

**A comparative analysis of the control of financial crime from the perspective of the UK, the
USA and Nigeria**

Institute of Advanced Legal studies

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DECLARATION

I, Adetunji Adeoye Johnson, declare that the research presented is my own original work. All sources of information have been appropriately acknowledged and quotations have been identified by indenting or through the use of quotation marks. The law is correct as of 1 August 2016

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Abstract

In 1939, Edwin Sutherland's thesis on white collar crime drew the global attention to the bane of crime committed by persons in upper social class who use their privileged position to commit crime and are protected from prosecution by the state while persons in the lower social class who commit street crimes do not enjoy similar privilege, despite several criticisms against the thesis, it altered the theory of causation of crime and the earlier perception that financial crime is a victimless crime and thus created an awareness of the consequences of financial crime on economic development, social stability, national security, integrity of the capital market and good governance.

The influence of information technology, globalisation and the link between financial crime, corruption, illicit drug trade, terrorist financing, human traffic and fraud (many of which are predicate offences of money laundering) demand a global concerted approach, development of which the UK and US laws have influenced with the introduction of national and international AML, OECD initiatives, the Vienna and Palermo conventions, the UNCAC and the FATF Recommendations. Many of these international initiatives (excluding the earlier Commonwealth initiatives) evolved from drug control measures, consequently, they have not effectively achieved the desired objectives in diverse ways, like the failure of the existing international initiatives (multilateral or mutual legal assistance) on the enforcement of transnational crimes.

In Nigeria, part of the reason why regulating, interdicting and disrupting financial crime has been less effective is due to the introduction of the British method of criminal jurisprudence to Nigeria criminal justice system, in contradiction to the Nigerian traditional customary laws, values and remedies of restitution, compensation and reconciliation; consequently, the imposed foreign criminal codes failed to adequately control crime and also failed to adequately disgorge the proceeds of financial crime.

While different nations have adopted various means of disgorging the proceeds of crime either by amending their adjectival laws to shift the burden of proof in certain circumstances (like criminalising the possession of unexplained wealth) without violating the offender's right of presumption of innocence or right to remain silence, however, such adopted method must be informed by the circumstance of any given country, so far due process, equity and justice are ensured. Nigeria has not deemed it appropriate to use the prohibition of possession of unexplained wealth as an effective tool of financial crime control, except Lagos state.

Again, due to the vast involvement of corporations in financial crime, an effective means of holding them liable through a clearly defined and pragmatic concept of corporate criminal liability has become necessary because this would play a crucial role in crime control. Consequently, this research questions the gross inconsistencies and ineffectiveness in the application of the organic or directing mind theory in holding complex, modern multinational corporations culpable and argues in favour of using a combination of principles of organic or directing mind, vicarious responsibility and strict liability offence (for failure to implement adequate internal policies to prevent crime by agents, similar to the provisions of the UK Bribery Act 2010, s.7) in attributing the knowledge of the agent or employee to the corporation, depending on the circumstance of a given case.

The thesis argues that the future of money laundering control lies in the criminalisation of unexplained wealth, without infringing the right to own property. It identifies and proffers solutions to the problems associated with legal systems, jurisdictions, complexity of law and standard of proof, it recommends the use of civil enforcement by victim, regulatory actions, disruption of financial crime through internal control and compliance mechanisms with emphasis on recovery of proceeds of crime either through conviction based confiscation or civil forfeiture. Further, the thesis argues that due to the challenges associated with scientific means of evidence gathering and the high standard of proof in criminal proceedings beyond reasonable doubt, it prescribes that Nigeria ought to adopt

the non-conviction based civil recovery of proceeds of crime, it also recommends the use of tax law to seize proceeds of money laundering.

The thesis observes that the Nigeria criminal justice system needs to deemphasise the restrictive use of traditional punishment like imprisonment and fine in controlling complex financial crime, and suggested the use of clearly defined negotiated pleas like DPA, NPA and plea bargain. In addition, argues that the social and cultural factors responsible for greed and impunity must be identified and attacked in order to create a new social order, similar to the African communal lifestyle which was effective in controlling public and private corruption, notwithstanding, its basic tenet of gift giving.

The thesis recommends that Nigeria ought to consider the introduction of an hybrid accusatorial and inquisitorial system of criminal justice so as to make its judiciary more participatory in criminal proceedings, it also recommends the provisions of fund for legal aid, compensation of victims of crime; prison and judiciary reform with a view to removing corruption without compromising the independence of judiciary and finally, it recommends legislations for protection and motivation of whistle blowers.

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Chapter 1

A comparative analysis of the control of financial crime from the perspective of the UK, the USA and Nigeria

1.1 Introduction

Comparative studies of any chosen field provides a broad evaluation of the historical, cultural, political, religious and social factors that influence the development of the studies with a view to providing suitable solutions to identified problems¹, it evaluates the similarities, differences, problems and how they have been effectively resolved in other jurisdictions, even as this would aid the scrutiny of extant policies, rules, process, procedure and regulatory measures with a view to assisting policy, social and law reform and redirection of state affairs. Consequently, in the context of this thesis, comparative study of the chosen topics will provide the opportunity to identify the challenges and proffer possible solutions in interdiction and control of financial crime.

Comparative analysis of financial crime law in Nigeria, the UK and the US is selected because of the relatively high level of development of the UK and the US legal systems and policies in disruption and interdiction of economic and financial crime, their common law background and the dominance of the US and the UK economies in the global financial market where they have played significant roles in influencing the developments and global regulation of capital and financial market, all of which could assist Nigeria in resolving its seemingly intractable challenges of controlling fraud, money laundering, corruption and advance fee fraud. However, the influence of Islamic financial jurisprudence is not deeply considered in this thesis because despite the operation of sharia criminal law in the Northern Nigeria (discussed in chapter 5), there has not been a significant political and economic interest to integrate sharia compliant investment with

¹ Zweigert k and Kotz H, *An Introduction to comparative law*, (3rd edition OUP 1998), see also Barry Rider, 'strategic tools - for now and perhaps the future?' Barry Rider (ed) *Research Handbook on International Financial Crime*, (Edward Elgar Publishing, 2015) 726

the conventional financial system beyond the Central Bank of Nigeria Policy guideline 2015 that allows Non Interest Financial Institution (NIFI) to operate Islamic banking separately from the conventional banks, supervised by Advisory Committee of Experts (ACE) who are versed in Islamic commercial jurisprudence but how ACE would interpret and harmonise the existing divergent schools of Islamic jurisprudence² in performance of its duty is yet to unravel in Nigeria.

Despite the various existing legal, extra legal crime control measures and institutions in Nigeria, the country has become synonymous with fraud, corruption, money laundering and recently terrorism, which hitherto was inconceivable within Nigeria's geographical landscape, several factors are responsible for this deplorable national tragedy which this thesis aims to evaluate, appraise and proffer credible and pragmatic solutions. The thesis is structured to achieve the set goals by making a thorough comparative analysis of the past and the existing control measures of financial crime in the US and the UK with a view to adapting and introducing similar measures in Nigeria where possible.

The first chapter lays the foundation for other chapters by analysing and synthesising the concept of crime and financial crime in relation to human greed, dishonesty, morality and law in regulating human conduct. It analyses crime from diverse perspectives and different schools of thought, as this will assist in proffering solutions to identified problems from such different perspectives. Further, the chapter identifies the influence of moral values on legislations which don't necessarily have to correlate. In order to buttress this view point, the natural, positive and sociological schools of thought will be scrutinized and analysed, especially an appraisal of the natural school of thought, involving conflicting extent to which mores influence legislations, which has pitched the concept of cultural relativism against cultural universalism, therefore, if moral values or cultural values are distinct, relative and acceptable means of regulating human conduct, how do we harmonise diverse customary practices, values and conventions against

² Barry Rider, Corporate governance for institutions offering Islamic finance, in Craig Nethercott and David Eisenberg, *Islamic Finance, Law and Practice* (OUP, 2012) 133

international best practices? Consequently, the thesis explains why it is imperative for international conventions to accommodate local cultural or moral variations, failing which the essence of crime control would be defeated.

Further, the first chapter attributes the failure of giving consideration to the concept of cultural relativism in implementation of criminal justice system in many African nations, especially in Nigeria as part of the general reason for the ineffectiveness of the crime control measures and institutions, as seen in the use of repugnancy clause in legislation whereby any local law or custom inconsistent with the English principles of natural justice, equity, justice and common law of England were declared null and void, in sharp distinction to the well-considered work of Savigny's theory of *volksgeist* (common conscience or national spirit) which advocated the need to consider the history and culture of a people in law reform.

Furthermore, the first chapter evaluates the influence of social class in criminal legislations, especially the socialists and Marxists theory which states that legislation is a tool by which the bourgeoisies control the means of production and oppress the proletariat, although this position is not absolutely true as there are many sources of law such as the inherited laws and laws derived from negotiations by pressure groups, Edwin Sutherland seem to reiterate this position in his thesis by defining white collar crime from the social class perspectives, thus challenging the extant theory of causation of crime but failed to proffer a comprehensive definition of white-collar crime, however, Sutherland thesis drew global attention to the evil of a special type of crime which up till then had not been given due consideration. Consequently, various inexhaustive definitions of financial crime are appraised in chapter one in order to ensure a precise meaning of the scourge with a view to proffering pragmatic legal and extra legal solutions to the problem, especially in view of the influence of development in information technology and globalisation on global trade and transnational crime.

Finally, the first chapter lays the general foundation for appraising the role of the existing international measures (UN Convention against illicit traffic in narcotic drugs, 1988, UN

Convention against Transnational organised crime 2000, UN Convention Against Corruption 2004) and the established anti-financial crime institutions like the Commonwealth, the IMF and the FATF. The chapter concludes that although various anti-financial crime control measures in place have not adequately eradicated it, nevertheless, they have created awareness for the pernicious effect of financial crime and the importance of devising more effective means of its control far beyond the purview of criminal law in order to ensure adequate interdiction, punishment, prevention and effective means of disgorging its proceeds.

In the second chapter, the adverse effect of financial crime is appraised against the background of the narrow perception that white-collar crime or financial crime is a victimless crime, and if it is a victimless crime, why should it be prosecuted? The chapter relies extensively on literatures, journals and text books published mainly within the past 20 years with a view to demonstrating that financial crime has adverse effect on economic development, social stability, national security, currencies, exchange rate and reputation of financial institutions and financial market, erosion of investors' confidence in a nation's capital market, possible loss of revenue to OFC; the chapter reaffirms that every segment of the society is a victim of financial crime and it must be controlled or possibly eradicated, again, in some instances, an identified person or group of persons could be the victims of corrupt practices where defective products or substandard services are provided due to lack of transparency, accountability and lack of compliance with due process in the procurement or award of contracts by the public or private sector.

The second chapter also appraises the advancement in information technology which though has made tremendous impact on globalisation, transnational and global trade transactions but it has also accelerated the rate of tax evasion, laundering of illicit wealth in relation to the OFC, thereby making an effective jurisdictional control difficult. It concludes inter alia, that identifying the consequences of financial crime and terrorist financing will assist in appreciating the fact that the solution transcends the enactment of legislations but the scrutiny of social, cultural, religious or traditional factors responsible

for it in order to proffer meaningful and holistic solutions in relation to Nigeria, as attempted in chapter 10.

In Chapter 3, the evolution of attempting to control financial crime in the UK and the US, which was developed from anti-drug law, exchange control law, tax law and civil law of tracing, it aims to establish that some of the early initiatives were haphazard, reactive and failed to address the specific characteristics of various financial crimes which are partly responsible for their ineffectiveness in dealing with its sophistication and modern trend. These two countries are chosen for the reasons earlier mentioned on Page 37 but more particularly because of the influence of their financial crime control methods in Nigeria.

The chapter appraises and outlines the relevance of the US Bank secrecy Act 1970 enacted to regulate the flow of illicit fund into the US which has influenced subsequent anti-money laundering legislations, the problem created in 1980 by the House Lords decision in *R v Cuthbertson* that prevented the recovery of proceeds of drug led to the enactment of the Criminal Justice Act 1993 and ultimately the Proceeds of Crime Act 2002, part 7 of which consolidates and reforms anti-money laundering law under a single legislation, excluding the control of terrorist financing (which had began in the UK since 1939), UK Prevention of Violence (Temporary Provisions) Act and a more detailed UK Terrorism Act 2000.

Further, the chapter evaluates the US PATRIOT Act 2001 which expands the jurisdiction of US AML beyond its territory due to the international dimension of financial crime, thus raising several fundamental issues including the breach of national sovereignty of other nations; it also evaluates the role of international institutions like the FATF which directs member states to establish FIU with the objective of assisting in financial control.

Chapter 4 analyses the history of attempting to control financial crime in Nigeria and demonstrates that the introduction of the British accusatory criminal justice system in Nigeria was a major setback to the evolution of the traditional inquisitorial justice system which though imperfect, could have evolved over the years and met the aspiration of the people. It also evaluates the provisions of the Sharia criminal law as a contravention of

the Nigerian constitution and the International Convention Against Cruelty. Further, it analyses the domestic financial crime control laws and institutions such as the Nigeria Criminal Justice (Miscellaneous Provision) Decree 1966, the Nigeria Tribunals of Enquiries 1984, the Nigeria ICPC Act 2000 and EFCC ACT 2002, the Nigeria Money Laundering Act 1999, 2011 and 2012, it demonstrates that the Hong Kong ICAC was relatively more successful than the Nigeria ICPC due to poor and unscientific investigation process and lack of political will.

In Chapter 5, a comparative study of how fraud is controlled in the US, the UK and Nigeria is conducted and showed that deception and dishonesty are the basis for fraud and the evolution of fraudulent schemes. It appraises the defect in the English case of *R v Preddy*, the ambiguity in common law conspiracy to defraud, the effectiveness of the US Mail Fraud Act as the generic law of fraud and other US specific anti-fraud statutes like the Bankruptcy Act and Oxley Act 2000. The chapter extensively explores the possession of unexplained wealth in different jurisdictions as a vital tool for control of financial crime, its potential danger to right to own property and presumption of innocence in criminal prosecution. Possession of unexplained wealth is identified as the way forward in money laundering control for effective confiscation of stolen wealth.

It identifies the increasing role of corporation in facilitating crime and the challenges of attribution of knowledge of individual to the company, it also analyses the inconsistencies and the restrictive application of directing mind theory in *Lennards carrying company v Asiatic Petroleum Co. Ltd* which does not reflect the modern reality of incorporations. The chapter concludes that the directing mind approach does not work and made 4 recommendations for attribution of knowledge in corporate criminal liability, namely: introducing strict liability offence for failure of a corporation to take appropriate preventive measures like s.7 BA in the UK, secondly, lifting the incorporation veil to hold the agent personally liable in exceptionally circumstances, thirdly, attribution of knowledge under specific legislation and fourthly, holding a corporation liable for any fraud committed by its employees.

Chapter 6 scrutinises the facilitative role of corruption in financial crime, it evaluates corruption in relation to abuse of human right; due to the difficulty in controlling corruption, decentralisation, deregulation, privatisation, transparency and accountability as effective means of control are examined, also examined is the South Korean model of controlled corruption that permits and fostered economic growth. It distinguishes between bribery, blackmail and stealing, and analyses the problem linked with corporate hospitality and gift giving in relation to corruption and identifies the solution under S.7 UK Bribery Act. It also identifies the challenges associated with the concept of entrapment in criminal investigation as a tool for preventing corruption.

Due to the need for an effective transnational cooperation between states, the thesis attempts to resolve the challenges of prosecuting corruption and territorial sovereignty as it affects the IBA, UK Bribery Act, OECD Convention, Art.3 of the ICPO- Interpol constitution that prevents intervention in political offence which includes Exchange Control laws and recommends decriminalisation of corruption, need for more effective international cooperation, quitam action, implementation whistle blower's protection and reward, asset declaration and verification as effective anti-crime control measures.

Chapter 7 compares and evaluates the control of money laundering in the UK, the US and Nigeria, it identifies the act of washing wealth as an ancient practice which had always been subjected to control under Exchange control laws, tax laws and equitable principle of tracing, the modern concept of which evolved from anti-drug laws and conventions. It compares money laundering and misrepresentation in trade based money laundering where imports and exports are either under invoiced, over invoiced or multiple invoiced. The relevance and influence of the US Bank Secrecy Act 1970, the 1988 Vienna, 2000 Palermo conventions and the FATF recommendations are appraised in relation to the role of OFC in facilitating money laundering as it affects the AML control measures in Nigeria. The existing literatures are compared and appraised to argue that money laundering process could be more complex than the FATF money laundering typology of placement, layering and integration. Again, comparison is drawn between money

laundering and reverse money laundering in relation to terrorist financing. The effectiveness of the UK POCA 2002 in money laundering control is evaluated, especially on recovery of stolen asset, confiscation regime and proof of criminal lifestyle, civil recovery regime and tax on proceeds of crime, it recommends these options as model for Nigeria subject to adaptation where necessary.

Further, the effectiveness of AML and TF preventive measures such as CDD, KYC, KYCB (being tools for financial intelligence as the best international practice are assessed) as they affect cash based economy like Nigeria with distorted data, lack of Data Protection law and possible financial services exclusion defeating the essence of various financial crime control measures. It scrutinises the preference of risk based approach over rule based approach and the concept of holding an assigned officer in an organisation responsible for money laundering infractions. It also evaluates the concept of predicate offence as it affects effective money laundering prosecution, especially where a foreign jurisdiction does not recognise such as an offence, it argues that though predicate offence safeguards against arbitrary use of legislative powers and protects human right, it ought not be a statutory requirement for prosecution in underdeveloped countries like Nigeria where crime detection and investigation are still rudimentary.

Lastly, the chapter compares the adequacy of recovery of proceeds of crime and criminal confiscation under the UK POCA 2002, the US RICO 1970 and the Nigeria criminal code Act 1990; it concludes that the essence of justice in financial crime control ought to evolve from retributive to restorative justice by denying the offender the proceeds of crime and awarding an adequate punishment.

Chapter 8 is an analysis of the identified problems in the context of the legal system, jurisdiction, complexity and standard of proof, by identifying the difference between international crime which is based on Rome statute of international Criminal Court 2002 Art.5 and transnational crime which are based on International Conventions. It identifies the development and the use of information technology and telecommunications in business transaction for the demystification of the concept of sovereignty of states, in

relation to prosecution of crime, thus raising the issue of appropriate exclusive or concurrent venue of prosecution of transnational crime, with the decision in *R V James Ibori* as a good illustration. The chapter identifies the lack of international cooperation as a major challenge in investigation, prosecution, punishment and seizure of proceeds of transnational financial crime, also it evaluates the difficulties associated with letters rogatory and police to police cooperation which are slow and the ambiguity surrounding political offence which the constitution of the INTERPOL prohibits and the existing MLA regime (under the FATF recommendations) observed to be of binding authority but has the challenges of dual criminality and difference in procedure between common law and civil law jurisdictions. The chapter re-emphasises the need for every jurisdiction, especially Nigeria to ensure compliance with TATF Recommendation 37 in drafting its MLA.

The Commonwealth's earlier initiative on MLA is analysed, although it was the harbinger of the current modern initiatives, however, it is observed that it had little impact because it was not a treaty and consequently had no binding effect. Again, many literatures are relied upon in appraising MLAT, especially, Sundarah Menon's recommendation on multilateral international structure with ability to formulate binding obligations and coercive powers transcending the existing traditional structures and MLAT. However, due to issues of sovereignty and possible loss of control over states, the thesis rejects the recommendation and opts for the review of the existing modalities under the FATF by designing a more practical peer review mechanism.

It also analyses the concept of standard of proof in litigations, in view of the high standard of proof in criminal matters, the thesis recommends for Nigeria, the use of quitam action, merger of criminal and civil proceedings to avoid the dichotomy in the standard of proof and thirdly, decriminalisation of financial crime by introducing the law of wrongs, as this will further obviate the challenges of double jeopardy and parallel proceedings.

Chapter 9 deconstructs the existing financial crime control measures, regards it as grossly ineffective and recommends alternative ways of financial crime control like the use of regulatory action, civil enforcement by victim and disqualified proceedings, especially where there are no proof of dishonesty, where there is no public concern for prosecution and punishment and where there is cooperation from the offending corporation, especially in complex crimes that are difficult to detect. In this context, the use of NPA, DPA and Plea bargain are appraised, as it affects effective resolution of corporate misconduct. It is observed that there is no equivalence of DPA and NPA in Nigeria and the UK, while the concept of Plea bargain that operates in the US is different from the UK style, it also evaluates the misinterpretation of S.14(2) EFCC Act 2004 and S. 180 CPA in relation to plea bargain in Nigeria Appeal Court decision of *Federal Republic of Nigeria V Igbinedion* which reiterates that plea bargain is novel concept in Nigeria criminal justice system but recently few states in Nigeria, like the Lagos state has enacted Administration of Criminal Justice Law 2011 s.75 and 76 and the Federal Administration of Criminal Justice 2015, for more clarification, the UK decision in *R v Dougall* that differentiated the concept of plea bargain in UK from the US style is scrutinised, this is supported by UK the A-G Guideline on plea bargain in serious and complex cases, a position reinforced in *R v Innospec Ltd*. It is observed that in order to prevent abuse of the use of plea bargain, particularly in weak legal systems, there must a clearly defined guideline for its effective implementation.

Furthermore, chapter 9 evaluates the importance of civil enforcement as a substitute to criminal prosecution mainly where there is a breach of fiduciary relationships, which by exploiting the constructive trust principle to ensure that recipient and facilitators of illicit wealth are held accountable as seen in *Selangor United Rubber Estate v Cradorck* and the recent case of *FHR Euroean Ventures llp v Cedar Capital Partners llc*, the latter decision which overturned over 100 years position of the UK courts by allowing the principal to recover stolen asset, including bribe into an investment even in the hands of a third party. The thesis compared the application of the same principle in Nigeria and prescribed expansion of the applicable law in Nigeria.

The chapter further recommends for Nigeria financial crime control, the provisions of S.7 UK Bribery Act, also, provisions of senior manager certification regime to hold designated senior members responsible for misconduct, It also weighs the inadequacy of victim support which is means tested compared to the available third party immunity for company directors thus defeating the deterrence effect of litigation, again, it recommends the need for Nigeria to develop a modality for supporting victims of financial crime.

Having made a comparative analysis of the control of financial crime between the three countries in chapters 1 - 10, chapter 11 revises and develops pragmatic solutions derived from policies, laws and regulations of other jurisdictions in order to fill the identified lacunae in Nigeria anti-financial control measures.

Chapter 2

Law, Moralism and white-collar crime

This chapter analyses and synthesises the concept of crime and financial crime in relation to human greed, dishonesty, the influence of moral values on legislations which don't necessarily correlate. It analyses crime from diverse, conflicting schools of thought such as the natural, positive, Marxist and sociological schools, with a view to assisting in proffering solutions to identified problems from such different perspectives. It evaluates the challenges in the concept of cultural relativism against cultural universalism, if moral or cultural values are distinct, relative and acceptable means of regulating human conduct, how do we harmonise diverse customary practices, values and conventions against international best practice? This chapter explains why it is imperative for international conventions to accommodate local cultural or moral variations, failing which the essence of crime control would be defeated.

The chapter identifies the failure to consider moral or cultural relativism in implementation of criminal justice system in many African nations, especially in Nigeria as part of the general reason for the ineffectiveness of the crime control measures and institutions, as seen in the use of repugnancy clause in legislation whereby any local law or custom inconsistent with the English principles of natural justice, equity, justice and common law of England were declared null and void, in sharp distinction to the well-considered work of Savigny's theory of *volksgeist* (common conscience or national spirit) which advocated the need to consider the history and culture of a people in law reform.

Furthermore, this chapter evaluates the influence of Edwin Sutherland's thesis on white-collar crime as it affects social class perspectives and the extant theory of causation of crime and identifies the failure of Sutherland's thesis to proffer a comprehensive definition of white collar crime, the chapter appraises various inexhaustive definitions of financial crime in order to proffer a more acceptable meaning of financial crime with a view to proffering pragmatic, legal and extra legal solutions to the problem, especially in

view of the influence of development in information technology and globalisation of commerce and transnational crime.

Finally, the chapter lays the general foundation for appraising the role of the existing international measures and concludes that although various anti-financial crime control measures in place have not adequately eradicated it, nevertheless, it has created awareness for the pernicious effect of financial crime and the importance of devising more effective means of its control far beyond the purview of criminal law in order to ensure adequate interdiction, punishment, prevention of financial crime and effective means of disgorging its proceeds.

2.1 Law and Moralism

Corruption, fraud and money laundering are acquisitive crime of choice, largely influenced by human greed, they hinge on dishonesty and deception, thus raising both moral and legal issues; although morality and law regulate human conduct, however, compliance with or obedience to the law is obligatory, law contains sanctions and it is flexible to adapt to modern trends but on the other hand, morality only attracts social opprobrium³, cheaper to enforce⁴ and not quite flexible in adapting to modern trends. The concept of crime has been influenced by various schools of thought, the earliest one being the postulations of the natural law theorists, prejudiced by the ancient primitive legal system when there was no distinction between law and morality, although law and morality intertwine and overlap (as seen in the influence of Judeo Christian creed on English common law and the influence of Islam on Sharia commercial jurisprudence) but as the society develops so do legal duties devoid of moral obligations develop; as a result, law and morality do not necessarily have to correlate⁵.

³ Gilbert Crentsil, 'The concept of fraud: a comparative analysis', in Barry Rider (ed) *Research Handbook on International Financial Crime* (Edward Elgar Publishing 2015) 16 -17

⁴ Ibid 17

⁵ H L A Hart, *The Concept of Law* (2nd edition OUP, 1997) 185

Furthermore, the natural law theorists who were largely influenced by the teachings of Plato and Aristotle⁶ postulated that laws are the objective moral principles derived from nature of the universe which are decipherable by reasoning⁷, for instance, Thomas Aquinas⁸, an adherent of this school of thought posits that human law must aspire to comply with the natural law, which is an immutable divine law and can only be understood intuitively by divine guidance, consequently, validity of every positive law is derived from its compliance with divine laws, therefore, human laws are either just or unjust, it is just when it complies with divine standard of virtue, clarity, usefulness and for the common good, conversely, unjust laws are perversion of law and must be obeyed only in order to avoid anarchy⁹.

Political application of the natural law theory reflected in the social contract theory of law which asserts that consent of an individual is the basis of submission to authority in every jurisdiction¹⁰. For instance, positivism theory of Thomas Hobbes, thinks natural law is not an immutable divine law from which human (positive) law derives its validity but rather Hobbes thinks natural law is man's right to self preservation, as no man can be subjected to compliance with any law without his voluntary consent to those who exercise authority over him, Hobbes claimed that before social contract between man and the state, *'man lived in a state of perpetual strife in which the life of man was solitary, poor, nasty, brutish, and short'*¹¹ as a result of which every man strives for self preservation, therefore, law and order eventually became necessary as a means of protecting order and security, and for each citizen to protect his own life; he must give absolute and unconditional obedience to the law, like Aquinas, civil rebellion is opposed and civil war is considered as the greatest of all evils because the

⁶ Plato stated that justice is a universal value that transcends customs and religion and that the essence of law is justice, hence any law that fails to meet up to the essentials of justice is unjust while Aristotle describes justice as "general justice" which is generally virtuous actions of just treatment of other people and "particular justice" which is fair and equitable treatment of others.

⁷ Michael Freeman, *Lloyds's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008) 84

⁸ A natural theologian, 1225 – 1274 AD

⁹ Freeman (n7) 101

¹⁰ Ibid 7

¹¹ Ibid 106

essence of human association is considered as peaceful co-existence and defence against whatever threatens their individual and collective existence. Again, John Locke reinforced the social contract theory of law by introducing another dimension to Thomas Hobbes' postulations by stating that in the state of nature man was different from beasts due to his ability to reason as designed by God. Therefore, God's expectation from men is obedience to His law of nature which can only be comprehended by reasoning, political power can therefore only be used for the public good but unlike Aquinas and Hobbes, Locke supports the right of men to resist an abusive political power even of a legitimate political society. This theory shifts from social contract to fiduciary duties by stating that government is based on trust, men put trust on the sovereign and any ruler who betrays this trust may be overthrown because such a ruler has placed himself in a place of war with his subjects, consequently, a just rebellion with a just cause is encouraged, when oppressed people resist tyranny, they have not created social chaos nor cause the attrition or war, hence a tyrant should be treated as a rebel with loss of authority and control over the state; nevertheless, he cautioned that revolution should not be an act of revenge but an act of restoration and reconciliation of a violated political order¹², in that light, overthrowing corrupt governments in coup plots as witnessed in several African countries could be justified as legitimate but experience of military rule in Africa has shown that an elected representative government embodying the collective aspiration of the people, with appropriate checks and balances is the most responsible political system.

As earlier mentioned, the natural and sociological theorists have brought forward the conflicting views on the extent to which law, morality or both should regulate human conduct, this a difficult position to balance unless all aspects of the issue are considered. **Gilbert** Crensil¹³, for example, argued in support of applying both morality and law in regulating human fraudulent conduct. For example, the natural and sociological theories of law presuppose an existing relationship between moral value and law, Aquinas' divine law which can only be glimpsed by intuition without any specific standard is an ambiguous assertion; if natural law is the generally accepted norms and mores of the society, protection of which lubricates the essence of the society, in the absence of which

¹² Ibid 109

¹³ adopted the argument of Steven Shavell, 'Law versus morality as regulators of conduct' (2002) 4 American Law and Economic Association 227

the society disintegrates and loses its moral fabric, how will an objective yardstick for moral values be determined and how will an appropriate punishment with a view to maintaining peace and well being of all citizens be defined? Even if divine law protects moral values, it would be inconclusive to equate observance of norms with obedience to law; as earlier mentioned, violation of law may earn sanctions and punishment, whereas violation of moral standards may only earn social opprobrium, except in the primitive legal systems where there was no distinction between law and morality, for the latter to have the force of law, it must be enacted into law by a valid state authority and such mores must be generally accepted or else it would not be obeyed. This was a challenge for the implementation of the Islamic financial products and services (with multifarious schools of Islamic jurisprudence) outside Islamic countries without losing the uniqueness and utopian characteristics¹⁴ of its jurisprudence which hinges on risk sharing, including profit and loss sharing schemes, which equally condemns dishonesty or misrepresentation in financial dealings; for instance, in Islamic jurisdictions, the secular financial law must comply with variations of schools of thought on Islamic financial jurisprudence; the position of which is clearer in the non Islamic jurisdictions where Islamic financial services and products must comply with the general law and regulations governing access to the market¹⁵.

2.2 Universal and Relative Moralism

It is therefore arguable that universal moral values are inapplicable to all persons but restricted to cultural boundaries of diverse civilisations, which Simon Caney¹⁶ captured as cultural relativism, which means that some generally accepted moral values like murder or rape have global acceptance¹⁷, including human right, although proponents of Sharia criminal law have argued persistently, especially in Nigeria that United Nations Human Right Convention and allied rights in national, regional laws and conventions are anti-

¹⁴ Craig Nethercott and David Eisenberg, *Islamic Finance, Law and Practice* (OUP, 2012) 7

¹⁵ Ibid 136

¹⁶ Simon Caney, *Justice Beyond Borders, A Global Political Theory* (OUP, 2005) 25

¹⁷ Ibid 28

Islamic Sharia practices¹⁸, in the light of these, it is pertinent to ascertain the position of cultural variety and diversity; Should the local law applicable to one tribe or nation also apply to others or vice versa?¹⁹ In the alternative, if cultural values are distinct, relative and are the acceptable moral principles of measuring conformity to the community's held view, the concept of universally applicable moral values would be faulty because different people are subject to different customs, practices, conventions, values and principles²⁰. Therefore, compliance with the international best practice lay down by international organisations must allow local deviation from and variation of its norms.

To buttress this view, Thomas Scanlon argued that relativism dwells on reason for an action and not the impact of the action²¹, hence, it will fail to address issues like the impact of denying right of speech and religion; for this reason, Jihadists like ISIS, Al-Qaida or Boko Haram²² could kill and maim because their version of Islamic jurisprudence permits terrorism, the impact of which is genocide and contravention of globally accepted standard of behaviour by virtue of Rome Statute of the International Criminal court 2002, Art.5 on genocide, crimes against humanity, war crimes and crime of aggression. In conclusion, Scanlon noted that global ethics and standards should not be construed strictly from the perspectives of the western world. The British colonial government made this attempt by applying repugnancy test in some of its West African colonies by ensuring that the applicable customary laws and traditions in the colonies were subjected to repugnancy test, to the extent that any customary law that fails to conform with the principle of natural justice, equity and good conscience; and the

¹⁸ Andrew Iwobi, "Tiptoeing Through A Constitutional Minefield: The Great Sharia Controversy In Nigeria", (2004) JAL 48 (2) 111, 130

¹⁹ Caney (n 16) 28

²⁰ Gilbert Harman, "Is there a single true morality", Michael Krausz ed, *Relativism: interpretation and confrontation* (University of Notre Dame Press 1989) 363

²¹ Thomas Scanlon, *what we owe each other* (Harvard University Press 1999)

²² A terrorist group unleashing havoc in the Northern Eastern part of Nigeria

common law of England in force on a given date²³ were declared null and void; this resulted in social frictions and uncertainty of the native laws, as many courts declared native laws which did not meet British standards as repugnant. The sacred opinion of Lord Atkin in *Eleko v Govt of Nigeria*²⁴ captured a glimpse of the mindset of the court at the material time; when he said that ‘*the court cannot itself transform a barbarous culture into a milder one if it stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience*’.

This decision is a sharp contradiction to Savigny's²⁵ work on law as a reflection of social evolution of a given society, therefore, any law reform must take cognisance of the history of the people into consideration; the approach of the British colonial government to law reform in Africa and Nigeria in particular was in total negation of the history and cherished values of the people and it amounts to an erosion of their *volksgeist* (common consciousness). Savigny, for example, rejected natural theory of law because according to him, law is a reflection of “*national spirit*” which originated from custom as interpreted by the courts; this is buttressed by Emile Durkheim that criminal law is a reflection of ‘*collective conscience*’ of acts universally disapproved by members of the society, violation of which is met by punishment²⁶. However, in contrast, the learned authors of “*Principle of Criminology*”²⁷, criticised the sociological theories of law on the ground that “some criminal laws are products of irrational enterprise” and the influence of pressure group on the legislature to secure favourable legislation to their interests and objectives and not any attempt to balance conflicting interests in the society, they further noted that there are laws with minimal societal disapproval like gambling, sexual offences, which

²³ Supreme Court Ordinance 1945, s19

²⁴ (1963) AC 662, 273

²⁵ M Dias, *Jurisprudence* (4th edition, London Butterworths, 1976) 519

²⁶ Freeman (n 7) 880; see also Roscoe Pound, *Philosophy of Law* (Yale University Press 1954)

²⁷ Edwin Sutherland, Donald Cressey, David Luckenbill, *Principles of Criminology* (11th edn, Rowman & Littlefield Publishers 1992) 36

nonetheless are crime in some jurisdictions²⁸; also some laws inherited from the common law jurisdiction to Africa and the U.S and not due to social disapproval of any behaviour, invariably, contemporary criminal law partially reflects the consensus of the people and in some other instances, it does not. For example, the degree of social disapproval to some offences differ from that which the criminal law attaches to it; social disapproval to white collar crime, industrial pollution and distribution of unsafe goods may be deeper than its legal disapproval, on the other hand, while criminal law attaches importance to the use of marijuana as crime, come people may regard it as trivial issue so far it is does not facilitate heinous crime²⁹.

A subset of sociological theory is the *Group Conflict* and *Marxist approach* which state that criminal law is a reflection of the diverse values and interest of groups who struggle over which value will prevail and which may be mediated by the state or settled by law, these contending groups do not compete on equal basis, they differ in power and this determines the group that succeeds at entrenching its power; articulate their agenda and get their interest protected by law, contending groups organised themselves into different pressure groups³⁰, consequently, Marxists concluded that criminal law only protects the interest of the most organised politically active group, while some group win in one situation, other group prevail at some other instance which usually involves negotiations with the appropriate arm of the state. Marxists, further postulates that legal institution is a social structure, supported by “means of production”, while social conflict is viewed in terms of struggle between the capitalists and the proletariat (work force), where power lies with the capitalist, law therefore, is an expression of economic interest of the capitalist class while state is one of the instruments and institution through which the capitalist class maintains the economic order, Marxists concluded that law developed out of the need to protect the economic interest of the capitalist³¹. However, the Marxists

²⁸ Ibid 23

²⁹ Ibid

³⁰ Ibid 37

³¹ Ibid 39

argument must be treated with circumspect because there are other social forces that control means of production apart from the capitalists and yet have enormous influence on law making process, although capitalists may use their power to safeguard their interests but in reality, they neither necessarily dominate the state nor manipulate the legal system absolutely to their advantage as other pressure groups often influence legislations.

2.3 Edwin Sutherland and the theory of White-Collar Crime

In 1939, the attention of the world was drawn to the concept of financial crime by Edwin Sutherland in his speech titled: "*The White Collar Criminal*"³², he stated that the administration of criminal justice system of many jurisdictions had focused on crime committed by persons of lower socio-economic class while the technical and advanced crimes committed by the affluent in the upper economic class have been neglected. "White collar crime" according to Sutherland, is the crime committed in the course of occupation by persons occupying positions of respect and high social status. Before Edwin Sutherland's thesis on white collar crime, the generally accepted theory of crime was based on the assumption that evil association corrupts good manners, such that wretched social condition like poverty, broken homes and personal pathologies associated with poverty are regarded as the causes of criminal tendencies of people in the lower economic class³³ but Edwin Sutherland's thesis expanded this widely accepted theory by asserting that persons in the upper socio economic cadre of the society are also influenced by their life circumstances to commit white collar crime as much as people in the lower economic class who commit street crime, unlike the general earlier belief that good family upbringing deters crime. Further, he challenged the concept that lack of self control by street criminals as another factor responsible for crime by showing white collar criminals who have achieved success in life by share display of self restraint and control, hence, the

³² Delivered at the 34th Annual General meeting of the American Sociological Society, the first study and published work on white collar crime which altered the established studies of crime and rejected the traditional definition of crime

³³ Edwin Sutherland, *White Collar Crime*, (Yale University Press 1983)

fact that a person cannot exercise self control over himself is not a complete defence for crime except in proven cases of kleptomania³⁴ or other psychological or personality disorder.

He drew a comparison between crime in the upper class and lower class from which he developed a theory of criminal behaviour by asserting that the statistics and case histories which represent the data upon which theories of crime are based only focus on the convicted criminals in the lower class, crime committed by the upper class are excluded from the data as evidenced by “Robber Barons” of the 19th century to the white collar criminal of the present age who are highly educated and suave in different professions committing embezzlement, fraud, misapplication of fund, tax evasion and other crimes. White collar crime violates trust which results in lower social morale which ultimately leads to large scale social disorganisation. Furthermore, He rejected the restriction of definition of crime to conviction in a criminal court by expecting the concept of crime to be extended to administrative proceedings before tribunals and bureaux which often adjudicate over white collar crime³⁵. He said that behaviour in the lower class and upper class which the society reasonably expects to be crime should account for a working definition of crime; that the essentials of street crime and white collar crime are similar but the application of criminal justice system differs for both due to social positions of the two offenders, since white collar crime are prosecuted in administrative board, tribunals, bureaux, in some other instances they are not investigated by the state and even when prosecuted, it is either there were no conviction or civil damages were awarded because white collar criminals have the financial and social means to influence and pervert justice. Hence, the absence of conviction should not be a reason why a theory of crime should not include unprosecuted upper class crime; all that should be required is ‘*convictability*’ as opposed to actual conviction, also Sutherland observed that often times, prosecution is usually restricted to the principal offenders, whereas other persons who are

³⁴ Ibid 16

³⁵ He drew the analogy of Juvenile courts which are not recognised as criminal courts yet criminologist took cognisance of juvenile offence in their definition

parties to the crime ought not to be exonerated. He opines that the victims of white collar criminals are lower economic class, unorganised consumers, investors, stock holders because they are weak and lack the technical knowledge of the law, whereas the victims of street crime are the upper economic class persons of affluence, men of power and wealth.

In view of the defects in conventional theories of causation of crime as espoused by Edwin Sutherland, a more robust hypothesis was required to explain the causes of white collar crime among the upper class and causes of crime among the lower class which could be found in the “*process of differential association*” theory which suggests that crime is learnt either by peer group pressure, that is a direct or indirect association with those who practice the behaviour³⁶ which takes us back to the concept of evil communication corrupting good manners, comparative intimacy and frequency with law abiding behaviour or criminal behaviour will determine whether a person becomes a criminal or law abiding. Those who learnt criminal behaviour are segregated from frequent and intimate contacts with law abiding behaviour and got exposed to criminal behaviour such as the white collar criminals starting in good environment, good homes, good colleges but later obtained a good paying job where “crime is a way of business”, thereby they became inducted into corporate criminal behaviour and ultimately became white collar criminals, conversely, the lower class element started his career in deteriorated environment, broken home and through comparative intimacy with delinquent people and through partial segregation from law abiding behaviour, he learnt delinquent behaviour and technicalities of street crime. Sutherland claims this is not the entire process of assimilation into culture of crime as there are opportunities for invention made by professional criminals in the lower class and by lawyers in the white collar crime. A second hypothesis is that as a result of differential association, the society is disorganised because the society is not adequately organised ab initio against such

³⁶ Gilbert Geis, Robert Meier and Lawrence Salinger, *White collar crime, classic and contemporary views* (3rd edn, Free Press 1995) 374; see also Sutherland (n 27) 17

behaviour, the legal provisions and its application are not in tandem with business practice, because the rules of the game conflict with legal rules, a law abiding business man is driven by competition to adopt the prevailing method of business transaction such as commercial bribery, LIBOR manipulation, tax evasion and money laundering despite efforts of business organisation to eliminate it, some business groups still do it, individual too do it and each protects its own against prosecution. It is therefore difficult for the community to present a common front against crime, especially because the crime Commissions, bureaux, administrative tribunals are composed of professional and business men who adjudicate over burglary, robbery and petty thieves but overlook the crime of their social class.

In order to buttress this view, Sutherland conducted an analysis of commission and court decisions against 70 American largest companies under 4 types of laws³⁷ and found that majority of the decisions show that not all unlawful acts of the companies are criminal and wondered if it is not a subjective semantic interpretation that an unlawful behaviour should not be a crime; if crime from legal perspectives is a punishable act considered injurious to the society; the behaviour of most the investigated companies were observed to be injurious to the society and they ought to be penalised but technical rules enabled them to evade conviction.

Sutherland's thesis represents a distinct academic research, exposing the greed and criminal behaviour of corporations and served as a test for compelling corporate social responsibility and accountability; it is a shift from the traditional sociological approach of restricting theory of crime to causation of crime which itself is based on wrongly interpreted data, the theory focused on the perpetrators of crime, their roles, characteristics and traits in committing crime³⁸. However, it is difficult to agree with Sutherland's white collar crime concept because it reflects traits of socialism and anti-

³⁷ Antitrust, False advertisement, National Labour Relations and Infringement of Patent, Copyright and Trade Marks

<<http://nassirhassan.wordpress.com/2012/02/16/book-review-white-collar-crime-by-edwin-h-sutherland>>
accessed 05/01/2103

business viewpoint by dwelling on stigmatisation of the upper social class³⁹, again, it would be difficult for Sutherland's theory to stand the evolution of crime as the definition is too general and ambiguous to be universally accepted as definition of white collar crime⁴⁰. For example, Paul Tappan in his work, "*Who is the criminal?*"⁴¹ criticised Sutherland's theory for focusing on anti social behaviour rather than crime, a term considered loose and vague, mere epithets until refined to mean specific actions because convicting a person without having committed a crime as defined in a statute and without trial in a competent court will amount to lawlessness; definition of crime as enshrined in the criminal code (no matter how imperfect) addresses the issue of precision, ambiguity, social stability, security and dependence on justice rather than subjecting the definition of crime to the whims and caprices of Criminologists. Finally, Tappan suggested a definition of crime as '*intentional act in violation of criminal law (statutory and case law) committed without defence or excuse and penalised by the state as a felony or misdemeanour*'⁴². Therefore, crime is a breach of legal norms⁴³ with sanctions to exert effective control over human behaviour, reinforced by morals, convention and tradition⁴⁴. Therefore, white collar crime is not a crime unless it is a violation of the criminal law provisions and duly pronounced guilty by the judiciary.

In another dimension, in her treatise on "Gender and Varieties of white-collar crime"⁴⁵, Kathleen Daly elucidated on the discordant views over the appropriate definition of

³⁹Baker John, 'The Sociological Origins of "White-Collar

Crime' <www.heritage.org/research/reports/2004/10/the-sociological-origins-of-white-collar-crime> accessed 05/01/2013

⁴⁰ Richard Brody and Kent A Kiehl, 'From white-collar crime to red-collar crime', (2010) JFC 17 (3) 357

⁴¹ American Sociological Review (1947) 12 (1) 96; Geis (n 36) 50

⁴² Ibid

⁴³ ibid 55

⁴⁴ Ibid 56

⁴⁵ Ibid 61

white collar crime by narrowing it down to the question of whether the primary focus should be on characteristics of the offence or the offender, she observed that if the offence related approach is used, there would be no contradiction; that the offender related approach focuses on upper economic class, in respected occupation or those in position of power; an approach which amounts to crime in one instance and in another instance, not a crime if committed by another person or group, she cited Medicaid fraud as white collar crime if committed by a doctor or nursing home owner but if committed by a clerical officer, it is not. Furthermore, John Braithwaite reveals more fallacies in Sutherlands' theory of White Collar Crime by noting that the concept of "respectability" is not precise, and compares reliance on commission of crime by persons of high status amounting to mixing explanation with definition⁴⁶ but acknowledges class bias in the administration of criminal justice systems such as weak enforcement of business regulations with focus on compliance as opposed to prosecution and where businesses are prosecuted, the punishment is less severe⁴⁷. Finally, Braithwaite offered an alternative definition which shifted emphasis from individual to the actual crime by relying on Herbert Edelhertz's definition of white Collar crime as '*an illegal act or series of illegal acts committed by non physical means and by concealment and guile to obtain money or property, to avoid loss of money or property, or to obtain business or personal advantage*'⁴⁸. Edelhertz ridiculed Sutherland's class approach because it is not imaginable that any prosecutor would accept the embezzlement by a bank president as white collar crime and reject same as offence when committed by a low paid bank Teller because in

⁴⁶ Ibid 33

⁴⁷ Lauren Snider, *Traditional and corporate theft: a comparative of sanctions* in Peter Wickman and Thomas Dailey, (ed), *White collar and economic crime* (Lexington books, 1982) 235

⁴⁸Herbert Edelhertz, 'The nature, impact, and prosecution of white-collar crime' (1970) US Govt. Print Office

practical terms, offence is being committed by senior executives and junior level employees⁴⁹.

Furthermore, apart from the course of business or occupation element of white collar crime, all the alternative definitions so far have failed to capture the physical harm to the victim of white collar crime. There are conflicting arguments whether financial crime involves violence despite instances of violence associated with white collar crime in other to conceal the crime and avoid detection. This view is made worse because as observed by John Hagan⁵⁰, many still believe that it is a 'victimless crime' because the victim of financial crime is sometimes difficult to identify⁵¹, it is however arguable that the society whose law is violated is the victim and there are instances of financial crime resulting in harm to or death of the victim.

There have been other several attempts to define white collar crime in relation to breach of trust, for example, Susan Shapiro had advocated that focus should be on violation of trust as the most important way to define white collar crime because the existing definitions are restrictive and distort empirical inquiry⁵² but the weakness in this approach is that in the absence of legal or equitable trust, duty of trust could not be ascribed. Another alternative definition of white collar crime is offered by Clinard and Quinney who divided white collar crime into occupational and corporate crime, '*occupational crime consists of offences committed by individual for themselves in the course of their occupations and offences committed by employees against employers*' this no doubt involve blue collar crime while corporate crime is defined as '*offences*

⁴⁹Herbert Hedelhertz, White Collar and professional crimes: The challenges of 1980s', ABS (1983) 27, 110

⁵⁰ John Hagan, Ilene Nagel, and Celesta Albonetti, 'The differential sentencing of white Collar Offenders in Ten Federal Courts' ASR (1980) 45 802; see also Station Wheeler, David Weisburd and Nancy Bode, 'Sentencing the white collar offender: Rhetoric and Reality, ASR (1982) 47 641

⁵¹ Laura Hansen, 'corporate financial crime: social diagnosis and treatment' JFC (2009) 16 (1) 28

⁵²Susan Shapiro, "Colouring the crime, reconsidering the concept of white collar crime", ASR (1990) 55, 362

*committed by corporate officials for the corporation and offences of the corporation itself*⁵³. There is a variation of this definition offered by Laura Schrage and James Short⁵⁴ who referred to white collar crime as organisation crime committed by corporate officials for either public or private organisations. Braithwaite observed that this last definition obviously excludes card fraud and welfare cheats and suggested that occupational theory ought to be discountenanced because employment disciplinary issues are distinct from crime. According to Braithwaite, a functional definition of white collar crime should encompass corporate or organisation crime, as any general theory of occupational crime would eventually turn out to be as difficult as theory of white collar crime and the way forward is to confine studies to specific occupational crime such as Quinney on retail pharmacy or Geis on abuse of medical programme⁵⁵.

However, in many legal systems, financial crime includes antitrust violations, bank fraud, bankruptcy fraud, bribery, kickbacks, computer/internet fraud, consumer fraud, counterfeiting, credit card fraud, economic espionage, trade secret theft, embezzlement and theft, extortion and blackmail, financial fraud, forgery, identity theft, public corruption, racketeering, and telemarketing fraud, this list is inexhaustive, they are related but each has its distinct ingredient, the list keep expanding because new schemes of crime are constantly being devised by criminals and the advent of information technology in perpetrating crime has added more sophistication to it. However, a common feature of financial crime is the element of deceit deployed to obtain financial gains from the victim⁵⁶.

