the Prosecution of High-Profile corruption cases' (2018) 80 Journal of Law, Policy and Globalization 2224
[1079] ibid

6.9 CONCLUSION

To summarise, available research and a consensus of assessments suggest that vast amounts of corrupt wealth which are public funds are stolen from Nigeria frequently. This thesis initiated and informed a much-needed debate about providing a proportionate legal response to the impunity achieved by perpetrators of grand corruption and money laundering. The economic and developmental problems in Nigeria caused by grand corruption and money laundering by PEPs remain acute. The amount of stolen public funds used to acquire assets is of such a staggering magnitude. Yet, Nigeria's performance in freezing, seizing and recovering stolen assets is undeniably poor compared to the scale of public funds stolen by corrupt PEPs. The problems are exacerbated by the failure of regulated entities such as banks to comply with their AML obligations or implement them in an effective manner.

At present, the asset recovery regime is not fit for purpose. It has been this thesis's argument in the course of this chapter that the extant AML legal framework in Nigeria, which is predicated on, and overly reliant on confiscation following conviction no longer provides an effective deterrence for PEPs who steal and launder public funds. The legal framework and measures with which to fight grand corruption and recover the proceeds of crime need to constantly evolve to close loopholes and improve efficiency.

This chapter provided comprehensive analysis of the way in which non-conviction-based asset forfeiture regimes can contribute immensely to the fight against grand corruption and money laundering in Nigeria. In this regard, this thesis argued that civil jurisdiction of extracting the proceeds of criminal activities from corrupt PEPs without the need of a conviction provides a better mode of deterrence than any criminal sanction could hope to achieve. In the grand scheme of things, this would be much more beneficial to the public who have suffered loss in the hands of public officials.

Importantly, the chapter argued that NCBAF proceedings are against the assets themselves, rather than against the individual. Inter alia, the powers are designed for cases where the proceeds of crime have been identified but not feasible to secure a conviction, or where a conviction has been secured but no confiscation order is made. There is now a growing global commitment to tackle money laundering as a result of the plunder of public funds by PEPs, especially those from developing countries. In essence, the global political will to combat financial crime has led to a tilt towards civil forfeiture of criminal assets. This approach is believed to be a more potent tool in disrupting and disgorging the proceeds of crime than the

traditional criminal conviction-based asset forfeiture regimes. The chapter argued that recovering the proceeds of crime through the traditional criminal law is hampered by the procedural safeguards inherent in criminal proceedings which is seen as providing excessive protection for criminals.

The chapter argued extensively that one powerful weapon which is an innovative legal tool in the fight against illicit wealth have been the Unexplained Wealth Order. Although a relatively new concept, the introduction of UWOs into the confiscation and forfeiture jurisprudence in a number of jurisdictions such as the UK and Ireland are geared towards making these jurisdictions hostile environments to financial crimes, while addressing the considerable practical difficulties under the traditional conviction-based regimes.

The UWO has proved to be a significant piece of legislation, with Transparency International citing it as the most important piece of anti-corruption legislation of the past 30 years.[1080] The chapter discussed extensively their primary objective which is to deprive criminals from acquiring or benefiting from unlawful activities. By using UWOs, the state does not have to first prove a criminal charge, as is the case with conviction-based forfeitures. Likewise, the state does not have to first prove that the property in question is the instrument or proceeds of a crime, as is generally the case in the conventional conviction-based regime. Also, because the UWO proceedings are seen as civil, criminal procedural protections do not apply.

Importantly, it has been argued that the very effectiveness of UWO legislation depends on the ability to shift the burden of proof to the asset owner. This is a fundamental feature of the UWO regime. Requiring the one who is better able to prove a fact to be the one to prove it has helped circumvent evidentiary problems encountered by law enforcement in proving underlying unlawful activities which gave rise to such wealth. In practice, they lighten the load on the prosecution, and tends to make asset forfeiture altogether speedier.

As a result of its stringent characteristics, the chapter posited that the UWO attracts a great deal of debate. Human rights challenges have been abundant but unsuccessful. Those who criticise it hold the view that they are an assault on due process which raises serious constitutional

[1080] Transparency International UK,' Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery' (2015) < https://www.transparency.org.uk/sites/default/files/pdf/publications/March2016_UWO.pdf> accessed 5 November 2020

concerns with regards to its consistency with human rights provisions.[1081] On the other hand, those who embrace UWO have done so because they believe that civil remedies offer speedy solutions that are unencumbered by the rigorous of constitutional protections associated with criminal trials. Despite the numerous challenges, the UWO legislation has withstood constitutional scrutiny when challenged in court. The courts have played an important role in interpreting the nature and scope of the UWO. As earlier examined, courts have held that the UWO serves a legitimate public purpose and is a proportionate response to the fundamental problem of corruption, money laundering and other financial crimes.

As seen in the UK and Ireland, a robust system of measures to confiscate the proceeds of crime is an important part of an effective anti-money laundering and anti-corruption regime. In the UK, various UWOs have been issued successfully few months after the law came into effect in early 2018. The introduction of UWOs in the UK is seen as an important step forward in bridging an important legal gap and would help curb the influence of the UK as a facilitator for global money laundering.[1082] The UWO provides a swift and efficient way to recover assets, not only because of its broad scope of application, but also since the alternative, criminal confiscation, entails a level of technical complexity that often acts as a deterrent against pursuing financial crime cases.

In view of the findings of this research, this thesis recommends the urgent promulgation of the UWO which would be pivotal in combating grand corruption and money laundering in Nigeria. This thesis challenges lawmakers and policymakers to consider this drastic legislation which could consolidate the extant AML legal framework in Nigeria. Of course, much work is still needed and it is right to feel optimistic that the problems of PEPs and money laundering in Nigeria will become a thing of the past. While much remains to be done, there are reasons to be hopeful.

[1081] Lea John,' Hitting Criminals where it hurts: Organised Crime and the erosion of due process' (2004) 35 Cambrian Law Review 81

[1082] Mat Tromme,' Waging War against Corruption in Developing Countries: How Asset Recovery can be Compliant with the Rule of Law' (2019) 29 Duke Journal of Comparative & International Law 140

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