⁵³ Marshall Clinard and Richard Quinney, 'Criminal Behaviour systems: A typology' (2nd edn. Holt, Rinehart and Wilson 1970)

⁵⁴ "Toward a sociology of organisational crime," (1978) SSSP, 25, 407

⁵⁵ Richard Quinney, Occupational Structure and criminal behaviour: Prescription Violation by Retail Pharmacists (1963) SSSP, 11 1795; see also Henry Pontell, Paul Jesilow, and Gilbert Geis, "Policing physicians: fraud and abuse in a government medical programme," (1982) SSSP 30, 117

⁵⁶ 'Richard Brody and Kent Kiehl, 'From White Collar Crime to red collar crime (2010) JFC (3) 117

The difficulty associated with finding a generally acceptable definition of financial crime was further captured in the IMF⁵⁷ working papers⁵⁸ stating that ‘*there is no internationally accepted definition of financial crime; the term expresses different concepts depending on the jurisdiction and the context*’ but financial crime is not a recent phenomenon, it dates back to over two hundred years ago, even as far back as the period of the British industrial revolution when complex finance, investment and economic structure supported by banking system, insurance products, stock market operations, credit system were designed to finance trade and commerce and an increasing complicated legal contracts, this resulted in remarkable growth of the economy that consequently produced skills, manpower and professionals (lawyers, brokers, bankers, engineers, surveyors), who seized the gap in the system to commit fraud, embezzlement of public fund which depleted public investments, with serious consequences on lives of victims of such crime⁵⁹. Again, during the medieval period in England, economic offences like regrating and engrossing were enacted to control the use of commercial power against the interest of the ordinary citizen⁶⁰. It was also an era of commercial and mercantile fraud, credit abuse, false accounting and fraudulent insurance claims⁶¹. The era witnessed various market abuses like deliberately spreading false rumour so as to distort

⁵⁷ The IMF and the World Bank were both created at an international conference convened in Bretton Woods, New Hampshire, United States in July 1944; to achieve its goals, it collaborates with the World Bank, UN, the G20, and it also sponsors expert research papers to address global economic issues. The mandate of IMF is to promote international monetary cooperation and to provide policy advice and technical assistance to countries <<http://www.imf.org>> accessed on 23/07/2013; see also Gorge Gilligan, ‘Financial crime: a historical perspective’ in Barry Rider (ed) *Research Handbook on international financial crime* (Edward Elgar 2015) 32

⁵⁸ Jack Boorman and Stefan Ingves, ‘Financial System Abuse, Financial Crime and Money Laundering’ (2001) IMF Paper, 1

⁵⁹ George Robb, *White Collar Crime and the criminal “Upper world” in White Collar Crime in Modern England: Financial Fraud and Business morality 1845 – 1929* (Cambridge University Press 2002) 1-2

⁶⁰ Geis (no 35) 7- 8

⁶¹ Ibid 5

the value of stock for financial advantage⁶². It was also an era where benefits of incorporation were grossly abused to raise fund for personal benefit⁶³. Nevertheless, the concept of financial abuse and financial crime remain ambiguous and the two words are sometimes used interchangeably, it is often referred to as economic crime, financial abuse, white-collar crime and crime in suite; since the first speech of Sutherland⁶⁴, the concept has been linked with illicit drug trade, terrorist financing, human trafficking, corruption and organised crime. In an attempt to provide an acceptable definition for the purpose of its operation, IMF recognises financial crime as ‘*a subset of financial abuse*’ and defines it as non-violent crime that generally results in financial loss, financial fraud and a range of illegal activities such as money laundering and tax evasion⁶⁵. It has also been

⁶² in 1711, rumour was deliberately circulated that Queen Anne had died in order to ensure a sharp fall in the stock market which a few people made a brisk profit from it and In 1803, rumour was circulated that the British and French had concluded a peace treaty which led to a rise in value of securities

⁶³ Gilbert (Geis n 36) 13, Incorporation permits the restriction of liability of shareholders to unit of shares held in the company and ensures the ability of companies to raise fund from investors in capital market which was grossly abused. In 1711, the South Sea incorporated by Royal charter for business purpose, was involved in inside dealing, company money was also used to purchase its shares by promoters and few individuals, leading to increase public investment in its shares which shore up its share value, at this time when there was no company law, no duty on directors to report to share holders, an era where there was duty to publish company audited accounts. This sudden fortune of South Sea led to springing up of so many other companies with fictitious objectives inviting members of public to invest in their company stock. However, promoters of South Sea Company eventually realised that their shares have been over valued; promoters began to sell their shares before the news spread, there was panic selling of the worthless shares by investors, South Sea Company and other companies eventually collapsed, speculators who took loans to purchase shares could not repay the loan, leading to collapse of many banks the government intervened to save the banks, the collapse ruined many investors, there were criminal allegations against the company promoters which led to embargo by the parliament restricting further incorporation till 1825

⁶⁴ Edwin Sutherland drew the attention of the world to the scourge

⁶⁵ The IMF Paper (n 58) 5, see also Michael Levi, “Some reflections on the evolution of economic and financial crimes” Barry Rider, Research Handbook on international financial crime (Edward Elgar 2015)

referred to as ‘illicit finance’⁶⁶. In UK, financial crime is defined as any ‘*offence involving fraud or dishonesty, misconduct or misuse of information relating to a financial market or handling the proceeds of crime*’⁶⁷. The (IMF) paper⁶⁸ attempted to distinguish between the concept of financial abuse resulting from poor regulatory and supervisory framework and weak tax systems⁶⁹ on the one hand and financial crime, sector based offences like money laundering and financial fraud related to cheque, credit card, mortgage, or insurance, tax evasion, circumvention of exchange restrictions, sale of fictitious financial instruments or insurance policies, embezzlement of non-financial institutions, stock manipulation, connected party lending⁷⁰ and many more on the other hand. The IMF paper however, appreciated that the two words are interchangeably used in many jurisdictions; also, in many jurisdictions, there are diverse legal characterisation of specific acts and the predicate offence such as money laundering, corruption and tax evasion that would give rise to the laundered criminal proceeds; also the concept of corruption is also not uniformly defined, in some countries the term “facilitation” or “grease” payments given to induce foreign public officials to perform their functions are not illegal, while in others, such conducts are treated as illegal⁷¹, there are divergence of opinions also on the issue of financial crime in relation to abusive or harmful tax competition, differences also exist on what is “excessive bank secrecy”, furthermore, the concept of crimes differ in various jurisdictions, “which raise questions as to which domestic laws one country may help

⁶⁶ Nicholas Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edward Elgar Publishing 2011) 3; see also Dept of Treasury, ‘Fighting illicit finance’, available at

<<http://www.ustreas.gov/topics/law-enforcemen/index.shtml>> accessed 16/4/2010

HM Treasury, ‘Counter illicit finance’ available at

<http://www.hm-treasury.gov.uk/fin_index.htm> accessed 16/4/2010

⁶⁷ Financial Services Markets Act 2000 S 6(3)

⁶⁸ (n 58) 4

⁶⁹ such as excessive bank secrecy, lack of disclosure rules and lack of effective fiduciary rules for investors and their agents and harmful tax practices)

⁷⁰ Sutherland (n 27) 4

⁷¹ IMF Paper (n 58) 5

another in enforcing. For example, some countries maintain a broad range of exchange controls, for example, capital controls within Nigeria legal system permits inflow of Western Union, Moneygram and allied international money transfer but proscribes reciprocal outflow of transfer of international fund except through its domestic banks, violations of which are financial crimes but which may not be a financial crime in the UK and America if reporting requirements are complied with.

Financial institutions can be involved in financial crime in three ways⁷²: as a victim⁷³, perpetrator⁷⁴ or instrumentality⁷⁵. Money laundering often involves a chain of financial institutions from many jurisdictions and increasingly, launderers are now using non-bank financial institutions (e.g. bureau de change, insurers, cheque cashing services, brokers, traders and illegitimate institutions such as shell companies created as laundering conduit and legitimate companies where illicit funds are intermingled with legitimate funds). Also because predicate crimes differ from one country to another, it is easier for launderers to transfer fund from one jurisdiction to another⁷⁶. There are many predicate crimes that facilitate and linked with money laundering like the control of a financial institution by organised crime. Criminals tend to launder proceeds of crime through the

⁷² IMF Paper (n 58) 6

⁷³ where financial institution is subject to different types of fraud such as misrepresentation of financial information, embezzlement, check and credit card fraud, securities fraud, insurance fraud, and pension fraud),

⁷⁴ where financial institutions commit different types of fraud on others such as the sale of fraudulent financial products, self dealing, and misappropriation of client funds

⁷⁵ Where financial institutions are used to keep or transfer funds, either wittingly or unwittingly, that are themselves the profits or proceeds of a crime, regardless of whether the crime is itself financial in nature will amount to money laundering; see also Barry Johnston and Oana Nedelescu, "Impact of terrorism on financial market, 2005 IMF Working Paper, WP/05/60, 3

⁷⁶ Predicate crimes are "underlying" crimes whose proceeds are laundered. In most countries, however, only the laundering of the proceeds of certain crimes (known as 'specified unlawful activities' or SUAs) are illegal. In some other countries, the range of SUAs is quite extensive, and may include all major crimes whether committed domestically or offshore. In others, the range is more limited and differs from one jurisdiction to another

financial system which may require a series of fraudulent activities such as counterfeiting invoices and by corrupting bank employees. Also, tax evasion, a form of financial crime, is facilitated by the existence of jurisdictions that have low tax rates, maintain relatively lax financial regulations and practices with excessive secrecy on information relating to client accounts⁷⁷.

2.4 Financial Crime and International Control Measures

Financial crime has assumed a global dimension in response to which there have been concerted efforts by international, national and regional institutions to combat it. The USA and the UK by virtue of their dominant economic roles and the influence of their financial institutions in the global economy have led the campaign against the threat of financial crime, initially, the control measures had focussed on drug trade and the financial crime related to it, the attention later shifted to the link between organised crime, illegal drug trade, human trafficking and much later terrorist financing when the USA was attacked on September 11, 2001, this has influenced the United Nations to adopt stringent measures against money laundering, terrorist financing, fraudulent activities, market abuse or insider dealing⁷⁸.

Globalization has also affected national and international trade, commerce and business transactions, the technological development in information technology and telecommunications has altered financial system operation, it has made banking and payment for commercial transactions fast and facilitated unrestricted cross border electronic money transfer but this development came with its attendant consequences, for example, it has made money laundering easier and faster, thieves, fraudsters, PEP do not need to carry cash between banks and countries but with a click of button, money transfer can be effected. This global crime has been met with global response by various national and regional bodies who have taken steps to criminalise the scourge. In its effort

⁷⁷ IMF Paper (n 58) 8

⁷⁸ *The 9/11 Commission Report* – Final report of the National Commission on Terrorist attacks upon the United States (Norton & company: London, 2004 Pg.170

to fight the crime, the *UN Convention against Illicit Traffic in Drugs and Psychotropic substances (1988) (Vienna convention)* is the first major attempt to criminalise money laundering⁷⁹, its *Article 3* prohibits illicit drug trade and laundering of money related to production of narcotic drug or any psychotropic substance⁸⁰, however, the Vienna Convention was restricted to laundering related to proceeds of illicit drugs and narcotics⁸¹, in order to broaden the scope of the law, the *UN Convention against Transnational Organized Crime 2000 (Palermo Convention)*, resolutions was passed to criminalise money laundering in general; these two international conventions with the support of many other international organisations are engaged in the control of financial crime, details of which are discussed in chapter 7 of this thesis.

Out of these international AML measures, the FATF, an institution established in 1989⁸² with a mandate to examine measures to combat money laundering (largely in recognition of the enormous proportions of illicit drug business) is the principal anti-money laundering multilateral organisation; to achieve its goals, it initially issued Forty Recommendations⁸³ which do not constitute a binding international convention, it is a voluntary task force and not a treaty organisation. However, each FATF member country undertakes a firm political commitment to combat money laundering by implementing

⁷⁹ although there have been previous resolutions of the United Nation on drug related offences such as the 1939 UN Convention on Suppression of Illicit Traffic in Dangerous Drugs, 1961 UN convention on Narcotic Drugs and the 1971 UN convention on Psychotropic substances

⁸¹ William Gilmore, *Dirty money, 'The evolution of international measures to counter money laundering and financing of terrorism'* (4th Edn, Council of Europe 2004)

⁸² it is a voluntary task force and not a treaty organisation, established by G-7 (a group of 7 rich countries) it's secretariat is located at Organisation for Economic Cooperation and Development OECD but it is independent of OECD

⁸³ Issued in 1990 and modified in 1996 and 2003; see also J. Johnson, "Is the global financial system AML/CTF prepared? (2008) JFC 15 (1) 7

the Forty Recommendations⁸⁴. The Forty Recommendations address the need for each country to criminalise money laundering in their domestic legislations, to implement measures to enforce criminal laws and to complement measures in the financial sector and international cooperation. The recommendations that apply to law enforcement can be grouped into 4, namely:

1. The criminalisation of money laundering
2. The seizure and confiscation of money laundering proceeds
3. Suspicious transaction reporting and
4. International cooperation in the investigation, prosecution and extradition of crime suspects.

Recommendations dealing with financial sector regulations relate primarily to customer identification and record keeping requirements which are commonly referred to as “know-your-customer” standards. Each member state has agreed to multilateral scrutiny of compliance with FATF standards through peer review or mutual evaluations, supported by annual self-assessments to track progress by each country so as to correct any observed deficiencies, the results of the mutual evaluations and the annual self-assessments are then summarised in FATF publications but where infractions are identified, FATF lacks the authority to recommended punitive actions. In addition, the FATF often evaluates the willingness of non-FATF members cooperation with FATF initiatives through publication of names of non-cooperative countries and territories (NCCT) exercise in specific key 25 criteria which are based on the Forty Recommendations; this evaluation results in publication of a list of the NCCTs. A listing by the FATF under the NCCT exercise has the semblance of punitive consequences because financial transactions with such jurisdictions adjudged as non-cooperative (a number of OFC in the Caribbean and Pacific, Israel, Lebanon, Panama, the Philippines and Russia) are subject to heightened scrutiny by financial institutions in FATF member

⁸⁴ After 9/11 terrorist attack on the US, additional nine special recommendations were introduced to address terrorist financing

countries. However, FATF approach has focused on persuasion and not coercion⁸⁵ because coercive measures would constitute an infringement of sovereignty of participating countries, again, it was considered controversial and condemned by the IMF and World Bank so FATF changed its policy to mere persuasion as opposed to coercion⁸⁶. Alldridge⁸⁷ observed that FATF discontinued the publication of the list of non complying countries due to fear of losing authority as the global anti money laundering agency.

In support of the existing national anti money laundering regimes and in view of the link between financial crime and corruption, the United Nations has added an impetus to the existing measures by enacting an international treaty against corruption (*United Nations Convention Against Corruption 2004*), though the provisions of this convention failed to define corruption, nevertheless, it enjoined all participating states to take preventive measures to combat corruption⁸⁸ in the private and public sectors but ahead of all these UN measures, there had been an earlier initiatives by the Commonwealth member countries to address the threat of financial crime, for instances, the *Commonwealth Law Ministers Meeting, 1980* held in Barbados identified the vulnerability of nations to the adverse effect of financial crime and emphasised the importance of united efforts to confront it. The meeting endorsed the establishment of *Fraud Liaison Services* to facilitate co-operation and dissemination of information among member states and advocated manpower training to fill the gap of incompetent manpower to handle commercial crime. A subsequent meeting of *Commonwealth Law Ministers 1983 held in Sri Lanka* recommended the need for judicial co-operation and assistance in criminal matters amongst nations within and outside the Commonwealth jurisdiction. The meeting recommended tracing, judicial forfeiture and confiscation of assets derived from crime as

⁸⁵ IMF Paper (no 58) 1

⁸⁶ R Hulsse, 'Creating demand for Global Governance: the making of a money laundering problem' (2007) *Global Society* (21) 155

⁸⁷ "Money laundering and globalisation" *J.Law & Soc*, 345 (4) 459

⁸⁸ *Article 5*

the most effective way to fight financial crime and the need to balance it with the protected right of property outside the jurisdiction of the crime, It identified an existing but defective mechanism for tracing of assets and the imperative of introducing another cost effective tracing procedure by creating the office of a *Commonwealth Fraud Officer* to assist states in combating serious international commercial crime, result of which has been very tremendous in the fight against drug trafficking and financial crime. The meeting advocated that emphasis should be laid on commercial loss prevention instead of detection and to achieve this, it was recommended that criminal intelligence should be developed to collate and analyse information and data on economic crime among member states. This was followed up at the *Commonwealth Law Ministers meeting 1985 in Port Villa, Vanatu* where it was rightly noted that organised crime, drug trafficking and financial crime undermine the integrity of national economies, political and social stability and called for cooperation among member states which the earlier *Commonwealth Heads of Government meeting in Nassau, Bahamas* held earlier in 1983 had reiterated the importance of all the issues later discussed in the 1985 Law Meetings with focus on the effect of drug abuse and trafficking on social fabric and security of many nations, it called for urgent attention to address its effect on young people and rehabilitation of victims of crime, reinforced the call for cooperation of states in the fight against financial crime and the need to deny the financial criminals from benefiting from the profit of their crime by tracing it and ensuring forfeiture.

However, the *Commonwealth Law Ministers meeting 1986 in Harare* took far reaching steps to stem the tide of economic crime, it recognised the large profits made from organised crime as motivation for criminals to perpetuate economic crime and such profit is largely invested to develop international criminal organisations activities such as terrorism and subversion or laundered with the sole aim to penetrate and subvert legitimate business. The meeting recommended that the established *Commercial Crime Unit of the Commonwealth* should be strengthened in order to facilitate mutual legal assistance on tracing, seizure and confiscation of proceeds of crime. It enjoined all states

to regulate their banks and financial institutions so as to preclude them from facilitating money laundering; it also recommends that *Commonwealth Commercial Crime Unit* should be saddled with the responsibility of countering money laundering and drug trafficking. The ministers re-echoed the concern of Heads of Government in Nassau, 1983 on the rising tide of drug abuse and trafficking which posed a serious social and security threat to nations and the urgent need to fight it. They noted that the economy of nations is being imperilled and retarded by economic abuse and identified the importance of establishing a fund for manpower training to combat it and adopted mutual legal assistance in criminal matters within the commonwealth and sets out its procedure. Another important step taken by the *1990, Commonwealth Law Ministers Meeting at New Zealand* where the progress recorded on mutual legal assistance measures adopted in Harare in 1986 was appraised and amended so as to make it more effective. The meeting examined bank secrecy laws as it affects crime investigation and the need to tackle drug trafficking and other serious crime by tracing their profit and an effective forfeiture legislation to strip criminals of their assets. The effect of these measures was recognised as being responsible for the assistance provided by about 50 states in Lockerbie bomb investigation. It noted the increasing internationalisation of financial markets which requires mutual assistance between national businesses, regulatory agencies and hence the need for inter agency agreements but similar to the FATF, Commonwealth Recommendations serve as the best international practice and guide, they are not enforceable, member states can only assist, persuade or mount pressure on non compliant state.

The clandestine mode of operation involved in perpetrating financial crime makes it an herculean task for the law enforcement agency to track, detect and prosecute because of difficulty associated with obtaining evidence for its criminal prosecution, the beneficial owner of its proceeds or property are often difficult to trace but despite the secrecy associated with financial crime and money laundering in particular, it has been identified

to involve 3 key basic stages which are placement, layering and integration⁸⁹. At the placement stage, the launderer makes deposit of proceeds of crime into banks, bureau de change, insurance or casino, an amount below the regulatory requirement for reporting in order to avoid suspicion⁹⁰; at the second stage, the launderer takes step to conceal the fund from its source in order to forestall audit trail and at the last stage of integration, the laundered money is cleaned, ready for investment and return into the economy⁹¹, huge resources have been committed to the fight against financial crime because its proceeds can corrupt and destabilise communities or national economy. It has also been linked to organised criminals who seek to maximise their profits so that they can enjoy a so called 'champagne lifestyle'⁹². It has dire economic and social consequences for countries; it weakens the financial system and a threat to national security⁹³. However, hope partially lies in the study of developed and developing countries which reveals that poor investment in anti financial crime technology, poor quality of human capital, inefficient legal framework, unethical corporate behaviour are factors that result in high-money laundering activities, whereas, improvements in new technology, new financial instruments and corporate integrity system reduces money laundering activities and thirdly, countries with matured financial sectors records low money laundering incidents, consequently, states must invest reasonably in anti financial crime technology, human capital and implement efficient legal framework in line FATF Recommendations and United Nations Conventions.

⁸⁹ Barry Rider, 'Recovering the proceeds of corruption' (2007) JMLC 10 (1) 16

⁹⁰ This method was referred to as "smurfing" where launderers in USA as far back as the 1970s started making multiple cash deposit below \$10,000 reporting threshold in different banks in order evade "suspicious activity report" to the regulatory authority

⁹¹ D Alford, "Anti-money laundering regulations: a burden on financial institutions' (1994) NCILJ, 437; R. Bosworth-Davies, 'Money Laundering: towards an alternative interpretation – chapter 2', (2006) JMLC, 9 (4), 346; M. Bassiouni, 'Critical reflections on international and national control of drugs' (1989) DJILP, 18 (3), 311

⁹² National Audit Office, The asset recovery agency-report by the comptroller and auditor general, 2007

⁹³ Santha vaithilingham and M. Nair, 'Factors affecting money laundering: lesson for developing countries' JMLC (2007)10 (3) 352

From the foregoing, it could be gleaned that despite the diverse perspectives of criminal law as a tool of social order, values and norms of the society play significant roles which must be taken into consideration in formulation of state policies and enactment of legislations, failing which there will not be an effective interdiction and disruption of crime; it can also be seen that although Edwin Sutherland's theory of white collar crime has been much criticised, nevertheless, it was the first attempt to draw attention to the scourge of white collar crime and shifted the emphasis on upper class crime, the nature of which requires a different means of control other than the traditional criminal justice approach; finding such appropriate means of controlling it must have influenced the global anti financial crime measures, such as the Commonwealth initiatives that started about eight years⁹⁴ before the United Nations, EU and the World Bank initiatives. Furthermore, it could be seen that although globalisation and development of information technology and telecommunications have accelerated the incidence of financial crime, however, the international initiative like the FATF measures have designed relatively creative measures to control it, even though financial criminals are always miles ahead of such control efforts; consequently, the social, political and economic factors responsible for the prevalence financial crime in each country need to be properly scrutinised and identified with a view to understanding their influence on financial crime and other heinous crime before designing a holistic, pragmatic and cost effective solution to the problem, otherwise, it will continue to have disastrous impacts on national and international economies, social stability, security, infringement of human right and abuse of rule of law, details of which is discussed in chapter 2, where it will be shown that money laundering, capital market fraud and financial crime in general, have adverse effects on various segments of the society, especially, corruption which facilitates financial crime, in addition to its threat to stability and security of societies, it destroys the economic development, a country's financial institutions and increases the risk of bank failures.

⁹⁴ Commonwealth Law ministers meeting 1980, Barbados

Chapter 3

Impact of financial crime on Economic Development, Social stability and National Security

As demonstrated in chapter 2, globalisation has accelerated the pace of national and cross border business transactions which has also affected the growth of global economic and financial crime with grave consequences on economic development, social stability and national security as seen in the interrelationship⁹⁵ of financial crime and organised crime⁹⁶ facilitating other heinous crime like illegal drug, illegal arms and human trafficking, kidnapping, to which all countries are exposed⁹⁷.

In this chapter, the adverse effect of financial crime will be appraised against the background of the narrow perception that white-collar crime or financial crime is a

⁹⁵ UN Sec. Council Res 1373 (2001) observed that there is a “close connection between international terrorism and transnational organized crime, illicit drugs, money laundering and illegal movement of nuclear, chemical, biological and other deadly materials”, and enjoins all states to avert and combat the financing of terrorism, criminalise its funding, freeze assets linked to terrorists, assist each other in criminal investigations or proceedings relating thereto and ensure that asylum seekers are screened to ensure that such persons have not planned, facilitated or participated in terrorist activities

⁹⁶ A structured and hierarchical criminal enterprise group of international dimension, with leadership appearing insulated from criminality, having the objective of maximising profit through legal or illegal investments, through ordinary business techniques, corruption, violence and extortion, see Barry Rider, “Organized Economic Crime”, paper presented to the Richards Butler Seminar on Economic Crime, 9 February, 1990, cited in Barry Rider (ed), *Research Handbook on International Financial Crime*, (Edward Elgar 2015) 42, see also Shima Keene, Organized crime, in Barry Rider (ed), *Research Handbook on International Financial Crime*, (Edward Elgar 2015)65; Bill Tupman, ‘What does the way crime was organised yesterday tell us about the way crime is organised today and will be tomorrow’, (2015) *JMLC*, 18 (2) 220

⁹⁷ Michael Levi, ‘The crime of corruption’ in Barry Rider (ed), *Corruption: The Enemy within* (Kluwer Law International 1997) 35; Wilmer Parker, ‘Every person has a price?’ in Barry Rider (ed), *Corruption: The enemy within* (Kluwer Law International 1997) 87

victimless crime, and if it is a victimless crime, why should it be prosecuted? The chapter relies extensively on literatures, journals and text books published mainly within the past 20 years to demonstrate that financial crime has adverse effect on economic development, social stability, national security, currencies and exchange rate and reputation of financial institutions and financial market, erosion of investors' confidence in a nation's capital market, possible loss of revenue to OFC and encourages organised criminal activities; consequently, every segment of the society is a victim of financial crime and it must be controlled or possibly eradicated. Further, the chapter appraised the influence of advancement in information technology transnational and global trade transactions, its effect on tax evasion, money laundering, sophistication in OFC secrecy, difficulties in effective jurisdictional control; and concludes inter alia, that identifying the effect of financial crime will assist in proffering solutions transcending the enactment of legislations but a scrutiny of social, cultural, political, religious or traditional factors responsible for financial crime and terrorism financing.

Financial crime has enormous dire consequences on the global economy; it has affected the banking and capital market regulations and policies, and led to the establishment of international and national regulatory institutions, setting the best international standards for its interdiction, interrupting and recovery of proceeds of crime, it has affected the rules of transnational commerce and trade; altered the protection of secrecy hitherto given to funds in Offshore Finance Centre. It is however, difficult to concede that money laundering facilitates terrorism because a meagre amount of fund is required to unleash terror, through a reverse money laundering process by using clean, legal fund for illegal purpose as seen in the 2005, 7th and 21st July attack in the UK and the 2001, 9/11 attack on the USA, the continuous Boko Haram group attack in Nigeria and the monstrous ISIS terrorist group in Iraq and Syria with huge disastrous effect on national security and social stability; all of which tend to flourish in the informal (underground) economy that provides a conducive environment for financial crime and terrorist financing, this was confirmed by the British House of Lords report on strong suspicion of a connection between high seas piracy in the Horn of Africa where money extorted as payment of

ransom to liberate a ship, crew or cargo could be laundered into the economy which could be difficult to trace, prosecute and seize due to the prevalence of informal remittance system and cash based underground economy in Somalia region and other countries with prevalence of huge underground economy and those under the throes of terrorism and insurgency which made audit trail difficult⁹⁸.

3.1 Effect of corruption on economy and society

Corruption varies between societies and systems of government even as there are divergent opinions on its causes and effects. Corruption is the acceptance, extortion or offering of bribe to circumvent public policies and processes with a view to gaining competitive advantage and profit over other individuals in the same circumstance but in the absence of bribery, corruption is patronage and nepotism⁹⁹, stealing of public assets¹⁰⁰, diversion of state revenues or effecting official transaction without following due process, transparency and accountability; it involves the offer and acceptance of bribe to win contract from the public sector or to reduce taxes, fees and levies payable for public services and utilities, to facilitate public service delivery or to cause delay of such service in order to benefit from its speed or delay but as a general guide, The World Bank simply describes corruption as *'the abuse of public office for private gain'*¹⁰¹. Corruption could be

⁹⁸ Ibid, Para 163, Pg. 45 - 46

⁹⁹ F. Shihata, Corruption: 'A General Review with an Emphasis on the Role of the World Bank' in Barry Rider (ed), *Corruption: The Enemy within* (Kluwer Law International 1997) 255; see also Robert Klitgaard, Controlling Corruption (University of California Press 1991) 1; see also Transparency International definition of Corruption at <[http:// archive.transparency.org/newsroom/fq/corruption](http://archive.transparency.org/newsroom/fq/corruption)> accessed 28/07/13

¹⁰⁰ Susan Rose-Ackerman, 'The Political Economy of Corruption-Causes and Consequences, public policy for the private sector, World Bank Note 74, 1996

¹⁰¹ Helping Countries Combat Corruption: The Role of the World Bank <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed on 08/06/2013; see also William Tupman, 'The characteristics of economic crime and criminals' in Barry Rider (ed), Research Handbook on International Financial Crime, (Edward Elgar 2015) 3

of large scale international dimension such as the ‘Malabu oil deal’ and the Halliburton bribery scandal in Nigeria involving politicians and bureaucrats; corruption could be in small scale where individuals are expected to give bribe before the provision of public services, it could be rampant, sporadic or isolated in public service¹⁰². The World Bank in its paper¹⁰³ observed that the aggregate amount of money involved in grand corruption may attract more adverse publicity than petty corruption but the ‘money and economic distortions’ of both may be of equal proportion or even greater than grand corruption.

The *UNCAC, 2004*¹⁰⁴ in its preamble vividly captures the deleterious consequences of corruption on the economy, politics, national security and social stability of any given state by describing it as a motivation for financial crime with serious threat to stability and security of societies, it destroys ‘*the institutions and values of democracy, ethical values and justice*’; jeopardises sustainable development and the rule of law, it has a strong link with organised and economic crime, especially money laundering. It is a drain on public assets and may result in political instability and retardation of sustainable development¹⁰⁵. This graphic scenario was reinforced by the former UN Secretary General, kofi Anan in his forward address to the UNAC where he observed that¹⁰⁶:

¹⁰² Shihata (n 99)

¹⁰³ Helping Countries Combat Corruption: The Role of the World Bank

<<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 08/06/2013

¹⁰⁴UNCAC came into force on 14 December 2005, criminalises a range of offences and requires international cooperation, mutual assistance and exchange of information to combat corruption.

¹⁰⁵ UCAC Preamble, 2004

¹⁰⁶Ibid 1 Pg. iv; see also Inter-American Convention against corruption adopted on 29, March 1996; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997; EU Convention on the Fight against Corruption adopted by the EU in 1997; Southern African Development Community Protocol against Corruption adopted in August 2001; Monterrey Consensus on mutual accountability of developed and developing countries in achieving the MDGs endorsed by the UN General Assembly on 9 July 2002; AU Convention on Preventing and Combating Corruption adopted on 11 July 2003 in Maputo (Mozambique)

‘Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries . . . 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 and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development....The adoption of the United Nations Convention against Corruption will send a clear message that the international community is determined to prevent and control corruption. It will warn the corrupt that betrayal of the public trust will no longer be tolerated. And it will reaffirm the importance of core values such as honesty, respect for the rule of law, accountability and transparency in promoting development and making the world a better place for all’

In the same vein, the UNDP also confirm that *‘...cross-country research suggests that high corruption levels are harmful to economic growth. When corruption is associated with organized crime, legitimate business is discouraged, the allocation of resources is distorted, and political legitimacy is compromised’¹⁰⁷.*

The positive effect, if any, of corrupt practices is not clear, especially in societies that thrive on communal lifestyle that encourages reciprocal act of giving gift in anticipated

¹⁰⁷ Paulo Mauro, ‘The Effects of Corruption on Growth, Investment, and Government Expenditure: a Cross-Country Analysis’, *Corruption and the Global Economy*, 83

<http://www.iie.com/publications/chapters_preview/12/4iie2334.pdf> accessed 21/10/2016

appreciation of present or future support. Svensson¹⁰⁸ while considering Leff's¹⁰⁹ argument on possibility of any positive impact of corruption (*'efficient corruption'*) that is, whether bribery could encourage efficiency in a corrupt system, he cited Lui¹¹⁰ and contended that a corrupt system dependent on bribery for provision of public service may actually ensure that the most efficient firms pays the highest bribe but concluded that the corrupt officials may actually cause greater administrative delays in order to attract more bribes, thus confirming the prevailing attitude in Nigeria public service where bribery is the oil that lubricates the entire social fabric, such that the political and economy of the nation depends on it, corruption facilitates official transactions, due partly to the low wages in the public service, consequently, any initiative to interrupt corruption in Nigeria may never succeed unless the quality of life of the work force is enhanced and the three pronged attack (investigation, prevention and education) adopted by Hong Kong to interrupt corruption is considered in letter and spirit by Nigeria.

The secret nature of schemes involved in perpetrating financial crime makes a fair estimate of the amount of global money laundering very difficult, the situation is even worse in African states where the economy is predominantly cash based transactions whereby substantial funds being exchanged in payment for goods and services are outside the conventional banking system¹¹¹, this encourages relative ease of obliterating illegal root of proceeds of crime; this situation is exacerbated by high illiteracy level resulting in enormous patronage of the informal sector where savings are mobilised and large sums infiltrate transnational financial systems without adequate record, this allows good

¹⁰⁸ Jakob Svensson, Eight Question about Corruption (2005) JEP 19 (3) 36

¹⁰⁹ Leff, Nathaniel H; "Economic Development through Bureaucratic Corruption" (1964) ABS 82:2, pp. 337–41

¹¹⁰ Francis Lui, "An Equilibrium Queuing Model of Bribery", (1985) JPE 93 (4) pp. 760–81

¹¹¹ ADB /African Development Fund Bank Group Strategy for the Prevention of Money Laundering and Terrorism Financing In Africa, Para 2:1<<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/pg.2>> accessed 13/05/2013

opportunity for laundering of proceeds of criminal activities¹¹², drug smuggling and terrorism as witnessed in the Northern Nigerian where Boko Haram¹¹³ has since 2009 paralysed the economic activities of the region, same with the ISIS in Iraq both of which are not unconnected with the Tuareg rebellion in Mali where Islamic terrorists sacked and dislodged the national army, seized territories, introduced Sharia law and government, created political instability, destruction of national cultural heritage until they were dislodged by the French military.

Jack Boorman and Stefan Ingves¹¹⁴ also reiterated the difficulty in obtaining an accurate measurement of impact of financial crime because criminal activities by virtue of their nature are hidden and concealed, thereby obstructing direct scrutiny of its effect on diverse spheres of human endeavours, as a result of this, they proffer two approaches, namely: (1) indirect assumptions from available macroeconomic data and (2) direct information from law and tax enforcement agencies. Although, these two approaches are considered imprecise, they however, provide a guide until a more valid standard of measuring the effect of financial is possible. The Macroeconomic approach measures the magnitude of underground economic activities that are generally not accounted for in the official GDP, this encompass a wide range of legal and illegal underground economic activities (like smuggled goods and counterfeit goods estimated to be within a range of 5 - 8 percent of the official GDP, depending on the country and method used; accuracy and reliability of this approach is doubtful as it only indicates the potentials of financial system abuse by criminals but inconclusive proof of the effect of underground economy on formal economy. The second approach through reported crime, measures the magnitude of financial crime by relying on data on expenditure and prices involved in criminal activity, like the final sales price of seized drugs in a given country, continent

¹¹² Inter Governmental Action Group Against Money Laundering in West Africa (GIABA) Report On Cash Transactions and Cash Couriers In West Africa <<http://www.giaba.org/>> accessed 12/04/2013

¹¹³A terrorist group in Nigeria

¹¹⁴ IMF Paper (n 58) Para 19- 20

and in the global market; it therefore assumed that 50 – 70% of such sales price would be laundered. Boorman and Ingves have argued that this approach is also an inadequate representation of the true position of magnitude of laundered proceeds of crime because law enforcement approach depends on reported crimes which are ‘mere subset’ or a fraction of an entire financial crime ranging from fraud, tax evasion, drug offence, credit card fraud etc, hence, this approach makes the real magnitude of money laundering significantly underestimated¹¹⁵. The paper concluded that ‘measurement based on reported crimes under estimate the actual magnitude of financial system abuse while estimates based on underground economy clearly exaggerates it’¹¹⁶.

3.2 Effect of financial crime on Economic Development: Currencies and Interest rates

In a competitive market, availability of goods and services is determined by the forces of demand and supply, in this context, availability of capital in circulation is one of the factors that affects developmental projects, provision and maintenance of basic amenities and bank interest rate on deposits and loans, consequently, introduction of huge amount of illicit money into a financial system could have a devastating effect on the amount of cash in circulation which invariably affects the domestic interest rate (cost of borrowing) on loan, an increased money in circulation pushes interest rate on loans down, the financial market reacts by reducing the value of approved loans, due to low return on investment, this forces the interest rate up until it gets to an equilibrium rate, deductively, laundered money or proceeds of grand corruption in the underground economy could affect the volume of excess fund outside the banking system which may encourage conspicuous consumption capacity otherwise called champagne lifestyle¹¹⁷, it encourages an increase in demand for goods and products incommensurate with rate of production of such products unless such criminal funds are successfully washed from the

¹¹⁵ IMF Paper (n 58) Para 20

¹¹⁶ Ibid Para 24

¹¹⁷ Shazeeda Ali, ‘Economic crime and terror: spinning a web of greed and fear’ in Barry Rider (ed) Research Handbook on International financial Crime (Elgar Edward) 86

underground/black market economy and are invested in the in the regulated market such as real sector of the economy, developmental projects in support of economic growth like the properties, the stock and capital market, and thus boost the economy of the recipient jurisdiction (like the OFC, the UK property business and the Swiss financial market) but to the detriment of the country where the fund is stolen from. However, it is gradually becoming more difficult to wash illegal funds as the level of interruption and interdiction has improved over the years, financial intelligence, KYC requirements and international mutual legal cooperation have improved in the last twenty years,

Similar to this is the disastrous consequence of capital flight on national economy, although there is no consensus on the acceptable definition of capital flight, partly due to the way the term is used between the developed and developing countries, for instance, outflows of capital from developed countries are usually referred to as foreign investments while the same activity when undertaken by the residents of developing countries, is referred to as capital flight¹¹⁸. However, Loungani and Mauro have elucidated further on it by defining capital flight as:

*. . . all outflows that occur in excess of those that would normally be expected as part of an international portfolio diversification strategy. . . includes outflows that are the result of truly criminal activities; outflows of funds that are earned through honest activities, but are illegal in that they breach capital controls (or evade taxes); and fully legal outflows that comply with existing regulations and are motivated by a desire to flee the country owing to non-economic factors such as political uncertainty*¹¹⁹

¹¹⁸ Ibi Ajayi, 'An Economic Analysis of Capital Flight from Nigeria', Policy Research Working Paper, Western Africa Department, The World Bank October 1992 WPS 993, 10

¹¹⁹ IMF Conference on Post-Election Strategy Moscow, 'Capital Flight in Russia', April, 2000, 1
<<http://www.imf.org/external/pubs/ft/seminar/2000/invest/pdf/loung.pdf>> accessed 30/05/2013

In developing countries, transfer of illicit fund out of a jurisdiction in a situation unrelated to genuine business transaction or economic forecast is in strict sense, a capital flight, it depletes the nation's foreign exchange reserves and leads to scarcity of capital, it pushes up the foreign exchange rate and results in pressure on foreign reserve, this makes it difficult for a country to finance its net imports and external debt payments¹²⁰, the interest rate on domestic and foreign loan increases, thus leading to "the threat of monetary instability"¹²¹. Capital flight increases the speculations that may lead to increase risks of loss of private domestic assets. Capital flight could affect the level of domestic investment such as deposit in savings account, tenured deposit and trading in stock market because it is a scenario where fund or capital necessary for local and domestic savings have been transferred abroad or outside the jurisdiction, consequently, this leads to a decrease in savings and banks' saving deposits, in return of which banks' capacity to grant credit facilities is affected and thereby lead to the dwindling of available resources for the financing of domestic investment¹²². There would be a decline in private investments because local investors will flee the domestic environment together with their assets in order to avert losing their wealth¹²³, investors would transfer their fund to other jurisdictions with stable economy and stable monetary policy with high and consistent return on investment commensurate with economic forecast and national investment objectives. Finally, capital flight renders economic indices incongruent with market forces of demand and supply, because economic forecast and statistics would fail the government and the government loses control of economic policy, deter 'Foreign

¹²⁰ Neils Hermes, Robert Lensink and Victor Murinde, "Flight Capital and its Reversal for Developing Financing" (2002), UNU/WIDER (Discussion Paper No. 2002/99)

¹²¹ John Mc Dowell and Gary Novis, 'The Consequences of money laundering and financial crime'(2001)JEP 6 (2) 3

¹²² Ameth Ndiaye, 'Impact of Capital Flight on Domestic Investment in the Franc Zone' ADB/UNECA Conference, 2007 Addis Ababa, Ethiopia, 7

<www.afdb.org/afdb/Conference_2007_anglais_13-part-III-1.pdf> access on 02/06/2013

¹²³ Ibid 8

Direct Investment' (FDI) necessary for economic development¹²⁴ and thus force the government to borrow money from international capital market¹²⁵.

Again, capital flight can be effected through over invoicing of imports and under invoicing of exports, result of which is a loss of productive capacity, loss of tax revenue and loss of foreign exchange reserve¹²⁶; an extensive inaccurate quoting of price ("misinvoicing") of import or export materials to hide illicit funds could have a devastating impact on the economy and its foreign exchange rate whereby official exchange rate will be difficult to regulate. Although foreign aid helps in finance of domestic investment but conversely, capital flight could result in foreign aid meant for developmental purpose being used to finance shortages caused by capital flight, which implies re-exporting aid fund in form of capital flight which invariably renders aid fund less available for the financing of domestic investment for which it was initially earmarked¹²⁷. Corruption facilitates and aggravates capital flight, for example, PEP could be largely responsible for capital flight as witnessed in most African states where politicians abuse the privilege of office to acquire and transfer funds to foreign jurisdictions, Mobutu Sese Seko of Zaïre (Democratic Republic of Congo) from 1965 to 1997, transferred \$4 billion as external private assets in the mid-1980s. General Sani Abacha, Nigeria's Head of State for five years, transferred \$2 billion to his family accounts in Swiss bank and opened other bank accounts worth several million of dollars in branches of Citibank in London and New York, this corrupt tendencies pollute domestic environment such that the whole fabric of the society becomes corrupt and discourage investors from investing in such economy¹²⁸

¹²⁴ Brent Bartlett, *The Negative Effects Of Money Laundering On Economic Development*, 24

¹²⁵ Ajayi and Ososami (1998) *JMLC* 1 (4) 342, 343

¹²⁶ Ndiaye (n 122)

¹²⁷ *ibid*

¹²⁸ *Ibid*

3.3 Effect of financial crime on integrity and confidence in a country's financial institutions and the risk of bank failures

A financial institution's level of compliance with rules and regulations set by regulatory authorities goes a long way in defining its reputation and the perception of its clients, general members of the public and the international and local business community. Therefore, an effective anti corruption, anti-money laundering and anti fraud regime enhances economic growth¹²⁹, the importance of this could be gleaned from the initiative of the Bank for International Settlements (BIS) Committee on Banking Supervision (the Basel Committee) which re-emphasised the importance of public confidence in banking when it states: '*...Public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of inadvertent association by banks with criminals. In addition, banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where the integrity of their own officers has been undermined through association with criminals*'¹³⁰. This validates the fact that financial institutions thrive on good reputation as this determines investment decisions made by customers, any scandalous information of involvement in financial crime alerts the customers that such a financial institution is unworthy and risky to transact business with, this could be interpreted as a possible or pending collapse of such an institution and may lead to a run on the bank¹³¹, the catastrophic effect of which is the inability of such financial institution to meet its cash commitments to its customers¹³², in fact, many instances of bank failure have been attributed to financial crime¹³³.

¹²⁹ Bartlett (124) 12

¹³⁰ BIS, Core Principles for Banking Supervision (1997)

¹³¹ Bartlett (no 124) 5

¹³² For example several economic organizations reportedly moved their funds out of the institution after indications that the bank was allegedly involved in money laundering which resulted in "a run" on a Bosnian bank, for example, see Bartlett (124)11

¹³³ Fraud, money laundering and bribery scandal in BCCI and collapse of Baring banks in 1995

Generally, financial institutions facilitate investment and flow of capital, hence, confidence reposed in them is crucial and paramount to the economic development which relies on them for growth, and to attract a stable base for customer deposits, to support credit growth for consumers and business without neglecting the need to increase the potential size of the formal economy¹³⁴. However, due to stiff competition among financial institutions to attract investment opportunities and profit maximisation, financial institutions often avoid reporting fraud and attempted fraud as often required by regulatory authorities in many jurisdictions, whereas the aim of such report is to provide learning points and to ensure implementation of mechanism for prevention of future occurrence and ultimately protect corporate reputation and reduced risk of being used as instrumentality of financial crime especially where the regulations, internal control and monitoring are weak or where operators perceive regulations as an impediment to competition¹³⁵. Although money laundering activities can occur in any country but it has more significant impact in developing countries due to their relatively small or fragile financial systems and weak economies, effect of which is the damage to financial institutions which may scare away foreign investors and reduce a country's access to both foreign investments and foreign markets¹³⁶.

Apart from risk to the reputation of the financial institutions, financial crime could also unleash serious implication on reputation, integrity and state of health of a country's economy¹³⁷. Collusion or inefficiency of bank employees could also aid the vulnerability of banks as platforms for financial crime¹³⁸. In some instances, banks use the benefit of

¹³⁴ ADB (n 111) Para 2:6

¹³⁵David Llewellyn, Economic Rationale for Financial Regulation, 1999 FSA Occasional Papers <www.fsa.gov.uk> accessed 12/04/ 2013

¹³⁶ ADB (111)para 2:5

¹³⁷Bartlett (124)

¹³⁸ Julian Alworth and Donato Masciandaro, 'Public Policy: Offshore Centres and Tax Competition: The Harmful Problem' in Donato Masciandaro (ed), Global Finance Crime: Terrorism, Money Laundering and Offshore Centres (Routledge 2004) 191; see also Bartlett (no 124) 7

corporate veil, camouflaging as legal entities to facilitate criminal objectives under the control and management of criminals with hands deep in money laundering activities, they evade the prying eyes of regulators by engaging in combination of legal and illegal activities¹³⁹, they accept illicit fund as deposit from customers and assist them in its laundering process, in some instance, they arbitrarily grant credit facilities to unqualified applicants, thus conferring undeserved credit rating or advantage on such persons, with its multiplier effect on the implicit trust and reliance on which other financial institutions could base their financial rating and decision making in their dealing with such company or individual (especially in jurisdictions where credit rating is neither computerised nor integrated). For this reason, “If a bank’s credit allocation policy is driven by distorted economic principles, the rating service offered by the bank credit ultimately becomes polluted and therefore unreliable”¹⁴⁰; conversely, where substantial illicit fund is invested in a company’s share capital, it will boost the capital market and returned as dividends and bonuses but it may not necessarily have relevance to the productive sector of the economy and thereby increases the rate of inflation, although isolated cases of financial crime in a jurisdiction may be inevitable due to the greedy nature of man but having several financial institutions in a jurisdiction being involved in financial abuse or crime portrays a systemic problem and a weak anti financial crime regime, the perception and reputation of such jurisdiction becomes tainted with dreadful economic consequences for its international trade, for example, this could inhibit “inward investment and foreign direct investment”, consequently, extra due diligence may be required by international financial institutions before transacting any business with them which may delay legitimate transactions¹⁴¹. This is responsible for the notoriety gained by many Offshore Finance Centres, like the recent Panama scandal revealing how many PEP evaded tax, looted state funds to hide in Trust Corporation and secret investments. There is no doubt

¹³⁹ Ibid 192

¹⁴⁰ Ibid

¹⁴¹ Inter-American Development Bank, Situation and Prospects: The Bahamas, 2002

<www.unodc.org/tldb/pdf/Asian-bank-guide.pdf>; accessed 22/10/2016; see also Bartlett (no 124)

that international business transactions between Panama and any other country shall be subjected to more scrutiny in view of the recent discoveries. In modern, integrated and global economy, no nation can afford to have its reputation and that of its financial institutions tarnished with systemic financial crime, as it will erode the confidence in the reputation of the country with attendant decrease in legitimate global opportunities and economic growth, conversely, such a country would only attract international criminal organisations as a safe haven for illicit fund¹⁴² and ultimately, such a country may confront internal, political, social and moral disintegration.

A country that condones financial crime or linked with terrorist financing is at the risk of economic sanctions from the international community with attendant adverse consequences on its domestic and international trade, this is no doubt why many nations aspire to put in place effective anti-money laundering laws in line with FATF standards or at least pretend (like in some countries) to punish infractions of anti-money laundering and other regulatory laws. A good example was when Iran was labelled with financing and sponsoring terrorists in the 1990s, American government froze the businesses and assets of Iranian government in the US banks to the tune of \$12 billion in bank deposit, gold and real property, export from Iran were cut, these measures deprived Iran of necessary supplies such as spare parts for its local industries and forced Iran to rely on middle men for its supply at exorbitant cost and possibly substandard products¹⁴³.

The need for more compliance with anti-money laundering regime is further necessitated by the current trend in the world economy where financial institutions (in developing countries) are gradually migrating from public venture to private ownership, government investments are being offered for sale to private investors, accordingly, in order to attract private investors, it has come to be appreciated that there must be strict compliance with

¹⁴² McDowell and Novis (n 28)

¹⁴³ Robert Carswell, Economic Sanction and the Iran Experience, *Foreign Affairs*, 1981, 60 (2) 247

<http://www.jstor.org/discover/10.2307/20041079> accessed on 12/04/2013

the best international practice of anti-money laundering laws, failing which, investors will not be attracted to invest in an organisation or nation linked with corrupt practices¹⁴⁴. Global integration of financial transactions with the aid of information technology to drive financial market makes poor anti-money laundering policy in one jurisdiction to have consequences in another jurisdiction, such that a gap in anti-money laundering regime in Afghanistan or Pakistan (where organised criminal group aids money laundering, drug trafficking and terrorist financing) could have serious effect on the security of the USA, the UK and other parts of the world as evidenced in 9/11 attack in the USA and July 7th and 22nd July attack in UK. Furthermore, where it is observed that a preponderance of financial institutions within a jurisdiction engage in financial crime or prevalence of underground economic activities (such as West Africa economy) or if the standard and measures of compliance with anti-money laundering recommendations and other international recommendations (such as Egmont group, FATF Recommendations, Basle Committee etc) in any jurisdiction is very low or if there is laxity in crime prosecution or absence of political will to prosecute and punish infractions of financial crime and corruption, the perception of the International community and the reputation of such lax country (as seen in Offshore Finance Centre and FATF list of Non Cooperative countries and Territories) would be regarded as a pariah in the comity of nations, financial transactions initiated or emanating from such jurisdictions are treated with great circumspect and would be regarded as a risky country to transact international financial business with, hence, most foreign banks could request extra due diligence as a condition precedent to any dealing with such jurisdiction, foreign banks may demand for extra comfort or other stringent terms like an additional guarantee from a correspondent bank or its home government before executing any contractual relationship with them, these extra measures retard the pace of completing transactions and increases the cost of transacting international business within and outside such jurisdiction. Finally, once the reputation of a country's financial institution is damaged; a huge resources would be required to revive it, whereas a bad reputation could have been prevented ab initio with

¹⁴⁴ Bartlett (n 124)

implementation of an effective anti-fraud, anti-corruption and anti-money laundering measures¹⁴⁵.

3.4 Effect of financial crime on capital market

Financial crime can also affect the investors' confidence in a country's capital market. The stock market is determined by forces of demand and supply, a well organised stock exchange directs investment in stock towards productive and relevant sector of the economy and it enables listed companies to raise capital from investors who are not involved in daily administration of companies¹⁴⁶. A share price reflects all known indices and collective deduction from all available information on business forecast, prospects and perceived market value of the shares, expected dividends and other attendant risks such as the value of its business and its potentials to make profit in the future. Where an investor perceives that the share value is higher than the market value, *ceteris paribus*, it is expected that shares would be purchased and where share value is less than the market value, investors would sell their shares¹⁴⁷, a prudent investor holds on to undervalued shares until the value appreciates higher than their market value when they sell and invest in other profitable sector of the economy. Where the share price and its market value are at par, investors tend to hold on to their shares until the value appreciates¹⁴⁸. Efficiency of stock market depends on several factors such as the large volume of shares traded on it, investment funds and other institutional investors who drive the market with the aid of financial analysts and other professionals who make informed decisions on the appropriate stock in which to trade¹⁴⁹. Lastly, relevant information obtained from published financial statements as analysed by finance experts drive the stock market. Whereas companies have better information than the investors, naturally, managements

¹⁴⁵ Mc Dowell and Novis (121)

¹⁴⁶ Paul Barnes, 'Stock Market Efficiency, Insider Dealing and market abuse' (Gower 2009) 3

¹⁴⁷ Ibid 4

¹⁴⁸ Ibid 5

¹⁴⁹ Ibid 5

tend to overstate the value and performance of their business in order to maximise profit, to enjoy salary increase and earn bonuses because information drives the stock market, an investor holding inside information may profit from the information by selling his shares if he is aware of any adverse information that would affect the share value he holds or buy more shares in anticipation of share appreciation because of the inside information he possesses which others do not have, thereby putting other investors at a disadvantage¹⁵⁰. The Board of Directors by virtue of their privilege position at Board meeting in the company have access to price sensitive information and forecast that could have an impact on profitability of the company strategy or forecast on potential decline of share value; in common law and in many jurisdictions, directors hold a duty of fiduciary to the company which precludes them from making secret profit from any privilege information they are aware of in the course of their duty to the company, they are under an obligation while issuing new securities to ensure fair and adequate disclosure of all material information and they must not make profit at the expense of other buyers in stock market either by buying or selling shares in order to avoid loss as this would amount to abuse of position and misuse of confidential information entrusted to them.

In most jurisdictions, market abuse, namely, insider dealing and market manipulation is an endemic problem which are controlled by promulgating laws directed at directors, employees and Stock brokers from making use of price sensitive information to trade in securities of their companies. Market abuse erode investors' confidence in the integrity and reputation of the stock market which may lead institutional investors to sell their stock and pull their fund out of the market and divert their investment to other stable jurisdictions, also it may also lead to loss of value of investors' fund, although it has been argued that insider dealing is a "victimless crime"¹⁵¹ so why prohibiting whoever has unpublished price sensitive information from profiting from it? Henry Manne¹⁵², for

¹⁵⁰ Ibid 10

¹⁵¹ Laura Hansen, corporate financial crime: social diagnosis and treatment, (2009) JFC 16 (1) 28

¹⁵² Insider Trading and Stock market (Free P; Collier Macmillian 1966)

example, argued that insider trading is not harmful to the investors but an efficient way of improving the stock value. However, the dynamics and reality of the stock market is that the victim is anyone who has invested or intends to invest in the stock market especially pension funds and other institutional investors who represent a huge class of victims¹⁵³. If insider abuse is not censured, it would confer unfair advantage on those who possess unpublished price sensitive to trade at the expense of other investors in the market.

3.5 Financial crime and Loss of Revenue to Offshore Centres

The Council of Ministers of Organisation for Economic Cooperation and Development (OECD)¹⁵⁴ in 2002 declare that globalisation and integration of financial markets have widened the scope of financial crime thereby leading to an increase in money laundering activities, terrorism financing and tax crime with attendant upsurge in threat of financial abuse of '*strategic, political and economic interest of sovereign states*' leading to the threat of integrity of the international financial system and raises new task and challenges for 'policy makers, financial supervisors and enforcement agencies'¹⁵⁵. In many jurisdictions, financial crime has undermined the democratic basis of government¹⁵⁶. Further, the OECD advocated the need for regulation of national financial systems or else its "contagious effect' in one jurisdiction could harm the economy of another nation. It also noted that some jurisdictions with scarce natural resources have opted to establish Offshore Finance Centre (OFC) as a catalyst for their national economic development,

¹⁵³ Nicholas Ryder, *Financial Crime in the 21st Century Law and Policy* (Edward Elgar Publishing 2011) 143

¹⁵⁴ Established in 1961 by European countries and later extended to include the US, Canada and Japan to coordinate international investment and mutual enterprises

¹⁵⁵ Masciandaro (n 138)

¹⁵⁶ Afghanistan by the Taliban also in Mali, terrorists took over the control of Northern Mali with imposition of Sharia law, In Somalia, Al shabab terrorist group funded by drug money and ransom taken from piracy and kidnapping has unleashed a reign terror on the country resulting in total collapse of any system of government in Somalia for over a decade

such established OFC are characterised by strict bank secrecy, with stiff criminal penalties for disclosure of client information and a policy or practice of non-cooperation with foreign investigators and law enforcement agencies. However, there are divergent views on the role of OFC in facilitating financial crime and loss of revenue, a brief analysis of the concept and modes of operation of OFC would shed more light on this vexed issue. OFC offer an array of attractive choice of investment portfolios with comparatively low tax, financial secrecy, criminalisation of divulging banks secrets and permits clients to register International Business Corporations (IBCs) or shell companies¹⁵⁷, investment packages offered by OFC have attracted PEP, tax evaders, corrupt individuals and organised criminals, who take advantage of it to launder criminal assets on the assurances of strict financial secrecy, protection from foreign investigations and prosecution. The recent publication of the list of individuals holding secret accounts in the Panama OFC underscores its global threat, in particular, capital flight from Nigeria, maintenance of foreign accounts by public officials in contravention of the 1999 constitution, 5th schedule, possession of unexplained wealth and tax evasion.

Bank secrecy and offshore banking derive their initial legitimacy from the imperative of protecting personal financial transactions from the public view, offer of tax advantages, holding of foreign assets to avoid the effect of economic adversity, with the use of coded account started in countries like Switzerland so as to shield customers' identity from guillotine in 1933 when Nazi Germany regulations mandated Germans to declare any foreign assets held, infraction of which is death penalty¹⁵⁸. The main advantage of these Offshore Finance Centres is their attractive tax efficient transactions while its flip side is

¹⁵⁷ Shell corporations are used for business transactions without them having any significant asset or operations, though not illegal and are part of the underground economy usually based in tax havens, used for tax avoidance and sometimes referred to as international business companies

¹⁵⁸ Reynolds John, 'The New US Anti Money laundering offensive, Will it prove successful?' (2002) CMJ 9 (3) 13

the unlimited protection offered criminals¹⁵⁹. For example, the BCCI collapsed in 1991 as a result of opportunities and immunities it offered to money launderers¹⁶⁰. The BCCI case led to the introduction of new global regulatory standards to prevent the use of financial markets for money laundering purposes but there are still some lacunae in the regulation of OFC that can still be easily exploited by criminals¹⁶¹. A new dimension to OFC is the introduction of internet banking services, occasioning the problem of supervision, control, operational base and ambiguity over jurisdiction in the event of criminal prosecution¹⁶². In the early and mid-1980s, the Permanent Investigations Subcommittee of the Committee on Governmental Affairs in the United States Senate held a series of hearings on offshore banking and bank secrecy. The chairman, Senator William Roth, noted that:

'We have repeatedly heard testimony about major narcotics traffickers and other criminals who use offshore institutions to launder their ill gotten profits or to hide them from the Internal Revenue Service. Haven secrecy laws in an ever increasing number of cases prevent U.S. law enforcement officials from obtaining the evidence they need to convict U.S. criminals and recover illegal funds. It would appear that the use of offshore haven secrecy laws is the glue that holds many U.S. criminal operations together'

¹⁵⁹ Jack Blum, Michael Levi, Thomas Naylor and Phil William, Financial Havens, Banking Secrecy and Money Laundering, UNODC and Crime Prevention, Global Programme Against Money Laundering

¹⁶⁰ It revealed the money laundering scheme that led to the seizure of more than US\$12 billion.

¹⁶¹ Ibid

¹⁶²As one observer noted in testimony before the US Congress, European Union Bank operated on a license from the government of Antigua. "The computer server was in Washington, DC. The man who was operating both the bank and the computer server was in Canada. And under Antiguan law, in effect, the theft of the bank's assets was not illegal. So now the problem is, where is the crime committed, who committed it, which is going to investigate it, and will anyone ever go to jail

OFC are attractive to criminal organisations seeking to launder the proceeds from their illicit activities. They offer complex financial trails, hiding of funds in places where they are relatively safe from identification and seizure by foreign law enforcement¹⁶³. They offer facilities for incorporation that are very attractive for individuals or organisations attempting to protect their anonymity and operate with a high degree of impunity and flexibility. In brief, OFC and bank secrecy jurisdictions are characterized by ‘*a minimum of transparency and a maximum of autonomy of private action. The function of the state is to ensure that, that very privacy and secrecy by keeping encumbering regulations to a minimum*’¹⁶⁴.

Nevertheless, it would be hasty to conclude that OFC are established solely to provide services to organised criminals, drug traffickers or those who engage in financial fraud. Their origins are far more complex¹⁶⁵. There are legitimate purposes for both bank secrecy and the use of offshore financial centres and the services they provide. Bank secrecy has its root in common law and it is designed to protect both personal and corporate privacy. Maintenance of banking confidentiality is a valid right of citizens in liberal democracies where bank data is protected by a wide range of laws, both civil and criminal. Many countries have legislation like Data Protection Act in UK, the United States, Bank Secrecy Act and the common law duty of fiduciary guiding bank/customer relationship in Nigeria, most of which prohibit the disclosure of customer information to a third party except disclosure to local bank regulators and auditors but usually in OFC, the auditors face the same criminal penalties as the banks for disclosure while in some cases, only citizens or permanent residents are allowed to examine bank data.

¹⁶³ John Masters, Offshore issues in policing financial crime in Barry Rider Research handbook on international financial crime (Edward Elgar 2015) 679

¹⁶⁴ Jack Blum (n 159) 36

¹⁶⁵ Ibid

Although global deregulation has made OFC less attractive, nonetheless, they still have a market advantage, for example, OFC in some poor nations, have attracted funds, provided jobs and facilitated economic development¹⁶⁶. They offer attractive low tax rates to investors and persons who desire to reduce their tax burdens through legitimate tax loopholes. They also attract those trying to evade taxes through concealing much of their wealth by hiding it in jurisdictions where confidentiality is sacred and where tax evasion in another country is not regarded as a crime. Hence, the advantages should not obscure the legitimate roles that these centres continue to play especially *‘in a world where money moves constantly in search of the best rates of return, where vast sums can be made through arbitrage, and where there has been a departure from an investment economy and the embrace of what many observers call a speculative economy or “casino capitalism”*¹⁶⁷.

Banking secrecy and the security of financial information have brought up the need to balance delicate issues of privacy of the individual investor against the commercial interests of the holder of the information (OFC) on one hand and the public interest of the law enforcement of the state or foreign country and the right of the public to know on the other hand. This intricate balancing will depend on the content of the information under protection, the owner of it, who wants it and what it will be used for. The need to protect the privacy rights of individuals is long rooted in jurisprudence of many jurisdictions. In the United States, these rights have been given constitutional status, in Europe, privacy standards that put a high value on the privacy rights of the individual has been adopted, while in Nigeria; Fundamental Human Right to privacy is enshrined in the constitution. More so, wealthy people have been targets of criminals for kidnapping¹⁶⁸,

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ In some parts of the world (such as Nigeria, Pakistan, Afghanistan) kidnapping for ransom is a lucrative business, also In a part of the former Soviet Union it has been alleged that criminal gangs bought banks to determine who had a big enough bank account to make kidnapping worthwhile; see Banking Secrecy and Money Laundering, 106

governments have been found spying on their citizens either for security reasons or to maintain political control and consequently, citizens have devised means to exercise their political freedom by hiding personal information from the government. However, privacy issues have been greatly complicated by the advent of electronic commerce and corporate global financial data networks. For example, credit card security operations monitor the spending patterns of individual cardholders to prevent fraud and in many cases, their computers have stored information about the spending habits of individual cardholders and are programmed to alert on suspicious transactions for further verification¹⁶⁹. To resolve the complication arising from bank secrecy laws in OFC, it is necessary to inquire if the laws are protecting real privacy interests or if they are protecting the account holders against accountability under the law? In the name of protecting “privacy” right of Clients, many OFC actually protected the account holders from the demands of requesting governments for financial information in connection with criminal investigation. Hence, more often than not the real protection is against legal accountability and not against an improper invasion of privacy¹⁷⁰

The combined effect of OFC, tax offence and money laundering has been of great concern to the international community with regards to the veracity of the claim that investment in OFC encourages tax evasion? Mc Dowell and Novis¹⁷¹ opined that “money laundering diminishes government tax revenue and indirectly harms honest tax payers” but the UNODC paper¹⁷² presents a different perspective to the understanding of relations between money laundering and tax evasion and suggests that there is no clear basis for the assertion that money laundering has adverse effect on tax revenue. Furthermore, although there is a convergence of ideas on tax evasion and money laundering in terms of their effect but their processes are quite different. In general, tax evasion involves hiding

¹⁶⁹ Jack Blum (n 159) 106

¹⁷⁰ Ibid 107

¹⁷¹ Mc Dowell and Novis (n 121) 4

¹⁷² Jack Blum, (n 159) 11; see also Daniel Mitchell, ‘US Government Agencies confirm that low-tax jurisdictions are not money tax havens’, (2003) JFC (11) 127

legally earned income or disguising its nature in order to make it appear as a non-taxable earning thereby turning legal income into illegal fund by not paying tax on profit, it was argued that money laundering does the opposite; it takes illegally earned income and gives it the appearance of being legally earned; therefore, tax evasion and laundering have quite opposite effects.¹⁷³, tax evaders under report the earnings of legal enterprises so as to pay less tax than legally required but money launderers over report the earnings of any illegal enterprises and therefore pay more tax than their legitimate front companies would normally be required. In conclusion, the authors stated that contrary to the generally held view that criminal activity is as an unrecorded and untaxed activity hidden from the tax authorities; once the money is laundered it becomes taxable even when its precise nature is disguised. While not disputing this view point, laundered fund could remain untaxed if it remains in the black market or in the OFC which is the case in Nigeria and would persist until Nigeria attains an effective level of cashless economy.

3.6 Effect of financial crime on private sector and social stability

Financial criminals often use companies as facade to launder dirty money into the economy; consequently, such front companies provide products and services at a price comparatively lower than the market rate or even below the cost of production, the far reaching implication of this is that undue economic advantage is given to the front companies over legitimate firms that apply for loan from financial institutions to fund their business who would need to repay the loan with interest, thereby “crowding out” legitimate private business by criminal organisations”¹⁷⁴, since the objectives of organised crime is to maximise available opportunity to launder illicit fund and not strictly to offer service and products nor is it to maximise profit, this could result in economic crises and distorts macroeconomic indices¹⁷⁵. Laundered fund is hardly invested in economic activities that are beneficial to the economy of the host country; this redirects investment

¹⁷³Jack Blum (n 159) 11

¹⁷⁴ McDowell and Novis (n 28) 3

¹⁷⁵ Ibid

from productive and relevant sector of the economy and stultifies economic growth. In some countries such as Nigeria auto retail shops, hotel, property business and finance houses were in vogue between 1990 and 1999 not necessarily because there was a high demand for them but because they served as opportunity to launder proceeds of narcotics, corruption and embezzled government fund but eventually when the government tightened the lapses in the banking law which hitherto had allowed illicit fund to be diverted into the economy, the catastrophic consequences prevented laundered funds from gaining access to the economy, short term deposit could no longer finance long term loan, this resulted in the collapse of finance houses with its ripple effect of glut in real estate and hotel business, supply of properties, hotels and luxurious automobiles were available but there were no demand, there were job losses in banks, loss of business in building construction and engineering, loss of accruable revenue from property tax and income tax and a colossal damage to the economy¹⁷⁶.

In the same vein, financial crime increases the rate of economic pollution by boosting illegal revenues and the financial assets that criminals can reinvest in criminal activities¹⁷⁷, criminal enterprise could target the controlling shares of a company by acquisition of majority share; this may result in biased company management rather than fair economic objectives. Proceeds of crime can also be used by criminals to gain control over private financial institutions or infiltrate and dominate the industries or sectors of the economy, organised criminals may corrupt public officials or thwart the objectives of government initiatives. Laundered proceeds of crime could be invested in ways that creates artificial distortions of assets and commodity prices and create a risk of monetary and economic instability¹⁷⁸.

¹⁷⁶Ibid

¹⁷⁷ Jack Blum (no 159) 189

¹⁷⁸ African Development Bank/African Development Fund, Bank Group Strategy for The Prevention Of Money Laundering And Terrorist Financing In Africa May 2007, Pg.2, para2:7 <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/>> accessed 13/05/2013

Again, enormous economic power in the hands of criminal organisations inevitably leads to their stronger influence on a country's social and political life with possible exacerbation and pollution of social standards¹⁷⁹, this portends danger for the society because it is a crime committed by the privileged members in position of power who ought to set standards of moral behaviour but chose to engage in dubious criminal activities. Systemic corruption and perpetual involvement in financial crime in any given society alienates the general populace from all forms of attachment to the society, in docile societies, an average citizen becomes disillusioned and disenchanted, distrust of political office holders, every government policy is perceived as an opportunity for another fraud, embezzlement, looting of treasury, the citizens feel powerless, helpless and totally disconnected from their leaders with absolute lack of confidence in major public institutions. The "*Champaign lifestyle*" of financial criminals tend to create an impression that crime pays, it poisons the fabrics and morals of the society, it gives motivation for commission of other crime such that if the risk of detection is low and the chances of its success and profit is higher compared to the risk involved, then the illegal activities becomes high¹⁸⁰. Weak or lax financial regulation embolden criminals, which invariably strengthens their economic and financial power, the more the criminals, the more there would be financial institutions, casinos and real estate firm to boost the underground economy¹⁸¹. Furthermore, financial crime allows smugglers, drug traffickers, kidnappers, terrorist and corrupt government officials to expand their circle of influence and operational base¹⁸². This increases the cost of governance because of the need to increase law enforcement and health care expenditure for treatment of drug addicts¹⁸³. In Nigeria, the social structure of the country is corrupted so much that nobody questions the source

¹⁷⁹ Ibid 189

¹⁸⁰ Ibid 188

¹⁸¹ Ibid 189

¹⁸² Ibid 4

¹⁸³ Mc Dowell and Novis (no 121) 4

of unexplained wealth, while the meagre salary of the law enforcement agents which denies them the basic necessities of life¹⁸⁴ renders them vulnerable to inducement from criminals and compromises criminal investigation; it is generally perceived in many African states, particularly in Nigeria that justice in financial crime is for the highest bidders, this frustration tends to make the larger society accept economic and financial crime as the 'National cake' and a 'victimless crime' to be tolerated as far as it is non violent compared to bank robbery¹⁸⁵ but ultimately the government and the society at large pay for these consequences with higher taxes and costs of governance. Furthermore, the link between organised crime and financial crime facilitate human traffic, occasioning death on the high sea in search of greener pastures' in Europe or America¹⁸⁶, this also aids economic crime of smuggling of substandard goods, machinery and consumable products, usage and consumption of which displaces activity in the legitimate economy, it undermines genuine businesses and potentially puts people out of work and may pose serious risks to health and safety.

Organised crime groups facilitate economic and financial crime, terrorism and corruption to fund criminal enterprise (terrorist groups like Boko Haram, Al-Qaida overthrow the state and military in Mali, Somalia, Democratic Republic of Congo, Boko Haram in Nigeria, IRA in Northern Ireland, Taliban in Pakistan and Al-Qaida in Afghanistan; ISIS in Iraq all engage in either drug trafficking, bank robbery, illegal oil trade and kidnapping to fund violent operations against the state); terrorism creates an environment of fear and crime, it destroys and drives out legitimate businesses (in the Northern Nigeria, business activities and developmental projects have been paralysed, no foreign investor or expatriates would risk working in the Northern Eastern Nigeria due to the ravaging war

¹⁸⁴Nlerum Okogbule, 'Official Corruption and the dynamics of money laundering in Nigeria', JFC (2007)14 (58)

¹⁸⁵ Home Department Paper, One Step Ahead: '21st Century Strategy to Defeat Organised Crime' Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, 2004, 7 <<http://www.archive2.official-documents.co.uk>> accessed 08/04/2013

¹⁸⁶ Home Department Paper (n 94) 9

of terror, kidnapping and robbery used to finance terrorism). Ultimately, the ordinary citizens bear the burden and cost of crime even as the economy suffers and tax revenues are lost to illegal activities, even as the EU and America bear a heavy financial burden of maintaining asylum programme for huge numbers of trafficked economic migrants disguised as refugees, the host society goes through the stress of coping with culture shock and anti social behaviour of refugees as the latter have been through trauma of war, kidnapping, child soldiers and exposure to indoctrination of radical and fundamental religious beliefs; painfully, consumers in the host cities where refugees are settled may have to pay higher insurance premiums as insurance providers may adjust covers to meet the exigency of time¹⁸⁷.

In summation, financial crime, the cost of which remains difficult to be pragmatically measured has its dire consequences on social development and cohesion of national and transnational economy, security and governance; designing an effective control over it is worsened by technological development and OFC. The challenges in the existing legislations and policies could however be traced to the history of development of such measures which were haphazard, spontaneous and reactive, for instance, anti-money laundering law in the US developed from the need to control and interdict illicit drug fund into the US financial sector, the same in UK and Nigeria, the measures gained momentum with the realisation of the need to interdict proceeds of fraud, capital flight, corruption and lastly, terrorism financing; the dynamism and sophistication of which the traditional international cooperation in investigation and judicial matters did not envisage, although the hitherto lack of international cooperation is now gradually collapsing due to the global realisation of the threat of terrorism, interrelationship between crime and international dimension aided by information technology. Therefore, these threats have forged unity of purpose among nations in drafting the anti-money laundering best international practice as laid down by the United Nations, The World Bank, FATF and regional anti-fraud groups. Majority of these best international practices

¹⁸⁷ Ibid 10

were however built on the previous efforts of the Commonwealth, the US and UK banking practices, rules and regulations which shall be considered and appraised in the next chapter with a view to considering and evaluating their effectiveness, and where possible, to recommend the introduction of such measures in Nigeria, subject to local adaptation. However, many nations, especially Nigeria are yet to accept that a successful anti-financial crime transcends enactment of legislations; it is a holistic approach that needs to dig into the socio, religious and political fundamentals of the society, by asserting more control against radicalism, scrutiny of free speech and right to association and a redefinition of sovereignty. The world could not afford to stand aloof whenever a state lacks solution to suppress and eradicate the local circumstance that breeds terrorism. It is time for the review of the UN, Art.2 (6) so as to ensure safer world.

Having analysed the pernicious effect of financial crime in this chapter, it is considered imperative in the next chapter to scrutinise the history of financial crime in the UK and the US for probable answers for the initial use of narcotic legislations to control money laundering and organised crime and appraise the initial global failure to adopt a comprehensive legal arsenal and remedies of civil, criminal and regulatory actions and thus made social problems which could have long been nipped in the bud to become an international problem.

Chapter 4

History of attempting to deal with financial crime in the UK and the USA

The deleterious effect of financial crime on every segments of the society was evaluated in chapter 3 where it was shown that the problem became entrenched due to many reasons but mainly attributable to the initial faulty measures of applying anti-drug measures to interdict, disrupt and recover the proceeds of financial crime; it is therefore necessary to scrutinise the evolution of the traditional criminal justice systems in the US and the UK which had hitherto focused on prosecution, confiscation and punishment, thus failing to proactively respond to the new developments in criminal activities; even where there were legislative responses to curb financial crime, such efforts have been on wrong assumptions and too slow compared to the rate at which financial criminal activities evolve.

In this chapter, the evolution of the control financial crime in the UK and the US is analysed and evaluated, It establishes that some of the early initiatives derived from anti-drug, exchange control and tax laws were reactive and not designed to resolve the modern typology of financial crimes which is largely responsible for their ineffectiveness in dealing with its sophistication and modern trend. The chapter identifies and appraises the influence of the US Bank secrecy Act 1970 on subsequent AML and the problem created in 1980 by the House Lords decision in *R v Guthbertson* that prevented the recovery of proceeds of drug resulted crime led to the enactment of the Criminal Justice Act 1993 and ultimately the Proceeds of Crime Act 2002, part 7 of which consolidates and reforms AML under a single legislation, excluding control of terrorist financing (which had began in the UK since 1939), UK Prevention of Violence (Temporary Provisions) Act and a more detailed UK Terrorism Act 2000, also evaluated are the US PATRIOT Act 2001 (which expands the jurisdiction of US AML beyond its territory, thus raising several fundamental issues including the breach of national sovereignty of other nations) and the role of international institutions like the FATF and its recommendations (which inter alia, directs member states to establish financial intelligence unit with the objective of

assisting in financial control were evaluated). In the final analysis, the chapter aims to evaluate the mistakes of other countries with a view to guiding Nigeria in its fight against financial crime.

The criminal law in England is enshrined in the common law and statutes unlike in the US and Nigeria where criminal code laws are in force though they are largely influenced by the philosophy of English common law of crime. It is arguable that codification of law is a foreign reform concept to England as this contradicts its tradition of judicial discretion and consolidation as a tool for law reform and development which has preserved the British conservative culture and a mechanism for avoiding systemic and social friction but while England encouraged and ensured codification of criminal law within the commonwealth, its criminal law remained uncodified¹⁸⁸, despite demands for codification of English criminal law by groups and individuals like Jeremy Bentham¹⁸⁹ who as far back as mid 1780¹⁹⁰, had started advocating for codification as the best means of reforming the voluminous and illogical English criminal law, believed to have been preserved for protection of commercial and class interests of legal professionals, rather than '*the greatest happiness of the greatest number*'; Bentham argued that codification would compress and rationalise the provisions of the criminal law and introduce new and clearer legal terminologies which would render the law more accessible, comprehensible and certain to the public who would no longer require the assistance of legal experts for its understanding and certainty¹⁹¹; other remarkable earlier attempts to review English criminal law included the petition to the parliament sponsored by the city of London in

¹⁸⁸ Adolphus Karibi-Whyte, History and sources of Nigeria criminal law, (Spectrum Law 1993) 38

¹⁸⁹ 1748—1832, an English philosopher and radical political analyst, renown for his moral philosophy based principle of utilitarianism

¹⁹⁰ Philip Schofield and Jonathan Harris (eds), The Collected Works of Jeremy Bentham, 'Legislator of the World' Writings on Codification, Law, and Education, (Oxford, 1998)

¹⁹¹ David Lieberman, 'The Challenge of Codification in English Legal History', University of California, Berkeley Presentation for the Research Institute of Economy, Trade and Industry, (RIETI), 2009

< <http://www.rieti.go.jp/en/events/bbl/09061201.pdf>> accessed 14/01/2015

1818¹⁹² arguing that the criminal law had become inconsistent with the moral and religious sentiments of the people and consequently, it would never deter crime but the petition yielded no positive result.

Another effort at codification of the English criminal law was led by Sir James Mackintosh¹⁹³ consequent upon which the parliament set up a committee of inquiry into criminal laws with focus inter alia, on codification, the committee recommend a repeal and amendment of some obsolete statutes, repeal of 3 capital offences on larceny, re-arrangement of all statutes on forgery, consolidation and change of punishment in force¹⁹⁴ but this effort was unsuccessful because the House of Commons amended the recommendations and rendered it ineffective; nevertheless, this created an awareness for the defects in the criminal law and stimulated the interest in criminal law reforms¹⁹⁵. Again, in 1825, Peel made another effort by presenting a digest of criminal code, concentrating on consolidation and amendment of law which could ultimately lead to codification but this was also rejected; all these failed attempts culminated in a Royal law commission being initiated in 1833 by Lord Brougham with the aim of compressing the procedural and substantive common law of crime into one statute and all procedural and substantive legislations on crime into another statute¹⁹⁶; again, the reports were not enacted into law. Furthermore, in 1852, St. Leonards (Lord Chancellor) attempted to codify the criminal law by setting up another commission which produced Greaves Consolidation Acts 1861; this deleted 107 statutes but again it failed to codify the criminal law¹⁹⁷. Further, between 1878 - 1879, individuals like Sir James Stephen attempted to adapt the criminal code which he had successfully introduced in India to English circumstance by producing a digest of the whole criminal law, compressing the legislation

¹⁹² Leon Raczinowicz: A History of English Criminal Law, Vol1 (Macmillan, 1948) 526

¹⁹³ Ibid

¹⁹⁴ Karibi- whyte (n 188)

¹⁹⁵ Ibid

¹⁹⁶ William Holdsworth, A History of English law, Vol Xv (Sweet & Maxwell 1965) 143

¹⁹⁷ Ibid

and decided cases to an explicit systemic shape, removed all technicalities and other defects, resulting in a criminal code Bill introduced to parliament in 1878, in response to which the House of Commons raised a commission to scrutinise it, a draft code and report of the commission were issued as Blue Book¹⁹⁸ in 1879, as usual, this bill was rejected in England but like a prophet without honour among his people, the latter bill rejected in England was utilised by Canada¹⁹⁹ and Australia²⁰⁰ as the basis of their criminal code.

For further elucidation of the history of control of financial crime, Alex Steel²⁰¹ in his analysis of metamorphosis of larceny to theft, observed that for many years, larceny was the only general property offence in the UK, an unlawful dispossessing another person of tangible moveable property (even if the initial possession is unlawful) without consent and with the intention to permanently deprive the person in possession of the property; Steel had argued that larceny in its original English form prohibited two forms of socially dangerous acts of secret and physical dispossession of another's property, the aim of which was to prevent potential violence that could arise from such activities and not necessarily the protection of an individual owner's property rights; quoting Michael Tigar²⁰², ownership in pre-mercantilist societies was not a popular concept but instead, the right to use items of shared community property was paramount, larceny was thus primarily a public order offence intended to prohibit acts that disturb social order, the courts would allow larceny only if it involved violence; dispossession of property devoid of violence was dealt with by civil action of trespass, Fletcher conceptualised this as the principle of 'manifest criminality', that is, where an objective person could recognise the prohibited act of the accused as crime, if there was no manifest violent act, a case of larceny would be defeated by 'possessorial immunity', that is a person in possession of

¹⁹⁸ Parliamentary Report of Commission or Committee

¹⁹⁹ Mewett, "The criminal law 1867 - 1967" (45) Can Bar Rev. 727 in Karibi-whyte (n 188)

²⁰⁰ Karibi-whyte (n 188)

²⁰¹ The Right of Property and the Law of Theft' (1984) 62 Tex. L. Rev.1032

²⁰² Alex Steel, Taking Possession, The Defining Element of Theft? (32) Melbourne Univ. Law R 1038

property is presumed the rightful possessor, rebuttable only by any competing, superior claimants; due to the feudal forms of property holding that protected the right to quiet possession²⁰³ and the prevalent high level of illiteracy that recognised physical control of property rather than documentary evidence of title as a valid means of establishing proof of ownership. As argued by Fletcher, over the years larceny has metamorphosed from “manifest criminality” to subjective criminality, a change from insistence on manifestly criminal action to the intent of the accused which has also impacted upon the scope of criminal law generally²⁰⁴, this has led to the introduction of embezzlement and false pretences offences where culpability depends on breach of special relationship or trust (like employment and bailment) knowledge and the intent of the accused. These three offences, initially protecting proprietary interests were merged into the Theft Act²⁰⁵. However, since 1968, fraud has increasingly transformed from protection of proprietary interest to prevention of dishonest financial gain or loss. In England and Wales, the Fraud Act 2006, repealed previous general fraud offences and detaches fraud from its theft based origin, culpability of which now depends on conduct intended to cause a gain or loss of money or property²⁰⁶.

Apart from the evolution of larceny law, in 1959, Lord Burtler²⁰⁷ had set up the Criminal Law Revision Committee to examine various aspects of criminal law (England and Wales) for revision and recommendations, several matters have been referred to the committee, and several working papers have been produced, its recommendations have led to amendment of some provisions of criminal law²⁰⁸. The Law Commission Act, 1965 sets up the law commission aimed at simplification, modernisation and reforming the law by

²⁰³ Michael Tigar, ‘The Right of Property and the Law of Theft’ (1984) 62 Texas Law Review 1443 cited in Alex Steel The Defining Element Of Theft (no 202)

²⁰⁴ Ibid 1041

²⁰⁵ Ibid 1

²⁰⁶ Ibid 1044

²⁰⁷ The Home secretary between 1957 - 1962

²⁰⁸ Criminal Damage Act, 1971 and Forgery and Counterfeit Act, 1981

amendment or repealing of obsolete and verbose laws; codification of law and reducing the number of separate enactments. TLC has conducted adopted periodic review of obsolete statutes by repealing them and restating common law offences in statutory form²⁰⁹. It has made substantial progress in reforming specific offences which have been published in several reports but despite the fact that in 1984, *The Criminal Law Sub Committee Of The Society Of Public Teachers Of Law* initiated and drafted a *Criminal Code Bill* and submitted it to the law commission (a reform by consolidation and restatement of the existing common law and statute which culminated in the production of a draft Criminal Code in 1989) but rather than adopting the bill and provide a semblance of codification in England, the law commission opted for a gradual review of various aspects of criminal law with a view to modernising any obsolete law such as the 1998 review of law dishonesty in relation to the law of fraud and the review of common law offence of corruption which recommended its repeal and eventual enactment of *Fraud Act 2006* and a single *UK Bribery Act 2010* respectively.

In contrast to the UK, the development of criminal law system in the U.S evolved from statutes, customs and jurisprudence of several other jurisdictions, reception of common law of England in the 17th century, the Spanish laws in Florida Texas, California and other states of the American Southwest, French tradition in Louisiana and the indigenous law of the various native American groups in their areas of control like the native Hawaiian influences in Hawaii, all these influenced the development of American criminal law. However, every state in the US, except Connecticut, expressly received the common law of England²¹⁰ either by charter, subsequent legislation or constitutional provisions subject to interpretation of the US courts or legislative amendment or repeal of any English law inconsistent with or repugnant to the local circumstance of the state. For example, common law was received in 1607 in Virginia, 1662 in Maryland, 1712 in South Carolina,

²⁰⁹ Report on codification of the criminal law (1985) Law Comm. No.143

²¹⁰ In force on a given date or at the time of reception, this includes the common law offences

1770 in Rhode Island, 1775 in New York, and 1776 in Pennsylvania²¹¹. Initially, there was no federal common law in the US because it was received by each state; by the time Federal Constitution was introduced in 1789, it impliedly imposed limitations on the common law, primarily through its first ten amendments (Bill of Rights) in 1791, Article VI designates the Constitution and the laws made in pursuance thereof; and all treaties made under the authority of the United States to be the supreme law of the land without abrogating the force of the retained common law in the states but any received common law inconsistent with the US constitution and any enactment made pursuant thereof shall be void²¹², however, there were dissatisfactions with the inconsistent judicial interpretation of the common law, uncertainty and inaccessibility of the common law and influence of Napoleonic codes in Europe perceived as more rational than unwritten common law have all influenced a need for codification of the US law, consequently, by 1796, Virginia had adopted Jefferson's codification of the criminal law²¹³. Presently, criminal law in American has developed beyond the rudiments of the English common law²¹⁴, it is now largely codified unlike England where criminal laws remain scattered in court decisions and different statutes. Conclusively, decisions of English courts are of no binding authority in American criminal proceedings except in novel situations where guidance can be sought from decisions of English court or any other developed legal system as a persuasive authority.

4.1 Development of anti-money laundering and terrorism law

The stratagem of laundering unlawful money has been unacceptable in Britain as far back as the 18th century, firstly, under the tax law in Mansfield C.J's dictum in *Holman v*

²¹¹ Cohen Morris, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, Yale Law School Faculty Scholarship, Faculty Scholarship Series, (1989) 81 13

< http://digitalcommons.law.yale.edu/fss_papers> accessed 8/01/2015

²¹² Ibid 22

²¹³ Ibid 25, 26

²¹⁴ Ibid 28

*Johnson*²¹⁵ stated that the UK courts would refuse to assist in enforcing foreign tax evasion, secondly, under the UK Exchange Control Act 1947 (repealed in 1979) which prohibited British residents from holding currency in foreign jurisdictions in order to help the state conserve currency reserves and maintain balance of payment and thirdly, under the civil law of tracing, in *Taylor v Plumer*²¹⁶ and *Scott v Surman*²¹⁷ which allowed trust property to be identified and traced into the hands of a third party even if such property has been mixed with another, so far its identification remains possible. However, money laundering has not always been known as a separate offence under the English law, it evolved from anti-drug trafficking statute²¹⁸ such as the *Misuse of Drug Act 1971, S.27* of which empowers the courts to confiscate properties used in drug trafficking and proceeds of drug crime until the House Lords in *R v Cuthbertson*²¹⁹ held that the power of confiscation applies only to property used to commit drug offence and not applicable to proceeds of crime; due to difficulties created by this decision²²⁰, the parliament responded by enacting *Drug Trafficking Offences Act 1986* to criminalise laundering the proceeds of drug trafficking and empowers the court to confiscate such proceeds on assumption that assets in possession of an offender within six years of commencements of trial were profits of crime, in addition, the *Criminal Justice Act 1993* was introduced with a wider scope than *Drug Trafficking Offences Act 1986*, this criminalises not only the laundering of proceeds of drug but money laundering in general²²¹, however, the *Proceeds of Crime Act 2002, Part 7* consolidates and reforms the crime of money laundering under a single legislation, thereby extending the definition of money laundering to all crimes, including the three principal offences of concealing or

²¹⁵ (1775) 1 COWP 341, 343

²¹⁶ (1815) 3 M & S 562

²¹⁷ (1742) Willes 400

²¹⁸ Angela Leong, Chasing dirty money: domestic and international measures against money laundering, 2007 JMLC 10 (2) 142

²¹⁹ [1981] AC 470, [1980] 2 All ER 401 (HL)

²²⁰ Cuthbertson case

²²¹ S.93(C)(1-4)

transferring criminal property²²², entering into or becoming concerned in money laundering arrangements²²³, and acquiring, possessing and use of criminal property²²⁴ but the *POCA 2002* is inapplicable to the act of financing of terrorism whereas, nexus exists between money laundering and terrorist financing, though the process involved in both are distinct as money laundering cleans dirty, illegitimate money by placing, layering and integration into the financial system, in contrast to terrorism which is often financed by "reverse money laundering", a process whereby legitimate fund is directed to finance illegal act of terrorism²²⁵. Barry Rider²²⁶ has thus opined that one of the initial reasons for the failure to interdict terrorist finance was the application of anti-drug mechanisms against terrorism when in reality secret wealth creation by criminal enterprise is distinguishable from terrorist financing, even if the mechanism is similar, the purpose is wholly different, terrorist financing involves banking of wealth for future use, a reversal of money laundering process.

Although the 84th UN Plenary meeting, 1994²²⁷ adopted steps to criminalise international terrorism via *UN General Assembly Resolution 54/109 dated 9/12/99*, however, it failed to criminalise financing of terrorism until the 9/11 attack, when the *2001 UN Security Council Resolution 1373* authorises member states to:

1. Prevent and suppress terrorist financing²²⁸
2. Criminalise it²²⁹,
3. Freeze their funds and assets²³⁰ and

²²² POCA, 2002 s 327

²²³ Ibid s.328

²²⁴ Ibid s 329

²²⁵ S. Cassella, "Reverse Money Laundering" (2003) 7 JMLC 92

²²⁶ Barry Rider, Disrupting the disrupters! Editorial to (2004) JMLC 7(3) 199

²²⁷ *A/RES/49/60*

²²⁸ S/RES 1373 2001, para.1(a), adopted by the Security Council in 2001

²²⁹ Ibid Para 1(b)

4. Prevent their citizens from financing terrorism²³¹

This culminated in terrorist financing being incorporated into *FATF recommendations* through the *9 special recommendations*. However, counter terrorism financing measures must be distinguished from war time emergency laws that proscribed any form of mercantile relationship with enemy nations with power to seize and confiscate assets. The UK counter terrorism measure predates the UN and US approaches, it started as far back as 1939 by virtue of the *UK Prevention of Violence (Temporary Provisions) Act 1939*²³² to counter the IRA "S-plan" threat and campaign of terror against British interests, it is however not comprehensive as it failed to tackle the source of financing terrorism, it merely focused on exclusion from and denial of entry to Great Britain, arrest and detention without warrant of suspected terrorist or those who incite others to terrorism. The UK *Terrorism Act 2000* enacted after 9/11 attack on the US as amended by *Security Act 2001*²³³ (repealed ss. 24-31, *Terrorism Act 2000*²³⁴) and it is now the main statutory instrument that criminalised terrorist financing by empowering the state to confiscate the fund or property found in the possession or control of the offender at the time of the offence and inter alia, made provision for freezing of terrorist cash through civil proceedings; tightens immigration and asylum control; expands the powers of crime prevention and law enforcement, it implemented international obligations under the EU

²³⁰ Ibid Para 1(c)

²³¹ Ibid Para 1(d)

²³² subsequent enactments like the *Prevention of terrorism (temporary provision) Act, 1974, 1984 and 1989* were also restricted to arrest of terrorists and prohibition of specific terrorist organisations like Irish Resistance Army until repealed by *Terrorism Act 2000*

²³³ Amends the *Terrorism Act 2000*; to make provision for freezing of assets, immigration and asylum, to make provision about the control of pathogens and toxins and to implement Title VI of the Treaty on European Union

²³⁴ Anti-terrorism, Crime and Security Act 2001, S.1(4)

Treaty on police and judicial co-operation and international obligations to counter bribery and corruption²³⁵.

However, the current AML and CTF measures in many jurisdictions are influenced by the FATF Recommendation on criminalisation, suppressing access to funds through reporting requirements, KYC procedure and asset recovery. In line with these international standards, UK AML/CTF is managed by the HM Treasury with the support of the former FSA now FCA, Home Office, former SOCA now National Crime Agency (NCA); to achieve its objectives, Proceeds of Crime Act (POCA) 2002, Money Laundering Regulations 2007²³⁶, Professional Guidance issued by JMSLG and specific Anti Money Laundering rules by FCA in line with international standards of 40+9 FATF Recommendations and obligations imposed on UK by the 3rd EU Money Laundering Directive are all operational laws in substantial compliance with the provisions of the UN Vienna²³⁷ and Palermo conventions; the essence of which is to achieve three principles of *effectiveness*²³⁸, *proportionality*²³⁹ and *engagement*²⁴⁰. The new 4th EU Directive came into

²³⁵ Repealed by Bribery Act, 2010

²³⁶ Introduced to implement EU Money Laundering Directive, the first Money Laundering Regulation was in 1993 amended by 2003 Money Laundering Regulation to broaden the scope of Money Laundering so as to include Notaries, Estate Agents, Auditors, Money Transmission providers, dealers in High Value Goods and Casinos, Money Laundering Regulation 2007 (repealed the 2003 Regulation) to implement the 3rd EU Money Laundering Directive

²³⁷ The 1988 Vienna convention was implemented in the UK in 1990 by the Criminal Justice (International Co-operation) Act and has influenced subsequent intergovernmental initiatives like the G-7, Financial Action Task Force (FATF) and the model legislation adopted by the Inter-American Drug Abuse Control Commission of the Organisation of American States (OAS), see also Matthew Morgan, Money Laundering: The American Law and Its Global Influence, (1997) NAFTA Law & Bus. Rev. Am. 3 (24)

²³⁸ ensuring that maximum impact is made on criminal and terrorist threat

²³⁹ where it adopts risk based approach towards fight against ML by ensuring that cost effective measures and flexible approach are applied by firms to meet their obligations under the law

force on 26th June, 2015 and member states have 2 years within which to implement it. It allows simplified customer due diligence where the customer is an FI, corporation listed in the regulated market or local authority; maintenance of register of beneficial owners, record keeping to be deleted within 5 years of cessation of relationship, risk assessment and extension of PEP to include their family members. The FCA had primarily adopted a risk based approach towards money laundering for firms to exercise the discretion of allocating cost effective approach, based on assessment and classification of services and products as high risk, firms put structures in place for proper customer identification but ultimately, the FCA has power to impose obligations²⁴¹. In August 2006, money laundering risk based approach was replaced with principles based approach in the Senior Management Arrangements, Systems and Control (SYSC). In part 3 of the Handbook, firms must have in place, system and control which are conducive for proper running of the firm²⁴² with the FCA reserved power to investigate, enforce rules and prosecute offenders by imposing adequate penalty.

Furthermore, the *Counter-Terrorism and Security Act 2015*, was enacted to address specific concerns of reducing or eradicating the observed increase in terrorism threat to the UK national interests which demands stopping persons from travelling to fight for terrorist organisations, from engaging in terrorist activities and to prevent returnees from the conflict zones in Syria and Iraq who had fought in support of ISIS. It strengthens the statutory instruments of law enforcement and intelligence agencies to disrupt terrorism and prevent individuals from being radicalised in the UK. It focuses on six areas of aiming to strengthen powers of temporary travel restrictions on terrorist suspect by passport

²⁴⁰ which focuses on firms for adequate feedback on steps taken and ensures enactment of criminal sanctions against Money Laundering; JMLSG Preventing ML/combating Terrorist financing guidance for the UK financial sector Pt1 (JMLSG: London, 2007 b) guidance 1.17

²⁴¹ Part of which was contained in Money Laundering source book which was stopped in 2006

²⁴² FSA Handbook (FSA, London 2006) at SYSC 3.1.1

seizure and temporary exclusion from the UK²⁴³ and reduce the risk of people being drawn into terrorism through terrorism ideology²⁴⁴.

However, in the US, the earliest attempt to control money laundering process was the enactment of *Currency and Foreign Transaction Reporting (Bank Secrecy) Act 1970*²⁴⁵ in reaction to the need to regulate the flow of illicit fund into the US economy, this approach has influenced virtually all subsequent US AML and CTF legislations in other jurisdictions²⁴⁶ like Nigeria. The BSA targets the placement stage of money laundering by requiring relevant financial institutions to:

1. Maintain sufficient records for audit trail of financial transactions and
2. File Currency Transactions Reports

of all currency and bearer instruments transactions in excess of \$10,000 into or out of the US²⁴⁷; the constitutionality of which was challenged by the US bankers in 1974 case of *California Bankers Association V Schultz*²⁴⁸ where the US Supreme Court held that the reporting requirement under the BSA did not violate due process, protection against unreasonable searches and seizures under the Fourth Amendment and the protection against self-incrimination under the Fifth Amendment; again in 1976, the BSA was challenged in *US V Muller*²⁴⁹ on the basis that it violated privacy interests but the US Supreme Court held that bank customers have no privacy interests protected by the Fourth Amendment in records of their affairs that may be "incidentally maintained" by the banks with which they deal.

²⁴³ Part 1, S.1-S.2

²⁴⁴ Part 5,S.26 - 36

²⁴⁵ 31 U.S.C 5312

²⁴⁶ Reynolds John (no 158)

²⁴⁷ Ibid 7

²⁴⁸ 416 U.S. 21(1974), 45-52, 52-54,71-72

²⁴⁹ 425 US 435 (1976)

However, the major weakness of the BSA is that it failed to specifically prohibit money laundering, it merely targets the process of money laundering, secondly, the loopholes in its provisions²⁵⁰ allowed structured payments below (\$10,000) the statutory threshold report to circumvent the purpose of the CTR, called “smurfing” “Smurf”, a term for dividing illicit funds into smaller size for deposits in banks so as to avoid detection and circumvent the cash reporting requirement, consequently, in order to strengthen the BSA, the *Money Laundering Control Act 1986* was enacted, empowering the state to inter alia, confiscate the proceeds of drug trafficking by civil and criminal forfeitures²⁵¹ and specifically criminalised money laundering²⁵² unlike BSA; it obstructed the loophole in BSA by prohibiting structured cash deposit but in 1994, there was a setback in the U.S AML regime when its Supreme Court in *Ratzlaf v United States*²⁵³ held that in order to establish the crime of structured deposit under the BSA, the state must prove that the offender knowingly, illegally and wilfully structured the financial transactions so as to avoid the reporting requirements and also did so knowing his conduct was unlawful. However, the *Ratzlaf*²⁵⁴ decision was briefly in force as the Congress repealed it by *Money Laundering Suppression Act 1994*, s.5324 of which makes it a strict liability offence, such that violation of structured deposit clause attracts criminal penalties without a need to prove wilful conduct, the Congress struck the word wilful from S.5322²⁵⁵ but before the enactment of 1994 MLSA, there was a partial legislative response to the BCCI crisis when the Congress again amended the BSA via *Annunzio-Wylie Money Laundering Act 1992* to increase the penalties attached to violations of money laundering laws and thus effectively raising the risks associated with such activity, it expanded the scope of

²⁵⁰ 31 U.S. Code § 5324

²⁵¹ SS.981 and 982

²⁵² 18 U.S. Code § 1956

²⁵³ 510 U.S. 135 (1994)

²⁵⁴ 510 U.S. 135 (1994)

²⁵⁵ Matthew Morgan (n 237)

financial transaction²⁵⁶, the scope of the provision against structuring under MLSA to include international monetary instrument transactions²⁵⁷ and shifts the regulatory focus of the U.S money laundering policy away from the central bureaucratic supervision to the financial institutions themselves²⁵⁸ by requiring financial institutions to establish internal AML programs, policies and controls; appointing a compliance officer, employee training program and an independent auditing of programs²⁵⁹ as manifested in KYC programs that increased the standard of compliance with AML statutes and safe banking practices.

An effective KYC program invariably complements the CTR requirements; it shifts the burden of enforcing the BSA directly from the US Treasury to the financial institutions themselves. However, the provision of Annunzio-Wylie Act raised ethical issue of legal compliance, risk of breaching client confidentiality and risk of client loyalty to the financial institution in reporting suspicious transactions but in order to protect financial institutions from liability and to encourage legal compliance, the Act protected financial institution from civil liability from clients and third parties that may arise from reporting "suspicious transaction". The level of compliance with CTR amendment of Annunzio- Wylie Act was successful to the extent that the US Treasury received an enormous CTR and this necessitates further amendment of BSA CTR by the *Money Laundering Suppression Act 1994* earlier mentioned by partially relaxing the reporting requirements of currency transactions between financial institutions and other legitimate business customers whose business involve huge cash exceeding the reporting threshold; a step which has drastically reduced cash transaction reported.

²⁵⁶To include the "transfer of title to any real property, vehicle, vessel, or aircraft and offence under Foreign Corrupt Practices Act (§1534), kidnapping, robbery, extortion against a foreign state or fraud on a foreign bank (§1534)

²⁵⁷ 31 U.S.C. § 5316

²⁵⁸Matthew Morgan (no 237)

²⁵⁹ 31 U.S.C. § 5318(h) (1995)

Although CTR, adequate record keeping, risk based approach of internal control measures are fundamental AML tools, however, there are emerging challenges posed by globalisation, abuse of banking products and services in foreign jurisdictions that hinders the progress of the US AML regime, now being pursued by increase international cooperation among FIUs and governments; consequently, these efforts by the US appear insufficient in the wake of an increasing global terrorism and allied threat to the US interests, thus informing a need for an increased control over foreign financial products utilised for money laundering objectives, by importing the substance of US AML to foreign jurisdictions; a complex step than bilateral or multi lateral negotiation, the latter which involves cooperation of foreign regulatory and enforcement agencies, international communities and foreign governments. This must have been responsible for Reynolds John's argument that *US PATRIOT Act 2001* reflects a unilateral indirect imposition of AML regulations on other jurisdictions, the *US PATRIOT Act* confronted money laundering and its link with terrorist financing, although the first law to specifically criminalise terrorist financing in the USA is the *Suppression of the Financing of Terrorism Convention Implementation Act 2002*²⁶⁰ which implemented the international convention for the suppression of the financing of terrorism. The Act criminalises provision of funds to support terrorist activities immaterial of whether the offence was committed within or outside the USA; the *US PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act 2001* has four main areas²⁶¹ and consolidates all existing US anti money laundering²⁶²

²⁶⁰ There are four 4 offences under the law: (1) giving material support for the commission of specific offence,(2) giving material support to a foreign terrorist organisation,(3) giving or collecting terrorist fund(4) concealing or disguising material support to terrorist organisations or funds used by such group.

²⁶¹ expansion of surveillance methods (Title II), protection of the border and changes to immigration procedures (Title IV), additional criminal sanctions against terrorism (Title VIII) and a comprehensive overhaul of the money laundering and currency transaction laws (Title III)

²⁶² Maureen Murphy, American Law Division Congressional Research Service, 1

< <https://epic.org/privacy/financial/RL31208.pdf> >

and international terrorism laws to deprive criminals from using the U.S. financial system anonymously to move funds obtained from or earmarked for illegal activities. It imposed new requirements on banks, financial institutions and informal money transmitting networks; and added foreign corruption offences to the list of predicate offence of money Laundering²⁶³ and confers long-arm jurisdiction of US courts over foreign persons or financial institutions that contravenes money laundering law if such a person maintains a bank account with a US financial institution²⁶⁴.

Although for centuries, international banking practice had developed correspondent banking accounts where transactional accounts are held with large banks in various financial centres all over the world to facilitate international business, however, correspondent accounts have been hijacked for money laundering objectives consequent upon which the *US PATRIOT Act* now prohibits its financial institution from maintaining correspondent accounts for foreign shell banks (i.e. bank that have no physical presence in any country)²⁶⁵ and prescribes minimum standards for identifying customers opening accounts by financial institutions, this includes procedures for verifying customer identity to be compared with government lists of terrorist organisations²⁶⁶ and record of identity of every beneficial owner of an account in the OFC jurisdiction or the identity of the sender and the ultimate beneficiary²⁶⁷, also the Act requires international cooperation in identifying sender and beneficiary of international money transfer²⁶⁸, the importance of which is to eliminate coded accounts in OFC except the parties are unmasked.

²⁶³ S.315

²⁶⁴ S.317

²⁶⁵ S.313

²⁶⁶ S.326

²⁶⁷ S.312

²⁶⁸ S.328

Enforcement of the PATRIOT Act outside the US operates by the support the US gives to the countries or entities that contributed to its anti-terrorism efforts²⁶⁹ and by denying aids to jurisdictions that support terrorism; apart from forfeiture of proceeds of money laundering, denial of economic aid to OFC lacking in transparent banking practice, potential poor rating for non cooperative countries affected by the quality and compliance level of the government's financial regulations with international best practice and law enforcement as enshrined in international treaties, the extent and compliance rating that a country earns will determine the multilateral economic aid to be granted to such country because a poor international credit rating has an adverse effect on a country's cost of obtaining credit and may place an offending country at a financial difficulty by making it unattractive for international business²⁷⁰. The Act confers Long-Arm Jurisdiction on the US courts on money laundering offence²⁷¹ either over foreign persons or foreign financial institutions even where such offence occurred through a foreign bank²⁷² and encourages foreign governments to require the name of the sender and recipient of international money transactions²⁷³.

The USA Patriot Act raises fundamental issues of conflict between protection of individual right of privacy and public safety, conflict between free speech, law enforcement and national security and conflict between state power of surveillance and protection against unlawful search and seizure as enshrined in the Fourth Amendment to the U.S. Constitution which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

²⁶⁹ S.360

²⁷⁰ Reynolds John (n 158)

²⁷¹ S.317

²⁷² S.318

²⁷³ S.328

The earlier interpretations of this constitutional provision by the US Supreme court had restricted its violation only to the physical intrusion of protected area, excluding its application from surveillance activities of the state like wiretapping of private telephone conversations without judicial approval²⁷⁴; under the *Omnibus Crime Control and Safe Streets Act of 1968 Title III*²⁷⁵ applicable to local investigation, the law enforcement officers are required to obtain search warrant before undertaking surveillance on U.S. citizens; this substantially complies with the constitution. The general prohibition of wiretapping without warrant had depended on the dichotomy between surveillance of foreign powers and surveillance of ordinary persons for criminal purposes, under the *Foreign Intelligence Surveillance Act 1978*²⁷⁶, the executive can conduct electronic surveillance and physical searches on foreign agencies for intelligence purposes without warrant and secondly under the *USA Patriot Act 2001* due to threat posed by terrorism to U.S. security interests and the reality of the modern crime, there is a departure from protections of the Fourth Amendment in the U.S. Federal Courts²⁷⁷. Again, complexity of human society reveals that the right to privacy has developed far beyond mere property rights; hence, the Fourth Amendment today protects an individual personal privacy far beyond trespass to property relating to unreasonable search and seizures²⁷⁸. The earlier position of the US Supreme court was overruled in *Katz v United States*²⁷⁹ where it was held that warrantless wiretapping of a public phone booth constitutes an unreasonable search of a "constitutionally protected area" in violation of the Fourth Amendment, consequently, any evidence obtained in such circumstance is inadmissible. However, in an attempt to fight terrorism, provisions of US Patriot Act, Title II "Enhanced

²⁷⁴ *Olmstead v. United States*, 277 U.S. 438 (1928)

²⁷⁵ codified as amended at 42 U.S.C. § 3711 (2000)

²⁷⁶ codified at 50 U.S.C. § 801 *et seq.* (2000 & Supp. 2003)

²⁷⁷ Justin Kollar, USA PATRIOT Act, the Fourth Amendment, and Paranoia: Can They Read this While I'm Typing?, *Journal Of High Technology Law*, (2004) (67) 74

²⁷⁸ *Katz*, 389 U.S. at 353

²⁷⁹ 389 U.S. 347, (1967)

Surveillance Procedures” reduced the requirements for judicial warrant prior to search of place or person in total negation of the Fourth Amendment, Justin Kollar argued that a balance needs to be struck between fundamental liberties and national security, notwithstanding the tremendous fear of terrorism which in this case appears not to be the situation, For instance, *Patriot Act S.215* empowers the FBI through secret court orders (from the Foreign Intelligence Surveillance Court) to obtain business records and other “tangible things” for authorized investigation aimed at protection from international terrorism or clandestine intelligence activities; such an order which must be granted even in the absence of facts justifying such an order is susceptible to being used for obtaining private information of people who have no connection to terrorism thus giving the FBI unhindered access to private data in violation of right of privacy as guaranteed by the constitution. Again, *S.213* empowers the law enforcement agency to search and seize property representing proof of an offence without immediately notifying the owner, this could be used for investigation unconnected with terrorism and violates right of privacy.

4.2 Financial Action Task Force

This is an inter-governmental body that develops and promotes AML policies; the FATF²⁸⁰ was created in Paris in 1989 by G7 summit, following the 1988 adoption by the UN General Assembly of a universal pledge to halt money laundering²⁸¹. The FATF issued 40 Recommendations in 1990 but amended in 1996, following the 9/11 attack on the US in 2001 by addition of 9 special recommendations on Terrorist Financing in 2003 with tougher clauses for high-risk customers, extension of anti-money laundering measures to

²⁸⁰ FATF has its office at the headquarters of the Organization for Economic Cooperation and Development (OECD) in Paris, there are collaborations among the staff of the two organisations but they are separate entities.

²⁸¹ J Johnson “Is the global financial system Anti Money Laundering and Counter Terrorist Finance prepared?” (2008) JFC 15 (1) 7 21

several non-financial businesses and prohibition of shell banks'²⁸². The key elements of the recommendations are:

1. Criminalisation of money laundering and terrorist financing
2. Introduction of preventive measures to be adopted by financial institutions like reporting of suspicious transactions and establishment of financial intelligence unit
3. Standards for prosecution and punishment of money laundering offences; freezing and confiscation of criminal proceeds
4. International cooperation and exchange of information among supervisors and law enforcements²⁸³.

FATF derives its legal force from the UN Security Council Resolution 1617²⁸⁴ which enjoins member states to implement the provisions of the FATF Recommendations; to achieve this mandate, UNODC offers technical assistance to member states to fight laundering the proceeds of crime through the international financial system by initiating measures like assisting law enforcement agencies and FIU with strategies to counter money laundering and by advising banks and FI on implementation of best international practice and by assisting in carrying out financial investigations²⁸⁵. Recommendations of FATF are monitored through an *annual self-assessment* exercise by member states and secondly, through cross country *mutual evaluation or pair review process*, this is carried out by a team of FATF experts who assess the level of compliance of any country with the

²⁸² E. Tsingonu, 'Global governance and transnational financial crime opportunities and tensions in the global anti money laundering regime' (2005) Centre for Study of Globalisation and Regionalisation (CSGR) Working Paper N0 161/05, 5

²⁸³ Barry Johnston and John Abbott, "Deterring Abuse of the Financial System: Elements of an Emerging International Integrity Standard", (2005) IMF Policy Discussion Paper, PDP/05/3

²⁸⁴ The UN Security Council (5244th meeting) Resolution (S/RES/1617 (2005) and The UN General Assembly Resolution 60/288 (2006) encourage states to implement the 40 + 9 FATF Recommendations

²⁸⁵ <<http://www.unodc.org/unodc/en/money-laundering/technical-assistance.html>>accessed 17/03/2015

FATF recommendations and guidelines; with four possible ratings as either compliant, largely compliant, partially compliant, non-compliant or not applicable²⁸⁶, these results are published, reviewed and followed with periodic discussion of progress of steps taken to address any observed deficiencies²⁸⁷; it considers issues like the effectiveness of FATF standards implementation, evaluation of supervisory practices and the functioning of the criminal justice system in relation to the roles of the judiciary and law enforcement agencies in enforcing AML/CTF laws and regulations²⁸⁸. Jackie Johnson, in her treatise²⁸⁹ concluded that the third round of mutual evaluations indicated that the compliance levels with FATF's Forty Recommendations have fallen for no explained reason and doubted the reliability of the Self assessment approach which tends to give a false sense of security and thinks FATF needs a unified approach to AML and CFT programs, otherwise the significant costs of implementing the new FATF standards will amount to financial waste and defeats the set objectives; observations such as this have prompted a fourth round of evaluation, which appears more pragmatic as it considers technical compliance with the FATF Recommendation and secondly, the effectiveness of compliance in mitigating AML and CTF, interdiction of ML and TF and appropriateness of the available sanction in a country²⁹⁰. Britain and America have not only demonstrated substantial compliance with

²⁸⁶Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems, Para.13

<http://www.fatfgafi.org/media/fatf/documents/methodology/fatf%20methodology%2022%20feb%202013.pdf>> accessed 17/03/2015

²⁸⁷ Sean Hagan, IMF Paper, 'Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT)—Report on the Review of the Effectiveness of the Program'

<<http://www.imf.org/external/np/pp/eng/2011/051111.pdf>>accessed 17/03/2015

²⁸⁸Barry Johnston (n 283)

²⁸⁹ Third round FATF mutual evaluations indicate declining compliance, (2008) JMLC 11(1) 47

²⁹⁰ Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems Para 40

specific FATF Recommendations but they have also implemented relatively effective AML/CFT systems (discussed in Chapter 5), however, Britain has a lot to learn from the US in respect of interdiction and recovery of proceeds of crime and punishment of financial criminals and terrorists. Apart from the FATF evaluation, the IMF in collaboration with the World Bank also embarked on a joint pilot task of preparing "*Reports on the Observance of Standards and Codes*" (ROSCs), based on summary assessments in 12 selected areas²⁹¹ relevant to stability of private and financial sector development and which are relevant to the operational work of the IMF and the World Bank, to which in November 2002, AML/CFT was added, it assesses the level of a country's observance of the "international standards" and are published at the request of the country involved, this serves as a tool for policy reform, aids the private rating agencies in risk assessment and encourages discussion in the affected sector and jurisdictions²⁹². However, effectiveness of rating agencies is quite controversial as their approach is reactive and not proactive, they failed to downgrade any country before the 2007 global financial crisis except after collapse of national economies despite all pre-existing indices of potential economic distress, again, it is generally obvious that the developed countries enjoy favourable ratings than emerging economies; an instance was the downgrading of Japan from AAA rating in 2002 while some dwindling economies of developed countries not doing well as Japan enjoyed better credit rating, nevertheless, the down rated Japan continued to flourish and consistently improved even far better than the higher rated developed economies. The scope and application of national rating needs to be reviewed in line with a country's overall development strategy and circumstances, and against the background of global regime of standard setting, financial crime prevention and international coordination in law enforcement.

²⁹¹ These comprise accounting, auditing, anti-money laundering and countering the financing of terrorism, banking supervision, corporate governance, data dissemination, fiscal transparency, insolvency and creditor rights, insurance supervision, monetary and financial policy transparency, payments systems and securities regulation

²⁹² <<http://www.imf.org/external/NP/rosc/rosc.aspx>> accessed 17/03/2015

Whereas FATF initially adopted a coercive measure as a means of ensuring compliance, it later realised its incapacity for enforcement, consequently, it resorted to “*naming and shaming*” campaign by identifying countries not cooperating with its recommendations. The first NCCTs report was made public in year 2000 and it is regularly being reviewed, though it can suspend members that fail to comply with its recommendations, only Austria and Turkey have been reprimanded since 1999²⁹³. It assesses members’ compliance with financial sector codes and standards in areas such as supervisory core principles: for banking (Basel - Committee on Banking Supervision), Securities (IOSCO - International Organization of Securities Commissions) and insurance (IAIS- *International Association of Insurance Supervisors*)²⁹⁴. The Basel Committee's anti-money laundering guidance is expounded in the Core Principles for Effective Banking Supervision, the 15th principle of which requires banking supervisors to ensure that adequate policies, practices and procedures are in place, including “KYC” rules, that promote high ethical and professional standards in the financial sector and prevent bank from being used either intentionally or unintentionally by criminal elements, this includes prevention and detection of criminal activity or fraud and reporting of such suspected activities to the appropriate authorities²⁹⁵.

In addition to these international efforts, several regional groupings²⁹⁶ affiliated with the FATF provide technical assistance for the AML/CTF and drug control measures in various regions of the world by providing platforms for technical expertise, framework for assessment, discussion and learning forum for countries within its enclave. EU as a regional block has been very active in this sphere; it is the only regional body whose

²⁹³ E. Tsingonu, Global governance (no 282)

²⁹⁴ Barry Johnston (no 283)

²⁹⁵ Jack Boorman (n 58) 37

²⁹⁶The Inter Governmental Action Group Against Money Laundering in West Africa (GIABA), The Eastern and South African Anti Money Laundering Group, The Asian Pacific Group on Money Laundering (APGML), Inter America Drug Abuse Control Commission (CICAD) and the European Union and G20

directives have the binding force of law unlike other groups who could only provide advisory and technical assistance within their sphere of authority. Due to threat to the FI and the professionals of being used to launder proceeds of criminal activities and the attendant risk on the stability of national financial systems, the *First EU Directive on Money Laundering* was introduced in 1991 to prevent the use of the financial system from being used to launder money²⁹⁷, implemented in the UK in 1993 by Money Laundering Regulations 1993²⁹⁸ and came into force on April 1st 1994, *The Second European Union Directive on Money Laundering* was introduced to amend the observed lapses in the First Directive on issues of member state jurisdiction on suspicious transactions where a financial institution has its head office in one country and branches in various jurisdictions, it requires state authorities to ensure that branches comply with the Directive, it also addressed the vulnerability of currency exchange offices ("bureaux de change") and money transmitters (money remittance offices) to money laundering, it captured the activities of investment companies and provided a wider definition of money laundering to cover a broader range of predicate offences in line with the 1996 revision of the 40 Recommendations of the Financial Action Task Force (FATF). It gave a wider definition of money laundering by increasing the number of predicate offence from drug trafficking to 'all serious criminal offences' like corruption, currency exchange dealers, money transmitters and investment firms; it contains the power to identify, trace, freeze, seize and confiscate any property. The UK implemented the 2nd EU Directive in 2003 again, in 2004, the EU Commission merged the 1st and 2nd Directives culminating in *The Third EU Directive*²⁹⁹ implemented via *Money Laundering Regulations, 2007*, it aims to implement the FATF's revised AML/CTF 40+9 Recommendations, It tightened the EU AML regime by regulating the activities of certain professionals like lawyers, notaries, accountants, real estate agents, casinos and trust company services exceeding €15,000. It requires an enhanced CDD for PEP, including other public officers like judges and their

²⁹⁷ 91/308, 1993 O.J (L.1966)

²⁹⁸ S.I. 1993/1933

²⁹⁹ issued via Commission Directive 2006/70/EC of 1 August 2006

immediate families or close associates to forestall acquisition of unexplained wealth and corruption; it simplified CDD procedures for low-risk transactions involving public authorities, where identity and activities are publicly available. Each Member State is held accountable for implementing European Community law within its domestic jurisdiction while EC has powers to enforce infractions by taking any action it deems fit.

4.3 Financial Intelligence Units

The 29th FATF Recommendation requires countries to establish FIU that will serve as a national centre for the receipt and analysis of suspicious transaction reports and other relevant information on money laundering and terrorist financing. The Egmont Group of Financial Intelligence Units³⁰⁰ has played a dominant role in facilitating global financial intelligence on AML/ CTF³⁰¹. Generally, financial intelligence unit (FIU) is a key element in AML/CFT regime, it must be a government authority, statutorily empowered to receive different financial information (local and international large cash transactions, offshore wire transactions or suspicious transactions) and analyse this information to uncover evidence of possible financial crime for use, either by domestic or foreign law enforcement or financial institution regulatory agencies³⁰². As observed by Barry Rider³⁰³, developing intelligence to query the source of wealth is easier than developing systems to process the information. However, because little amount of fund is required in terrorist financing, FIU may play an insignificant role in CTF unlike money laundering, fraud and other financial crime involving huge fund; therefore, it is imperative to beam the

³⁰⁰ It is an international organisation supporting FATF to achieve its objectives. It promotes cooperation and facilitates exchange of information, manpower training and fosters implementation of domestic programs on anti money laundering measures and counter terrorism financing in various countries, it also help to establish better and secure communication among FIUs through the application of technology.

³⁰¹ Interpretive Note to FATF Recommendation 29 (Financial Intelligence Units) Paragraph G. 13

³⁰² Jack Boorman (n 58)

³⁰³ Barry Rider, *Disrupting the disrupters!* (226) 199

searchlight on the use of alternative remittance systems in funding terrorism, effective control of social media to prevent it from being used to recruit vulnerable persons as terrorists and designing a more pragmatic control of donations to charity organisations from being diverted to fund terrorism and arms trafficking. Further, Alan Krueger and Jitka Malečková³⁰⁴ argued that poverty and lack of education are not necessarily the cause of terrorism; therefore a successful global battle against terrorist financing, particularly in the UK and the US requires a renewed scrutiny of the syllabus in Islamic schools and content of speeches or sermons within religious groups so as to protect the vulnerable members of the society from falling prey to inciting, provocative, hate speech and indoctrination. Again, the root cause of terrorism in each country differs³⁰⁵ which must be identified and resolved before any meaningful CTF may be achieved³⁰⁶.

The 3rd part of the UK policy on money laundering is the use of financial intelligence, initially introduced by *Drug Trafficking Offences Act 1986*, now codified by *POCA 2002* dealing with failure to disclose in regulated sector where a "*person knows or suspects*³⁰⁷ or *has reasonable grounds for knowing or suspecting that another person is engaged in money laundering*"³⁰⁸ A person nominated to receive disclosures under section 330 who fails to disclose when he knows or suspects or has reasonable ground to suspect shall be found guilty under the Act³⁰⁹. There are conflicting views on the appropriate interpretation of the word used in this section, a subjective test has been applied to the interpretation of the word '*suspect*' while an objective test has been applied in reference to the word '*reasonable ground*' (i.e. reasonable ground to suspect). In *Ahmad V HM*

³⁰⁴ Alan Krueger, Education, Poverty and Terrorism: Is There a Causal Connection? 2003) JEP 17 (4) 119

³⁰⁵ as noted by president Bush speech in Monterrey, Mexico March 22, 2002 that combination of poverty, corruption and government repression engenders terrorism

³⁰⁶ UK, Counter-Terrorism and Security Act 2015, Part 1, S.1-S.2 inter alia focused on tackling issues of radicalisation.

³⁰⁷ S.330 (2) (a)

³⁰⁸ S.330 (2)(a) (b)

³⁰⁹ S. 331(2) (a)(b)

*Advocate*³¹⁰, it was emphasised that under S.330(2), money laundering need not have taken place, the obligation to report suspicious activity may arise if a person suspects or has reasonable cause for suspicion. This is based on negligent liability, it may arise where a person knows, suspects, fails to or ought to have filed a SAR when on reasonable grounds, ought to have done so. It marks a major difference between reporting measure and other obligations such as exercising of CDD that are not based on reasonable grounds for suspicion³¹¹ but there is a challenge because in criminal court, mens rea is required to establish that an individual in fact knew that the transaction was a suspicious money laundering; this could only be achieved if knowledge is inferred from the surrounding circumstances; such as failure to ask obvious questions; such knowledge must, however, have come to the firm (or the employee) in the course of business as a consequence of a disclosure under S.330, POCA or S.21A of Terrorism Act.

Miriam Goldby³¹² opined that the huge resources earmarked to the SAR exercise by FI necessitated a consideration of its effectiveness against a possible law review to achieve an effective AML regime and the objectives of the enabling legislation; in this context, should the relevance of SAR be assessed restrictively from its use in investigation, prosecution and conviction? Grossey contrasted such restrictive view by noting that importance of SARs ought not to be restricted to successful utilisation for money laundering conviction only but must be relevant also in intelligence gathering³¹³. More so, it is cheaper and cost effective to use information provided to disrupt crime and to hold

³¹⁰ [2009] HCJA 60; [2009] SCL 1093

³¹¹ CPS, Legal Guidance on the Proceeds of Crime Act 2002 Part 7, Money Laundering Offences, <http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_money_laundering/#S330_Failure_to_disclose> accessed April 3, 2013

³¹²Anti-money laundering reporting requirements imposed by English law: measuring effectiveness and gauging the need for reform (2013) JBL 4
<<http://0-login.westlaw.co.uk.catalogue.ulrls.lon.ac.uk/maf/wluk/app/search/run?>>

³¹³ Sue Grossey, "I'm wishing on a SAR" (2007) 146 Money Laundering Bulletin 8, cited in M. Goldby (no 312)

those who manage other people's fund accountable for non compliance as opposed to lengthy, complex criminal prosecution associated with problems of gathering admissible evidence and the burden of proof in criminal proceedings. This view is validated by the benchmark for measuring effectiveness of SAR in the FATF 2012, Recommendation 33 which obliges a measure of steps to be exploited in assessing the usefulness of AML reporting systems:

'This should include statistics on the [suspicious transaction reports (STRs) received and disseminated; on money laundering and terrorist financing investigations, prosecutions and convictions on property frozen, seized and confiscated and on mutual legal assistance or other international requests for co-operation']

One of the main problems with POCA, S.330 is its support for reporting any suspicious transaction, immaterial of its insignificance, thereby discouraging the functioning of a truly risk-based approach despite JMLSG observation that an unusual or erratic transaction is not necessarily suspicious; unusual transaction ought only serve as a basis for additional investigation which may inform decision on whether it is suspicious and where suspicions are raised, an obligation to report would arise³¹⁴; some SAR are mere defensive³¹⁵; it appears this quandary persists till date and has influenced the need for legislative amendment of the SAR but this may not even be the solution in the absence of further research³¹⁶.

Generally, in UK and US, a risk-based AML regime is adopted, this assesses the sector to be subjected to AML requirements, thus giving institutions a broad discretion to decide the extent of applicable due diligence, depending on the general risk analysis of their business. This institutional risk management approach is supported with the AML/CTF

³¹⁴ Prevention of Money Laundering (2009), para.6.12

³¹⁵ Stephen Lander, Review of the Suspicious Activity Report Regime (2006), para.35; see also KPMG, Review of regime for handling Suspicious Activity Reports: Report of recommendations (2003), para.4.3.3; see also the FSA, Review of Private Banks' anti-money laundering Systems and Controls (2007), para.128

³¹⁶ SOCA, Suspicious Activity Reports Regime (2010)Annual Report, 15

examination manual developed by diverse organisation in conformity with the regulatory authority but while the UK approach to SAR is risk based (whereby transaction value is not necessarily an indicator of risk), the US operates an amalgam of mandatory SAR and secondly, a threshold transaction disclosure (TTD) where certain value report is part of the AML regime (immaterial of such transactions being suspicious or not); the advantage of which is the prevention of collusion and deliberate or negligent failure of reporting; an example of such law is the US Bank Secrecy Act, 1970³¹⁷ (The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act, 1970 (31 U.S.C. 5311)³¹⁸ which though was enacted to surmount the secrecy surrounding the confidentiality of bank/customer relationship being an impediment to investigation of organised and other criminal activities in the 1970s, the Act now represents a veritable tool for the US AML regime for gathering evidence in criminal proceedings and investigation of tax evasion, drug trafficking and terrorist financing. Although any jurisdiction operating dual reporting system would have access to information than the UK single reporting system, the former system however, incurs more costs of filling reports and problem of multiple deposit just to keep transactions below the required reporting threshold (smurfing); apart from the exemptions to CTR filing which has reduced some burden of reporting and to ensure a more efficient use of the filed records in the US, Gallo and Juckes³¹⁹ have also offered a solution that could enhance reduced cost of running such an amalgam system of restricting TTD to request from the regulatory authority only rather than the existing regime of general reporting immaterial of relevance. Gallo and Juckes suggested that the FI would generate internal report within TTD and provide information but would not file

³¹⁷ A Report to Congress in accordance with §357of 2001(USA Patriot Act) Submitted by the Secretary Of The Treasury April 26, 2002, 5

<<http://www.treasury.gov/press-center/press-releases/Documents/357.pdf>> accessed on 3/3/2014

³¹⁸ The need for CTR was initially introduced by Trading with Enemy Act, 1958.

³¹⁹ Gallo and Juckes, "Threshold transaction disclosures" (2005) 8 JMLC 28

it to the regulators except on request or by filling the reports in a manner directly accessible to the regulator"³²⁰.

The introduction of SAR, though an additional cost to the affected institutions, has changed the way crime is being investigated with focus being shifted to interruption, disruption and confiscation of proceeds of crime, as opposed to the traditional system of prosecution and punishment, SAR is useful for developing financial intelligence to investigate and detect abuse and misconduct, although it is feared that it may be abused by the state as a tool for infringing the right to privacy of citizens, however, it is a pragmatic solution to hold perpetrators and facilitators responsible for either criminal or civil infraction; and a means of holding financial institutions liable for non compliance with regulatory requirement, if well utilised, it could be an effective means of detecting tax evasion and hold tax evaders accountable. However, despite the beneficial use of SAR, its effective use has not been substantially appreciated in Nigeria criminal justice system despite Nigeria being a signatory to the UN conventions and treaties on AML regime; this is seen in sheer number of Nigerian PEP revealed in Panama paper which threw up question of how such huge amount of money were transferred from Nigeria without being detected through SAR, it could also infer that SAR were not filed to the appropriate authority ab initio or where filed, the legal system was not substantially transparent to investigate, disrupt and prosecute the infractions, it could also be inferred that the skills and knowledge to make an adequate use of filed SAR is lacking within the Nigeria criminal investigation department and lastly, the continued reliance of criminal prosecution as a means of recovering stolen wealth in Nigeria is one of the contributory factors to the seemingly ineffective use of SAR in AML regime.

Having analysed the evolution of the UK and the US attempt to control financial crime, it is necessary to compare it with the history of the same attempt in Nigeria so as to identify the past mistakes, compare it with the errors in the three jurisdictions which would assist

³²⁰Ibid

in proffering solutions to identified mistakes. For these reasons, the next chapter will evaluate the history of Nigerian evolution from the primitive customary law to the English common law of crime and the subsequently introduced criminal and penal codes as a means of interrupting and controlling financial crime.

Chapter 5

History of attempting to deal with financial crime in Nigeria

In chapter 4, it was shown that the US and the UK played significant roles in establishing global standard of best practice in terms of AML structure, institutions and conventions, many of which Nigeria is a signatory in terms of various international treaties, provisions of which have in fact been domesticated in its municipal law but despite the enactment of such laws, fraud, corruption, money laundering, organised criminal and economic crime seem to be intractable and on the increase. In fact, it appears Nigeria has become one of the countries synonymous with transnational crime, email scam and corruption. Is it possible that the problem resulted from the introduction of foreign laws to Nigeria without giving due consideration to local circumstance? Are there social, political and other factors confronting Nigeria that made its administration of financial criminal justice difficult to enforce? Answer to some of these questions would be provided by tracing the history of Nigeria criminal justice system and efforts made so far to confront the challenges.

This Chapter seeks to demonstrate that the introduction of the British accusatory criminal justice system to Nigeria was a major setback to the evolution of the traditional inquisitorial justice system which though imperfect, could have evolved over the years and met the aspiration of the people. It also evaluates the provisions of the Sharia criminal law, it concludes that it is a contravention of the Nigerian 1999 constitution and international convention against cruelty. Further, it analyses the domestic financial crime control laws and institutions such as the Criminal Justice (Miscellaneous Provision) Decree 1966, the 1984 tribunals of enquiries, the ICPC Act 2000 and EFCC ACT 2002, Money Laundering Act 1999, 2011 and 2012, it demonstrates that whereas the Hong Kong ICAC has been relatively successful compared to the Nigeria ICPC due to poor and unscientific investigation process and lack of political will.

5.1 Introduction of the English Common law and criminal code

Before the advent of the British in Nigeria in 1861, its various ethnic nationalities had customary rules and regulations based on their shared values for maintaining social and political stability, law and order which were suitable and conducive to the local circumstances unlike the complex English criminal jurisprudence later introduced to Nigeria³²¹, as rudimentary as those local laws appeared, they distinguished between *mala prohibita and mala in se* although in few instances, they are similar to offences under the English criminal law, such as homicide punishable with death³²², murder and manslaughter³²³ were also regarded as the most heinous crime but in contrast to English law, there appears to be ambiguity and conflicts between English concept of corruption, bribery and abuse of office and African traditional values of reciprocal '*gift giving*'³²⁴.

Lagos, Nigeria was annexed by Britain in 1861 through a treaty establishing it as a British colony, signed in 1863³²⁵, this expedited the introduction of English common law of crime in Lagos but in the protectorates³²⁶ (outside Lagos), the existing customary criminal law continued to be in force³²⁷, in the Northern region, Islamic native law³²⁸ remained in force

³²¹ Karibi-Whyte (n 188) 64; see also Teslim Elias, Government and politics in Africa (University of Manchester Press 1963) 147

³²² Nigeria Penal code 1959, SS 221 and 222

³²³ Nigeria criminal code 1958, S 316

³²⁴ Yemi Akinseye-George, 'Legal system, corruption and governance in Nigeria', (New Century Law Publishers 2000) 7-8 argued that voluntary gift giving is unrelated to systemic corruption and ought not encourage transnational bribery by international business men who ordinarily would not bribe anyone in their home country but Adolphus Karibi-Whyte (n 188), thinks that there is a thin line between bribery, corruption and communal gift giving.

³²⁵ Edward Hertslet, The map of Africa by Treaty, Abyssinia to Great Britain, Vol.1 (HM stationery office 1894) 406 <<https://archiv.org/stream/mapafricabytrea02britgoog#page/n6/mode/2up> > accessed on 9/9/2014

³²⁶ G. Ezejiolor, 'Sources of Nigerian law' in C. Okonkwo, Introduction to Nigerian Law (ed) (Sweet and Maxwell 1980)

³²⁷ C. Okonkwo, 'Introduction to Nigerian Law' (Sweet and Maxwell 1980) 213

while the minority non-Muslim communities in the Northern region remained governed by non-Islamic customary law³²⁹.

Although there were some inherent flaws in the customary criminal system that threatened its continuous practice under a colonial system like its draconian enforcement procedure³³⁰, unscientific process of gathering evidence, trials by ordeals and admissibility of evidence based on unreasonable assumptions, superstitions and denial of basic principles of natural justice of fair hearing, absence of presumption of innocence, right of defence and the fettered discretion often exercised by the judges who presided over its administration³³¹, nevertheless, they were largely accepted and suitable to the circumstances of the people it applied to than the complex English common law of criminal justice system. In the Southern Nigeria, the colonial administration allowed the continuous operation of the customary law system because they observed that the English common law introduced to Lagos was unsuitable to meet the challenges of governance outside Lagos as it was too complex to apply in predominantly illiterate communities with diverse customary and traditional criminal jurisprudence, a situation that has persisted till date such that offences like bigamy, bribery and corruption were hardly prosecuted due to many reasons, including disconnect between the social value, the perception of the people on bribe and the legal provisions on the subject matter³³². Karibi-Whyte³³³ re-echoed Fredrich Savigny's theory of historical and evolutionary theories of Law when he noted that it would have been fair to allow the existing customary criminal regulations to

³²⁸ Maliki school of thought

³²⁹ Nigeria Native courts Proclamation Ordinance 5, 1900; Fredrick Lugard, Political Memoranda cited in Karibi-Whyte, History and Sources of Nigeria Criminal Law (n 188)

³³⁰ Slavery and amputation of limbs

³³¹ Karibi-Whyte (n 188)

³³²A. Adeyemi, "Towards victim remedy in criminal justice administration in Nigeria", Compensation And Remedies For Victims Of Crime In Nigeria", (n 1166) 291, observed that Nigerians' sentiments is opposed to a criminal justice which excludes the victim from participating in a criminal trial.

³³³ Karibi-Whyte (n 188) 67

remain in force and evolve in Nigeria rather than abolishing it and introducing volumes of incomprehensible foreign criminal laws which are confusing even in the UK where the laws originated from but conversely, it could be argued that the challenges of unifying the diverse customary laws applicable among different ethnic groupings under a single administration of criminal justice and secondly, the imperative of maintaining law and order to entrench colonial economic interests and human capital exploitation of Africa far outweighed any process of allowing the traditional criminal law to evolve and this must have necessitated the option of introducing a foreign criminal law³³⁴ immaterial of its suitability to the affected people.

In 1904, forty one years after the initial introduction of English common law of crime to Lagos protectorate, the first criminal code was introduced and enacted³³⁵ into law in the Northern region, however, the English common law and customary criminal law remained in force in Lagos and Southern region respectively. The 1904 Criminal Code was a product of a number of criminal codes in some jurisdictions³³⁶, Queensland criminal code Act of 1899³³⁷ was finally considered because it was deemed concise, comprehensive and comprehensible³³⁸, its major flaws as noted by Karibi-Whyte³³⁹ was that it was copied from a country with a European culture in total negation of the argument for a penal code

³³⁴ Karibi Whyte (n 188)

³³⁵ Ordinance N0.10 1904

³³⁶ Queensland criminal code Act, 1899; the Gold coast colony criminal code Act, 1892; James stephen's digest of criminal law; the draft criminal code prepared by Mr H. Stephen; the Sudan penal code, 1899 and Indian penal code

³³⁷ Adopted by state of western Australia, it was based on a criminal code (drafted in 1878 by Sir Fitzstephenson, an English criminal lawyer) which was meant to replace the English common law of crime but was never enacted by the English parliament; see also Criminal law by Okonkwo in Introduction to Nigerian Law edn, C Okonkwo, (Sweet and Maxwell 1980) 214

³³⁸ Report on draft criminal code proclamation" enclosed with dispatch of 6/10/19033 (Wallace/ Cahmberlain) C.O 446/33 cited in criminal law by Karibi-Whyte (n 188)

³³⁹ A retired Justice, Supreme court of Nigeria

practiced in a Muslim nation similar to the Northern region of Nigeria but again, suitability and the best interest of the conquered people of Northern Nigeria must have been an immaterial consideration in this choice, in the alternative, it is arguable that the overwhelming consideration for adopting the Queensland criminal was due to the quest for uniformity of law, perpetuation of English common law³⁴⁰, the successful operation of the criminal code introduced to Gold Coast (now Ghana) in 1892 and the need to avoid ambiguity, inconsistency and complexity in English common law.

Further, the Northern and Southern protectorates of Nigeria were amalgamated in 1914 and the criminal code earlier enacted in 1904 which hitherto had been in force in the Northern Region for 12 years was introduced to the southern protectorate of Nigeria in 1916. It was fundamentally similar in substance to the 1904 code. This development resulted in the application of a single criminal code throughout Nigeria. As at the time of introducing the 1914 Criminal code to the entire country, several native courts still assumed criminal jurisdictions along with criminal code courts in the Northern region³⁴¹.

Before its independence in 1960, Nigeria criminal jurisprudence recognised three distinct systems of criminal law, namely, customary criminal law in the south, Islamic criminal law in the North and criminal code applicable in the entire country; this resulted in conflict of criminal jurisdiction, misapplication of law and miscarriage of justice because the boundaries of each court was not clearly defined³⁴², meanwhile, tension in the Northern region over application of Islamic customary law between the majority Muslims and the minority non-Muslim residents who did not want to be governed by Muslim customary law eventually culminated in setting up a panel in 1958 by the Northern region government to undertake reform of criminal justice system with the objective of having an acceptable criminal code devoid of pitfalls between criminal code and Islamic

³⁴⁰ Karibi Whyte (n 188)

³⁴¹ Karibi Whyte (n 188) 77

³⁴² Ibid 148

law conducive for a Muslim society³⁴³, the panel considered the acceptable criminal codes from countries with similar population and political complexities and system as Nigeria, in 1959, a penal code came into force on 1/1/1960³⁴⁴, the Sudanese, Pakistanis' and Libya's codes were considered³⁴⁵ but the final draft was based on the Sudanese code³⁴⁶, a Muslim nation, the Sudanese code was in turn modelled after 1860 Indian Penal code drafted by Lord Macaulay between 1834-1838. The Northern Nigeria Penal code attempted to strike a balance between the traditional Muslim criminal jurisprudence and the English Criminal system by prohibiting adultery and drinking of alcohol by Muslims and made provocation a mitigating factor in homicide cases.

Due to Nigeria federal system of government, legislative power is shared between the federal and the federating regions (now states since 1966), criminal matters fall under concurrent legislative list while some criminal matters are inherently within the federal legislative competence (like immigration, defence and currency), some are within the powers of the state legislatures, consequently, the federal offences were supplemented under the Penal code by federal legislation³⁴⁷. After the transition period of switching from Criminal code to Penal code in the North, offences committed under each code continued to be prosecuted under the code in which it was committed³⁴⁸. In addition, Nigeria criminal law system is not restricted to the provisions of the criminal and penal codes, there are some other enactments regulating criminal conducts which are deemed

³⁴³ Ibid 192

³⁴⁴ In 1959, the submitted draft code was passed into law on 26/9/1959 and came into force on 3/11/1960 (about a month after Nigeria independence) by the Northern Region legislature.

³⁴⁵ Karibi-Whyte (n 188) 191

³⁴⁶ a country with similar polyethnic, population and religious diversity to Nigeria with local modification to accommodate the minority non Muslims

³⁴⁷ The penal code (Northern Region) Federal provision Act, 1960 which deals with offences like treason

³⁴⁸ Queen V Bukar (1961) 1 ANLR 646; Onuche V Police (1963) 1ANLR 262 and Queen V Tuke (1961) 1ANLR 258

an integral part of the code³⁴⁹. An intricate legal challenge may arise where elements of an offence occur in more than one jurisdiction or between the penal code and criminal code jurisdictions. *Penal code S.4(2) and criminal code S.12(a)* both provide that either jurisdiction can try the offence if either an initial element of an offence or its subsequent element occur in either jurisdiction, the accused may be prosecuted where the initial element occurred or if he enters the other jurisdiction except where the death of the deceased is what happened in subsequent jurisdiction³⁵⁰ or put differently, where a Northern Muslim commits an offence in the Southern Nigeria, he shall be tried under the criminal code³⁵¹.

Immaterial of the influence of Queensland, Sudan and India codes on Nigeria criminal codes, they both have a common origin in English common law criminal jurisprudence in terms of liability; for example, specific concepts in the codes are common law's which explain the occasional recourse to English courts for clarification on interpretation of appropriate meaning of technical words and phrases in the codes where there are

³⁴⁹ Vallance V The Queen, 108 CLR 74, where a Tasmanian code with a similar provision was held to be part of the criminal code, cited in Karibi-Whyte (n 188) 229; see also Nigeria Penal code, S.28 incorporated by reference other offences not specifically provided for in the codes, this is in line with the provisions of UNCHR (adopted as Fundamental Human Right in chapter four of the 1999 Nigerian constitution) Art. 35 (11) of which prescribes that offences must be defined and the applicable penalty must be in a written law which includes federal, state laws and local government bye laws and any subsidiary legislation. This includes *Exchange Control Act (Anti Sabotage) Decree NO. 57 1977; Money Laundering Act, EFCC Act, ICPC Act, Bank and Other Financial Institutions Act* as integral part of Nigeria criminal code. Also, due to several incursions of the Nigeria military into politics, the Military Decrees enacted at the federal level and Edicts at the state level are deemed Acts of the Federation and laws of the state respectively.

³⁵⁰ R v Osoba (1961)1 ANLR

³⁵¹ The 2 codes have similar provisions on venue of trial of offences in S.12(a) Criminal Code and S.4 Penal Code and R V Osoba (1961) 1 ANL 283, 216

ambiguities or where such words have acquired technical meaning in England before the enactment of the code³⁵².

Before Nigeria became a republic in 1963, appeals from the Federal supreme court of Nigeria (now Appeal Court status) used to go to Judicial Committee of the Privy Council in the English House of Lords, it used to be the highest appellate court in the Nigeria court hierarchy³⁵³, abolished in 1963 and the supreme court of Nigeria became the highest court in Nigeria. However, before the abolition of appeals to JCPC, its decisions on Ghana criminal code and East Africa code were binding on Nigerian courts but after the abolition of appeals to JCPC, such decisions are now of mere persuasive authority³⁵⁴. The 1960 Penal code and the 1958 criminal code abolished the operation of customary criminal law in the entire country as both codes prohibit punishment for offences under an unwritten law³⁵⁵.

The failure of Nigeria criminal code to incorporate the local circumstance of its people in terms of values and norms persisted for forty years until year 2000³⁵⁶ when Zamfara state of Northern Nigeria enacted Sharia criminal law (later followed by other Northern states) this re-defined existing offences in compliance with Islamic custom; a step which has raised constitutional and legal issues on infringement of freedom of religion under S.38 of the 1999 Nigeria constitution which sharia recommends death penalty for any Muslim that converts to another religion; secondly, this seems to contravene the secular status of Nigeria under S.10³⁵⁷ and the supremacy of the Nigerian written constitution³⁵⁸; also the

³⁵² Bank Of England v Vagliano Bros (1891) AC 107

³⁵³ Nigerian Appeals to Privy Council Order in council, 1955

³⁵⁴ Karibi Whyte (n 188) 252

³⁵⁵ S.3(2) Penal Code law and S.4 Criminal code Act

³⁵⁶ Sharia law has always been restricted to personal law of Muslims in civil trials

³⁵⁷ Andrew Iwobi (n 18) 111 refuted the argument that Nigeria constitution does not confer secular state in the Constitution but only prohibits adoption of any religion as the state religion but on conversely, it was argued that the constitutional prohibition of state religion does import the secularity of the state. Further, stated that deriving Sharia law from Islamic norms ought not be equated with the adoption of Islam as a

draconian sharia punishments seems to contravene the prohibition of cruel and inhuman treatment³⁵⁹, the discriminatory Sharia punishments³⁶⁰, the jurisdictional problems

state religion and sought guidance from the United States Supreme Court on whether legislation in dispute before it had a religious or secular purpose in *Lemon v. Kurtzman 403 US 602, 1971* where Burger, CJ propounded three test approach (Lemon test) that before deciding whether a particular enactment violated the Establishment Clause, the court would need to consider: (i) whether it had a bonafide secular purpose or whether its purpose was to advance religion; (ii) whether its principal or primary effect was to inhibit or advance religion; and (iii) whether it pointed to an excessive government entanglement with religion; Iwobi (n18) further argued that applying Lemon test to recent developments in the Sharia states of Northern Nigeria, the events leading up to the enactment of the Sharia Penal Codes, the contents of these codes, and the manner in which they have been implemented and received all reveal that the main purpose of the exercise is to advance the Islamic religion. The reforms went beyond mere "legislative borrowings from a religious code", the governments of these states have embarked on programmes designed to restore the Islamic religion and propagate Islamic way of life in their territories and have utilized the legislative process to adopt Islam as official religion contrary to s10 of 1999 constitution and ought to be regarded as the adoption of Islam as state religion.

³⁵⁸ S.1(1) of the 1999 Constitution affirms the supremacy of the constitution above all persons and authorities throughout Nigeria and S.1(3) any law inconsistent with its provisions is null to the extent of its inconsistency. Iwobi (no 18) argued that this supremacy of the constitution is contrary to the fundamental belief of Islamic teachings that Sharia law embodies the will of Allah and "as such is eternally valid, immutable and not susceptible to review by any human agency" and override all other laws. But conversely, referring to Philip Ostien, 'Nigeria's Sharia Criminal Procedure Codes' in Philip Ostien, (ed) *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook (Spectrum Books 2007)* Vol. IV, 5, 171, 185, he drew attention to the preamble to the Zamfara Sharia Penal Code (after which corresponding codes of other Sharia states are modelled) which declares that the Code is subject to the provisions of the Constitution.

³⁵⁹ Article 7, International Convention on Civil and Political Rights (ICCPR) 1966 domesticated in Nigeria by African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Article 5, 1983; the Fundamental Human Right set out in S.34(1) Chapter IV of the 1999 Constitution all include the right of every individual to respect for dignity of his person and freedom from torture, inhuman or degrading treatment

³⁶⁰ Article 26 of the ICCPR declares equality before the law and right against discrimination; offences created under the Sharia Penal Codes and the prescribed punishments targeted every person who professes

relating to Sharia Penal Codes³⁶¹, the unconstitutional recognition of unwritten Sharia offences³⁶². However, the challenge of validity of unwritten sharia criminal law was attempted to be resolved by enacting them into law in each state, thereby seemingly complying with S.36 (12) of the Nigerian constitution that prohibits criminal prosecution of unwritten criminal law; in all intent and purpose, it was a reintroduction of the abolished Sharia criminal law³⁶³. Presently, three criminal justice systems now exist in the Northern Nigeria:

1. The Sharia Penal Code applicable in Sharia courts,
2. The 1960 Penal Code in force in Magistrate courts and High Courts (or amended Penal Code to include the Islamic offences and punishments)³⁶⁴ and
3. Absence of Sharia Penal Code but the courts remain guided by Penal code in interpreting Sharia law³⁶⁵.

the Islamic faith which means as noted by Iwobi (n 18) that Muslims in Sharia states are likely to be penalized more harshly for their infractions than their non Muslim counterparts in violation of S.42, 1999 constitution. Also, Article 3 of the African Charter on Human and Peoples' Right confers equality of every individual under the law and equal protection of the law; see also Iwobi (n 18) 149

³⁶¹ The primary criminal jurisdiction created by Sharia Penal Codes lies on Sharia Court while appellate jurisdiction in respect of such offences vests on the state Sharia Courts of Appeal contrary to unconstitutional provision which confers unlimited jurisdiction on state High Courts in criminal matters by s 272(1) of the 1999 Constitution, see also Iwobi (n 18) 134

³⁶² S.92 Sharia Penal Code refers to offence under the Quran, Sunnah or Ijthihad of the Maliki School of Islamic as an integral part of the offence under the Code, this violates *s.36(12) of the 1999 Constitution* which nullifies application of unwritten criminal law except where it is provided by the Constitution; see also Iwobi (n 18) 151

³⁶³ *Zamfara state Anti corruption commission Law, 2003, NO.2, 2003* modelled after *ICPC Act* with some differences in type of punishment for corruption s.14-23 like canning, apart from imprisonment and fine. Lagos state government also has enacted Administration of Criminal Justice Law which redefined several offences with emphasis on deterrence, restorative justice, rehabilitation, bargain plea and restitution.

³⁶⁴ Niger state

The implementation of Sharia criminal law has proved to be an instrument of further suppression and subjugation of the poor and vulnerable population of the Northern Nigeria, as no high profile case of white collar crime of corruption, fraud and financial crime has been prosecuted under it; if the true intent of Sharia law is to relate with the circumstance of the Northern Nigeria Muslims, it is expected that its application would have been wide enough to cover financial crime and corruption and not restricted to street crimes and lower class offences. Further, its evidence gathering process needs to be reviewed, according to Ostien, some discriminatory, unfair and unjust practices³⁶⁶ dated back to pre-1914 colonial period when Sharia native law was fully in force in the North have been reintroduced under the current Sharia dispensation; and the application of Sharia classical text in Sharia Courts which are not explicitly provided in the new Sharia Criminal Procedure Codes as reflected in the record of proceedings and verdict of the two cases of Safiyatu Hussaini and Amina Lawal in the Sharia court³⁶⁷.

5.2 Criminal Prosecution

The federal offences are created by Acts of National Assembly, state offences are created by laws of state Assemblies³⁶⁸, the Attorney-General of the federation and Attorney-General of the states have jurisdictions over applicable laws within their respective jurisdictions³⁶⁹, police prosecution in magistrate courts³⁷⁰ are deemed prosecution by

³⁶⁵ Philip Ostien, 'Nigeria's Sharia Criminal Procedure Codes' in Philip Ostien, (ed) *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook (Spectrum Books 2007)*, Vol. IV, 5, 171, 185

³⁶⁶ The procedural rules and laws of evidence applicable on testimony of a given number of reputable witnesses to establish particular charges, the use of oath-taking to complete otherwise inadmissible evidence in defence which is inapplicable to non Muslims. The discrimination among categories of potential witnesses, based on their reputations in the community, gender, religion and status e.g. slave.

³⁶⁷ Philip Ostien (n 365) 174

³⁶⁸ Decrees and edicts respectively under the military system

³⁶⁹ S.150 and 174 on office and duties of AG Fed; S.195 and 211 on office and duties of AG state

Attorney General of the state or the federation as confirmed by the Nigerian supreme court in *Anyebe V The state*³⁷¹, that state cannot prosecute federal offences³⁷² unless with express permission of the Attorney General of the federation except where the Acts of the federation take effect as laws of the state³⁷³ in such instance, Attorney General of the State can prosecute and they can both delegate power of prosecution to each other but without such delegation either of them can not prosecute an offence falling within the jurisdiction of the other³⁷⁴. In the light of this decision, it is clear that corruption, fraud, stealing and financial crime under federal legislations or code can only be prosecuted by the state if the office of the federal Attorney General has expressly delegated his prosecutorial powers in relation to offences under the Criminal Code Law and the Criminal Procedure Act of Nigeria to the State Attorney General, deductively, Attorney General of the federation can only prosecute offences under state laws under similar authority from the state³⁷⁵. Further, the 3 federal agencies EFCC, ICPC and Code of Conduct Bureau have exclusive powers to investigate and prosecute financial and economic crimes, corrupt practices and declaration of asset respectively either at the federal or state level. In practice, offences are reported to the EFCC or the police which are controlled by the federal government, this could be referred to the Special Fraud Unit of the Police, EFCC or ICPC which are better equipped with international link as Financial Intelligence Unit and resourceful to investigate and prosecute relevant offences. For EFCC or ICPC to prosecute under a state law, it must have in place, an express authority from office of the

³⁷⁰ Police Act s.19

³⁷¹ (1986) 1 SC 8

³⁷² Offences relating to matters under the exclusive legislative list like provisions of the codes on currency and defence and treason.

³⁷³ corruption, bribery, stealing etc

³⁷⁴ Fidelix Nwadialo, Criminal Procedure in C.O Okonkwo, Introduction to Nigerian Law (n 8) 358

³⁷⁵ Federal Republic of Nigeria v Sanni, Lagos High court Suit NO.LCD/177/2012; see also Amadi v Federal Republic of Nigeria (2008) 18 NWLR (Pt. 1119) 259

state Attorney General,³⁷⁶ a state may avail itself of similar provisions on theft, stealing, fraud, corruption or advance fee fraud under the criminal or penal code³⁷⁷ but the lapses in these state laws may result in failed prosecution. Furthermore, since crime falls under concurrent legislative list, states are not precluded from enacting better and comprehensive financial criminal and corruption laws as done in Zamfara and Kano states of Nigeria³⁷⁸

Where the state declines to prosecute an offence, there are statutory provisions for a private prosecutor (not being a private legal practitioner prosecuting under the fiat of an Attorney General) to prosecute. This position is distinct from the right of a private person to enforce compliance with the statute or the constitution as decided by the Nigeria court of Appeal in *Fawehinmi V President of Federal Republic of Nigeria*³⁷⁹, here, the court uphold the right of an individual to sue and enforce compliance with the constitution, that s.6(6)(b) 1999 constitution cannot be separated from locus standi, that under the public law, an ordinary individual will generally not have locus standi as a plaintiff because it involves public right and duties owed to all members of public including the plaintiff, it is only where an individual has suffered damage over and above suffered by the public generally that he can sue personally, in an action to protect public right or to enforce the performance of public duty, it is only an Attorney-General that has the requisite locus standi to sue; a private individual can only bring an action if he is granted a fiat by the Attorney General to do so in his name but the Nigerian Court of Appeal has now taken a different position that a tax payer has a sufficient interest to enforce the law that his tax money is utilized prudently in which case, locus standi operation would not

³⁷⁶ Ibid

³⁷⁷ S.419 of the Criminal Code on Advance Fee Fraud and S.320 and 321 on cheating and cheating by personation respectively

³⁷⁸ Zamfara state Anti-corruption commission law, NO.19, 2003 modelled after ICPC Act and Administration of Criminal Justice Law of Lagos State, 2011

³⁷⁹ (2007) 14 NWLR 275 – 345

deprive a party, the right to institute an action on the ground that he lacks sufficient connection with the subject matter of action. The Appeal court held that the Supreme court of Nigeria has departed from its former narrow approach in *Adesanya V Attorney General Federation*³⁸⁰ and *Fawehinmi v Akilu*³⁸¹; according to Aboki JCA³⁸², since an Attorney General being a minister of justice and a member of executive cabinet may not be disposed to sue the government in which he is part of, which means the government suing himself. And there is no provision in the 1999 constitution for the state to sue itself and no such event ever happened, then who will approach the court to challenge the government where it violates the constitution or legislation contrary to the constitution; that in consideration of separation of power, rule of law and checks and balances and to preserve legal order, the judiciary ought to permit any person to put the judicial machinery in motion in Nigeria whereby any citizen could bring action in respect of a public derelict. Thus, the requirement of locus standi becomes unnecessary in constitutional issues as it will merely impede judicial functions. It would have been more appropriate if this verdict extends to the right of an individual to institute criminal proceedings especially against a corrupt public official, if the state refuses to prosecute.

Apart from the power of the federal and states to formulate policies and enact criminal laws, an area of the law not well utilised is the private prosecution of offences under the Nigeria legal system, the existing system is hazy and it has always been frustrated by the state denying an individual, in the interest of public policy and justice to either compel the government to initiate criminal prosecution or an outright commencement of private prosecution of economic and financial crime at both levels of government. Whereas, private prosecution is at the risk of liability for malicious prosecution in tort and compensation for wrongful prosecution³⁸³, and although he may be motivated by malice, private gain and such effort may eventually fail due to insufficient evidence; also pressure

³⁸⁰ (1981) 2 NCLR 358

³⁸¹ (1987)4 NWLR 797

³⁸² Fawehinmi v FRN (n 379) paras 334 – 336

³⁸³ S.256 CPA

and threat may dissuade continuance of private prosecution but nevertheless³⁸⁴, it is an alternative to ensuring that justice is served where the state refuses to prosecute³⁸⁵, especially in corruption, fraud, money laundering and financial crime in general, furthermore, private prosecution prevents citizens from resorting to self-help³⁸⁶. In order to initiate a successful criminal proceeding, there are some legal hurdles to cross which Isabella Okagbue in her treatise³⁸⁷ while drawing a distinction between private prosecution in the traditional Nigeria community before the advent of English criminal laws, the current situation under the codes and the way forward; pointed out that in the Northern Nigeria, under the Islamic native criminal system, an individual could initiate criminal prosecution by laying complaints before a native court, similarly in the southern Nigeria, the general traditional approach was self-help through age grade, private societies and the entire family enforcing the law by taking responsibility for the conduct of erring members for sanctions in order to avoid societal anger, also the family could help its members to seek redress for wrongs committed against any member, in the same vein, an aggrieved individual may institute a private action before a village head. However, with the demise of customary law³⁸⁸, many provisions of the existing criminal codes allow a private person to institute criminal action in the High Court³⁸⁹ and in the

³⁸⁴ Isabella Okague, 'Private Prosecution In Nigeria: Recent Developments And Some Proposals JAL (1990) 34 (1) 53

³⁸⁵ Ibid 60

³⁸⁶ B. Craig, Little and Christopher Sheffield, "Frontiers of criminal justice: English Private prosecution societies and American vigilantism in the 18th and 19th century" (1983) *Am. Sociol. Rev.*, 48, 6, 796 chronicled the history of extra legal criminal control In America from 1760s to 1900 when mob action like illegal whipping and expulsion from the communities were enforced arising from citizen's perception of failure of the criminal justice system to prosecute criminals and absence of an alternative means of prosecution like private prosecution of criminal proceedings.

³⁸⁷ Isabella Okague, (n 384) 53

³⁸⁸ by virtue of S.22(10) 1960 constitution, S.33(12), 1979 and S.36 (12) 1999 constitution

³⁸⁹ S.342 (a)(b) CPA, a law officer must have declined to sue by endorsement on the information to that effect and private person must provide a surety in the sum of 100 Naira to prosecute to logical conclusion.

event of unsuccessful prosecution; he may be subjected to pay cost³⁹⁰. Attempt by private persons in the past to institute criminal proceedings in *Fawehinmi V Akilu*³⁹¹ and *Ilori V The State*³⁹² were frustrated by the state, the relevant section is now abolished³⁹³ in Lagos state but remains in force in other states of the federation, consequently, apart from Lagos state, a private individual can prosecute crime though it remains doubtful if the state would allow its success as it can be frustrated by the Attorney General not giving his approval/fiat to the individual or by entering a nolle prosequi to discontinue the prosecution, a power which though ought to be exercised only in the public interest, interest of justice and to prevent abuse of legal process³⁹⁴.

1. Rather than abolishing the power of a private prosecution, Okagbue³⁹⁵ argued that justice would be best served by adopting the practice in the Northern Nigeria code which protects its misuse by empowering the court to reject vexatious private prosecution³⁹⁶, the court can refer a private charge filed by an individual to a lower court or police for more investigation or discontinue the charge where it deems fit³⁹⁷. Further, because the cost of criminal prosecution may hinder private prosecution, Okagbue suggested that legal aid ought to be made available to private prosecutor but regrettably, under the current means tested³⁹⁸ provision of Nigeria Legal Aid Act³⁹⁹, legal aid is restricted only to 3 instances, namely: criminal

In the Northern Nigeria, a private person may institute criminal proceedings S.59(1) and S.143 CPC with less hurdles to cross S.143 (d)(e) CPC and S.150 CPC

³⁹⁰ S.255(2) CPA

³⁹¹ (1987) NWLR 797

³⁹² S.C. 42/1982 of 25/02/1983

³⁹³ as amended by S.340 (2) CPL Lagos

³⁹⁴ Nigeria 1999 constitution, s.174(3)

³⁹⁵ Isabella Okague, 'Private Prosecution In Nigeria (n 384) 61

³⁹⁶ S.149 (1) CPC

³⁹⁷ S.150 (1) CPC

³⁹⁸ S.10 Legal Aid Act, 2011

³⁹⁹ The Legal Aid Council of Nigeria was first established by the Legal Aid Decree, No. 56 of 1976, repealed, the Legal Aid Act, Cap. 2005 LFN 1990 repealed; Cap. L9 LFN 2004 repealed, Now Legal Aid Act, 2011

defence, assistance in civil matters and community legal service⁴⁰⁰, amending the Act to accommodate private prosecution of corruption and financial crime whenever the state fails to prosecute, would go a long way in the fight against these specific crimes. In addition, the procedure for private prosecution under the Penal Code is preferable to what obtains under the criminal code which is slightly similar to the procedure in the UK Prosecution of Persons Act, S.6(1), 1985, though hardly ever put into practice in the UK due to the high level of development of its criminal justice system. However, in order to have a meaningful and effective prosecution of corruption and financial crime, ICPC Act, Money Laundering Act and Criminal Procedure code and Acts require amendment to authorise private prosecution in cases relating to the subject matter. It must be emphasised that although financial crime, corruption and terrorist financing are explicit problems confronting modern nations, including Nigeria due to several reasons like the indirect rule administrative system adopted by the British where traditional rulers administered and supervised state functions under the control of colonial administrative officers⁴⁰¹, this required minimal foreign capital and minimal human resources⁴⁰², the direct involvement of village heads in public administration resulted in such heads losing their '*sovereignty and social anchor on their subjects*', which was the basis for societal cohesion from time immemorial; the erosion of traditional checks and balances where the subjects lost the power of removing autocratic rulers sustained in power by the British military force and unchallenged by colonialists⁴⁰³ as long as revenue was being generated for the government and peace being maintained, in response to which Taslim

⁴⁰⁰ S.8 Legal Aid Act, 2011

⁴⁰¹ Fredrick Lugard, Principles Of Native Administration, Historical Problems Of Imperial Africa (Markus Weiner Publishers 1996) 103, 120

⁴⁰² Lawrence Gower, Independent Africa (Harvard University Press 1967) 7

⁴⁰³ Akinseye - George, (n 324) 26

Elias⁴⁰⁴ had argued that this loss of societal cohesion and political morality in Nigeria was the consequence of colonial rule where kings found themselves having to play dual role as agents of an unpopular foreign government and representative of their subjects which invariably corrupted the society.

Furthermore, the breakdown of the ancient communal system whereby every member of the society was accountable for one another and to the community in general unlike the British culture which introduced state and bureaucracy that failed to provide what the family hitherto provided for an individual member⁴⁰⁵ was partly responsible for corruption, although in contrast, Akinseye-George⁴⁰⁶ argued that kinship and extended family structure is responsible for clientelist relationship in public life where strong alliance to family and tribe erodes integrity in public life, decline in loyalty to country and failure to involve Africans in the development of countries imposed on them were responsible for corruption in Nigeria, as the imported laws did not reflect the mores and values of the people; a challenge which may take a long time for the people to imbibe as their law⁴⁰⁷ but if truly the corrupt practices were absent in African communities before the advent of the British, the post-colonial African leaders must have learnt some good lessons in corruption from their colonial masters as observed in the fraudulent Treaties executed to acquire Africa territories⁴⁰⁸ and the institutions and structures of governance

⁴⁰⁴ The nature of African customary law (University of Manchester Press 1956) 18

⁴⁰⁵ Robert Signor, Political corruption in Nigeria before independence, (1993) The Journal of Modern African Studies, 31 (2) 175, 202

⁴⁰⁶ Oladimeji Aborishade & Robert Mundi, Politics in Nigeria (Longman, 1999) 83

⁴⁰⁷ Lawrence Gower, Independent Africa (Harvard University Press, 1967) 33, 34

⁴⁰⁸ Akinseye-George (n 324) 22, 25 cited Herslett, The map of Africa by treaty, vol.1,2,3 and observed the legacy of corruption bequeathed to Africans starting from the questionable treaties executed to acquire land and power in Africa under threat and intimidation supported with military fire power; for example, Lagos treaty signed by an illiterate king, other examples were compliance with terms of the treaty at convenience of British authority in *Nyali V A-G (1954) QB 1*, where Lord Denning refused to give interpretation to limits of the treaty but allowed application of power exercised contrary to the treaty.

bequeathed to Africa but conversely, if indeed the traditional criminal system was more effective in tackling the ancient crime than the introduced British criminal system, why has Nigeria and indeed, other affected African states not re-evaluated the inherited machineries of criminal administration of justice and formulate a new order and structure?

5.3 Domestic initiatives to deal with financial crime

There have been few and feeble efforts in the past to rectify the anomalies in Nigeria anti-financial crime law so as to address some observed lapses such as in 1966 when the Criminal Justice (Miscellaneous Provisions) Decree 1966 repealed the provisions of the code on official and judicial corruption (applicable in Lagos), the repealed provisions were simplified and reintroduced as S.98, S.98 (a), (b), (c), (d); it abolished the confusion on distinction between public and judicial officers, categorisation of corruption between administration of justice and other sectors, this feeble attempt failed to provide fundamental reform and subjected the code to more ambiguous interpretation⁴⁰⁹ as offenders continued to escape justice⁴¹⁰. There was another weak attempt to rectify the flaws in Nigeria codes on corruption by Corrupt Practices Decree 1975 which provided a simple definition of corruption as corrupt giving or receiving of gratification to do or to refrain from doing anything relating to any matter, this effort only achieved two aims of providing a definition of corruption wide enough in application to public and private persons and secondly, it established corrupt practices investigation bureau with power to establish special ad hoc tribunals for trial of offences, the gross failure of which was that it recorded only one conviction in four years of its existence when it was repealed in 1979,

⁴⁰⁹ Akinseye-George (n 324) 47, 48 cited Isabella Okagbue (n 384), 'Development in criminal law and procedure' in Akinola Aguda ed, *The challenge of Nigerian nations* (NIALS 1985) 67 and Akinola Aguda, 'Law as a means social Hygiene' pointed out the flaws in anti corruption provisions in criminal code on difficulties in prosecutions relating to appropriate sections to bring a charge for the offence

⁴¹⁰ 'Legal System, Corruption And Governance In Nigeria' (n 324) 49

even as it failed to address the issues of disruption, tracing, freezing and confiscation of asset and international cooperation on investigation of crime.

Another feeble attempt was in 1984 when the Nigerian military government attempted to arrest the slow pace of the existing administration of criminal justice system by establishing tribunals to adjudicate over economic crimes and corrupt practices, an approach that departed from the strict application of technical rules of criminal procedure and burden of proof in criminal trials, new anti-corruption offences with stiffer punishment than the southern Criminal and the Northern Penal Codes were introduced but it is difficult to ascertain the success of this effort because although verdicts of the military tribunals were expeditious, there were infringements of fair hearing and natural justice, lack of uniform application of law and punishment, resulting in uncertainty of law, lack of transparency all of which eroded public confidence in the military tribunal criminal system. The investigation process was perceived partial, the judicial process was neither independent nor transparent⁴¹¹ and the appeal process was considered bias⁴¹², and the reviewed cases were never given equal considerations⁴¹³. It must however be noted that military laws⁴¹⁴ introduced a new paradigm shift to Nigeria criminal jurisprudence by adopting inquisitorial criminal system and laid the burden of proving innocence of unexplained wealth on the accused in contrast to the existing accusatory system of criminal adjudication under which an accused is presumed innocent until proved otherwise by the state. Akinola Aguda⁴¹⁵ had argued in support of this method by saying

⁴¹¹Decree N0.3, 1984 reserved the chairmanship of the tribunal to military officers with a serving judge as a member

⁴¹²Akinseye - George (n 324) 55

⁴¹³ Taiwo Osipitan, 'Administration Of Criminal Justice: Fair Trial, Presumption Of Innocence And Special Military Tribunal' in Omotola and Adeogun, eds, 312 cited in Akinsye-George, 'Legal System, Corruption And Governance In Nigeria, (n 324) 54

⁴¹⁴ S.6(3) Recovery of public property (Special Military Tribunals) Decree N0.3, 1984

⁴¹⁵ Akinseye-George (n 324) 58, 59 cited Aguda, 'some aspects of criminal procedure' proceedings and papers at the 6th commonwealth law conference, 1980, 444,445

that the accusatory system has failed to meet the necessities of justice in African countries where there exists a lack of scientific means of crime investigation to prosecute corrupt practices and argued that *"a nation plagued by corruption, abuse of office and white collar crime"* deserves an inquisitorial system of trial to curb the undue protection afforded an offender under the existing accusatorial criminal administrative system that exposes administration of justice to ridicule. In the same spirit, Osipitan⁴¹⁶ had pointed out that the accusatory system may be ideal in developed countries where sophisticated methods of investigation and detection of crime exist, and that a strict adherence to accusatorial system of crime prosecution will not achieve result in Nigeria. However, contrary to Osipitan's conclusion that shifting the burden of proof from the state to the accused does not negate Nigeria's criminal administrative system, this approach ought to be cautiously applied as it might jeopardise fair trial and constitute an abuse of human rights and privileges of an offender. In the first place, suitability between the accusatorial and inquisitorial criminal system could be contested, the former affords more protection to an offender with the right to silence than the latter; under the inquisitorial system, the judge has access to more detail information at the pre trial stage which assist him to unravel the truth and meet the essence of justice, but the neutral role that a judge plays in the accusatorial system shields him away from relevant information which a defending solicitor has access to; an ethical question which the adversarial system fails to satisfactorily answer, captured by Albert Alschule⁴¹⁷ is, why should an accused person holding material information to unravel criminal disputes be protected from testifying at his own trial? Will it not amount to shielding an offender from revealing what he knows? Is it not ethically and morally incomprehensible and reprehensible to protect an offender from narrating his own side of the story?⁴¹⁸ As earlier mentioned, this is the basic fundamental disconnect between the African traditional criminal system and the English

⁴¹⁶ Akinseye-George (n 324) 59

⁴¹⁷ A Peculiar Privilege In Historical Perspective: The Right To Remain Silent (1995) Michigan Law Review, 94, 8, 2638

⁴¹⁸ Ibid 2636

law, the formal focused on the truth of the matter in order to dispense justice to all parties by reconciliation, assuaging the pains of victims and providing community support where necessary.

However, introducing an inquisitorial criminal system to Nigeria without first amending the constitution and other relevant legislations (criminal code, Penal code and Evidence Act 2011) would be unconstitutional and illegal as the right of an arrested person to remain silence in criminal investigation before the police until he has access to solicitor of his choice is engraved in the constitution⁴¹⁹, noncompliance of which vitiates the admissibility of the evidence against the offender⁴²⁰, while this a constitutional right in Nigeria, it is derived from court rulings in the USA **Miranda V Arizona**⁴²¹, **Miranda** right in the US and Judges rule in the UK, are used by the police warning the suspects in custody before interrogation to avoid self incrimination⁴²²; In Nigeria, apart from being a constitutional provision, it is contained in the rules of court⁴²³ but distinguishable from compellability of an offender to be a witness in his own trial as contained in the 5th

⁴¹⁹ S.35(2) 1999 Nigerian constitution

⁴²⁰ Alam Dershowitz, *Is There A Right To Remain Silent? Coercive Interrogation And The Fifth Amendment After 9/11* (Oxford University Press, 2008) relying on 2003 American Supreme Court case of *Charez v Martinez* 538 US 760 (2003) 270 F.3d852 argued that the there is no violation of the right to remain silent when police applied brutal technique to obtain evidence so long the government did not use the information extracted from such individual in any criminal trial in which he was an accused; in another word, the right is violated only when the information so obtained is used against the offender in a case against him

⁴²¹ 384 US 436 (1966)

⁴²² Albert W Alschule , *A Peculiar Privilege In Historical Perspective* (n 417) 2627

⁴²³ Nigeria 1999 constitution s.35(2) and Nigeria Evidence Act 2011, ss.28 and 29; In England, only voluntary confession (without threats, inducement, tricks or force) is admissible in evidence, before 1912, there were no rule of interrogation and investigation for the police, before this time, there were guidance but not enforced to great extent These are not rules of law but guidance to the police. These rules emphasises authority and duty of police to investigate crime and caution any suspect before asking questions even where he volunteers statement; T St.Johnston, 'Judges rule and police interrogation in England', (1966) *J.C.L. & Crim.* 57, 1, 85

amendment of the US constitution⁴²⁴ similar to protection afforded an accused under Nigeria Evidence Act but the court can draw necessary inference from such silence except an inference of guilt⁴²⁵ and thirdly, it is different from the right of a witness against answering self incriminating question during trial⁴²⁶; these privileges in an adversarial criminal system offer undue protection to offenders to escape justice but neither of these two systems is perfect; exigencies of fighting corruption and the imperative of lifting the protection afforded offenders in nations with poor scientific means of crime investigation and expeditious trial support an hybrid system by extracting legal principles from both systems to create a system that guarantees judicial impartiality and unbiased trials⁴²⁷. This was the approach of the Italian government which before 1988 used to practice the inquisitorial criminal system but due to system abuse, it changed its criminal justice system to a combination of the two systems to create a single system.

Further, between year 2000 and 2002, Nigeria had become labelled as the second most corrupt country in the world⁴²⁸, although there are many doubts on validity of this report due to the modalities adopted to arrive at such conclusion which is largely based on perception and not necessarily on data; however, no credible alternative approach would have been preferred to assess corruption level in a country where data are either wrong or nonexistent. The TI rating is an outcome of many feeble attempts by successive Nigerian government to reduce corruption to a tolerable level; past efforts to address

⁴²⁴ Nigeria Evidence Act 2011, s.180, the fifth amendment to the US constitution

⁴²⁵ Evidence Act 2011, s.181

⁴²⁶ Nigeria Evidence Act 2011, s.183 and the UK Criminal Justice and Public Order Act 1994, s.34

⁴²⁷ David Siegel, Training The Hybrid Lawyer And Implementing The Hybrid System: Two Tasks For Italian Legal Education, 101 <file:///c:/users/Tosh/Downloads/SSRN-id900585.pdf> accessed 21/11/2014

⁴²⁸ Transparency International Report

corruption were mere campaign exercise than criminal prosecution⁴²⁹ and recovery of proceeds of crime, although there are extant anti-corruption provisions under the Criminal Code Act⁴³⁰, the first local attempt at fighting corruption backed with the force of law and punishments in Nigeria was in 1990 when the Nigeria military government set up the National Committee On Corruption And Other Economic Crimes which submitted a draft anti-corruption legislation and recommended the establishment of an independent commission against crime⁴³¹, this effort culminated in the establishment of *Independent Corrupt Practices (and Other Related Offences) enactment Act 2000* which established the ICPC, a Commission⁴³² responsible for investigating and prosecuting corrupt offences⁴³³; examining the practices and procedures of public bodies, direct a review of them where necessary⁴³⁴, educating the public against corruption and enlisting their support in combating it⁴³⁵, similar to the three pronged approach adopted in 1974 by the Hong Kong ICAC but while the Hong Kong ICAC was relatively effective and achieved tremendous result, the same could not be said of the Nigeria ICPC due to lack of political will, absence of transparency and undue interference by the political leadership in its activities, it provides 19 offences substantially on bribery and conflict of interest⁴³⁶ but fails to define corruption, probably the rationale is to give the courts the discretion to determine what constitute corruption in each case, nevertheless, its context is wider in scope than the exiting criminal Code and Penal code as they are applicable to both private and public officers. The Act interfered with the privilege information between client and

⁴²⁹ Jaji Declaration in 1977, Ethical Revolution in 1981- 1983, War Against Indiscipline in 1984, National Orientation Movement in 1986, Mass Mobilization for Social Justice in 1987, War Against Indiscipline and Corruption in 1996

⁴³⁰ ss.98 and 99 on extortion by public officer and ss.114 and 116 on corruption in administration of justice have been expunged from the code

⁴³¹ fashioned after Hong Kong independent commission against crime

⁴³² S.3 (1)

⁴³³ S.6 (a)

⁴³⁴ S.6(b)

⁴³⁵ S.6 (e-f)

⁴³⁶ Nigeria ICPC Act 2000, ss.8-26

solicitor except information on dealings which the court is empowered to direct the solicitor to disclose immaterial of any existing law. The ICPC Act though enacted four years before the UNCAC⁴³⁷, nonetheless, it has similarities with chapters 2 to 6 of the UNCAC⁴³⁸ except on issues of compensation for victim of corruption⁴³⁹ which may be inconceivable in corruption cases except when an innocent third party gets caught in the web of corruption, as suggested by Rider, like a person injured as a result of substandard product or defective service procured by corrupt means, again damages may apply where a third party could establish denial of business opportunities resulting in loss due to refusal to give or pay bribe but this could be difficult to establish as there could never be an absolute certainty that a business proposal would succeed, no matter its competitiveness.

There is no doubt that Nigeria, Afghanistan and many other third world countries are “fantastically corrupt”, however, the policy of the Western world, particularly, the USA, UK and the Swiss Banks encouraged corruption in Africa, they are safe havens for stolen public funds which were neither traceable, seized nor returned to Africa until the 9/11 attack on America when it conspicuously dawned on the global receivers of African proceeds of corruption and drug trafficking that laundered fund facilitates organised crime and could be a source of financing global terrorism, consequently, in order to protect their national and security interests, the global AML/CTF measures were introduced. In the final analysis, proceeds of illicit business which hitherto would have

⁴³⁷ The ICPC Act came into force on 29 of September, 2000 ahead of United Nations Convention Against Corruption which came into force in 31 October, 2004 and United Nations Convention Against Transnational Organized Crime And The Protocols, drafted 15 Nov 2000 but came into force in 2004; Articles 8 and 9 of the latter captures criminalisation and measures against corruption

⁴³⁸ Divided into 8 chapters (preventive measures, criminalisation and law enforcement, international cooperation, asset recovery and technical assistance) and 71 Articles as international guidance on anti corruption regulations and Palermo convention

⁴³⁹ Chapter 3, Article 35, UCAC, 2004

attracted little interest of the western world are now subject of scrutiny but despite the current anti-corruption measures in Nigeria, public officers and private persons have never been deterred from corrupt practices due to lack of transparency in formulating policy to ensure disruption, detection, effective recovery of stolen asset and enforcement of sanction⁴⁴⁰, in addition, there are inadequate provisions of punishment and ambiguous definition of offences which must have necessitated the introduction of restitution as punishment under the advance fee fraud, money laundering and drug laws but due to the nature of bribery cases, restitution from the recipient to the giver would be difficult, as it is illegal and contravenes public policy, thereby rendering corrupt practices illegally unenforceable by the victim based on the well established maxim in law of contract in pari delicto potior est conditio defendentis et possidentis (where both parties are equally in the wrong, the position of the oppressor is stronger because the court will not aid the victim to recover what he has given to the other party under an illegal contract), a related maxim to buttress this position of law is ex turpi causa non oritur actio (the court will not give any remedy to any party if it is based on an illegal act), while this position is more relevant in contractual relationship, in criminal law, this maxim will however, not apply in cases of extortion attributable to involuntary action of the victim; also a person who has voluntarily participated in crime will be held liable as a party to the offence and the position of the court is to confiscate such property and forfeit it to the state; Nigerian criminal justice still grope in the darkness as it is yet to find it useful to adopt civil proceedings to recover proceeds of crime especially the use of constructive trust to trace, identify and hold an agent or fiduciary, person occupying special position of trust accountable for bribe as recently held in *FHR European Ventures LLP v Cedar Capital Partners LLC*⁴⁴¹ where the UK Supreme Court overruled Appeal court decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*.⁴⁴² and held an agent accountable to

⁴⁴⁰ Barry Rider, "strategy Tools for and perhaps the future?" in Barry Rider (ed) Research Handbook on International Financial Crime (Edward Elgar, 2015)

⁴⁴¹ [2014] UKSC 45; [2015] A.C. 250; [2014] 4 All E.R. 79

⁴⁴² [2011] EWCA 347

refund to the principal, an amount equivalent to the benefit received in breach of his fiduciary duty to the principal.

The first main anti-money laundering law in Nigeria, *Money Laundering Act, 1995* was promulgated by military Decree but there was no successful prosecution under it due to the usual inherent weaknesses⁴⁴³ but prior to the establishment of the Nigeria EFCC⁴⁴⁴, the Nigeria Customs and the Special Fraud Unit of the Nigeria Police were responsible for investigation and enforcement of corruption, economic and financial offences but in response to the pressure from the international community, EFCC was established as the FIU to investigate and liaise with the Attorney General of the Federation⁴⁴⁵ to prosecute economic and financial crimes, adopt measures to identify and seize proceeds of crime and collaborate with other law enforcement agencies within and outside Nigeria to fight the crime⁴⁴⁶; the weaknesses in the 1995 Act led to its amendment three times⁴⁴⁷ until the enactment of the current principal *Money Laundering (Prohibition) Act 2011* as amended by the *Money Laundering (Prohibition) (Amendment) Act, 2012* so as to strengthen the law to meet the current FATF standard on the emerging global trend by expanding the role of

⁴⁴³ Joseph Sanusi. a former CBN governor, "Central Bank of Nigeria standpoint of anti-money laundering compliance", conference on "Anti Money Laundering in ECOWAS, (2003) stated that ambiguous definition of money laundering, narrow provision on forfeiture of assets, failure of the Decree to address evasion of mandatory reporting requirements by customers of financial institutions, problems in interpretation of S.6 of the Act on reporting of suspicious activity report which is couched in such a way to mean that the reporting obligation is discretionary, selective punishment (under S.10 of the Act) of employees and directors of financial institutions which leaves out the institution itself from any criminal responsibility and also the failure of the Act to protect financial institutions against breach of confidentiality and duty of non disclosure of customer information resulting in reluctance to comply with requirement for disclosure under the Act

⁴⁴⁴EFCC 2002 (Establishment) Act, 2002 repealed by EFCC (Establishment) Act, 2004, S.44 2004

⁴⁴⁵ S.6 (c)(j)(n) and (o)

⁴⁴⁶ S.5 of the EFCC Act 2002 and S.6 of the EFCC Act 2004

⁴⁴⁷ Via Money Laundering (Prohibition) Act 2003, 2004 and 2011

1. Supervisory and regulatory authorities⁴⁴⁸,
2. Criminalisation of ML/TF,
3. Risk based assessment of the national AML/CTF policy,
4. CDD and record keeping,
5. Reporting obligation of reporting entities,
6. Human capacity development and
7. International cooperation

It is difficult to measure the effectiveness of EFCC in respect of its AML/CTF responsibilities but The GIABA, 2015, 7th follow up mutual evaluation report on progress made by Nigeria revealed that there is partial compliance in some key areas and recommended that Nigeria needs to intensify its effort in AML/CTF⁴⁴⁹.

Another major issue in the history of attempting to deal financial crime in Nigeria is the prevalence of black market commercial transactions in West Africa, including Nigeria which frustrates audit trail of financial transaction and hinders the detection of terrorist financing, tax evasion, money laundering and advance fee fraud; consequently, prohibition⁴⁵⁰ of cash transportation within Nigeria and between the ECOWAS will remain a mirage until Nigeria takes appropriate steps of putting in place an accurate national data of its citizens, containing comprehensive information of all citizens' criminal, traffic, tax, property, customs, social welfare and consumer credit records, verifiable by independent source similar to the information used by Irish Criminal Asset Bureau to recover unexplained wealth; the current national record keeping system in Nigeria is poor even though the CBN has mandated a compulsory biometric verification registration with a unique identification number of all bank customers, this is a laudable step but not enough until each Nigerian has a unique, computerised identification

⁴⁴⁸ explanatory memorandum to the Act

⁴⁴⁹ Lack of autonomy and enabling Act for NFIU, lack of information of any terrorist seized asset, lack of mutual legal assistance law except MLA with few countries EU and USA

⁴⁵⁰ S.7 (4)(a-b)(1-2)

number linked to the national drivers license, international passport, national identity card and tax revenue. This will go a long way in curbing fraud, especially advance fee fraud for which Nigeria has become notorious. In view of the foregoing, the next chapter will evaluate and make a comparative analysis of how fraud is dealt with in the UK, the US and Nigeria, with a view to improving Nigeria legislations against fraud.

Chapter 6

Fraud: How it is dealt with in the UK, USA and Nigeria

In chapter 5, it was revealed that immaterial of the level of underdevelopment of a legal system, it does not necessarily translate to poor or weak control of social vices, even such primitive laws recognised mala in se and mala in prohibita offences. In this Chapter, a comparative study of how fraud is controlled in the US, UK and Nigeria is lucidly clarified by showing that deception or dishonesty is the basis for fraud. It appraises the defect in the English case of *R v Preddy*, the ambiguity in common law conspiracy to defraud, the effectiveness of the US Mail Fraud Act as the generic law of fraud and other US specific anti-fraud statutes like the Bankruptcy Act and Oxley Act 2000. The chapter extensively explores the possession of unexplained wealth in different jurisdiction as a vital tool for control of financial crime, its potential danger to right to own property and presumption of innocence in criminal prosecution. Possession of unexplained wealth is identified as the way forward in money laundering control for effective stripping of stolen wealth. The increasing role of corporation in facilitating crime and the challenges of attribution of knowledge of individual to the company is identified, also the chapter analyses the inconsistencies and the restrictive application of directing mind theory in *Lennards carrying company v Asiatic Petroleum co* which does not reflect the modern reality of incorporations. The chapter concludes that the directing mind approach does not work and made 4 recommendations for attribution of knowledge in corporate criminal liability, namely: introducing strict liability offence for failure of a corporation to take appropriate preventive measures like s.7 BA in UK, secondly, lifting the incorporation veil to hold the agent personally liable in exceptionally circumstances, thirdly, attribution of knowledge under specific legislation and fourthly, holding a corporation liable for any fraud committed by its employees.

Fraud is a moral⁴⁵¹ and legal problem in the context of dishonesty which is the foundation on which fraud hinges either in civil or criminal law. The bible says '*Truth exalts a nation but sin brings reproach to any people*'⁴⁵², any nation that condones dishonesty especially, in trade and commerce attracts self-destruction⁴⁵³. Fraud is a representation made by one person to another with the intention of obtaining economic advantage or causing economic loss to the person who the representation is made⁴⁵⁴. As earlier mentioned in chapter one, the English common law recognised the offences of engrossing, forestalling and regrating as far back as the 13th Century. At common law, a statement made to the market was presumably made with the intent that any buyer in the market should be influenced thereby⁴⁵⁵. History is replete with incidence of dishonest schemes that exploited human greed, naiveté, vanity and innocence of others to part with their valuable asset or money or to alter their position to their detriment; like the "*Spanish prisoner scheme*"⁴⁵⁶ in the 16th century, the UK capital market and corporate fraud during the industrial revolution, the UK railway mania of 1845, the abusive use of joint stock companies⁴⁵⁷ occasioning securities fraud and share theft and the recent global perception against Nigerian advance fee fraud.

As the society evolves so do fraudulent devices assume sophistication, also globalization of commerce and information technology have tremendously aided fraudulent activities, although the early English courts refrained from restricting the concept of fraud to any

⁴⁵¹ Gilbert Geis, The concept of fraud: a comparative analysis in Barry Rider (ed) Research Handbook on international financial crime (Edward Elgar 2015) 15

⁴⁵² Bible, Proverbs 14:34

⁴⁵³ Gilbert Geis, The concept of fraud (n 451)

⁴⁵⁴ Joseph Norton and George Walker eds, Banks: Fraud and crime (The centre for commercial law studies and the London institute of international Banking, financial and Development law, 2nd ed. 2000) 13

⁴⁵⁵ A. Berle, Stock Market Manipulation, (1938) Columbia Law Review, 393 (38) 394

⁴⁵⁶ Russel Smith, Michael Holmes and Philip Kauffman, 'Advance fee fraud in Australian Institute of criminology' <<http://www.ac.gov.au>> accessed 23/09/2014

⁴⁵⁷ Robb, 'White-Collar Crime in Modern England, 1845 – 1929' (n 59) 5, 11

given definition due to the belief that fraud is infinite in variety⁴⁵⁸, it was believed that as the depth of human creativity in devising new schemes of fraud is great, flexible approach was needed to deal with it under any form it presented itself⁴⁵⁹. However, Kerr⁴⁶⁰, defines fraud in civil context as all acts, omissions and concealments occasioning breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another or by which an undue or unconscious advantage is taken of another person; consequently, all tricks and other unfair way employed to cheat another person are deemed as fraud, including the wilful acts by one person to deprive another person by illegal or equitable means; Rider and others⁴⁶¹ in 'Market Abuse and Insider Dealing' have argued that this definition is vague for the purpose of criminal prosecutions as it failed to emphasise the requisite mens rea in fraud prosecution; an ambiguity such as this in the concept of fraud was one of the factors responsible for the need to enact the UK Fraud Act 2006. On the other hand, Alan Doig⁴⁶² distinguished theft from fraud by describing fraud as an act of oral or written persuasion of another person to part with his asset through deceptive means or misrepresentation rather than by means of threat, violence or physical intimidation, because fraud thrives on an existing relationship between the offender and the victim unlike theft which may occur between parties with no forged contact or relationship⁴⁶³ and sometimes result in death, threat to life and kidnap of victims⁴⁶⁴. Again, *Arlidge and Parry on Fraud*⁴⁶⁵, reiterated that in England and Wales, fraud was a concept, not a crime until 2006 when Fraud Act was enacted, they observed that for over

⁴⁵⁸ Reddway V Banham [1896] AC 221, LJQB 381

⁴⁵⁹ Allcard V Skinner, 36 ch. D.p.183; 56 LJ Ch.1052

⁴⁶⁰ Kerr on the Law of Fraud and Mistake by Dennis Lane Mc Donnell and John George Monroe (7th edn, Sweet and Maxwell 1952) 1

⁴⁶¹ B. Rider, K. Alexander, S. Bazley and J. Bryant, Market Abuse and Insider Dealing (3rd edition Bloomsbury Professional 2016) 135

⁴⁶² Alan Diog, Fraud (Willian 2006) 1

⁴⁶³ *ibid*

⁴⁶⁴ *Ibid*

⁴⁶⁵ (4th edition Sweet and Maxwell 2014) 1

200 years, various statutes⁴⁶⁶ have dealt with those who dispossess others of their properties until 1968 when Theft Act was enacted to create the offence of theft and obtaining goods or services by deception. Fraud covers a variety of orthodox activities under various laws defined with the word "fraudulently" in various legislation to distinguish it from lawful activities⁴⁶⁷, so the term fraud may be used in different situations depending on the definition of each given offence but it is different from forgery, although there is a common element of misrepresentation and deception between them but while forgery relates to making of a false instrument (fake birth certificate or international passport) with a view to inducing a third party to accept it as genuine⁴⁶⁸, fraud on the other hand relates to the deceptive use of the information in the document, forgery is the inherent falsehood of the document⁴⁶⁹, the similarity between fraud and forgery is that they are both designed to deceive another person into accepting falsehood as truth.

Up till 2006, fraud is defined as obtaining financial advantage or causing loss by implicit or explicit deception⁴⁷⁰, it relates to an array of activities like deception, dishonesty and misrepresentation but no matter what definition is proffered, fraud covers different type of offences which may not be found in one single statute⁴⁷¹. For example, in **RE London Globe Finance Corporation Ltd**⁴⁷² per Buckley J:

⁴⁶⁶ Larceny Acts 1827, 1861, 1916

⁴⁶⁷ Alan Diog (n 462) 20

⁴⁶⁸ Ibid 29

⁴⁶⁹ Ibid 30

⁴⁷⁰ Michael Levi, John Burrows and others *"The Nature, Extent and Economic Impact of Fraud in the UK"*, Report for the Association of Chief Police Officers' Economic Crime Portfolio, 2007, 9

http://www.xact.org.uk/information/downloads/Fraud/ACPO_UK_fraud.pdf accessed 22/2/2014

Serious Fraud Office, 'What is fraud?' <<http://www.sfo.gov.uk/fraud.what-is-fraud.aspx>> accessed 22/2/2014

⁴⁷¹ Alan Diog (n 462) 19, 20

⁴⁷² [1973] 1 Ch.728, 732

"To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action".

In England, before 2006 there were a number of lacunae following the House of Lords decision of *R v Preddy*⁴⁷³ which had held that funds transferred between accounts is a chose in action and not a property obtained from another person under Theft Act 1968 s.15; also the ambiguity in the common law conspiracy "to defraud" where an agreement between two people to do something is a crime, when the same act would be lawful when done by one person, among several other reasons, the fraud Act, 2006 was enacted by creating a single general legislation on fraud⁴⁷⁴ by dishonesty representation for gain to the offender and loss to the victim in 3 ways:

1. False representation
2. Wrongly failing to disclose information and
3. Abuse of office⁴⁷⁵

Although it did not abolish the common law conspiracy to defraud and there are subsisting numbers of other statutory offences similar to fraud⁴⁷⁶ but nevertheless, the 2006 Act is wider in scope than the common law conspiracy, it is advantageous to prosecute under the common law conspiracy where the charges wouldn't secure conviction under the Act because mere agreement even without the capacity to commit the offence is a crime⁴⁷⁷. The Fraud Act also introduces other offences which can be used

⁴⁷³ [1996] 3 WLR 25

⁴⁷⁴ Fraud Act 2006, s.1

⁴⁷⁵ Ibid ss.2,3,4

⁴⁷⁶ POCA 2002, ss.327-330, Forgery Act 1981, FSMA Act 2000 (market manipulation), Companies Act 1993 (S.993 which re-enacts the offence of fraudulent trading), Insolvency Act 1986 (corporate winding up and personal bankruptcy), Social security and administrative Act 1992 (S.111 on benefit), Gaming Act 1845 (S.17 on cheating while gambling), Enterprise Act, 2002 (S.188 on cartels), The common law conspiracy to defraud and cheating the revenue.

⁴⁷⁷ Scott V Metropolitan Police Commissioner [1975] AC 819

in particular circumstances to address the possession and supply of articles for use in fraud, a new offence of fraudulent trading applicable to sole traders and other businesses not caught by the existing offence in S.458 of the Companies Act 1985; including corporate false accounting⁴⁷⁸. As argued by Rider and others⁴⁷⁹, the UK Fraud Act, 2006 differs from the offence of fraud in many other jurisdictions because an offender in UK can be held liable if it is proved that he makes an intentional misleading statement with the intention to gain advantage or cause harm to the plaintiff, in any of the 3 circumstances under the Fraud Act, immaterial if it actually influenced the mind of the person to whom it was made⁴⁸⁰ because it hinges on the making of a misrepresentation with the requisite mens rea by the offender and not on the deception of the victim⁴⁸¹; hence, arguably, the principle of contractual relationship in the latin maxim, Non decipitur qui scit se decipi, (he is not deceived who knows that he is being deceived) is inapplicable under the UK new Fraud Act except where the statement is so unreasonably ridiculous, that no reasonable person would rely on it; in contrast to the US Federal law s.1001 of title 18 USC on statements and entries in general where proof of materiality of the misrepresented fact, deduced from its natural meaning is mandatory.

In contrast to the UK, the US criminal law developed from statutes, customs and jurisprudence of several other jurisdictions, including the common law of England concept of fraud but generally in the US, fraud was initially restricted to the common law criminal acts of defrauding the public⁴⁸², the scope has now expanded over the years owing to an increase in trade and commercial activities, fiduciary relationships and social development created by incorporations⁴⁸³, consequently, fraud in the US is as defined by

⁴⁷⁸ S.12

⁴⁷⁹ Market Abuse and Insider Dealing B. Rider, K. Alexander, S. Bazley, J. Bryant (Bloomsbury 2016) 139

⁴⁸⁰ R V Gilbert [2012]EWCA Crim. 2392

⁴⁸¹ UAE v Allen [2012] EWHC 1712 (Admin)

⁴⁸² Ellen Podgor, 'Criminal Fraud', (1998-1999) American University Law Review (48) 737 cited Cecil Turner, Kenny's Outline Of Criminal Law 275 (1952)

⁴⁸³ Emlin McClain, 'Treatise On The Criminal Law' (1897) 669, cited in Podgor (n 482)

Arlidge in the context of English criminal jurisprudence, it focus on two elements of deceit and secrecy resulting either in actual injury, possible injury or an intent to expose another person either to actual injury or to a risk of possible injury⁴⁸⁴. Podgor remarked that the US federal criminal law used terms synonymous with deceit as gleaned from the US Federal Jury Practice And Instructions⁴⁸⁵ which defines fraud as an intentional or deliberate misrepresentation (by words, conduct or silence) of the truth for the purpose of inducing another to rely on it, to part with a thing of value or to surrender a legal right or to act on it to his or her peril. Similar to the situation in the UK before the enactment of the Fraud Act 2006, there is no single statute on fraud in the US federal criminal system, fraud is not crime in itself but an integral aspect of several criminal statutes⁴⁸⁶, there are various statutes covering fraud offence which Podgor⁴⁸⁷ characterised into either generic or specific fraud statutes; going by this analysis, Mail and Wire Fraud Acts could be regarded as generic statutes, ditto the UK, 2006 Fraud Act while specific statutes are fraud resulting from commercial transactions like tax evasion, customs and excise fraud, mortgage fraud, insurance fraud, securities and investment fraud by company promoters; false representation, wrongful application of investment fund, theft or abuse of position⁴⁸⁸, fraudulent investment by inducing another person to invest in securities and building society⁴⁸⁹ and obtaining by false pretence are specific fraud statutes, with emphasis on mens rea as a prerequisite for culpability.

⁴⁸⁴ Podgor, Criminal Fraud (n 482) 737

⁴⁸⁵ § 16.08 (4th ed. 1992)

⁴⁸⁶ With attendant inconsistency and ambiguity as regards parameters what constitute fraud and a violation of UN Resolution on certainty of criminal law.

⁴⁸⁷ Podgor, Criminal Fraud (n 482)

⁴⁸⁸ S.2 Fraud Act; see also Arlidge and Parry on Fraud (n 465) 319

⁴⁸⁹ Prevention of Fraud (Investment) Act, 1958, S.13

Again, in the US, the initial conspiracy statute was enacted in 1867 with focus on internal revenue but this was later expanded in *US v. Hirsch*⁴⁹⁰ where the Supreme Court gave a broader interpretation of the statute to include conspiracies unrelated to the revenue laws; in support of which Podgor argued that conspiracy to defraud is perhaps the broadest of the fraud offences, the general conspiracy statute⁴⁹¹ prohibits an agreement by two or more persons either to commit any offence against the United States, to defraud the United States or any state agency, punishable with \$10,000, five years imprisoned or both⁴⁹² but on the other hand, *Mail Fraud Act*⁴⁹³, enacted in 1872, has consistently been used to prosecute fraud in total negation of the purpose and object of the Act; though it was not initially designed to be a generic fraud statute as its objective was the prevention of scheme to defraud through the use of the US post-office establishment but over the years Mail Fraud Act had been generally used to prosecute corruption cases⁴⁹⁴ and new forms of fraud in the absence of a specific legislation or until the congress enacts a specific statute to address such a new fraud, its scope has expanded not only by the decisions of the courts but also by legislative amendments until 1987 when the US Supreme Court rejected this application of the intangible rights doctrine in *McNally v United States*⁴⁹⁵ by

⁴⁹⁰ 100 U.S. 33 (1879); also in *Haas v Henke* 216 U.S. 462 (1910) the Court held that the statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.

⁴⁹¹ 18 U.S.C. § 371 (1994)

⁴⁹² conspiracy to defraud the United States and conspiracy to commit any offence against the United States though enshrined in the same statute, are two separate offence, in *United States v. Ashley*, 905 F. Supp. 1146, 1153 (E.D.N.Y. 1995) held that S.371 criminalises two different types of conspiracies, unlike a conspiracy to commit any offense against the United States, a conspiracy to defraud does not require agreement to violate a specific statute; *United States v Terranova*, 7 F. Supp. 989, 990 (N.D. Cal. 1934) held that in order to constitute conspiracy to defraud the United States, "it is not necessary that the conspiracy should have been to commit an act in violation of a criminal statute"

⁴⁹³ 18 U.S.C. § 1341 (1994)

⁴⁹⁴ L Greenwood, 'Mail and wire fraud', (2008) 45 ACLR, 717

⁴⁹⁵ 483 U.S. 350, 358 (1987)

holding that the logic behind the enactment of the mail fraud statute was meant to protect the integrity of the mail service from schemes devised to deprive citizens of money or property and not intangible rights but the US Congress responded to this decision in *McNally*⁴⁹⁶ by enacting 18 U.S.C. § 1346 which expressly extended the Mail and Wire fraud statutes to any acts of depriving another person the intangible right of honest services (corruption) and thus overturned the *McNally*⁴⁹⁷ decision and revert the honest-services doctrine to its pre-1987 interpretation, Since then, §1346 has been applied to any alleged fraudulent activity by both public officials and private sector employees, again, due to new schemes which bypassed the public postal services by the use of private couriers, the US Congress amended the mail fraud statute in 1994⁴⁹⁸, to cover fraud by mailings delivered by private or commercial interstate couriers.

The provisions of the Mail and Wire Fraud statutes are similar as the object of the offence plays an insignificant role in fraud prosecution⁴⁹⁹ but unlike Mail statute, Wire statute did not evolve from a specific fraud statute into one with a generic coverage, wire fraud from its inception has been generic⁵⁰⁰. Two defences available against alleged violations of mail and wire fraud statutes are firstly, that the offender acted in good faith and in truth concerning the alleged fraudulent representations or the absence of an intent to defraud⁵⁰¹, secondly, the statute of limitations, as trials must commence within five years⁵⁰² except where the alleged fraud affects a financial institution where the period runs from the last day of completion of the scheme or overt act⁵⁰³; with respect to specific fraud offences, Podgor argued that some statutes use fraud in describing both the conduct

⁴⁹⁶ Ibid

⁴⁹⁷ Ibid 495

⁴⁹⁸ Violent Crime Control and law enforcement Act, 1994

⁴⁹⁹ Podgor, Criminal Fraud (n 482) 755

⁵⁰⁰ Ibid 754

⁵⁰¹ *United States v. Gole*, 158 F.3d 166, 167 (2d Cir. 1998); see also (2013) 50 ACLR 1265

⁵⁰² 18 U.S.C. § 3282 (2006)

⁵⁰³ 18 § 3293(2) (2006); *United States v. Crossley*, 224 F.3d 847, 859 (6th Cir. 2000)

and the mens rea of the offence such as fraudulent conduct or omission. Obtaining by fraud and offences requiring mens rea as key component like acting with intent to defraud but it is erroneous to regard a crime as fraud by such mere definition without looking at the whole substance of the offence because many definition with such words are not necessarily fraud offence, it could be stealing, forgery or embezzlement. Nevertheless, in line with Podgor's characterisation, other types of specific fraud statutes in the US are those that specifically limit the object of the offence to a narrow range of fraudulent specific conduct like the Bank Fraud Statute⁵⁰⁴, Major Fraud Act, 1988⁵⁰⁵, Computer Fraud⁵⁰⁶, Bankruptcy Fraud, Health Care Fraud and many more. These statutes have more restrictive application than the Mail and Wire Fraud Statutes due to the nature of the object they serve to constrain⁵⁰⁷; both generic and specific fraud statutes may serve as predicate offences⁵⁰⁸ under Racketeered Influence and Corrupt Organization ("RICO") Act⁵⁰⁹ while other statutes like the Sarbanes Oxley Act, 2002 is a regulatory instrument for accounting profession and to discourage unethical practices exposed by accounting fraud in the aftermath of the collapse of the big American companies like ENRON and WorldCom; previous conventional legal approach had always placed reliance on the use of accountants and auditors as "gate keepers" but over the years, these professionals have continued to fail in fraud detection, fraud reporting and improper accounting due to increased competition and reduced auditor's liability because often times, appointed

⁵⁰⁴ (18 U.S.C. § 1344 (1994); While mail and wire fraud focus on the scheme and designs of fraud, bank fraud statute focus on fraud in which the victims are financial institutions created, controlled and insured by the federation; for example, where the victim of a fraud is a bank client and not the bank insured by federal government, Bank fraud statute will not be applicable but the Mail and Wire statute.

⁵⁰⁵ 18 U.S.C. § 1031, enacted in response to series of fraud and financial malpractices in the US defence contracts. It focuses on major procurement fraud committed against the United States where the value of the contract exceeds \$1,000,000⁵⁰⁵; amended in 1989 to add provisions rewarding "whistle-blowers" financially

⁵⁰⁶ 18 U.S.C. § 1030 (1994 & Supp. 1997

⁵⁰⁷ Podgor, Criminal Fraud (n 482) 755

⁵⁰⁸ Ibid 746

⁵⁰⁹ 18U.S.C.§ 1961 (1994)

auditors' fees paid by managers allows the executive management to manipulate facts and figures in financial report to reflect business growth and profitability⁵¹⁰. The Act provides new laws on auditor's retainership and protection of corporate whistle blowers in S.806 and 1107. It created Public Company Accounting Oversight Board (PCOAB) to oversee auditors and enlist them for enforcing laws against fraud while Security and Exchange Commission oversees public companies⁵¹¹ and protects investors by organising an efficient market with powers to enforce Sarbanes-Oxley Act, 2002

Fraud in Nigeria is enshrined in the criminal codes and other enactments like in America but as earlier explained, while the US federal criminal code evolved from several customs, predominantly from common law of England, Nigerian criminal code did not evolve, it was imposed on the country by the British colonial government as discussed in chapter 4, it was rooted in English legal concepts and hence, there are similarities in the criminal jurisprudence in the three jurisdictions. For example, the Supreme Court of Nigeria defines fraud in *Onwidiwe V Federal Republic of Nigeria*⁵¹² as fraudulent action or conduct in terms of deceit to obtain some advantage for the owner of the fraudulent action or conduct or another person or to cause loss to any other person

Like America, Nigeria does not have a single legislation on crime of fraud as found in English Fraud Act, 2006; relying on Podgor's characterisation of generic fraud statutes and specific fraud statutes, there are various provisions contained in the Nigeria criminal code, penal code and other statutes at the federal level like Mail and Wire Fraud Act in America being a generic statute for prosecuting various fraud offences, such as s.419 of the Nigeria criminal code, it was initially the specific provision on obtaining by false pretence, in addition to other specific provisions under the codes⁵¹³ dealing with various

⁵¹⁰ John Coates iv, 'The Goals and promise of the Sarbanes Oxley Act', JEP (2007) 21 (1) 96

⁵¹¹ S.101- 109

⁵¹² (2006) NWLR (Pt. 988) 382, 429

⁵¹³ SS. 157, S.174, 175, 396, 398, 400, 435, 436, 438, 439, 441, 480-482, 484 -489, 490 of Nigeria Criminal code and allied provision under the Nigeria Penal code

types of fraud. S.419 prohibits obtaining by false pretence with intent to defraud another person anything capable of being stolen or to induce any other person to deliver to any person anything capable of being stolen⁵¹⁴ but in response to emerging trends of offence of obtaining by false pretence which was not envisaged by the provisions of s.419 of Nigeria Criminal Code⁵¹⁵, the Advance Fee Fraud Decree 1995 was promulgated, repealed in 2006 by Advance Fee Fraud and Related Offences Act, 2006 (AFF) , this criminalises the act of obtaining by false pretence and with intent to defraud or inducing another person to obtain by fraud pretences any property or inducing another person to deliver his property by false pretence, with intent to defraud either within or outside Nigeria; it is immaterial if the property obtained or its delivery is induced by means of any subsisting contract between the parties⁵¹⁶ so as to obviate the defence of *impari delicto* (in equal fault).

The AFF Act encompassing money laundering, was influenced by the provisions of the international obligations and treaties to which Nigeria acceded, like the FATF 40 Recommendations on criminalisation of money laundering⁵¹⁷, adequate punishment by confiscation and forfeiture of asset; liability of company directors⁵¹⁸, it distinguishes money laundering from negligent and failure to exercise due diligence and infraction of internal regulations or procedure on client business relations⁵¹⁹; corporate criminal liability⁵²⁰ as distinguished from personal liability of an individual employee for non-compliance with internal control measures⁵²¹. The Act took cognisance of the prevalence

⁵¹⁴ Onwidiwe V Federal Republic of Nigeria (n 512) 431

⁵¹⁵ Territorial jurisdiction, stiffer punishment and wider definition of the offence, exclusion of ordinary court jurisdiction, simplified rules of evidence and procedure; see also Uche Osimiri, 'Appraisal of Nigerian Advanced Fee Fraud Legislation' (1995) JFC 4, 3, 271

⁵¹⁶ S.(1) (a-c)

⁵¹⁷ S.(7)(1)(a-c), S.7(6)(h) and R.3 FATF

⁵¹⁸ S.7(2)(a-b)

⁵¹⁹ S.7(3) of 2006 and R.10, 15 & 22

⁵²⁰ S.7 (3)(a)

⁵²¹ S.7 (3)(c)

of underground or black market, cash based economy and cash courier across porous national borders, audit trail of which is difficult and thus facilitates money laundering, most of such financial transactions elude the banking or financial institutions, consequently, Advance Fee Fraud (AFF) criminalised cash transportation⁵²² within or outside Nigeria with full knowledge or on reasonable knowledge that such fund is a proceed of advance fee fraud⁵²³; it regulates international and local electronic money transfer business like Western Union and other types which are required to obtain and keep client's data; failure of which attracts a fine or terms of imprisonment⁵²⁴, regulation of internet business by registering with the EFCC and obtaining of personal data from clients for monitoring and control⁵²⁵, ditto the telecommunication companies; other provisions of the AFF Act has its effect on the right to own property⁵²⁶ which though is guaranteed under the Nigeria constitution, S.3 of AFF Act makes owners of premises liable for deliberate permission of its use for any criminal purpose and introduced restitution for victim of advance fee fraud, which is a new development in Nigerian Penal system⁵²⁷, before the 2006 Nigeria AFF Act, the general attitude of the court was an award of fine, terms of imprisonment and confiscation against the offender while the complainant would often have to commence a civil action to recoup his loss from the offender. It could therefore be seen that, applying Podgor's analysis, Nigerian AFF Act unlike Wire and Mail Fraud was introduced as a specific fraud law but provides several predicate offences which invariably extend the Act to cover many other offences.

6.1 Possession of unexplained wealth

A novel introduction to Nigeria criminal jurisprudence in the AFF Act is the concept of possession of unexplained wealth being taken into consideration as corroborative

⁵²² FATF, R32 and S.4 (&B) AFF Act, 2006

⁵²³ S.7 (4)(a-b)(1-2)

⁵²⁴ S.12(2)(3) and FATF R.14 and 16

⁵²⁵ S.13(1)(a) and in S.13(1)(b)

⁵²⁶ Art.17 (1)&(2) UN Declaration of Human Right and 1999, Nigeria constitution, ss.43 &44

⁵²⁷ S.11 (1)

evidence or testimony in fraud proceedings⁵²⁸, due to difficulty and huge cost in obtaining evidence and the burden of proof beyond reasonable doubt in financial crime trials⁵²⁹, there have been global legal mechanisms to prevent public officers and in some cases, the general public from benefiting from corrupt practices as it is expected that this would make it easier to either prosecute or confiscate illicit proceeds of crime, this initiative validates the UNCAC 2003 Art.20 which mandates member states, subject to their municipal laws to criminalise intentional illicit enrichment by public officials, similar to IACAC Art ix and AUCPCC Article 8 but despite its gradual international recognition as crime, unexplained wealth has not been universally accepted as an anti-corruption instrument in all countries such as North America and Western Europe⁵³⁰ due to fear of possible infringement of human rights on presumption of innocence, the right of an offender to remain silent in criminal proceedings and individual right to own property, these concerns led some state signatories to UNCAC, IACAC, and AUCPCC to avoid criminalising illicit wealth in their jurisdictions, by utilising the flexible clause in the UNCAC that allow states to apply the treaties subject to national circumstances⁵³¹. Critics like Thomas Snider & Won Kidane⁵³² had argued that the concept of illicit enrichment is so flawed that it is '*a remedy that is worse than the ailment*', because it tends to compromise the fundamental principle of presumption of innocence and secondly, it is subject to abuse in countries where the rule of law, transparency and good governance remain an aberration. The ECHR provided an answer to this fear by suggesting the appropriate circumstance in which presumptions against illicit wealth ought to be

⁵²⁸ S.14

⁵²⁹ Bertrand de Speville, 'Reversing the onus of proof, Is it Compatible with Respect for Human Rights norms?', 8th International Anti corruption conference <<http://8iacc.org/papers/despeville.html>> accessed 19/01/2015

⁵³⁰ Lindy Muzila, Michelle Morales and others, 'On the Take: Criminalizing Ilicit Enrichment to Fight Corruption' 2012 International Bank for Reconstruction and Development/The World Bank

⁵³¹ Ibid 30

⁵³² 2007 Cornell International Law Journal 40, 691

permitted in *Salabiaku V France*⁵³³ which held that presumptions of fact or law in a given legal system must be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence⁵³⁴. However, many countries that chose not to criminalise it have enacted alternative means of tackling it by restricting its application to public officials while others have extended the law to the private sector, for instance, Colombia extended the law to the private sector as a distinct offence while in Pakistan, illicit enrichment law applies to “holder of public office or any other person⁵³⁵. Few other countries have taken cognisance of possible assistance of third parties assisting public officials to hide illicit wealth, including family members who could be potential beneficiaries or accomplices in hiding the proceeds of corruption. In El Salvador, Egypt and Paraguay, for instance, the offence extends to wealth hidden in possession of spouses, minor children and distant relatives of a public official⁵³⁶; this expanded approach is further buttressed by Article 52 of UNCAC and FATF, Recommendation 6, both of which require effective scrutiny of the family and close associates of PEP in their relationship with financial institutions⁵³⁷.

In order to stop the UK property and capital market from continuing to be used by organised crime, PEP and money launderers as a safe haven for hiding illicit wealth, the UK government has indicated its readiness to criminalise possession of illicit wealth as a separate crime, with emphasis on shifting the burden of proof, disclosure of the source wealth and seizure of such property. The former prime minister, *David* Cameron⁵³⁸ said this would ensure the restitution of stolen assets, through modalities of automatic

⁵³³[1988] ECHR 19; see also *Euro Wine C & C Ltd v Revenue and Customs Commissioners* [2016] UKUT 359 (TCC)

⁵³⁴ Presumption of fact and law under Nigeria Evidence Act 2011 (S.145 - 168), Criminal code and 1999 Constitution, Marriage Act, though a presumption of law is rebuttable, all presumptions of facts are rebuttable.

⁵³⁵ Lindy Muzila (n 530) 14

⁵³⁶ *Ibid*

⁵³⁷ *Ibid*

⁵³⁸ Anti-Corruption Summit, London, 2 May 2016

exchange of tax information among nations and legislation against unexplained wealth, maintenance of public register containing list of beneficial owners and controllers of UK companies, including all foreign companies owning properties in the UK, which shall be accessible to law enforcement agencies across the world, and no foreign company will be able to buy UK property or bid for government contracts without being on this register; it also proposed to establish a new *International Anti-Corruption Co-ordination Centre* which would serve as a global forum for asset recovery to assist the police and prosecutors; a proposal to create a new illicit enrichment offence and new powers under Unexplained wealth Order to assist in the prosecution and recovery of stolen assets, in order to deter prospective looters of national wealth that the UK is no longer a safe haven for illicit wealth. This corresponds with the OECD mechanism developed to reduce the misuse of corporate vehicle for illicit purpose⁵³⁹, in addition to the 4th EU ML Directive which effective from the 6th April, 2016 UK now requires disclosure of beneficial ownership of corporate and trust entities but under the Small Business Enterprise and Employment Act 2015, unlisted companies in UK (except listed companies and AIM which are already under disclosure obligations by virtues of FCA Rules) are required to disclose the person of significant control (i.e. beneficial owners holding more than 25% of nominal shares or 25% voting rights or exercising significant interest or control over a company or trust) over its shareholding.

As earlier mentioned, there are two types of reactions to this development by states, some countries like Malawi⁵⁴⁰ have criminalised illicit enrichment by public officials if the state adduces evidence showing the disproportion between the acquired illicit wealth and the official's emolument, thus dispensing with the need to prove any underlying crime such as bribery, embezzlement or corruption, this is the same position under the Lagos state Administration of criminal Justice law 2011, S.82 but at the federal level, the burden of proof and presumption of innocence in criminal trial is merely altered, to the extent that

⁵³⁹ Financial Stability Forum on OFC recommendation, Behind the corporate veil, using corporate entities for illicit purposes, 2001, OECD Report

⁵⁴⁰ Malawian Corrupt Practices Act, 1995 S.32(2)(C)

proof of possession of unexplained wealth may be taken into consideration as corroborative evidence in trial⁵⁴¹; this relaxes the presumption of innocence and shifts the burden of proof on the defence to establish its legitimate sources; this reversal of burden of proof and the flexible application of presumption of innocence, a cardinal principle of criminal prosecution is arguably, a violation of the right against self-incrimination, though a valid exception, considering the existence of various similar presumptions available in criminal law and the general principle that no fundamental right is absolute⁵⁴². For example, Hong Kong, a common law based legal system has over the years made effective use of this legal provision despite incorporating in its domestic law, the international convention on Civil and Political Rights on fair trial and presumption of innocence of an accused person⁵⁴³. The Hong Kong Court of Appeal in *AG v Hui Kin Hong*⁵⁴⁴ held that placing the onus on the accused to provide an explanation is a deviation from the principle that lays the onus on the state to prove the guilt of the accused beyond reasonable doubt as enshrined in their *Article 11(1) of the Bill of Rights*; but in exceptional circumstance compatible with human rights, it is justifiable to permit a degree of deviation from the normal principle of prosecution to prove the guilt beyond reasonable doubt; citing another Hong Kong case⁵⁴⁵ where the Privy Council had submitted that justification for such exceptions depends on whether it was the primary responsibility of the prosecution to prove the guilt of an accused beyond reasonable doubt and whether the exception is reasonably imposed against the provision of Art. 11(1), therefore, if the prosecution retains the primary responsibility of establishing the essential ingredients of the offence, the exception will be regarded acceptable but if the exception requires certain presumption against the offender until the contrary is established, then it will be difficult to justify that such presumption does not negate established principles of human right, this position validates the S.15 of 2006 Nigeria AFF

⁵⁴¹ Advance Fee Fraud and Related Offences Act, 2006, S.14 & EFCC ACT, 2004, S.19(5)

⁵⁴² Lindy Muzila (n 530)

⁵⁴³ Hong Kong Bill of Rights Ordinance, Art.11(1)

⁵⁴⁴ Court of Appeal No.52, 1995

⁵⁴⁵ AG v. Lee Kwong-kut [1993] AC 951

Act where possession of illicit wealth is not a primary offence and the primary burden of proof in AFF or money laundering proceedings rests solely on the prosecution, consequently, possession of illicit wealth will only be a supporting evidence after fraud or any primary offence has been established by the state, in defence of which the accused has to provide a satisfactory rebuttal or explanation. A requirement for an accused to provide satisfactory explanation needs strong justification for a departure from the fundamental principle of the rule of law that the prosecution has the onus of proving every element of the case against the accused; such justification as the Privy Council observed is bribery, a menace to the foundations of any civilised society⁵⁴⁶, secondly, difficulty in proving bribery against a public servant⁵⁴⁷ or thirdly, a pressing social need to eradicate corruption in the society as the Privy Council observed in *Ming Pao Newspapers Ltd. v AG Hong Kong*⁵⁴⁸ may inform the justification to shift the burden of proof in corruption proceedings. However, challenges facing each country differ, in some other countries; the rationale for a shift of burden of proof could arise from the prevalence or threat of other type of financial crime. Unfortunately, Nigeria AFF had treaded softly on corruption, by restricting the shift in burden of proof to AFF and money laundering, the Nigerian legal system ought to have adopted the Malawian method of criminalising possession of unexplained wealth by public officials, private sector persons and members of their families due to the prevalence of corruption and money laundering and its adverse consequence on national and regional securities fuelling an increase in organised crime and terrorism and the scandalous revelation from the Panama OFC where some PEP were implicated; despite the concerns that an outright criminalisation of illicit wealth is susceptible to abuse in developing countries like Nigeria with questionable observance of rule of law, transparency and good governance but considering Akinola Aguda's argument in support of inquisitorial system that where there is persistent lack of scientific means of investigation to prosecute corrupt practices in '*a nation plagued by*

⁵⁴⁶ AG v. Reid [1994] 1 AC 324, 330

⁵⁴⁷ Mok Wei Tak v. The Queen [1990] 2 AC 333 at p.343E-F

⁵⁴⁸ Privy Council Appeal No.8 of 1996 cited in Pg.5 of Bertrand de Speville (n 75)

corruption, abuse of office and white collar crime, this same argument justifies the need to criminalise illicit wealth in reducing financial crime.

Furthermore, considering the phenomenon success thus far recorded under a similar provision in Ireland⁵⁴⁹, though Italy is one of the first countries in Europe or in the world, to have adopted unexplained wealth offence as a tool for recovering the proceeds of organized crime in the late 1950s, a non-conviction based approach whereby any asset or property that cannot be legally justified will be seized and forfeited⁵⁵⁰. It is instituted against a person and not against the property like the US civil recovery, it does not require any proof of criminal charge like the Nigeria where it is a rebuttable presumption of guilt, nor in UK where criminal lifestyle after conviction is required, it is not a conviction based confiscation, therefore no need to first prove that the property in question derived from proceed of crime, as required in rem asset forfeiture; thus shifting the burden of proof of legitimate source of wealth, if proved successfully, though it remains a controversial means of seizing assets where traditional methods have failed⁵⁵¹, but while Italy Constitutional Court declared UWO unconstitutional after two years of its operation, it has been successfully used in Ireland to dismantle and disrupt criminal activities under the Proceeds of Crime Act (POCA), 1996 under “POCA Orders” and the Ireland Criminal Asset Bureau (CAB) Act, 1996 which established the institutional framework supporting POCA’s implementation, the success factor of which was attributed to the CAB, an elite, well-resourced unit, staffed by police, prosecutors, tax and social welfare experts, who have access to a database containing comprehensive information of all citizens’ criminal, traffic, tax, property, customs, social welfare and

⁵⁴⁹ Booz Allen Hamilton, Comparative Evaluation of Unexplained Wealth Orders, sponsored by the U.S. Department of Justice

⁵⁵⁰ Ibid, Pg.50

⁵⁵¹ Ibid Pg. 1-4

consumer credit records. This gives the CAB access to comprehensive information for analysis of assets ratio to income for investigation and prosecution purposes⁵⁵².

Australia adopted its first UWO law in 2000, four years after Ireland, but its UWO has not been as successful like in Ireland due firstly, to opposition by the Australian courts, secondly, trepidation by the prosecutors to bring actions under these new laws, thirdly, lack of cooperation between the police and prosecutors on the use of the law, fourthly, lack of forensic accounting staff and fifthly, a strict forfeiture laws for drug crimes which in some cases obviate the need for UWOs, the sixth reason is the peculiar Australian tax law where a property owner can meet his burden of proof by ascribing the source of his wealth to inheritance or gambling winning, because Australia does not mandate reporting of such earning to tax officials, this shifts the burden back to the prosecution which in the absence of paper trail renders the state handicap to rebut the property owner's claims, and finally, the absence of a centralised agency similar to the Ireland CAB for coordination of activities, thus resulting in lack of public support⁵⁵³. It could therefore be concluded that for a successful implementation of unclaimed wealth approach to recovery of illicit wealth, all the observed pitfalls in the Australian model must be avoided while Ireland's model presents a good option subject to local circumstance in each jurisdiction.

6.2 Corporate Criminal Liability

Under the English common law, for commercial purpose, a corporation is clothed with legal personality different from its subscribers, officers and employees⁵⁵⁴ (this confers on corporations, name, capacity to own property, enter into binding contracts, power to sue and be sued and perpetual succession) because it is an artificial creation, its decisions are taken by two organs (the General Meeting and the Board of Directors) the members do not necessarily own the corporate asset and liability except the aggregate unit of allotted

⁵⁵² Ibid

⁵⁵³ Ibid Pg. 1-4

⁵⁵⁴ Salomon v Salomon [1897] AC 22

shares, the Board of Directors (are appointed by the shareholders at the General Meeting of the company and they are saddled with management and control of the corporation), the resolutions of the General Meeting are deemed the acts of the company as delegated to the board of directors, individual directors or other agents or servants; while agency relationship exists between the corporation and board of directors, there is no such relationship between members and the corporation; the latter can only perform duties as empowered by its Articles of Association, whatever is beyond its object clause is ultra vires; but despite the numerous advantages of incorporations, there are some problems, for example, a corporation, not being a natural person cannot form an intent to commit an offence and cannot be imprisoned for its crime; consequently, how would it be held responsible for the acts and omission of its officers while performing their assigned roles or should the officers be held personally culpable in such circumstance? The criminal law jurisprudence presupposes the element of mens rea – actus non facit reum nisi mens sit rea (an act does not make a person guilty unless the mind is guilty). Possible answers to the questions of attribution of knowledge of the servant to the company are verse and diverse, as corporations began to play significant commercial roles, there arose instances where they caused serious harm to the society and they began to be punished for public nuisances⁵⁵⁵, as far back as 1635, the King's Bench had held a corporation liable for nonfeasance⁵⁵⁶, but there is still the imperative of finding a way of attributing the culpability of the former to the latter in mens rea offence, the state of mind of a natural person began to be attributed to it⁵⁵⁷, while the civil law of tort had developed the theory of vicariously liability to hold a master or an employer liable for acts and omissions of its

⁵⁵⁵ Ved Nanda, Corporate Criminal Liability in the United States: Is a New Approach Warranted? Am. J. Comp. L. 58, 605; Up till the mid 19th century, U.S courts had followed the English doctrine of excluding corporations from misfeasance and misdemeanour

⁵⁵⁶ The case of Langforth Bridge, 79 Eng. Rep. 919 (K.B. 1635)

⁵⁵⁷ The Law Commission Paper No 195, Criminal Liability in Regulatory Context, Para 5.2

<http://lawcommission.justice.gov.uk/docs/cp195_Criminal_Liability_consultation.pdf> accessed 27/1/2015

servants or employees⁵⁵⁸ within the scope of service or employment except when acting on frolic of his own⁵⁵⁹, same applies under the doctrine of agency in contractual relations to hold the principal liable for the acts of his agents, the rationale being that the employer has the means to insure against the risk and distribute the cost on price or cost of goods and services indirectly paid by the consumers, hence, the victim need not sue the employee or agent who may have no means of paying the damage⁵⁶⁰ but as a general rule, vicarious liability is inapplicable under the English criminal jurisprudence, however, in order to find a way of attributing the knowledge of an officer to the company, by 1915, the directing mind theory was introduced by the Courts, application of which has raised further issues of cadres and class of individual's acts and type of states of minds to be attributed to the corporations⁵⁶¹ as enunciated in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*⁵⁶², per Viscount Haldane:

*"A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation"*⁵⁶³.

Cheong-Anne⁵⁶⁴ noted that many English cases had been inconsistent in holding corporation responsible for crime of its agent until the 1940s cases of **DPP v KENT and Sussex contractors**⁵⁶⁵ when Mac Naghten J said:

⁵⁵⁸ respondeat superior in the U.S

⁵⁵⁹ Joel v Morison [1834] EWHC KB J39

⁵⁶⁰ Cheong-Anne Png, 'Principle of attribution in the context of corporate liability' (DPhil thesis, IALS 2000) 139

⁵⁶¹ The Law Commission Paper No 195 (n 557) para 5.2

⁵⁶² [1915] AC 705

⁵⁶³ Ibid, 713

⁵⁶⁴ Cheong-Anne (n 560) 49

⁵⁶⁵ [1944] 1 KB 551; same approach in R v ICR Haulage Ltd [1944] 1 AER 551, also Moore v I. Bressler Ltd [1944]

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‘A body corporate is a person to whom amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention. . .it can only know or form an intention through its human agents...the knowledge of the agent may be imputed to the body corporate ‘

Thus establishing that in some circumstances, the knowledge and intent of an agent may be imputed to the corporation, without making reference to the earlier *LENNARDS case*⁵⁶⁶ although a subsequent House of Lords decision in *Tesco Supermarkets Ltd v Natrass*⁵⁶⁷ upheld the directing mind theory enunciated in *Lennard’s case*⁵⁶⁸ and distinguished it from employer/employee, principal / agent relationship, consequently, a corporation is guilty only for regulatory or criminal offence if the actus reus and mens rea exist not just in any servant or agent but in the person exercising management control. However, TLC paper⁵⁶⁹ regards the decision of the House of Lords in *Natrass*⁵⁷⁰ as the most restrictive application of directing mind doctrine in corporate criminal liability⁵⁷¹ for exonerating the corporation from the act of a Branch Manager, held not to be part of the directing mind of the corporation and noted that this could be distinguished in future as an interpretation of a specific legislation⁵⁷².

The main advantage of the directing mind theory lies in the identification of perpetrators of the crime, it scrutinises if they represent the company’s mind and will⁵⁷³, this enabled attribution of liability on a corporation for virtually any offence, including those that require mens rea except offences not punishable by fine like murder, rape and bigamy⁵⁷⁴

⁵⁶⁶ [1915] AC 705

⁵⁶⁷ [1972] AC 153

⁵⁶⁸ [1915] AC 705

⁵⁶⁹ No 195 (n 103) para 5.46

⁵⁷⁰ [1972] AC 153

⁵⁷¹ The Law Commission Paper 195 para 5.45

⁵⁷² Due diligence requirement in S.11(2), Trade Descriptions Act 1968

⁵⁷³ James Gobert, “Corporate criminality: four models of fault” (1994) 14(3) Legal Studies 393, 395

⁵⁷⁴The Law Commission Paper 195, Para 5.10

(for obvious reasons this crime is beyond a corporation). However, the directing mind approach seems inadequate because it is restrictive in scope as it applies in reference to the status and authority of the officer acting for the corporation⁵⁷⁵ and fails to reflect the reality of the complex, modern management structure of multinational corporations⁵⁷⁶ where enormous powers and responsibilities are often delegated to various cadres of management staff without necessarily being at the very top hierarchy; further, the size, business objectives and jurisdiction of a company may inform its structure and controlling mind, a general principle of identification applicable to a small corporation may not necessarily apply to multinational corporations⁵⁷⁷; failure to resolve these ambiguities will perpetuate the existing injustice, such that multinational corporations would hide under the principle to deny responsibility for acts of their employees despite enormous responsibilities assigned to such persons, for this reason, Gobert thinks the identification doctrine ‘*works best in cases where it is needed least [small businesses] and works worst in cases where it is needed most [big business]*’⁵⁷⁸

In view of the foregoing, it is imperative to have a new approach and reform of corporate criminality, in response to which Cheong-Anne Png⁵⁷⁹ suggested:

1. Functional approach where the knowledge of the agent or servant of the corporation who has been assigned with specific duties is attributed to the corporation like *EL Ajou v Dollar Land Holdings Plc*⁵⁸⁰ and

⁵⁷⁵ per Eveleigh J. in *R v Andrews weatherfoil ltd* [1972] 1 WLR 118, 124

⁵⁷⁶ John Smith & Brian Hogan, *Criminal Law* (12th edition, OUP 2008) 24, see also, C. Clarkson, “Kicking Corporate Bodies and Damning Their Souls” [1996] *Modern Law Review* 557, 561

⁵⁷⁷ The Law Commission Paper 195, 105

⁵⁷⁸ James Gobert, *Rethinking Corporate Crime* (Butterworths 2003) 63

⁵⁷⁹ Cheong-Anne (n 560) 49, 50-51

⁵⁸⁰ [1993] 3 AER 717

2. Contextual approach where knowledge of the servant and agent is attributed to the corporation by virtue of specific regulations immaterial if they are its directing mind and will, as seen in *Director of Fair Trading v Pioneer Concrete UK Ltd*⁵⁸¹; *A-G Reference (No.2 of 1999)* and *Meridian Global Funds v SEC*⁵⁸² all establish that although the directing mind may be found in the directors, however, it is not a rigid rule, as it may be extended to other employees in appropriate circumstances

The initial approach in Nigeria is similar to the decisions in *LENNARDS CASE*⁵⁸³ with emphasis on the status of the employee; this is reflected in the Nigerian Court of Appeal decision in *Adeniji v State*⁵⁸⁴, Per Sulu-Gambari, JCA:

‘ . . . Corporations being a legal fiction can only act and think through their officials and servants. For the purpose of imposing criminal liability upon corporations other than vicarious responsibility, the conduct and accompanying mental state of senior officers, acting in the course of their employment, can be imputed to a corporation ’.

However, since the enactment of the Nigeria Company And Allied Matters Decree, 1990, (now an Act, CAMA) corporate criminal liability has been expanded beyond the common law organic, identification or directing mind theory to a more pragmatic solution that borrows largely from the combination of English⁵⁸⁵ and American law on corporate criminal liability⁵⁸⁶, partially similar to the US Model Penal Code. For example, Ved

⁵⁸¹ (No.2) [1995] 1 AC 456, 473-474

⁵⁸² [1995] 2 AC 500, pp 506 – 507

⁵⁸³ [1915] AC 705

⁵⁸⁴ (1992) 4 N.W.L.R. (Pt. 234) 248, 261

⁵⁸⁵ Nigeria Companies Ordinance introduced to the Southern Nigeria in 1912 by the British colonial government, amended and applicable to the entire country in 1917, repealed in 1922 by 1968 Companies Decree and further repealed in 1990 by the Nigeria Companies And Allied Matters Decree (now an Act) codifies Nigeria Companies law

⁵⁸⁶ Chijioke Okoli, Criminal Liability Of Corporations In Nigeria: A Current Perspective, JAL (1994) 38 (1)

Nanda⁵⁸⁷ observed that as far back as 1909, the US Supreme Court in *N.Y. Central & Hudson River R.R. Co. v. United States*⁵⁸⁸ had extended the application of the principle of agency⁵⁸⁹ to hold corporations responsible for the crime of their employees even where capacity to form a criminal intent is required⁵⁹⁰. In the US, the principle of respondeat superior (derived from law of agency, a variation of vicarious liability in tort) doctrine had become firmly established in corporate criminal proceedings by the mid-20th century by imposing criminal liability on corporations for the crime of their employees while acting within the scope of employment⁵⁹¹, or in the course of employment⁵⁹² or within the scope of employment or in the course of performing an authorised act⁵⁹³; a corporation needs not benefit from its agent's actions for it to be held liable⁵⁹⁴ except in cases of receiving bribe by the employee for personal benefit. This principle was applied in *United States v Bank of New England, N.A.*⁵⁹⁵ when a federal appellate court applied 'collective knowledge' otherwise referred to as the aggregation theory of corporate criminal liability to convict the offending bank for failing to file CTR within the stipulated time under the Act. The court held that the knowledge of individual employees acting within the scope of their employment can be attributed to the corporation that employ them; although Sara Beale⁵⁹⁶ argued that holding an entity vicariously liable for

⁵⁸⁷ Ved Nanda, Corporate Criminal Liability (n 101) 60

⁵⁸⁸ 212 U.S. 481 (1909)

⁵⁸⁹ The Doctrine of Respondeat Superior Source, (1903) Harv.L.R, 17, 1, 51, explained as a fundamental principle of civil law of agency holding masters responsible for damages to third parties caused by the negligence of their servants in the course of their employment in civil jurisdictions

⁵⁹⁰ Though the case involved the violation of the Elkins Act, a federal statute under which vicarious criminal liability was imposed, nevertheless, the Court denied the company of the old doctrine that a corporation cannot commit a crime.

⁵⁹¹ U.S. v. Armour & Co., 168 F.2d 342, 343 (3rd Cir. 1948)

⁵⁹² United States v A&P Trucking Co., 358 U.S. 121, 126 (1958)

⁵⁹³ United States v. Cincotta 689 F.2d 238, 241 (1st Cir. 1982)

⁵⁹⁴ United States v Automated Medical Laboratories Inc., 770 F.2d 399, 407 (4th Cir. 1985)

⁵⁹⁵ 820 F.2d 844 (1st Cir. 1987)

⁵⁹⁶ The Development and Evolution of the US Law of Corporate Criminal Liability, 11

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5910&context=faculty_scholarshipaccess>

accessed 17/02/2016

the conduct of its agents and employees appears inconsistent with the principle of criminal responsibility, however, in support of the principle, she drew attention to the enormous impact exerted by corporations on individual workforce behaviour⁵⁹⁷, consequently, a corporation ought to be held culpable and subjected to criminal sanctions for its corporate environment or culture that produces the wrongdoing or else a culture of impunity would be encouraged and result in increased violation of societal norms at a significant cost to the legitimacy of the legal system⁵⁹⁸.

In Nigeria, corporations are not only criminally culpable by virtue of the identification or directing mind theory; they are also liable by virtue of principle of agency whereby corporations are vicariously liable for expressly or impliedly authorised acts of its agents and employees. For example, *S.65(1)(a) of Nigeria CAMA, 1990* espouses the organic theory by which acts of members in a general meeting, the board of directors or of a managing director in the course business of the company (even when acting by proxy) is treated as the act of the company itself for the purpose of company criminal liability and *S.66, CAMA*, adopts agency principle whereby corporations are liable for the acts of any of its officers or agents if the corporation acting through its members in a general meeting, board of directors, or managing director expressly or impliedly authorised such officer or agent to act in that matter, such criminal act must have been done in the usual course of company's business. It is immaterial if such criminal act is ultra vires the object clause of a corporation's Articles of Association⁵⁹⁹, this clause codifies the position of the Nigerian Supreme Court in *James v Mid-West Motors Limited*⁶⁰⁰ which clarified the hitherto ambiguity on tort or crime committed by a company while acting ultra vires the object clause⁶⁰¹, the court held that the master will be liable if a servant or agent is acting

⁵⁹⁷ Ibid 13

⁵⁹⁸ Ibid 14

⁵⁹⁹ S.65(1)(b)

⁶⁰⁰ (1978) NSCC 536

⁶⁰¹ Ibid 38

in the course of his employment or master's business even if the act in question has been expressly prohibited by the corporation⁶⁰².

It could be seen that attribution of knowledge of an individual officer to the corporation does not work, other legal interventions are therefore necessary like the strict liability offence and the doctrine of lifting the veil and under specific legislation. In the first instance, for example, bribery occurs at the senior and the low cadre of the corporation and it could be problematic to hold low level staff who take bribe in the course of business as its directing mind, the UK Bribery Act, S.7 provides a solution in such instance by reversing the attribution rules⁶⁰³ and made it a strict liability offence where corporations are vicariously liable for failure to implement adequate internal policies to prevent their agents and employees from giving or accepting bribery in the course of business, for the purpose of obtaining or retaining business or an advantage⁶⁰⁴; secondly, with regards to lifting the veil, rather holding the company culpable for crime of its agents or employees, the agent may be personally held culpable in few instances when the veil of incorporation is lifted to see those behind the corporation in exceptional circumstances, such as in the UK Supreme court decision in *Prest v Petrodel Resources Ltd*⁶⁰⁵ where the court held that in limited circumstances, the court will lift the veil of incorporation to prevent an offender from evading an existing legal obligation or enforcement of legal obligation, which if not lifted would have given the company or its controller the advantage they would have obtained by the company's separate legal personality. Hence, an individual in control of a corporation could be personally held responsible under statutory exceptions like when he runs the company fraudulently⁶⁰⁶,

⁶⁰² James v. Mid-West Motors Limited, (1978) NSCC 536, 530

⁶⁰³ Jonathan Mukwiri, 'British law on corporate bribery', (2015) JFC 22(1) 17

⁶⁰⁴ Peter Yeoh, The UK Bribery Act 2010:Contents and implications JFC, 19, 1, 2012, 43

⁶⁰⁵ [2013] UKSC 34, see also VTB Capital Plc v Nutritek International Corp [2013] UKSC 5

⁶⁰⁶ s.213 &214 Insolvency Act

directors who operate a public quoted company below required minimum share capital⁶⁰⁷ or liability for debts incurred by the company for acting as a director when under disqualification order⁶⁰⁸. Thirdly, another means of avoiding the pitfalls in the attribution of knowledge challenges is through the enactment of specific legislation like the UK, Corporate Manslaughter Corporate Homicide Act 2007 which imposes liability on companies for manslaughter arising from gross negligence even when no individual Director may have contributed to a death as long as the negligence of Directors (or equivalent persons) played a substantial role in causing the unlawful death. Though, this approach is only applicable to liability for gross negligence, it will not apply in offences requiring proof of fault⁶⁰⁹ but TLC⁶¹⁰ had argued that it could also apply to simple negligence.

The way forward in interdicting fraud, to discourage professionals from facilitating financial crime and corporate culture of corruption is to focus on holding the corporations culpable for the crime and dishonest conduct of their employees, this will reduce the facilitative role of corruption in fraud, a corporation should be culpable for their employees who facilitate financial crime or committed fraud while acting for the corporation, after all such employees are not absolved from personal liability⁶¹¹ unless liability for the offence is excluded under the relevant legislation or where such an officer is not charged for the offence. Above all, the major problem confronting many nations in dealing with financial crime is not the dearth of adequate anti financial crime legislations but the pervading culture of impunity, lack of transparency that facilitates dishonesty and corrupt practices permeating the entire society which has destroyed the conscience of the society in validation of the biblical truth that “Righteousness exalts a nation but sin is a

⁶⁰⁷ 1986, s.767(3) Companies Act, 2006

⁶⁰⁸ Companies Director Disqualification Act, 1986, s.15

⁶⁰⁹ The Law Commission Paper 195, Para 5.92

⁶¹⁰ Ibid para 5.95

⁶¹¹ Cheong-Anne, thesis (n 560) 155; R v Grubb [1915] 2 KB 683, pp 689 – 690, see also Dellow v Busby [1942] 2AER 439

reproach to any people”⁶¹², consequently, the next chapter discusses corruption, the concept of giving, corporate hospitality, the challenges of controlling corruption and possible solutions to the identified problems as they affect the UK, the US and Nigeria.

⁶¹² Bible, Proverbs 14:34

Chapter 7

Corruption – How it is dealt with in the UK, the USA and Nigeria

As revealed in Chapter 6, the prevalence of fraud, money laundering, tax evasion and financial crime generally in Nigeria does not arise from lack of extant legislations, policies and institutions against the scourge but due to the prevailing culture of impunity and lack of transparency that creates opportunity for temptation to do evil because it is the only way to meet expectations. However, this chapter scrutinises the facilitative role of corruption in financial crime, it evaluates corruption and human right, it identifies the difficulties in controlling corruption, examines the option of controlling corruption through decentralisation, deregulation, privatisation, transparency and accountability, it also considered the South Korean model of controlled corruption that permits and fostered economic growth. It distinguishes between bribery, blackmail and stealing and analyses the problem linked with corporate hospitality and gift giving in relation to corruption and identifies the solution proffered under the S.7 of the UK Bribery Act. It also identifies the challenges associated with the concept of entrapment in criminal investigation as a tool for preventing corruption. Furthermore, due to the need for an effective transnational cooperation between states, the thesis also attempts to resolve challenges on prosecution of corruption and territorial sovereignty as it affects the IBA, UN Bribery Act, OECD Convention, Art.3 of ICPO- Interpol constitution that prevents intervention in political offence which includes Exchange control laws and recommends decriminalisation of corruption, need for more effective international cooperation, quitam action and implementation of whistle blower's protection and reward, asset declaration, verification as effective anti-crime control measures.

Corruption is like cancer which may ravage any country just like human body but the lifestyle choices like entronement of transparency, compliance with basic anti-corruption principles, education and awareness of consequences of corruption serve to prevent the possibility of a society contracting it, and where it is prevalent, its effect is

lethal and terminal but with proper management, in this case, specialist tools like transparency and effective disclosure regime could stop the spread of the malignant tumour of corruption. Again, as cancer triggers other sickness and helps shut down different parts of human body so also does corruption facilitate other crimes⁶¹³, fraud, money laundering, economic crime, and even organised criminal activities all of which cripple social and economic development. Corruption manifests in private and public service, especially in public procurements and contracts, as observed in the recent procurement of defence equipment scandal in Nigerian where funds earmarked for military hardware were diverted to private purse of political associates, resulting in the inability of the Nigeria military to effectively fight the terrorist group “Boko Haram”, consequently, some parts of Nigeria territory were lost to the insurgents, leading to problems of accommodating internally displaced persons, ‘kidnap of Chibok girls’, massive loss of military and civilian lives and disruption of economic and social activities in the North Eastern Nigeria.

Generally, corruption undermines human right but the Constitutional Court of South Africa has taken this view a little further in *South African Association of Personal Injury Lawyers v Health and Others*⁶¹⁴ and held that corruption is actually a violation of human right, ditto the supreme court of India⁶¹⁵. However, as earlier mentioned, corruption is an element of many crimes rather than a separate crime⁶¹⁶, it facilitates other crimes in the public and private sectors, with far reaching implications on the state economy, culture and security, in the public sectors, it manifests as embezzlement, abuse of power, conflict of interest or when government embargo on specific goods creates scarcity and

⁶¹³ William Tupman, ‘The characteristics of economic and criminals’ in Barry Rider Research hand book, 3, see also Bill Tupman, ‘Transaction and corruption: some theoretical and practical implications’ in James Sheptycki and Ali Wardark, *Transnational and comparative criminology* (Glasshouse press 2005) 247

⁶¹⁴ 28 November 2000, (CCT 27/00) [2000] ZACC 22

⁶¹⁵ State of Maharashtra Tr. C.B.I Anti Corruption, Branch Mumbai v Balakrishna Dattatrya Kumbhar Criminal Appeal No. 1648 of 2012, 15 October 2012, para 14

⁶¹⁶ Richard Alexander, Corruption as a financial crime, *Company lawyer* (2009) 30 (4) 98

opportunities for rent seeking and inefficiency in public service delivery⁶¹⁷, identifying the root cause of corruption would assist in designing effective anti-corruption policies and strategies and a possible redefinition of corruption for a given society, thus raising the question, if corruption could actually be totally eliminated in the society, and perhaps if the society needs to live with a level of corruption in as long as it is within control like the South Korean experience⁶¹⁸, although decentralisation, deregulation and privatisation was deemed a panacea to some of these challenges⁶¹⁹, transparency and accountability in the public sector is also a pathway to the solution⁶²⁰; thus reaffirming Klitgaard view that corruption thrives in an environment that gives room for monopoly and discretion without accountability⁶²¹ which has been the focus of many anti-corruption regimes. Russell on Crime⁶²² defines corruption as ‘. . . *the receiving or offering of any undue reward by or to any person whatsoever, in a public office in order to influence his behaviour in office and incline him to act contrary to the known rules of honesty and integrity*’.

A breach of duty induced by bribery must be distinguished from a breach induced by blackmail and threats and stealing under theft legislations, for example, Professor John Smith stated inter alia⁶²³:

⁶¹⁷ Anne Krueger, “ The political economy of rent seeking society”, *American Economic Review* (1974) 64, 3, 291-303

⁶¹⁸ D.C Kang, “Bad loans to good friends: money politics and the developmental state in South Korea” , 2002, *International organization*, 56, 177- 2017, see also Ingrida Kerusauskaite ‘corruption and international development assistance’ in Barry Rider (ed) *Research handbook on international financial crime*, 405

⁶¹⁹ Jesper Johnson, ‘Corruption – New strategies’ in Barry Rider edn, *Research Handbook on International Financial Crime*, 397 (Edward Kluwer 2015)

⁶²⁰ J.E Campos and V. Bhargava (ed) ‘Tackling a social pandemic’ in ‘The many faces of corruption: Tracking vulnerabilities at the sector level’, World Bank, 2007.

⁶²¹ Robert Klitgaard, *Controlling corruption* (University of California Press 1991) x,69,71,75

⁶²² (12th ed. Sweet & Maxwell 1964) 381

⁶²³ *Ibid* 8.18

‘ . . . The principal is equally damaged, whether the breach is caused by bribes, threats or deception. The deceived agent is ...in no sense “corrupted”: nor is that word particularly apt for the agent who gives in to threats . . . there is no betrayal by the deceived agent and a possibly excusable one where the agent acts only because of threats...’

Another grey area of corrupt practice is when corporate entities, driven by highly competitive commercial interactions go beyond advertisements to attract business by providing corporate hospitality or public relations to influence the conduct of agent of other companies for a reciprocal conferment of an (undue) advantage on the influencer, this has become a generally acceptable business activity and not regarded as corruption in many jurisdictions⁶²⁴, it is a major challenge to the offence of corruption, similar to the custom of gift giving in many African societies, a common practice in fostering social and personal relationships, rejection of which could be considered antisocial or disrespectful conduct. Peter Verhezen⁶²⁵ buttressing this view, argued that gift giving is a universal social phenomenon found in every culture with reciprocal expectation of a return consciously or otherwise but there are concerns that this reciprocity poisons the social cohesion as it influences the receiver who shows appreciation and thus confers undue competitive advantage against those who did not give⁶²⁶; in the same vein, Antoon Vandavelde⁶²⁷ had argued that there is an ambiguity between gift, bribe and corruption, which renders gift giving prone to misuse, disintegration of the society by the elites in power who make bribery and malpractices "culturally acceptable" but if well nurtured, it could be articulated as corporate social responsibility, in terms of corporate donations to the host community; deductively, if a society properly defines the parameters of acceptable gift, bribe disguised as gift would not earn undue competitive advantage in

⁶²⁴ Ibid Para 5.74 - 5

⁶²⁵ Peter Verhezen, Gifts, corruption, philanthropy: The Ambiguity of Gift practices in business (Verlag Peter Lang Publishers 2009) 6

⁶²⁶ Ibid 33

⁶²⁷ Ibid x-xix

application for public contract and official corruption will be curbed, as argued by the TLC, excluding corporate hospitality from the purview of corruption would lead to bribery being camouflaged as corporate hospitality while paltry bribe would remain an offence⁶²⁸, since corporate hospitality is a reality of modern business practice, the circumstance, the essence and the recipient of it would determine if it is meant to influence the decision, immaterial of its quantity or quality which can be unravelled by the internal control policies of each organisation as regards handling of corporate gifts, such as the UK Bribery Act S.7 which criminalises failure of an organisation to implement internal control against bribery. In Nigeria the conflict created by *S.60 of Nigeria ICPC Act* prohibiting admissibility of any evidence of gift giving as recognised by any custom, profession, trade or on social occasion, is validated by the provisions of the 1999 constitution⁶²⁹ that allows acceptance of gift during festivals recognised by customs but it must be treated as a gift to the public department and not to an individual in the department, notwithstanding this provision, even in African traditional and modern societies, determination of whether a gift amounts to bribery would depend on the given circumstance and the recipient in question.

7.1 Entrapment

Crime investigating officers while gathering evidence sometimes need to induce a suspect with bribe in order to establish the commission of the corruption offence, or by entrapping the suspect or victim, in such situation, how would an undercover agent participating in corrupt practices with intent of exposing it have a valid defence for giving bribe and how would a receiver of bribe be able to raise a defence of being an innocent victim induced to receive bribe? Where corruption is induced by a state agent, would it be morally justifiable to convict the recipient? Would this not appear as the state profiting from its misdeed⁶³⁰? The American criminal law as far back as 1928 had recognised

⁶²⁸ The Law Commission Paper 248, Legislating Criminal code: corruption Para 5.76

⁶²⁹ 5th schedule part 1, s.6

⁶³⁰ Entrapment, Harvard Law Review (1960) 73 (7) 1334

undercover operations as permissible tools of law enforcement⁶³¹, hence, it is a valid defence in the US but not in the UK, in determining its application, US courts would apply subjective and objective tests; the subjective test considers the role of the law enforcement official and the particular offender and the predisposition of the offender to commit the offence; and probe if the state had unfairly counselled an innocent victim into receiving a bribe or lured a criminal with a previous criminal corruption record to receive bribery again, on the other hand, the objective test focuses only on the nature of the police activity, without reference to the predisposition of the offender by verifying if the police conduct amounts to inducing a person to commit a crime, this goes beyond mere request, offer or even persuasions⁶³²; objective test answers the question, if not for the police activity, would the crime have been committed?⁶³³. In 1928, the US Supreme Court in *Casey v United States*⁶³⁴, Brandeis J. dissenting buttressed the importance of preserving the purity of the courts thus:

'The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The government may set decoys to entrap criminals but it may not provoke or create a crime and then punish the criminal, its creature crime'

Four years after *Casey*, a majority of the Court affirmed the defence of entrapment in *Sorrells v United States*⁶³⁵ and twenty five years after in *Sherman v. United States*⁶³⁶, the courts maintained the same principles, again in the 1990s in *Jacobson v. United States*⁶³⁷, it

⁶³¹ Jessica Roth, The Anomaly Of Entrapment, Wash. U. L. Rev. W (2014) 91 (4) 979, 91

⁶³² Entrapment (n 630)

⁶³³ Ibid

⁶³⁴ 276 U.S. 413 (1928), 425

⁶³⁵ 287 U.S. 435 (1932)

⁶³⁶ 356 U.S. 369 (1958)

⁶³⁷ 503 U.S. 540 (1992) 553, 554

was held that the offender in question was induced to commit crime because the state had created his predisposition and concluded:

'Law enforcement officials go too far when they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.... When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.'

Though entrapment is a legal defence in the United States, it has no source in the English common law, in Choo's treatise on entrapment⁶³⁸ citing the House of Lords in *R v Sang*⁶³⁹, reveals that there was no substantive defence of entrapment in England and Wales, it is only relevant in mitigation of sentence, this legal position was reinforced by the same court in *Attorney General's Reference (No.3 of 2000)*⁶⁴⁰ that in appropriate circumstances, entrapment could result in a stay of proceedings to forestall an abuse of court process, '*not because the accused was not guilty or because he could not receive a fair trial or to discipline the police but to protect the integrity of the criminal justice system*'.

However, even in the US and England, the general principle is inapplicable where the entrapment is induced by private individuals, including the media but it must be distinguished from whistle blowing, relying on Hofmeyr Dyer⁶⁴¹, the non application of state entrapment to media practitioners is based on lack of threat to the rule of law and human rights; while distinguishing the divergent aims of the state entrapment from media entrapment, Hack Lai Ho⁶⁴² argued that a journalist induces crime for commercial reasons and not necessarily to ensure criminal conviction; the police, in contrast has a

⁶³⁸Andrew Choo, West Law Uk

⁶³⁹ [1980] A.C. 402

⁶⁴⁰ Re [2001] UKHL 53; [2001] 1 W.L.R. 2060

⁶⁴¹ "The Problem of Private Entrapment" [2006] Crim. L.R. 319, 332

⁶⁴² "State Entrapment" (2010) 31(1) Legal Studies 71, 91

duty to investigate a published news, journalists do not owe the same moral duty as the police in crime detection, though both sides may unravel crime, media entrapper like a private entrapper should according to Ho, be treated as facilitators whose evidence require corroboration, similar to the provision under the Nigerian Evidence Act where the testimony of such accomplices must be corroborated by independent credible testimony, failing which, the judge must warn himself that it is unsafe to convict upon such uncorroborated evidence⁶⁴³. The position in Nigeria is different from the UK and the US, under the Nigeria Evidence Act, a law enforcement official who incited or induces bribery or crime (in general) beyond mere investigation shall be treated as an agent provocateur whose evidence must be corroborated to justify conviction⁶⁴⁴ but where such law enforcement agent only facilitated a predisposed offender to commit an offence, they are not agent provocateurs and their evidence does not require corroboration to justify conviction but the approach is different if an offender is being prosecuted under the Nigeria ICPC Act, S.55 which renders the statement of a state agent admissible in evidence without any need for corroboration so far such witness participation has been reported to the ICPC ab initio; encouraging an unauthorised person to take the law into his hands in crime investigation portends danger of such defence being exploited by “unscrupulous people to perpetuate corruption under the guise of conducting criminal investigation which is an exclusive responsibility of the investigative agencies and not investigative journalists⁶⁴⁵. TLC thinks that introducing such a defence with respect to corruption offences would give rise to a glaring inconsistency between corruption and conspiracy to defraud⁶⁴⁶. Unfair entrapment either as a defence in the US, as a stay of proceedings in UK or as a reason for the court to be circumspect and thus requiring corroborative evidence in Nigeria all serve to protect offenders from miscarriage of justice but justice would however be better served if the three types of defence are available to offenders in the three jurisdictions.

⁶⁴³ S.198, Nigeria Evidence Act, 2011

⁶⁴⁴ R V. David (1961) ANLR 170

⁶⁴⁵ 1998 The Law Commission Paper 248 Legislating Criminal code: corruption Para 5.149

⁶⁴⁶ Para 5.150

7.2 Prosecution of Foreign corruption

The general rule in England is that criminal jurisdiction at common law and statutory offences do not extend to crime committed outside English jurisdiction, consequently, British subjects who commit crime abroad are not indictable under the English criminal jurisdiction⁶⁴⁷ except where there is a specific parliamentary instrument extending the territorial limit on a particular offence⁶⁴⁸. Again, TLC noted that the common law criminal jurisdiction distinguishes between conduct crimes, completed by mere engaging in the crime and result crimes which are completed only when its consequences manifest; a conduct crime is generally indictable at the jurisdiction where the actus reus took place unlike result crimes which is indictable within England only if the result occurs in England, immaterial that the conduct causing it took place abroad⁶⁴⁹. Corruption is a conduct crime and there was no statutory instruments extending territorial jurisdiction over corrupt act committed outside England under the repealed common law, consequently, English court only had jurisdiction over the corruption offence committed within England⁶⁵⁰, these lapses are the reasons why the new UK Bribery Act 2010 was introduced, similar to the lacuna in the American law where there was no prohibition of bribery of FPO by US citizens and entities thus resulting in enacting the FCPA 1977 as amended by IBA 1998⁶⁵¹.

⁶⁴⁷ Para 7.3, *Cox v Army Council*, [1963] AC 48 and *BBC Enterprises Ltd v Hi-Tech Xtravision* [1929] 2 WLR 1123

⁶⁴⁸ For example, *Offences Against the Person Act 1861*, s 9; *Customs and Excise Management Act 1979*, s 148. The territory of England and Wales is extended so as to include British controlled aircraft if the act taking place on board would be an offence in this country and is not an authorised act under the law which applies to the territory over which the plane is flying: *Civil Aviation Act 1982*, s 92. Where any act in relation to property or person done by any master or seaman employed on a UK ship would be an offence if done in the UK, it is treated for the purposes of jurisdiction and trial as if it had been done within the jurisdiction of the Admiralty of England: *Merchant Shipping Act 1995*, s 282, cited in 1998 *The Law Commission Paper 248*, 103, Para 7.4

⁶⁴⁹ *R v Bevan* (1987) 84 Cr App R 143

⁶⁵⁰ 1998 *The Law Commission Paper 248* Para 7.7

⁶⁵¹ Peter Johnstone, George Brown, *International Controls of Corruption: Recent Responses from the USA and the UK* (2004) JFC 11, 3

In England, the 2008 TLC Report proposed a repeal of the common law offence of bribery, the 1889, 1906 and 1916 Acts; and some parts of other statutory provisions; to be replaced by:

- I. Two general offences of giving and receiving bribery
- II. One specific offence of bribing a foreign public⁶⁵² and
- III. A new corporate offence of negligently failing to prevent bribery by an employee or agent⁶⁵³.

These offences relate to public function and private business, in the course of employment by natural and legal entities⁶⁵⁴. The new corporate offence is similar to the provisions of International Bribery Act as it extends the gamut of the law rendering corporate entities liable for failure to prevent third party bribery for payment of bribe; a legal person can only be exonerated if there exists an adequate internal anti-bribery control measures as “credible deterrence” is the basis of the IBA approach to infractions of transaction reporting requirements which though not defined; its meaning can be fathomed from references in Financial Conduct Authority publications. It is the philosophy that guides the FCA in its quest to promote confidence in the UK financial market⁶⁵⁵ through a robust use of civil and criminal prosecution. In order to achieve results, prosecutors in the UK and the US encourage companies to voluntarily disclose violations and cooperate with them in return for more lenient treatment, this has influenced corporate self-report⁶⁵⁶ among the US companies registered with the SEC,

⁶⁵² Bribery Act, s.6 - bribery of foreign public official, similar to Council of Europe criminal law convention on corruption, 1999, Article 5 on bribery of foreign public officer, and UCAC, Art.16

⁶⁵³ Bribery Act, S.7; Council of Europe criminal law convention on corruption, 1999 Art 18 requesting each state to ensure that corporate entities are held accountable for any breach of the offences established in the provisions of Art. 2 to 14, and UCAC, 2003 Art.26

⁶⁵⁴ Bribery Act, S.3(2)

⁶⁵⁵ Gary Wilson and Sarah Wilson, The FSA, “credible deterrence” and criminal enforcement –a “haphazard pursuit?” (2014) JFC 21, 1, 8

⁶⁵⁶ Ernst & Young, Developing an anti corruption compliance network, Pg.11

following the passage of the Dodd-Frank Act in 2010 which created a new Whistleblower reward program which in certain circumstances, allows employees of companies registered with SEC to receive about 30% of any financial penalty resulting from reported allegations⁶⁵⁷. Consequently, companies who fail to report may find their employees blowing the whistle.

Unlike the UK, the USA does not have a single anti-corruption law, they are scattered in various codified legislations first, there are four specific legislations⁶⁵⁸ criminalising corruption by public officials, two of which require specific, direct link and intent to give or to receive bribe in exchange for an official act, thus making bribery a difficult charge to prove⁶⁵⁹, secondly, there are various state bribery statutes⁶⁶⁰, thirdly, §1346 fraud

<[http://www.ey.com/Publication/vwLUAssets/UK_Bribery_Act_Developing_an_anti-corruption_compliance_framework/\\$FILE/EY_UK_Bribery_Act__Developing_anticorruption_compliance_framework.pdf](http://www.ey.com/Publication/vwLUAssets/UK_Bribery_Act_Developing_an_anti-corruption_compliance_framework/$FILE/EY_UK_Bribery_Act__Developing_anticorruption_compliance_framework.pdf)> accessed 12/01/2015; see also The SFO guidance issued in 2009, on self-reporting of overseas corruption which deals with timing of reporting to the SFO, degree of cooperation offered by the company and remedial steps

⁶⁵⁷ A proposed Rules issued would obviate the requirement on employees to first raise a matter internally before going to the SEC

1. ⁶⁵⁸ 18 U.S.C. § 201, Bribery of public officials and witnesses
2. 18 U.S.C. § 666, Theft or bribery concerning programs receiving Federal funds;
3. 18 U.S.C. § 1951 (2006) The Hobbs Act criminalising extortion by government officials;
4. 15 U.S.C. §§ 78dd-1 to -3 (2006) The Foreign Corrupt Practices Act, criminalising the bribery of foreign public officials

The FCPA, a similar interpretation to 18 U.S.C. § 201 applies by state and local officials employed by agencies that receive more than \$10,000 in federal program grants. It includes a “corrupt intent” but not a quid pro quo limitation and recently held to cover payments made with the intention to produce future but yet unidentified favours in *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010) cited in Lisa Griffin, ‘The Federal Common Law Crime Of Corruption’, *North Carolina Law Review* (2011) 89 (5) 1818

⁶⁵⁹ *United States v. Sun-Diamond Growers of Cal.* 526 U.S. 398, 404 (1999); see also *United States v. Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002) “Bribery involves the giving of value to procure a specific official action from a public official” cited in Lisa Kern Griffin (n 657)

⁶⁶⁰ For example, lobbying and campaign finance regulations, state and federal conflict of interest provisions 2 U.S.C. § 437g(d)(1)(A) (2006) authorizing criminal prosecution of campaign finance violations; 18 U.S.C. §§

statutes, the omnibus federal anti-corruption prosecution tool and fourthly, corruption as a predicate offence under RICO Act, 1970⁶⁶¹, while the UK Bribery Act encompasses both local and foreign bribery, the US has a separate law covering foreign bribery, that is the FCPA 1977 as amended by International Anti bribery Act, 1998 to implement the 1997 OECD Convention on Combating Bribery of FPO in International Transactions (the OECD Bribery Convention)⁶⁶². The main US federal anti-corruption law developed from the crucible of anti-fraud law of Mail and Wire statutes, discussed in chapter 5 of this thesis, with hazy and confusing subsequent restrictive interpretation of the term “deprivation of honest services” by focusing on the nature of the damage the corruption caused⁶⁶³. James Strandere⁶⁶⁴ observed that the federal mail fraud statute⁶⁶⁵ and its accompanying “honest services” provision⁶⁶⁶ being jointly used to prosecute corrupt public officials and private employees⁶⁶⁷ are epitomes of fluidity and inconsistencies of the US crime law on corruption⁶⁶⁸. It was as recent as June 24, 2010 that the courts developed a coherent principle defining intangible right of honest services in *Skilling v United States*⁶⁶⁹ when the US Supreme Court held that 18 U.S.C. §1346 which proscribes fraudulent deprivations of “the intangible right of honest services,” criminalises only

203–209 (2006 & Supp. 2009) (conflict-of interest statutes, cited in North Carolina Law Review, Vol. 89, Pg.1819

⁶⁶¹ 18 U.S.C. §§ 1961-1968

⁶⁶² It deals with accounting transparency under the Securities Exchange Act, 1934 and the bribery of foreign officials such that US citizens or residents, corporations and business entities registered under the US law or having its principal place of business in the US or foreign corporations having any class of securities registered under the Securities and Exchange Act, 1934.

⁶⁶³ Lisa Kern Griffin (n 657)

⁶⁶⁴ ‘A Potent Federal Prosecutorial Tool: Weyhrauch V United States, Duke Journal Of Constitutional Law & Public Policy Sidebar’ (2009) 5 (80) 81 <scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1056&context=> accessed 16/05/2015

⁶⁶⁵ 18 U.S.C.A. § 1341

⁶⁶⁶ 18 U.S.C.A. § 1346

⁶⁶⁷ Sorich v. United States, 129 S. Ct. 1308, 1309 (2009)

⁶⁶⁸ dissenting view per Scalia, J in Sorich v. United States, 129 S. Ct. 1308, 1310 (2009)

⁶⁶⁹ 130 S. Ct. 2896 (2010)

bribery and kickback schemes⁶⁷⁰, the court noted that beginning from the 1940s, interpretation of the Mail fraud statute had laid emphasis on prohibition of ‘*any scheme or artifice to defraud*’, including deprivations of money, property and also intangible rights; unlike traditional fraud where the victim’s loss of money or property is offender’s gain; the honest services doctrine targeted corruption devoid of traditional definition of fraud such that while the offender profited, the betrayed party (the state in case of corruption in public sector and the principal in case of private sector) suffered no deprivation of money or property; instead, a third party who had not been deceived enriched the offender, even if the scheme occasioned money or property gain for the betrayed party, the courts reasoned that enforceable damage lays in the denial of that party’s right to the offender’s “honest services” in public and private sector by public officials and private employees or agents respectively who breached allegiance to their employers by accepting bribes or kickbacks⁶⁷¹. However, in order to douse the argument that the US anti-corruption is vague, the Supreme Court held that confining §1346 to bribery and kickbacks is not unconstitutionally vague⁶⁷² as an ordinary person would understand what conduct the specific penal statute precisely criminalises, with sufficient certainty and in a manner devoid of arbitrary and discriminatory enforcement; a gap which the court filled via this decision⁶⁷³ and rejected expanding §1346 (beyond bribe and kickback) to a wider range of offensive conduct as this would render the law ambiguous⁶⁷⁴; it also failed to extend §1346 to proscribe undisclosed self dealing by a public official or private employee as such interpretation would further deepen the ambiguity in this sphere of criminal law⁶⁷⁵; an offender who misrepresented the company’s fiscal health to foster his personal financial interests, never violated §1346 as there was no proof that he solicited or accepted bribery or kickbacks from a third party in

⁶⁷⁰ Ibid 34

⁶⁷¹ Ibid

⁶⁷² Ibid 38

⁶⁷³ Ibid

⁶⁷⁴ Ibid

⁶⁷⁵ Ibid

exchange for making such misrepresentations which Lisa Griffin insinuated should be applicable to private sector only, as an earlier decision⁶⁷⁶ had held that a public official who makes a legitimate decision but fails to disclose his pecuniary interest in the matter makes the public suffer loss because the public is deprived of its right either to disinterested decision making or to full disclosure of the official's potential motivation behind an official act; it is glaring that in line with the reasoning in *Skilling*⁶⁷⁷, if there was no proof that the offender had solicited or accepted bribery or kickbacks from a third party in exchange for non disclosure even in public sector duties, the statute ought not apply.

Lisa Griffin⁶⁷⁸ argued inter alia that though fraud involves gaining advantage by deception, both fraud and corruption occur in relationships; their proceeds are structured to avoid detection like money laundering and corruption evolved as a subset of fraud enforcement partly due to shared characteristics of the two crimes. Moreover, while the norms against deceptive practices are relatively stable, the norms concerning corruption by public officials shift and vary across jurisdictions⁶⁷⁹. Bribery, kickbacks often involve conflict of interest and nondisclosure are often the basis of prosecuting infraction of honest service⁶⁸⁰, as concealment is harmful and deprives the public to its right to unbiased decision making. for instance, in *Sorich v. United States*⁶⁸¹, the state argued that the employees breached their duty of honest services to abide by the decree, even though they neither received direct economic benefit from the patronage, neither enriched themselves nor improperly rewarded from several persons who received the public jobs nor promotions; the court held that the illegitimate gain from the “dishonest services”

⁶⁷⁶ United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996) 1837

⁶⁷⁷ 130 S. Ct. 2896 (2010)

⁶⁷⁸ Lisa Griffin (n 657)

⁶⁷⁹ *ibid*

⁶⁸⁰ *Ibid*

⁶⁸¹ 129 S. Ct. 1308, 1310–11 (2009)

could flow to parties other than the defendants⁶⁸². Likewise, a public official who makes a legitimate decision but fails to disclose a pecuniary interest in the matter makes the public suffers loss because it is deprived of its right either to disinterested decision making or to full disclosure as to the official's potential motivation behind an official act⁶⁸³. Griffin⁶⁸⁴ further argued that:

*“A politician who steers a public contract to his own company commits essentially the same wrong as one who accepts a bribe to steer the contract to the bribe payer. In each case, the politician’s official actions are being driven not by the public interest, but by the politician’s desire to line his own pockets. Both should be paradigm honest-services violations, but after **Skilling**⁶⁸⁵ only the bribery case may be prosecuted under § 1346.”*

Far before the UN anti-drug and anti-money laundering conventions, the Commonwealth had seized the initiatives eight years earlier to fight the emerging threat to economic and commercial crime by recognising the role of international cooperation, domestic anti financial crime law, schemes for fugitive offenders in ensuring an effective financial crime control. In a report presented by Barry Rider to the 1980 meeting of the commonwealth ministers at Barbados, it was observed that national and international police crime investigation was not effective due to two main restrictions, first, Article 3, ICP-INTERPOL Constitution expressly forbids it from intervening or assisting in political offence; secondly, the restrictive general description of international commercial crime to Exchange Control violation Laws, that is generally not extraditable and would not necessarily be regarded by ICPO-Interpol as an ordinary crime⁶⁸⁶. This limitation of the ICPO was raised as far back as 1967 at the ICPO General Assembly in Japan, as a great

⁶⁸² 129 S. Ct. 1308, 1310–11 (2009), Pg.709

⁶⁸³ United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996) 1837

⁶⁸⁴ Citing Randall Eliason, The Future of Honest Services Fraud, National Law Journal, (2010) 30, 30

⁶⁸⁵ 130 S. Ct. 2896 (2010)

⁶⁸⁶ ‘The promotion and development of international cooperation to combat commercial and economic crime’, Report submitted to the meeting of commonwealth law ministers, Barbados, 1980 memorandum, pg.6

impediment to international fight against cooperation in economic and financial crime⁶⁸⁷ but despite the ICPO General Assembly memorandum on request for more cooperation and mutual assistance in economic crime and the numerous circulars from the General secretariat of ICPO, Interpol and 3 symposia on international fraud held at ICPO in 1968, 1974 and 1979, Barry Rider noted that the efforts only resulted in drawing attention to the need for more cooperation and mutual assistance⁶⁸⁸. Rider further took cognisance of many organs of the UN that have also addressed the problem of international cooperation and assistance, such as the UN Committee on Crime Prevention and Control Meeting in 1974, Geneva which recommended that studies be undertaken on financial intelligence at the national and international levels with a view to reducing the damage to economic, political and cultural development but little success came from this effort. Apart from police to police cooperation, mutual legal assistance within the commonwealth was hitherto, a big problem, as depicted in *AG for Hong Kong v Ocean Timber Transportation Ltd (1978) No.86*⁶⁸⁹, where, in order to assist in their investigation, the Fiji Police authority requested for criminal activity information about the respondent from Hong Kong Police in 1978, the Fiji court refused to compel release of the required information, basing their refusal on the territorial jurisdiction of the Hong Kong court which is not bound by another country's request and secondly on lack of control over any released document to another country. This underscores the legal and practical problem facing police officers when requesting for assistance and vital information from another country's police force on information gathering; this failure manifested in refusal of mutual legal assistance in seizure of stolen wealth, in *Hamid V Government of Singapore*⁶⁹⁰, a case of non cooperation in enforcing violation of Sri Lanka Exchange Control law when precious stones from Sri Lanka were unlawfully imported to Singapore, efforts to ensure a return to the original country where it was illegally removed proved abortive when the Singapore High court held that there was no proof of Sri Lankan

⁶⁸⁷ Ibid 8

⁶⁸⁸ Ibid 9

⁶⁸⁹ Ibid 20

⁶⁹⁰ suit no.1894 of 1973

possessory right over the items, despite the Sri Lankan government contention that under S.44 of Sri Lanka Customs Ordinance, any person exporting or attempting to export precious stones in contravention of the law would forfeit it to the state, nevertheless, the Singapore High court considered the request for forfeiture as restricted to territorial jurisdiction of Sri Lanka. The failings arising from this judgement and many other challenges was addressed in the communiqué issued at the Commonwealth Law Ministers, Colombo Sri Lanka, 1983 which emphasised the exigency of facilitating effective cooperation and judicial assistance in criminal matters within and outside the commonwealth, forfeiture of proceeds of drug trafficking, prevention of crime to be preferred above detection and saddled the Commonwealth commercial crime Unit with criminal intelligence to trace and monitor the proceeds of fraud⁶⁹¹. Rider, in the report had proposed the facilitation of international cooperation within the commonwealth without affecting the political, legal and territorial sovereignty and integrity of member states⁶⁹² and advocated for the creation of two positions, namely: the commonwealth fraud liaison officer (CFLO) who would develop a close working relationship with subdivision of ICPO-Interpol, commercial crime unit of Metropolitan police, city of London company fraud department and FBI to co-ordinate criminal intelligence between relevant international agencies and National authorities⁶⁹³ and secondly, the commonwealth panel of experts (comprising experts in law, accountancy, commerce and other relevant field, including CFLO) to provide expert advice on matters of general or specific interest to the commonwealth, inspection and special investigations⁶⁹⁴, this is expected to facilitate international cooperation and minimise misunderstanding and mistrust among nations, aids evidence gathering from foreign nations, guide against accusations of partiality, supply of experts to countries in need, cost reduction, aid member states in policy formulation and legal drafting, legal advice and dissemination of relevant information⁶⁹⁵

⁶⁹¹ The Commonwealth law ministers meeting, Harare, 1986

⁶⁹² Ibid 30

⁶⁹³ Ibid 31

⁶⁹⁴ Ibid 38

⁶⁹⁵ Ibid 40

but as Commonwealth operates by intergovernmental consensus between member states, it lacks power to enforce its decisions and declarations, it may only resort to persuasions, the only time it has attempted to go beyond this limit was in 1995 when the Commonwealth Ministerial Action Group (CMAG) was established with authority to negotiate, punish and possibly expel any state in flagrant breach of democratic principles although this has yielded little result, the Commonwealth initiatives have accelerated plethora of collaborations between member states and the ICPO-Interpol on international cooperation, mutual legal assistance; it has influenced international opinion, cooperation and assistance on the scourge of financial and allied crime, also, it has formed the basis for bilateral and multilateral agreements on mutual legal assistance, tracing and forfeiture of assets and mutual cooperation among state police forces through the platform of ICPO-Interpol.

7.3 Corruption and criminality

There have been concerns about the appropriateness of designating corruption as crime, in view of the ambiguity on the existing thin line between it and gift, authors like **Bryane Michael**⁶⁹⁶ had preferred civil law remedies against corruption rather than criminalising it because criminalising it would only exacerbate it especially in developing countries, in view of several advantages of civil litigation, as it empowers victims to litigate on their own initiative thereby relieving public prosecutors from a complicated burden of proof. Young⁶⁹⁷ while buttressing this view stated that private victims with resources will naturally resort to a civil action even when there are options of state prosecution probably due to the empowering nature of civil action which allows the victim to assert control over the process; civil litigation also has benefits of secrecy by protecting individual reputation, speedy action that preserves evidence which may be impracticable in criminal prosecution, avoidance of human rights challenges which a criminal trial

⁶⁹⁶ B.Michael, 'Suing against corruption: the role of civil law', (2007) Policy Innovations <www.policyinnovations.org/ideas/innovations/data/000015> accessed 17/02/2016

⁶⁹⁷ Simon Young, Why civil actions against corruption? (2009) JFC 16 (2) 144, 152

might attract⁶⁹⁸ but conversely, there is a danger of not pursuing the case to a logical conclusion or satisfactorily to judgment, again, there are costs and delays that may discourage the plaintiff; Rider⁶⁹⁹ had also warned against such impediments related to civil cause of action like waiver of rights, the appropriate plaintiff to the suit, limitation periods, provision of security of costs, issues of parallel proceedings and costs of proceedings exceeding the recovered amount; all of which create a great amount of risk and uncertainty for civil actions. The 1999 Council of Europe's Civil Law Convention provides common principles and rules of civil law and corruption, and charged member states to provide effective remedies for persons who have suffered damage as a result of acts of corruption⁷⁰⁰, to provide victims of corruption a right to initiate an action in order to obtain full compensation for damages (both pecuniary and non-pecuniary losses) suffered⁷⁰¹.

Young⁷⁰² suggested 5 options available to a plaintiff planning to commence civil action, 3 of which are applicable to private corruption, namely:

1. Breach of trust suits by a principal suing an agent to recover benefits gained or losses incurred
2. Overpayment and recovery by the principal against a third party whose corruption or wrongdoing resulted in loss to the principal
3. Unfair competition suits commenced by private companies claiming to have suffered loss after participating in a tendering exercise in which the tender was awarded to another company as a result of bribes or corruption

The last two categories are applicable to public officials:

4. Regime change proceedings against grand corruption.

⁶⁹⁸ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, (University of Toronto Press 1999)

⁶⁹⁹ Barry Rider, "Recovering the proceeds of corruption" (2007) *JMLC* 10 (1) 31

⁷⁰⁰ *Ibid* Art. 1

⁷⁰¹ *Ibid* Art.3

⁷⁰² Simon Young, *Why civil actions against corruption?* (n 697)

5. Qui tam law suits (*qui tam pro domino rege quam pro se ipso in hac parte sequitur*) i.e. whoever sues in the matter for the king sues as well for himself. It is commenced by individuals who on behalf of the government sue to enforce criminal legislations which, if successfully prosecuted, the individual enjoys a portion of the monetary award made by the court.

Qui tam action, abolished in Britain since 1951 is traceable to the end of the thirteenth century when there was no modern police organisation⁷⁰³; it is similar to the existing US False Claims Act (FCA) 1863 as amended by Fraud Enforcement and Recovery Act 2009 and Patient Protection and Affordable Care Act 2010 which empowers individuals with original information to sue a defendant for committing a specified act of fraud against the government by submitting a false claim for payment but this is applicable only to fraud *stricto sensu* and not corrupt practices in the USA. It is tempting to recommend this approach to enforcement of breach of financial crime in Nigeria but considering the high level of corruption at the Nigeria bar and bench, it could be counterproductive but the whistle blower may be encouraged if the Nigerian president signs into law the Whistle Blower Protection Bill 2015 and secondly by enacting a law similar to Dodd-Frank Act, 2010 (unlike Quitam or False Claim Act) which in certain circumstances rewards Whistleblower employees of companies registered with SEC with approximately 30% of any financial penalty resulting from reported allegations, here, the whistle blower does not prosecute, it is out of the fund recovered by the state that an individual recovers the reward.

Apart from state prosecution, in the UK an individual can commence a civil or private prosecution in public and private sector corruption; however, because there is no private sector corruption offence in Nigeria, only the state or private prosecution of public sector

⁷⁰³ Indira Carr, "Corruption, legal solutions and limits of law", (2007) *International Journal of Law in Context*, 3 (3) 241

corruption is the option; also in the US, there is no private prosecution⁷⁰⁴, though, the federal prosecutor may appoint a private prosecutor to prosecute a crime, an individual can only institute civil action. Civil recovery by states in corruption cases is reinforced by provision of UNCAC Art.53 which recognised the imperative of flexible measures for the return of stolen public assets through direct recovery of property by affected state initiating civil action in another state court⁷⁰⁵ or by direct recovery through an independent civil or criminal proceeding in a state awarding damages to the victim State⁷⁰⁶ and thirdly, by recognising the claim of another state party to a legitimate ownership of property in confiscation matters⁷⁰⁷; these steps provided answer to identified problems of recovery of stolen assets in commonwealth jurisdictions⁷⁰⁸ even as Young⁷⁰⁹ agreed that the UNCAC would have more impact than EU civil convention as it does not focus on civil right of action by states but aims at achieving an effective international cooperation system of recovery proceeds of corruption through civil actions to restrain property from being transferred or dissipated and ensure reduction in costs of dual civil litigation or the need to obtain a Mareva injunction⁷¹⁰.

This multilateral approach to recovery of proceeds of crime could often result in dual processes, which prompted Young's⁷¹¹ advocacy for establishment of safeguards to prevent unfairness and unlawful self-incrimination that might ultimately undermine any criminal

⁷⁰⁴ *Leeke v Timmerman* 454 US 83 (1981) and *Linda R S v Richard D*, 410 US 614 (1973)

⁷⁰⁵ Art.53(a) UCAC

⁷⁰⁶ Art.53(b) UCAC

⁷⁰⁷ Art.53(c) UCAC

⁷⁰⁸ *Gulam Mohimmed V Government of Singapore*

⁷⁰⁹ Simon Young, *Why civil actions against corruption?* (n 697)

⁷¹⁰ *Mareva Compania Naviera SA v. International Bulk Carriers SA* [1980] 1 All ER 213; [1975] 2 Lloyd's Rep. 509 (CA), held that where it appears that a debt is due and there is a threat that the debtor may dispose of his assets in order to defeat its recovery before judgment, the court has jurisdiction to grant an interlocutory injunction to prevent the debtor from disposing those assets

⁷¹¹ Young, *Why civil actions against corruption?* (n 697)

proceeding. In a related comparative study of double jeopardy, Tyler Hodgson⁷¹² noted that a single illegal transaction can expose a company or its officers to simultaneous or successive multi-jurisdictional proceedings; given an hypothetical case of a French citizen who is a senior officer of a company incorporated in the US, quoted on the LSE who bribes a public official in foreign jurisdiction like Nigeria could be exposed to enforcement actions for the same offence in at least four different jurisdictions, namely, in the USA⁷¹³, UK⁷¹⁴, France⁷¹⁵ and Nigeria⁷¹⁶ with possible contravention of variations of double jeopardy⁷¹⁷ in force in such countries; double jeopardy is a principle of law estopping a court from assuming jurisdiction over a person where there is a previous judicial resolution of the exact same offence, based on same facts, in a court of competent jurisdiction, in a subsequent foreign or domestic prosecution; ceteris paribus, the Canadian, the UK and Nigeria courts would take cognisance of an earlier conviction or acquittal for the same transaction by a foreign court as estoppels for any further domestic prosecutions⁷¹⁸ as indicated by the 1964 House of Lords Decision in *Connelly v DPP*⁷¹⁹ and affirmed by the same court in 2010 in *DPP v Alexander*⁷²⁰ but there was a major change in

⁷¹² "The gift that keeps on giving" Does the protection against double jeopardy have any application to international crime?, (2012) JFC 19 (4) 327

⁷¹³ §78dd-2(h)(1) and 78dd-2(i) FCPA now International Bribery Act

⁷¹⁴ Bribery Act s. 7(5)

⁷¹⁵ The French Penal Code, Art. 113-6, and the Anti-Corruption Act

⁷¹⁶ the criminal code, ICPC Act or EFCC Act

⁷¹⁷ simply defined as second trial for the same offence in Black's Law Dictionary Free Online 2nd Edition

⁷¹⁸ The international context of the common law doctrine of double jeopardy, adopted by Canada was restated in Treacy v. DPP [1971] 1 All ER, 122, Per Lord Diplock: '*The common law doctrine of autrefois convict and autrefois acquit . . .has always applied whether the previous conviction or acquittal based on the same facts was by an English court or a foreign court; cited in Tyler Hodgson, 'The gift that keeps on giving' Does the protection against double jeopardy have any application to international crime?', JFC (2012) 19 (4) 328; also Nigeria ICPC Act, 2000 S.166(2), Nigeria Criminal Procedure Act S.171 and S.180-184, Nigeria Evidence Act, 2011, S.59-63; S.36(9) 1999 constitution and FRN V. Igbiniedion (2014) Law Pavilion Electronic Report (LPER) 22760 (CA)*

⁷¹⁹ [1964] A.C. 1254

⁷²⁰ [2010] EWHC 2266 (Admin); [2011] 1 W.L.R. 653

this area of law in the UK in April 2005 following TLC Report⁷²¹ recommending a retrial of an acquitted person where a new and compelling evidence⁷²² exists and in the interests of justice⁷²³ in specific listed offences⁷²⁴. This new position of law was applied in *R v D*⁷²⁵ where the court ordered a retrial of a decided case when new compelling evidence emerged in its support. Though Art.4 (1) to the 7th Protocol ECHR prohibits double jeopardy, nevertheless, in Art.4 (2), a retrial in certain circumstances is justifiable. However, the exceptions of retrial to the rules of double jeopardy⁷²⁶ does not extend to cases of corruption, fraud, money laundering, consequently, in financial crime and corruption cases, an acquitted or convicted offender cannot be retried for the same offence in Nigeria, England and Wales but as regards the USA, Hodgson contended that the principle applies differently, a foreign court judgement would not be recognised by the US courts unless such foreign judgement involves the US authorities; the US approach is unfairly and unjustifiably different from the UK and Nigeria principle of double jeopardy⁷²⁷, although the Fifth Amendment to the US constitution protects against double jeopardy but its jurisprudence created “dual sovereignty” doctrine which holds every citizen liable to dual allegiance to the state government on one hand and the federal government on the other hand⁷²⁸, in *Moore v Illinois*⁷²⁹, the court held that ‘*Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns . . . the same act may be an offence or transgression of the law or both*’. If the same criminal act violates distinct state and federal laws, it could be deemed as two separate and distinct offences under the dual sovereignty doctrine of the

⁷²¹ The Law Commission Paper no.267, Double jeopardy and prosecution Appeals

⁷²² Now codified in S.78 CJA, 2003

⁷²³ S.79 CJA, 2003

⁷²⁴ Pt.1 Sch.5 (murder, manslaughter, kidnapping, sexual offences, drug offences, criminal damages, war crimes)

⁷²⁵ [2006] EWCA Crim 1354; [2007] 1 W.L.R. 1657

⁷²⁶ Pt.1 Sch.5, CJA 2003, UK

⁷²⁷ Tyler Hodgson (n 96) 326

⁷²⁸ Ibid 328

⁷²⁹ 55 US 13, 16 (1852)

federal and state government except where the two different legislative or law enforcement bodies derive their authority from the same source of power⁷³⁰, for example, in the *Heath case*⁷³¹, the offender, a resident of Alabama was charged with murder of a deceased whose body was found in another state, Georgia where the offender pleaded guilty in exchange for mitigated sentence of life imprisonment but three months thereafter, the Alabama court charged and convicted the same offender for the same offence of murder in cognisance of his earlier guilty plea for the same crime in Georgia. In dismissing his appeal, the US Supreme court noted that subsequent prosecutions are barred under the Fifth Amendment only if the two offences “are the ‘same’ for double jeopardy purposes” and since Georgia and Alabama are two separate sovereigns, the two charges of murder cannot be considered the same for Fifth Amendment purposes⁷³².

The American system of double jeopardy extends to international criminal trials as shown in *US v Jeong*⁷³³, the offender, a South Korean national was charged and convicted of bribing two US officials in relation to a contract in South Korea. He was tried, convicted and sentenced to imprisonment and a fine but the USA made a formal application for evidentiary material under the Mutual Legal Assistance Treaty between the two countries, assuring the South Korean Government that it would not seek any further prosecution of Jeong⁷³⁴; the offender was later invited to the USA to negotiate his outstanding claims but got arrested, sentenced to terms of imprisonment and fine; on appeal, he claimed that double jeopardy doctrine prohibits successive prosecutions by different nations for the same crime, the court dismissed the appeal, stating that its court would not deviate from established principle to Fifth Amendment jurisprudence in the international context.

⁷³⁰ Heath v Alabama 474 US 82, 90-91 (1985)

⁷³¹ Ibid

⁷³² ibid

⁷³³ 624 F.3d 706 (2010)

⁷³⁴ United States v. Jeong, 624 F.3d, at 709

In Nigeria, the ICPC Act created corruption offences and established a Commission⁷³⁵ responsible for receiving, investigating and prosecuting corrupt offences⁷³⁶; the ICPC reviews the practices, systems and procedures of public bodies and where in the opinion of the Commission, such practices or procedures facilitate fraud or corruption, it directs and supervise their review⁷³⁷. Official Corruption under ICPC Act is wider in scope, clearer and provides stricter punishment than the criminal codes and relatively similar to the UK Bribery Act in scope; the two Nigeria main anti-corruption laws, the Nigeria criminal code and ICPC Act operate concurrently at the federal level and like the UK Bribery Act, they both prohibit the receiving⁷³⁸ and giving⁷³⁹ of bribe in public office; an allusion to the principle of agency in S.17 ICPC Act tends to distract observer to think that the Act applies to corruption in the private sector but given the fact that its S.12 prohibits conflict of interest, affirms duty of loyalty of public officials only, it prevents public officials from private interest in a company vying for public contract except as a share holder of public quoted company⁷⁴⁰, the Nigerian law fail to provide a similar law to the UK corporate offence of negligently failing to prevent bribery of an employee or agent, thus stretching the argument further that the Nigeria anti corruption law is inapplicable to corruption in the private sector and lastly, under the ICPC Act, only the Attorney General of the federation can institute a criminal action or whoever he delegates such power to sue with no provision for civil recovery.

⁷³⁵ S.3 (1)

⁷³⁶ S.6 (a)

⁷³⁷ S.6(b),(c),(d)

⁷³⁸ S.8 ICPC Act

⁷³⁹ S.98 A(a-b) similar to S.9 (1) (a-b) ICPC Act, 2000

⁷⁴⁰Ss.101 and 102 Criminal Code, similar to S. 57(9)(b), Public Procurement Act, 2007 mandating public officers not to engage in commercial transactions with any government ministries or departments which may result in financial advantage to him and punishable with an imprisonment of 5 years or 1 million Naira fine and a dismissal from the public service)

Furthermore, similar to the UK Bribery Act and the US International Bribery Act, the ICPC Act also criminalise giving bribe to FPO although its context is vague and liable to subjective interpretations by combined effect of its S.13 and S.66(1) as it indirectly criminalises bribery of foreign public officials such that a Nigerian resident or citizen must not receives bribe outside Nigeria in circumstance that constitutes an offence in Nigeria and any circumstance that constitutes an offence under a law in force abroad, deductively, though the wordings of the two sections emphasise receiving but the act of giving bribe is also an offence in Nigeria and in many other foreign jurisdictions, giving bribe to a FPO constitutes an offence, if done within or outside Nigeria. Again, S.12 Nigeria CPA, renders Nigeria criminal law applicable to all residents for any initial element of an offence which occurs in Nigeria as if all subsequent elements of the offence had occurred in Nigeria or if an offence occurs outside Nigeria and the offender afterwards enters Nigeria.

In addition to the specific anti-corruption criminal provisions in the criminal code and the ICPC Act, there are some offences prohibiting corrupt giving, the essence of which has been captured in the general provision of the law but only being re-emphasised in other to show the importance attached to it⁷⁴¹. In summation, the dearth of judicial interpretation and failure of Nigeria criminal codes and the ICPC Act 2000 to define corruption makes an accurate and clear meaning of corruption uncertain within the Nigeria geo-political and cultural context but a clear understanding of Nigeria law of corruption could be gleaned from the statutory provisions of both laws (ICPC Act and Criminal code) thereby providing a general philosophy and principle of corruption which may be inferred as the receipt or giving gratification to a public official (or to a 3rd party on his behalf) as an inducement for acting, refraining from acting or acting illegally in public position or by using official position to confer corrupt or unfair advantage upon

⁷⁴¹ Corruption by false accounting in S.103 and S.16 ICPC Act LFN 1990; arbitrary act and abuse of office, S.104; peddling of influence by demanding or receiving bribe to facilitate employment or proposed employment in the public service, S.112 and S.22 ICPC Act

self, any relation or associate⁷⁴², such inducement could relate to public auctions, inflating the price of goods and service above the prevailing market price, compromising professional standards, awarding contract without budget approval, diversion of budgetary allocation; including dealing with or concealing any property being subject of bribery and failure to report the offer or demand of bribe⁷⁴³; conversely, failure of the ICPC Act to define corruption may be attributed to the need to avoid restrictive interpretation of the law by giving the courts discretion to fill in the gaps and expand the scope of anti corruption law to meet emerging trends and unlawful corrupt practice.

Furthermore, apart from the statutory provisions on corruption, there are constitutional safeguards against corruption enshrined in the Nigerian 1999 constitution in the asset declaration of public officials, widely considered as an effective anti corruption measure, which has long been a part of the UN, the AU and the Inter-American conventions, however, its effectiveness in reducing corruption depends on a number of factors as observed in Ranjana and Omer's works⁷⁴⁴ who adopted the Transparency International's 2004 Corruption Perceptions Index (CPI), stated that asset declaration has no effect on reduction of corruption even where it is a constitutional provision unless the public has access to the declared asset, secondly, countries with longer tradition of official asset declaration laws had significantly lower corruption than countries with newer laws, thirdly instead of requiring all officials to submit asset declarations, selecting the top officials is more effective in fighting corruption; fourthly, the threat of prosecuting the offending official reduces corruption; fifthly, establishing a verification mechanism of declared assets significantly reduces corruption than countries that do not verify declaration content until corruption allegations were received against an official and lastly, the public and not designated persons must have access to the disclosed asset.

⁷⁴² S.19 ICPC

⁷⁴³ SS.8 - 24

⁷⁴⁴ Ranjana Mukherjee and Omer Gokcekus, Officials' Asset Declaration Laws: Do They Prevent Corruption? Pp.326 - 327 <http://works.bepress.com/omer_gokcekus/36> accessed 17/06/2015

The Nigeria constitution, the fundamental law on which validity of other legislation depend provides 10 codes of conduct for Public Officers⁷⁴⁵ which are applicable at both the federal⁷⁴⁶ and state⁷⁴⁷ levels, the state may either prosecute it either before the Code of Conduct Tribunal or in a regular court of law⁷⁴⁸; the most three prominent of which are the codes against conflict of interest in official duties⁷⁴⁹, bribery in public sector⁷⁵⁰ and declaration of assets and liabilities by public officers including their children under the age of 18 years⁷⁵¹, with the Code of Conduct Bureau⁷⁵² that receives declarations of assets and liabilities made by public officers⁷⁵³, the Code of Conduct Tribunal has powers to punish breaches of the code by giving an order for vacation or disqualification from legislative seat or public office for ten years; seizure and forfeiture to the state of any property acquired in abuse of office⁷⁵⁴; these sanctions are applicable in addition to penalties that may be imposed under the criminal law subject to the Court of Appeal verdict. The constitutional provisions underscore an abhorrence for corrupt practices by extricating anti corruption clause from political intervention such that the presidential power of prerogative of mercy in granting state pardon is inapplicable to convicted corrupt persons⁷⁵⁵ but unfortunately, the bane of effective anti corruption regime in Nigeria has never been the absence of law but a lack of political will to implement the law, the state flouts its law and granted state pardon to a convicted person involved in

⁷⁴⁵ Para 1 - 11, 5th schedule, part 1, 1999 constitution

⁷⁴⁶ S. 172

⁷⁴⁷ S.209

⁷⁴⁸ Para 18 (6),Part 1, 5th Schedule to the 1999 constitution

⁷⁴⁹ Para 1, Part 1, 5th schedule to the 1999 constitution

⁷⁵⁰ Para 6, 5th schedule, part 1, 1999 constitution

⁷⁵¹ Defined in SS.52, 94, Para 6, 5th schedule, part 1, SS.141, 142, 185, 186, 187, 149 152, 194 and Para 1- 16, Part 2, 5th schedule, 1999 constitution⁷⁵¹

⁷⁵² Chapter 58 Laws Of Nigeria, 1990

⁷⁵³ 12 of Part I of the Fifth Schedule to this Constitution

⁷⁵⁴ Para 18(2) (a-c),Part 1, 5th Schedule to the 1999 constitution

⁷⁵⁵ Nigeria 1999 constitution, s.175

corruption⁷⁵⁶, this constitutes a breach of the constitution and an impeachable offence against the president but the prevailing culture of impunity and abuse of power prevented the constitutional provision from being successfully implemented. Inference from Omer's work reveals that declaration of asset clause in the Nigeria constitution is hollow and futile unless the six identified lapses hinging on impunity are addressed.

This trend was further observed in the non-implementation of the constitutional provision of recalling corrupt federal⁷⁵⁷ and state legislators⁷⁵⁸, who may be recalled if over 50 percent of members of their constituency present petition of 'loss of confidence' in such person, this remains an herculean task due to the level of political apathy, ignorance induced by poverty and ineffective civil society failing to galvanise the populace for common cause; it remains doubtful if the Nigerian electorates could be sufficiently organised to recall a corrupt legislator because there have been several instances where elected legislators have been involved in corruption and still manage to remain in public office⁷⁵⁹.

While the US and UK have put in place diverse anti-corruption measures and ensure that offenders are prosecuted, the situation in Nigeria is precarious despite the existing anti-corruption laws demonstrating a measure of compliance with international standard but enforcement is in abeyance, this encourages impunity and more corrupt conducts. It must however be reemphasised that political will is vital to successful fight against corruption and the importance of identifying the sociological, political and economic cause of it, with a view to providing a detailed solution of allowing the institutions and machinery of law to operate without political interference. Furthermore, it is unforeseeable if a sole charge of corruption can survive in any financial crime proceedings, as it is adjunct to

⁷⁵⁶ Diepreye Alamieyeseigha, a fugitive money laundering offender

⁷⁵⁷ 1999 constitution, S.69

⁷⁵⁸ Ibid, S.110

⁷⁵⁹ Farouk Lawan and Femi Otedola's bribery scandal; Ndudi Elumelu and others in NEPA investigation scandal, cited by Monday Aliu, Legislative Corruption and Democratic Consolidation in the Nigerian Fourth Republic, *Journal of Sustainable Development in Africa* (2013) 15 (6) 106

other financial crime like fraud and money laundering; consequently, curbing fraud, illicit drug trade, and embezzlement in public or private sector and stealing would ultimately ensure interdiction of corruption and money laundering. Opportunity and incidence of fraud, embezzlement and stealing would be largely discouraged where channels of laundering illicit fund is difficult by implementing AML regime that makes it difficult for criminals to conceal, convert or transfer illicit fund from any given jurisdiction by looking beyond the provision of criminal law and look into civil law options, which shall be discussed in the next chapter.

Chapter 8

Money laundering – How it is dealt with in the UK, the US and Nigeria

In chapter 7, the facilitative role of corruption in fraud and generally in financial crime was appraised and it was established that if not disrupted, it could spread beyond control and corrode and destroy every segment of the society. However, this chapter discusses the scope and effect of money laundering in changing the global transnational banking practice and policies, and the importance of shifting the focus of interdicting money laundering from the traditional criminal justice approach to the use of disclosure and transparency in disrupting and recovering the proceeds of money laundering. It compares and evaluates the control of money laundering in the UK, the US and Nigeria and identifies the act of washing wealth as an ancient practice. It evaluates the relevance and influence of the US Bank Secrecy Act 1970, the 1988 Vienna, 2000 Palermo conventions and the FATF recommendations are appraised, including the role of OFC in facilitating money laundering as it affects the control measures in Nigeria.

The existing literatures are compared to argue that money laundering process could be more complex than the FATF money laundering typology. Again, comparison is drawn between money laundering and reverse money laundering in relation to terrorist financing. The effectiveness of the UK POCA 2002, the US RICO 1970 and the Nigeria criminal code Act 1990 in money laundering control is evaluated, especially on recovery of stolen asset, criminal confiscation and civil forfeiture of asset, civil recovery and taxing the proceeds of crime and seizure, it recommends the UK and the US options as a model for Nigeria subject to local adaptation where necessary. It further evaluates the effectiveness of AML and TF, preventive measures such as CDD, KYC and KYCB as tools for financial intelligence and the best international practice, its effect on cash based economy like Nigeria with distorted data, lack of Data Protection law and possible financial services exclusion, which tends to defeat the essence of various financial crime control measures. It also evaluates the concept of predicate offence as it affects effective money laundering prosecution, especially where a foreign jurisdiction does not recognise

such as an offence, it argues that although predicate offence safeguards against an arbitrary use of legislative powers and protects human right, however, it ought not be a statutory requirement for prosecution in underdeveloped countries like Nigeria where crime detection and investigation are still rudimentary.

Hiding of one's wealth is not a recent phenomenon and not necessarily illegal except hiding the proceeds of crime or legitimate income in order to evade tax as far back as the 18th century⁷⁶⁰; and also under the exchange control measures like the UK Exchange Control Act, 1947 (repealed in 1979) that prohibited British residents from holding currency in foreign jurisdictions in order to help the state conserve currency reserves and maintain balance of payment; again, under the civil law of tracing⁷⁶¹ where a plaintiff is allowed to trace, identify and recover stolen property even in the hands of a third party. The only recent development is the recognition of money laundering as a separate offence, compared to other classical offences like stealing, fraud and corruption; invariably these classical offences are the predicate crime of money laundering. This is contrary to the views of Levi and Williams⁷⁶² who think the term money laundering began to be used around 1930 by the American gangster, Al Capone; also in contrast to Hinterseer⁷⁶³ who stated that money laundering received judicial recognition around 1982 in the US as depicted in decisions like *US v \$4,255,625.39*⁷⁶⁴. It is however, incontrovertible that AML initially evolved from the global attention on international anti drug trade measures in the *Vienna Convention, 1988* and later the 1989 FATF measures which have influenced the enactment and evaluation of national anti money

⁷⁶⁰ 1775 Holman v Johnson (1775) 1 COWP 341, 343

⁷⁶¹ Taylor v Plumer, (1815) 3 M & S 562, see also Scott v Surman, (1742) Willes 400

⁷⁶² M. Levi, R. Naylor and P. Williams, *Financial Havens, Banking Secrecy and Money Laundering* (UN 1998) 12

⁷⁶³ Kris Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative* (Kluwer Law International 2002) 23

⁷⁶⁴ (1982) 551 F. Supp 314

laundering laws⁷⁶⁵. Money laundering involves concealing of illegally obtained wealth through devices that makes it appear legitimate. Peter Allridge⁷⁶⁶ for examples describes money laundering as the process of transforming illegal activities or unlawfully acquired money into legitimate capital through an infinite number of mechanisms of financial transaction; the oldest forms of which are Hawalah and Hudi systems in Pakistan and Indian; and Chop system in China⁷⁶⁷ which operate originally within specific racial groups, having tribal or geographical bond, they operate outside the financial system and thus leave no audit trail with capacity to transfer huge wealth and have recently become useful tool for money launderers⁷⁶⁸. Money laundering is linked with organised crime, illegal trade in goods and services; it intertwines with illicit drugs, arms, prostitution and illegal immigration. As a result of the link between illicit drug trade and money laundering, Michael Levi and Peter Reuter⁷⁶⁹ observe that the war on drug controls played significant role in money laundering control because AML evolved from anti-drug laws. Bell⁷⁷⁰ observed the word “concealing” and “disguising” used in money laundering laws in many jurisdictions is derived from the *1988, UN Vienna Convention*, which has attained global attention with international controls aimed at a wide array of predicate

⁷⁶⁵ Nicholas Ryder, *The Financial Services Authority And Money Laundering A Game Of Cat And Mouse*, (2008) CLJ 67(3) 636

⁷⁶⁶ Peter Allridge, *Money laundering, forfeiture, confiscation, civil recovery, criminal laundering, and taxation of the proceeds of crime* (Hart Publishing 2003) 2; see also statutory definition of money laundering as contained in the 2002, POCA ss.327-340

⁷⁶⁷ Alternative remittance systems of transferring value across nations without physical movement of currency

⁷⁶⁸ Barry Rider, *Recovering the proceeds of corruption* (2007) JMLC 10 (1) 19

⁷⁶⁹ Money laundering, (2006) *Crime and Justice*, 34, 1, 290

⁷⁷⁰ Evan Bell, *Concealing and disguising criminal property*, (2009) JMLC 12 (3) 268; see also 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; and similar to 18 U.S. Code § 1956 on Laundering of monetary instruments

offences ranging from cigarette smuggling, corruption of public officials to terrorism finance but the learned authors noted that the degree of link between money laundering and tax evasion remains a conflicting issue in national legislations and in mutual legal assistance which has culminated in international treaties, with enactment of comparably similarity with substantive domestic criminal laws and international enforcement mechanisms, these measures have redefined the existing international relations and international criminal jurisprudence with corollary threat to national sovereignty which is one of the ingredients of the Westphalian⁷⁷¹ initiatives on sovereignty that confers each nation state with legislative, investigation and prosecution powers to enforce its distinct criminal laws have now diminished with globalisation⁷⁷².

After a review of various definitions of money laundering, Kris Hinterseer⁷⁷³ concludes that:

'Money laundering is a process that employs financial, accounting, legal and other instruments in conjunction with an object that has either been used in, or derived from unlawful activity. The primary purpose of the process is to create a veil of legal cleanliness around the object. This veil not only prevents the object's association with unlawful activity from being accurately traced and identified but also enables the object to be used in legal economy with anonymity and without fear of criminal, civil or equitable legal action'

⁷⁷¹ Named after the 1648, peace treaty of westphalian, ending 30 years war in Europe where warring European countries agreed to respect territorial integrity of every state party and later extended to into international law sovereignty.

⁷⁷² Peter Alldridge, Money Laundering and Globalization, Journal of Law and Society, Vol. 35, No. 4 (Dec., 2008), Pg.437, see also E. Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44 International Organization 479

⁷⁷³ Hinterseer, Criminal Finance (n 763) 11

To buttress this observation, Rider⁷⁷⁴ acknowledged the influence of legislation and judicial interpretations in developing the scope and meaning of the crime of money laundering, as being influenced by ‘*the authoritative language of statutes to the “punchy” comments of the judges*’ and reiterates that the process of obscuring the origin of money and its source, encompasses transactions designed to hide money as well as wash dirty money into clean. Rider further recognises money laundering as the processes of transfer and misrepresentation which due to the considerable attention given to the fight against drug cartels; money laundering has become linked to tracing and confiscation of the profits from illicit drugs and narcotics trade. Again, the process of hiding one’s wealth is not necessarily intrinsically abusive or evil and may not be necessarily legal or morally abhorrent because prudence might have necessitated weaving of secrecy around one’s wealth⁷⁷⁵; like in many jurisdictions, money laundering in Nigeria evolved from the 1989 anti narcotic drug law⁷⁷⁶ but by 2004, a Money laundering Act was enacted in Nigeria to extend its predicate offences to other crimes now retained in the current Money laundering (Prohibition) Act 2011. However, as earlier mentioned in chapter four, Nigeria’s first Money Laundering Decree was in 1995 but due to its inherent weakness, it was amended three times (Via the Money Laundering (Prohibition) Act 2003, 2004 and 2011) until the enactment of the current principal *Money Laundering (Prohibition) Act 2011* as amended by the *Money Laundering (Prohibition) (Amendment) Act, 2012* so as to strengthen the law to meet the current FATF standard on the emerging global trend. The principal AML criminalises terrorist financing, arms and human trafficking, especially the s.15 of which prohibits money laundering in general and laundering of proceeds of drug or crime. It provides guide on preventive measures like KYC, tipping off, disclosure regime inter alia.

⁷⁷⁴ Barry Rider (n 768)

⁷⁷⁵ Ibid

⁷⁷⁶ National Drug Law Enforcement Agency Decree, 1990

Hinterseer⁷⁷⁷ suggested a classification of money laundering into grey money (tax evasion), dirty money (criminal activity like proceeds of child porn, these two are presumably unlawful activity with moral condemnation and sanction) and thirdly, hot money, a mixture of clean and dirty money such as capital flight caused by economic changes in political, economic and social conditions like looted public fund or clean money transferred to OFC in violation of exchange control laws. Money laundering uses a technique designed to deceive the regulatory authorities so as to make dishonestly and unlawfully earned money appear honest and legitimate⁷⁷⁸, however, it is different from tort of deceit, negligent misstatement and fraudulent behaviour except where the proceeds of fraud are laundered, in any case, it is a subset of other crime; again, money laundering is not misrepresentation in strict sense except trade based money laundering where services and goods are physically moved by misrepresenting the price, quantity or quality of imports or exports by under invoicing, over invoicing and multiple invoicing⁷⁷⁹ used in conjunction with other money laundering techniques to obscure detection to legitimise their illicit origins⁷⁸⁰, apart from trade based money laundering, its other two main methods identified by FATF are the use of the financial system and the physical movement of money (cash couriers). Though misrepresentation by false invoicing appears to be a criminal offence of tax fraud, however, fraud in strict sense is distinguishable from money laundering⁷⁸¹. The processes of hiding looted, unaccountable fund or proceeds of corruption by PEP are also different from terrorist financing as the latter might not have

⁷⁷⁷ Hinterseer, *Criminal Finance* (n 763)

⁷⁷⁸ *Ibid*

⁷⁷⁹by issuing more than one invoice for the same international trade transaction, to justify multiple payments for the same shipment of goods or delivery of services, complex Trade-Based Money Laundering Techniques like Black Market Peso Exchange Arrangements employs combination of smuggling and sale of illegal drugs, alternative money remittance

⁷⁸⁰ FATF TBML, Pg.1, 2006 < <http://www.fatf-gafi.org>> accessed o 14/07.2015

⁷⁸¹ Melvin R.J. Soudijn, *A critical approach to trade-based money laundering* (2014) *JMLC* 17 (2) 238

derived from criminal activity⁷⁸², financing of terrorism is reverse money laundering, it is a process whereby clean money is clandestinely earmarked for unlawful purpose. Chapter 3 of the UNCAC obliges states to enact laws criminalising a wide variety of corrupt practices, ranging from the giving and taking of bribes to peddling influence but not all obligations to expand the scope of the criminal law under UNCAC are obligatory, an example is the important provision on penalising of unexplained wealth.

FATF typologies have always been a good source of guide on emerging trends in financial crime but Rider⁷⁸³ warned that a simplistic assumption of a general model that fits all acts of laundering (especially, corruption) in all cases must be avoided; as observed, most cases of serious corruption do not involve a "continuous process of re-cycling tainted wealth", in actual fact, in many instance of serious corruption, the hidden wealth does not require a "back-flow" to the originating jurisdiction. Similarly, Rider raised concerns against restricting money laundering stages to the traditional process of placement, layering and integration as it may involve a chain of complex actions; contrary to the assumed "seamless process". Furthermore, since public officials are susceptible to self dealing, embezzlement and the use of corporate vehicles and trust to hide stolen assets, adherence to FATF Recommendations on Enhanced Due Diligence process for PEP⁷⁸⁴ and effective use of financial intelligence especially by the OFC would go a long way in minimising corruption, including laundering fuelled by any other means.

The US AML law is scattered in about four different statutes⁷⁸⁵ and hundreds of predicate offences, the gamut of which Charles Doyle⁷⁸⁶ identified and summarised as:

⁷⁸² Barry Rider (n 768)

⁷⁸³ Barry Rider (n 768)

⁷⁸⁴ FATF, Recommendation 12

⁷⁸⁵ 18 U.S.C. §§ 1956, 1957 & 1952, RICO and US Patriot Act

⁷⁸⁶ Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law;

<<https://www.fas.org/sgp/crs/misc/RL33315.pdf>> accessed on 4/8/2015

1. Engaging in a financial transaction involving the proceeds of certain crimes in order to conceal the nature, source, or ownership of proceeds they produced⁷⁸⁷
2. engaging in a financial transaction involving the proceeds of certain crimes in order to promote further offences⁷⁸⁸
3. transporting funds generated by criminal activities into, out of or through the US to promote further criminal activities or to conceal the nature, source or ownership of the criminal proceeds or to evade reporting requirements⁷⁸⁹
4. engaging in a financial transaction involving criminal proceeds in order to evade taxes on the income produced by the illicit activity⁷⁹⁰
5. structuring financial transactions in order to evade reporting requirements⁷⁹¹
6. spending more than \$10,000 of the proceeds of certain criminal activities⁷⁹²
7. Travelling in or use of the facilities of interstate or foreign commerce in order to distribute or promote the proceeds of certain criminal activities⁷⁹³

On the other hand, the UK POCA, 2002 creates three principal money laundering offences of concealing, disguising, converting, transferring or removing from the UK

⁷⁸⁷ 18 U.S.C. 1956(a)(1)(B)(ii)

⁷⁸⁸ 18 U.S.C. 1956(a)(1)(A)(i)

⁷⁸⁹ 18 U.S.C. 1956(a)(2)

⁷⁹⁰ 18 U.S.C. 1956(a)(1)(A)(ii)

⁷⁹¹ 18 U.S.C. 1956(a)(1)(B)(ii); 31 U.S.C. 5324

⁷⁹² 18 U.S.C. 1957

⁷⁹³ 18 U.S.C. 1952(a)(1) & (3)

jurisdiction⁷⁹⁴, it criminalises any arrangement that knowingly or suspiciously facilitate another person to acquire, retain, use or control criminal property when the person knows or suspects that the property is criminal property⁷⁹⁵, it also criminalises the acquisition, use or possession of the proceeds of crime⁷⁹⁶. It imposes up to five years imprisonment for “tipping off” an investigation⁷⁹⁷ and prejudicing an investigation⁷⁹⁸. Another major influence of POCA identified by Sproat is the strengthening of the existing SAR duty⁷⁹⁹ by regulated financial sector with up to five years terms of imprisonment⁸⁰⁰ under the POCA ss.330 and 331, also POCA reforms and enhances the powers of asset recovery of proceeds of crime by four distinct routes:

1. Unlike in the US where many states and the federal jurisdiction could confiscate the instrumentality of crime (property used to commit or facilitate crime) not being proceeds of crime, in the UK confiscation of instrumentality of crime is restricted to specific offences like smuggling, serious road traffic, drug and human trafficking offences. Under Pts. 2-4 POCA 2002, confiscation order is aimed at disgorging asset or property derived from benefit of criminal conduct (that is, conduct constituting an offence in England and Wales under s.76(1) (a) POCA). Under S.6 of POCA 2002, confiscation of proceeds of crime depends on criminal conviction of the defendant, after which the prosecution applies for confiscation hearing or by the court if it is deemed appropriate, it is however possible for either

⁷⁹⁴ Peter Sproat, ‘To what extent is the UK’s anti-money laundering and asset recovery regime used against organised crime’, (2009) JMLC 12 (2) 136, see also POCA S.327

⁷⁹⁵ POCA S.328

⁷⁹⁶ POCA S.329

⁷⁹⁷ POCA S.333

⁷⁹⁸ POCA S.342

⁷⁹⁹ based on the combined subjective test of actual knowledge and an objective test of standard of a reasonable person, the essence of which is to ensure that financial institutions implement internal control measures to deter criminals from using banking platform for laundering the proceeds of crimes

⁸⁰⁰ Richard Alexander, ‘The Pursuit of criminal property’, in Barry Rider (ed) Research Handbook on International Financial Crime (Edward Elgar 2015) 448-449

the state or the court to consider confiscation proceeding unnecessary, hence it is not in all circumstances that the confiscation hearing would follow a conviction but should confiscation hearing be deemed appropriate, the court would first need to determine if the offender has a 'criminal lifestyle', under S.75 POCA 2002, criminal lifestyle is found in the following three circumstances:

- a. Where the defendant is convicted of one of the specified listed in schedule 2 of substantive offences: money laundering (excluding the acquisition, use or possession of criminal property under s.329 POCA 2002), directing terrorism, human trafficking, arms trafficking, counterfeiting of currency, intellectual property offences, sexual exploitation of children and prostitution for financial gain.
- b. In the case of repeat offender, where the defendant has two previous convictions from two separate occasions within 6 years up to the commencement of the current proceedings or where the offender has been convicted of three other offences in the current proceedings, in these second category, for criminal lifestyle clause to apply, the prosecution must prove that the defendant derived at least a total sum of £5,000 benefits from each or all the offences before criminal lifestyle clause could be relevant. This is unlike the first category where mere conviction is sufficient and no actual benefit needs to be proven; and
- c. When the offence has been committed over a continuous period of at least 6 months; here, the prosecution must prove that the offence resulted in benefit of at least £5,000 before the burden of proving the origin of the assets shift to the defendant.

The burden is on the prosecution to prove that the property to be confiscated is a benefit derived from the defendant's crime. The standard of proof in confiscation proceeding is civil and conviction for crime is not a conclusive proof that the defendant has benefited from the crime. The court would need to evaluate if the defendant benefited from crime and the value of the benefit. Every property received and expenditure by the defendant within six years up to the time of commencement of the proceedings is presumed proceeds of, and funded by proceeds of crime, lastly every asset the defendant holds on the day following his conviction is presumed to be proceeds of crime, immaterial of the time it was acquired. Where the defendant is proved to have a criminal lifestyle, the burden of proof shifts to the defendant to establish the legitimate source of his asset, and no property could be confiscated twice, although an earlier conviction is a ground for criminal lifestyle clause, the value of an earlier confiscated order cannot be included in a subsequent confiscation order. After establishing the benefit and its value, the court considers the defendant's available asset to satisfy the confiscation order. It is presumed that a defendant has sufficient assets to repay the assessed benefit except he can show otherwise. The property considered available need not derive from any form of criminality, what is confiscated is the value of the asset and not the asset itself; hence the defendant could pay the confiscation from his legitimate fund, the question is the value of the available assets rather than their nature. However, Stefan Cassella⁸⁰¹ identified four categories of property subject to forfeiture in money laundering under the US law as proceeds of the 'Specified unlawful activity' (SUA) offence being laundered⁸⁰², property that is subject matter of money laundering offence⁸⁰³, property used to facilitate money laundering offence⁸⁰⁴, property that is central to the entire scheme, including an

⁸⁰¹ The Forfeiture of Property Involved in Money Laundering Offenses 7 Buff. Crim. L. Rev. 583 2003-2004 pp.615 -616

⁸⁰² US v. Trost 152 F.3d 715 (7th Cir. 1998), pp 616 & 617

⁸⁰³ Stefan Cassella (n 801) 620

⁸⁰⁴United States v One 1989 Jaguar XJ6 1993 WL 157630, No. 92 C 1491 (N.D. Ill. 1993, held that there must be "substantial connection" between the property and the money laundering offence. here, the car in which

underlying SUA Offence. Where it is not determined that the offender has a criminal lifestyle, it is for the prosecution to show what benefit he has received from the specific offence of which he has been convicted, the value of that benefit is then confiscated

2. Civil recovery of proceeds of crime (property obtained through unlawful conduct, definition of which is similar to criminal property) by the NCA showing on balance of probability that the property in question is derived from any type of criminal activity of the person in possession of the property or of a third party. This is often used where confiscation order is not appropriate and it is different from civil recovery by victim of crime.
3. Power to tax the proceeds of crime which⁸⁰⁵ arguably is a legitimate exercise of taxation powers rather than an exercise in crime control with attendant moral dilemma on the state benefiting from criminal conduct or an indirect legitimisation of unlawful behaviour and tacit recognition that there is no difference between lawful and unlawful revenue, conversely, the sense of justice could be explained as the rationale for taxing legitimate and illegitimate profit because excluding proceeds of crime from taxation means only law abiding persons shall bear the burden of taxation while illegitimate business is excluded⁸⁰⁶; this is unjust and has the potential to send a wrong message to the society that crime is profitable. Again, taxation power under POCA, 2002 should be viewed as a response to the existing lacuna in UK taxation law which requires identifiable taxable source which POCA aims to fill by allowing imposition of taxation on assumed income even where the source is not identifiable, an approach derived

the money launderer wanted to escape after perpetrating the money laundering offence was held not to have been used to facilitate the money laundering offence as this was too incidental to the money laundering transaction.

⁸⁰⁵ Mary Gallant and Edward Elgar, Money laundering and the proceeds of crime: economic crime and civil remedy (Gallant and Elgar Publishing, 2005) 113

⁸⁰⁶ David Lusty, Taxing the untouchables who profit organised crime, JFC (2003)10 (3) 209

from the US concept of net worth assets which assists in prosecuting tax evasion such that the tax authority can assess the disparity between an individual declared income and his actual financial net worth to establish crime of tax evasion⁸⁰⁷, until recently, tax evasion was difficult to enforce under the international forfeiture of proceeds of crime, tax evasion is not a universal offence, it is not a crime against humanity, it has always been punishable at the domestic level, it lacks universal definition and courts refrain from enforcing foreign fiscal measures⁸⁰⁸. It is a trite principle of international law in common law jurisdictions and the US that a nation will not enforce the revenue rule or tax laws of another jurisdiction⁸⁰⁹, this has been criticised for aiding tax evasion and tax fraud of foreign nation by peripatetic taxpayers⁸¹⁰. The rule was initially developed under contract law relating to legality of enforcing contraband goods, where trade contract was legally completed in a jurisdiction but the goods were illegally transported into another country thus amounting to infraction of the law of the country from where the goods were shipped. However, this general rule has been modified over the years by treaties⁸¹¹, MLA and specific legislations protecting foreign tax creditors,⁸¹² tax evasion being predicate offence under Nigeria, US and UK AML

⁸⁰⁷ Gallant and Elgar (n 805) 144

⁸⁰⁸ Anthony Smellie, Prosecutorial challenges in freezing and forfeiting proceeds of international crime and the use of international asset sharing to promote international cooperation, *JMLC* (2004) 8 (2) 104

⁸⁰⁹ *Askanase v United States (In re Guyana Development Corp)*, 189 B.R., 393, 396 (Bankr S.D. Tex. 1995) acs; and *Holman v. Johnson*, (1775) 98 Eng. Rep. 1120, 1121 (KB)

⁸¹⁰ A. Albrecht, "The Enforcement of Taxation under International Law" (1953) 30 *B.Y.I.L.* 454, 462. See also Richard Smith, "The Non-Recognition of Foreign Tax Judgments: International Tax Evasion" (1981) *Ill. L.R.* 241, 242

⁸¹¹ Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 1992

⁸¹² The US wire and fraud Act was applied to tax revenue violation a foreign government in *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997)

regimes, would no doubt be enforceable in a foreign jurisdiction under mutual legal assistance, if any exists between them or any other jurisdictions.

4. Seizure and forfeiture of suspicious cash⁸¹³ of £1,000 and above in the UK by law enforcement officers (originally it was £10,000, then £5,000), this is different from forfeiture by the court either in UK or US; the clandestine movement of bulk cash across borders defeat paper trail and it is more relevant to smuggling offence than failure to file a currency transaction report; it could facilitate laundering of drug proceeds, terrorism financing, evasion of income taxes and allied crimes, which prompted the US to enact §5332 to criminalise currency smuggling in or out of the US when CMIR form is not filed subject to civil and criminal forfeiture even in the absence of proof of a nexus between the currency and any crime⁸¹⁴

8.1 Preventive money laundering Control Measures:

Apart from the SAR mentioned in this chapter, CDD is another means aimed at ensuring an effective control of money laundering and counter terrorism regime; CDD entails KYC but wider in scope than KYC; financial institutions and relevant businesses are expected to implement a set of AML and CTF measures in compliance with international standards⁸¹⁵, among which is the valid identification of customers, KYC to ensure that institutions know who they are dealing with which could go a long way in preventing criminals and terrorists from having access to financial systems. As observed by Jackie and Lim⁸¹⁶, giving organised criminals access to banking services gives them access to international payment system and international money transfer as opposed to physical

⁸¹³ POCA S.294

⁸¹⁴ Stefan Cassella (n 801)

⁸¹⁵ FATF R.10 on customer Due diligence, R.11 on record keeping, R.12 on Enhanced Due Diligence of Politically Exposed Persons and their family, R.22 on DNFBF influenced by Bassel Committee on CDD, 2001; see also, IOSCO 2004, and IAIS 2004 which have also adopted FATF principles.

⁸¹⁶ Jackie Johnson, Desmond Lim, Money laundering: Has the Financial Action Task Force made a difference? (2002) JFC 10 (1) 7

cash movement, consequently, financial institutions and their staff are the strongest line of defence against money laundering, for this reason, they are the nucleus of anti money laundering campaign. CDD is a process of gathering sufficient and relevant information about a customer, identifying and verifying such customer means of identification by independent means, the beneficial owner, purpose and nature of business and conducting ongoing scrutiny of customer business transaction. It involves conducting an enhanced due diligence of PEP and members of their family⁸¹⁷ and record keeping of all transactions for five years⁸¹⁸, all of which involve Data protection challenges in some jurisdictions. However, many commentators, including, Louis de Koker⁸¹⁹ have expressed concerns regarding the adverse effect of CDD as it tends to exclude a high proportion of the society who could not provide valid means of identification from financial services by temporarily or permanently isolating them from having bank accounts, therefore pushing them to the unregulated informal banking sector where there is no audit trail, thereby making investigation and prosecution difficult, and thus defeating the objectives of the law which aims to have audit trail of cash transactions as a tool for financial intelligence to control money laundering and terrorist financing. Therefore, a rigid adherence to this international principles could engender financial exclusion unless countries adopt liberal and alternative options to meet the local circumstance like the simplified procedure of the UK, FCA Handbook on identification that permits alternative means of identification by professionals like doctors, priests and solicitors⁸²⁰, this is the same approach by Nigerian banks and has recently been developed to a more pragmatic approach which requires Bank Verification Number (BVN), a biometric identification system that captures finger prints attached with a unique identification number to assist banks in KYC exercise, identify blacklisted customers and enhance quality service. KYC transcends AML and CTF regime as it mitigates adverse consequence of operational, legal and reputational

⁸¹⁷ FATF, R.6

⁸¹⁸ FATF, R.10

⁸¹⁹ Money laundering control and suppression of financing terrorism, some thoughts on the impact of customer due diligence measures on financial exclusion, JFC (2006) 13 (1) 26

⁸²⁰ FSA Handbook ML3.1.5, ML3.1.5G, ML3.1.7G

risks of financial institutions⁸²¹, it is not a new banking practice, it has been in existence before 1914⁸²² when failure of any banking institution to demand for reference or introduction from an existing customer before opening an account or before issuing cheque booklets to customer could render a bank liable for negligence; to achieve this purpose, many financial institutions have put in place, internal control measures to ensure compliance; it is enforced and regulated by different regulatory bodies, in UK, it is enforced by the FCA, in Nigeria, the CBN and in the US, the Treasury department while the MLRO at the management level ensure compliance, however, most of the efforts are tick box approach just to avoid infraction⁸²³, any customer that fails to supply the required means of identification are likely to be rejected from account opening process and thereby excluding an honest customer⁸²⁴.

Over the years, FATF has developed sector risk based approach as a guidance to member nation, this risk-based approach empowers affected regulated institutions either DFI or NDFI to identify, assess, develop strategies to manage and mitigate identified money laundering and counter terrorism risks by designing a compliance process with focus on specific areas of risks, ranging from regulatory/legal risks, market/product risks to customer risks; generally identified as high, medium to low risk; the risk based approach differs and is better from rule-based approach. The regulatory authority provides the general guideline like systems and controls at the management level without compelling any specific solution; this style relies on the presumptions that businesses have the best knowledge of the ML & TF risks they face and as such should be given the prerogative of deciding how to resolve identified risks, this is preferred to the rule-based approach because it is cost efficient, allows risk prioritisation and reduces the burden on

⁸²¹ Chapter 2, Pg.15

⁸²² *Ladbroke & co Ltd. V. Todd* (1914) 30 TLR, 433; see also *Lloyds Bank Ltd v. EB Savory & co* 2 KB 122; *Marfani &co ltd V Midland Bank Ltd.* (1968) 1 Lloyds Report, 411; *Lumsden & co V London Trustee Savings Bank* [1971] 1 Lloyds Report 114 QB

⁸²³ Chapter 3, pp.21-22

⁸²⁴ confirmed by the FSA Research, 2000, Pg.21 and 2002, Financial services Consumer Panel

customers⁸²⁵. In the UK, the FCA emphasises prudent allocation of resources on AML fight and ensures the removal of previously existing detailed AML rules, now replaced with high-level provisions in the Senior Management Arrangements, Systems and Controls Sourcebook for firms to have their own risk-based controls; in Nigeria, the CBN “KYC Manual” and in the US, responsible officers are assigned with the responsibilities to enforce and apply the internal measures based on risk profile of each transaction and are held accountable for AML compliance rules without having to go through the pain of lifting the corporate veil to determine the corporate culpability in the event of AML infractions but there are few challenges to the RBA, for example, LexisNexis survey of June 2008⁸²⁶ conducted within three sectors, accounting, finance and law in the UK reveals that RBA affects the revenue and resources of small and medium firms than larger firms in areas of training, loss of trust from clients, longer time to do business due to checks on clients; even cost of compliance is a major task in the US⁸²⁷ but these challenges could be regarded as minimal against the humongous evil and adverse effect of money laundering. The challenges of complying with RBA faced in some other jurisdictions like Nigeria lies in wanton waivers of CDD in order to meet marketing targets which if not waived in a given financial institution, would be waived by competitors and may never be detected or if detected, appropriate sanction may not be applied against a defaulting institution; also manpower training is largely inadequate as most employees may know the rules, policies and punishment for infraction but often lack the understanding of the rational, reputational, legal and financial risk of noncompliance.

⁸²⁵ M. Sathye and J. Islam, Adopting a risk-based approach to AML CTF compliance: the Australian case, (2011) JFC 18 (2) 170

⁸²⁶ Overcoming the Challenges of the Risk-Based Approach Findings from the LexisNexis Anti-Money Laundering Survey, 6
<<http://www.lexisnexis.co.uk/pdf/insights/Risk-based-approach-white-paper.pdf>> accessed 24/08/2015

⁸²⁷ J. Gilsinan, J Millar and others ‘Assessing the Impact of the USA PATRIOT Act on the Financial Services Industry’, (2005) JMLC 8 (3) 246

8.2 Money laundering and predicate offence

Entrenching the concept of 'predicate offence' in money laundering before effecting a meaningful conviction even in the event of overwhelming evidence could hamper an effective prosecution, for example, under the US money laundering system, there are hundreds of predicate offences that must be proved before securing a successful conviction⁸²⁸, also under the Nigerian AML regime, one of the reasons for the enactment of the new Money Laundering Prohibition Act 2011 was in response to comply with the revised FATF Recommendations of February 2012⁸²⁹ which enjoined countries to designate tax crimes as one of the predicate offences of money laundering⁸³⁰, following which Nigeria has expanded the scope of its predicate crime accordingly.

There appears to be a definite response to the necessity of predicate crime. Bell⁸³¹, for example, considers predicate offences as US imposition which has no place in the UK POCA 2002 and argued that the concept ought to have been 'consigned to the jurisprudential dustbin' even in the US. The concept sets a very high standard of establishing the offence of money laundering and has often made prosecutions difficult⁸³², In the US, the requirement for proving that money laundering offence was derived from any of the predicate offence of 'Specified Unlawful Activities'⁸³³, the list of which keeps growing has weakened the prosecution of money laundering, it has constituted a great challenge to the prosecutors and investigators such that investigation or prosecution

⁸²⁸ Kenneth Murray, A suitable case for treatment: money laundering and knowledge, (2012) JMLC 15 (2) 188

⁸²⁹ Nigeria Financial Intelligence, Guidance On Tax Evasion Indicators In Relation To Money Laundering And Terrorism Financing, NFIU/EXT-PUB/SA/APR-2015/VOL.1/004 issued March 2015

<file:///C:/Users/Tosh/Downloads/NFIU%20GUIDANCE%20ON%20TAX%20EVASION%20INDICATORS.pdf> accessed 22/08/2015

⁸³⁰ Money Laundering Prohibition Act, 2011, s.15(a)

⁸³¹ R.E Bell, 'Abolishing the concept of 'predicate offence' (2002) JMLC 6 (2) 137

⁸³² Kenneth Murray, A suitable case for treatment (n 828)

⁸³³ 18 U.S. Code § 1956

would be inconclusive unless the offence is confined to a particular money laundering SUA as predicate offence, it is even more difficult when the predicate offence takes place outside the US where such conduct is not recognised as money laundering predicate offence or where the fund has mingled with legitimate fund⁸³⁴. Meanwhile, Murray argued that the UK, 2002 POCA provides an effective AML with no need to resort to proof of any predicate offence though this has been rendered weak by judicial interpretations restricting conviction to proof of knowledge of the source of the illegal origin of the money rather than concealment of the source of fund⁸³⁵ which was not the intention of the legislation⁸³⁶. This perceived judicial approach arose from the confusing interpretation of s.340 and S.328(1) POCA on criminal property defined in s.340 in relation to knowledge, while a person commits an offence under s.328(1) if he enters into or becomes concerned in an arrangement which he knows or suspected to facilitate (by whatever means) the acquisition, retention, use or control of criminal property on behalf of another person⁸³⁷, however, the Scottish case of *HM Advocate v Ahmad*⁸³⁸ and English case of *R v. Anwoir*⁸³⁹ have held that money laundering can either be established by proving that the fund is derived from unlawful conduct or by circumstantial evidence showing that the assets have been handled in such a way that gives credence to irresistible evidence that it derives from crime. Therefore, UK prosecutors do not need to prove predicate offence like in the US and Nigeria. Again, an attempt to limit money laundering provisions under POCA to proceeds of indictable offence which could have been a barrier to successful prosecution was rejected during the parliamentary debate⁸⁴⁰. Tax offence is a predicate offence in the UK even as the FATF recommends that member

⁸³⁴ Bell, Abolishing the concept of 'predicate offence' (n 831)

⁸³⁵ Kenneth Murray, A suitable case for treatment (n 828)

⁸³⁶ Ibid

⁸³⁷ Ibid

⁸³⁸ [2009] HCJAC 60

⁸³⁹ [2008] AER 401

⁸⁴⁰ Hansard, House of Commons, standing committee B, 24/1/02.Col.1185

states should make it a predicate offence because it is a pre-requisite for civil recovery under POCA, it is also a predicate offence under the US and Nigeria AML mechanism.

Finally, considering Bell's argument⁸⁴¹, predicate offence appears to be an outdated concept militating against effective money laundering regime though it safeguards against abuse of legislative power such that specific conduct and not vague clause would constitute money laundering offence and therefore ensure certainty, clarity and specificity of offence and protection of human right, furthermore, the concept of predicate offence throws up moral questions that require rational answers like why should an offender be allowed to retain an obvious proceeds of crime just because the hidden source cannot be specifically ascertained or linked to a particular predicate offence? why shouldn't legislations be drafted to accommodate incontrovertible circumstantial evidence as proof of money laundering or why can't irresistible inference from the facts of each case be allowed to determine recovery of proceed of crime without any allusion to predicate offence⁸⁴²? In underdeveloped nations of Africa where crime investigation remains rudimentary, resulting in poor crime detection, poverty engendered by corruption (or vice versa) of public officials who launder public fund into private account in OFC; restricting money laundering to specific predicate offence would be counter-productive, although it could be argued that eradicating predicate offence in such states could result in abuse of state power and erosion of fundamental human right of fair hearing and right to property but in the overall interest of the society, nothing should impede the state from asking an individual to account for suspicious wealth.

8.3 Appropriate punishment and recovery of proceeds of money laundering

Criminalisation of money laundering entails punishment by imprisonment, fine, confiscation and forfeiture of assets so as to strip offenders the fruit of their crime and

⁸⁴¹ Bell, "Abolishing the concept of 'predicate offence' (no 831) 140

⁸⁴² Ibid

where necessary, restitution of victim of crime. Many theories have been considered and developed to justify equitable and adequate punishment of offenders which are necessary guide on limitations and rationale for legislative and judicial justification of criminal punishment and secondly, for moral and rational justification of criminal law of punishment, it is expected that this would serve the essence of justice, especially in view of the two prevailing theories of punishment or justice, namely; utilitarian and retributive perspectives, the subsets of which are deterrence, incapacitation, rehabilitation and restorative justice, some of these theories are conflicting and in some instances, interwoven, it is the prerogative of the courts to balance these rationales and be guided accordingly in their judgements, over the years, there have been shifts in perspectives to punishment by interference of politics, public policy and social evolution, nevertheless, the quest for appropriate and purposeful punishment has been on for ages, arguments have concentrated on whether it should be retributive justice by giving an offender what he deserves for his crime as deterrence for potential offenders and the convicted offender from future crimes or should offenders be punished for the purpose of rehabilitating and reforming them or a combination of some or all these theories. Rehabilitative justice regards crime as a symptom of social disease which must be cured with punishment so that the offender could be reintegrated into the community as a productive citizen without being a further threat⁸⁴³, this gives consideration to the personal circumstance of the offender in awarding punishment as opposed to retributive theory which hinges on offence and punishment or pain based on moral justification⁸⁴⁴, here, offenders are punished by being given what they deserve⁸⁴⁵ according to their deeds, it is equated with treating evil with evil, an old penal theory, Lex Talonis in the bible: "*an eye for an eye, a tooth for a tooth and life for life*"⁸⁴⁶ but despite the justification for retributive punishment, it has its drawback, which is that, it is vicious, vengeful and difficult to

⁸⁴³ Mike Materni, Criminal Punishment and the Pursuit of Justice, (2013) 2 Brit. J. Am. Legal Stud. 263, 291

⁸⁴⁴ Ibid 278

⁸⁴⁵ Ibid

⁸⁴⁶ Barbara Hudson, Understanding Justice: An introduction to ideas, perspectives and controversies in modern penal theory (Open University Press 1996) 38

justify in criminal justice system where an eye is indeed removed for an injury inflicted on victim's eye or death sentence for murder; this type of justice tends to degrade the value of human life, and rather than curbing crime, it may aggravate it. Again, how do we justify retribution in cases like rape? Will the state rape a rapist in return for his offence or how effective is vengeance exerted by the society for violation of its norms in deterring future offenders⁸⁴⁷, Kaufmann⁸⁴⁸ quoting French Philosopher, Blaise Pascal⁸⁴⁹ states that killing a murderer by the state makes 2 murderers which will not restore the life of the dead victim⁸⁵⁰, the cruelty advocated by retributive justice contravenes the modern international laws against cruelty⁸⁵¹ or how will death sentence revive the victim of murder? Secondly, there is no provision for mental state of the offender in awarding retributive punishment and thirdly, under its strict application, there is no provision for mitigating or aggravating factor of the offender in the award of punishment in cases like accidental or negligent act or voluntary act and omission.

There have been conflicts between the abolitionists who believe that punishment is unjustifiable and therefore should be abolished on the one hand; and the retributionists who believe that punishment is morally justifiable and should be retained; these 2 divergent extreme views have dominated the debate of the appropriate punishment and require a fair solution that avoid a repeat of Sutherland's apprehension that the lower social class receives far more punishment for street crime while the upper class escape justice; deterrence and utilitarian theories, though used interchangeably, are based on Jeremy Benthan's hedonistic calculus⁸⁵² which assumes that man's action is determined by considerations of pain and pleasure, as a result, punishment ought to justify the

⁸⁴⁷ Whitley Kaufman, Honour and Revenge: A Theory of Punishment (Springer 2013) 3

⁸⁴⁸ Ibid

⁸⁴⁹ in his Penssees 911- 659

⁸⁵⁰ Kaufman (no 847)

⁸⁵¹ International Convention on Civil and Political Rights (ICCPR)] Art.7, EU Convention on Human Right, Art.3

⁸⁵² "An Introduction to the Principles of Morals and Legislation", Elibron classics series, (2005, Adamant Media Corporation) 1

prevention of greater harm than the harm inflicted by the offender through punishment⁸⁵³, this theory assumes that man is a rational being who acted on calculation of risk of pleasure and pain, deductively, if the punishment outweighs gain of committing the crime, he would refrain from crime but he would engage in crime if the gain or pleasure outweighs derivable punishment; the utilitarians view punishment as a means to deter and rehabilitate individual offender from further offence and potential criminals from crime, consequently, punishment ought to aim at crime reduction, promote public welfare and not focus strictly on inflicting pain; but as plausible as this theory appears, it is doubtful if man is as rational as postulated, it is also doubtful if fear of punishment has any effective deterrence because in some crime, severe punishment result in greater deterrence while in others, severe punishment like prison ends up being a "school of specialisation in crime," and thus casting doubts on the personal deterrence effect of criminal punishment⁸⁵⁴. Again, Bentham's argument is flawed because moral inhibition prevents individuals from crime and not calculation of pain and pleasure, criminals don't make rational choices but act out of greed, emotional instability, lack of self control or due to acquired value of criminal sub culture⁸⁵⁵; because threat of punishment affect people in different ways, law abiding citizen do not need the threat of the law to remain law abiding, nevertheless, criminals may fear the law and still break it; solution to the appropriate punishment lies in awarding adequate terms of imprisonment, restoring or restituting the victim's loss and confiscating the proceeds of crime; by so doing, the community would have exercised control over the particular offender and potential offenders and demonstrated that crime is unprofitable; restorative punishment reinstates the lost asset, assuage the battered psyche of the victim and rebalance the social

⁸⁵³ Barbara Hudson, *Understanding Justice: An introduction to ideas, perspectives and controversies in modern penal theory* (Open University Press, 1996) 18

⁸⁵⁴ Materni, *Criminal Punishment* (no 843) 290

⁸⁵⁵ Johannes Andenaes, "Does punishment deter crime", in Gertrude Ezorsky (edn), *Philosophical Perspectives on Punishment* Albany (State university of New York press 1972)

disequilibrium by supporting the victim and effective control over the offender⁸⁵⁶. This is reflected in the increasing emphasis on forfeiture and asset recovery in transnational crimes as laid down in international treaties like the Vienna Convention, the UNCAC and The World Bank's Stolen Asset Recovery Initiative (StAR)⁸⁵⁷.

The UK POCA 2002 seeks to demonstrate restorative justice in financial crime control, it is a comprehensive legislation⁸⁵⁸ that removes the dichotomy between drug trafficking and other criminal proceeds by consolidating the confiscation provisions on drug trafficking and other crime, as earlier explained in page 240-241, it deals with confiscation of property of a convicted person who has a criminal lifestyle⁸⁵⁹ and a non conviction based civil forfeiture of proceeds of crime in Crown Court (similar to the provisions of the 18 U.S. Code § 981, civil forfeiture and 18 U.S. Code § 982 on criminal forfeiture) and created an agency⁸⁶⁰ to manage the confiscation mechanisms. Under S.327 (1) POCA 2002, it is an offence to conceal, disguise, convert, transfer or remove criminal property⁸⁶¹ derived from criminal conduct⁸⁶² from UK. In *R. v GH*⁸⁶³, the Supreme court of England defined criminal property for the purposes of ss.327, 328 and 329 as property

⁸⁵⁶ Gordon Bazemore and Mara Schiff, "What and Why Now: Understanding Restorative Justice." in Bazemore and Schiff (ed), *Restorative Community Justice: Repairing Harm and Transforming Communities* (Anderson Publishing 2001) 301

⁸⁵⁷ Sundaresh Menon and Teo Siew, Key challenges in tackling economic and cyber crimes Creating a multilateral platform for international co-operation, (2012) *JMLC* 15 (3) 248

⁸⁵⁸ POCA,2002, based on the Cabinet Office's Performance and Innovation Unit (PIU) recommendations

⁸⁵⁹ POCA, Part 2

⁸⁶⁰ the Asset Recovery Agency (ARA), later replaced by SCO, now NCA

⁸⁶¹ S.340 (3) POCA, 2002 defines criminal property as whole, partial, direct or indirect benefit from criminal conduct which the offender knows or suspects as such a benefit

⁸⁶² S.340 (2) defines Criminal conduct as conduct which constitutes an offence in any part of the United Kingdom or which would constitute an offence if it occurs in any part of the United Kingdom.

⁸⁶³ UKSC 24 [2015] 1 W.L.R. 2126

obtained from or in connection with criminal activity of dirty money and not aimed at clean money used for criminal offence, affirming the Appeal Court case of *R v Loizou*⁸⁶⁴ where the court had held that criminal property within S.327 refers to property being proceeds derived from an earlier criminal conduct and not money to be used to facilitate a crime. Deductively, if the money is to be used to facilitate a crime, an offender could be a party to the offence either as an aider, an abetter or a terrorism financier under various terrorism legislations.

Confiscation and forfeiture have become effective tools for recovering proceeds of laundered fund; these two terms are often used interchangeably to disgorge proceeds of crime and to award compensation and restitution⁸⁶⁵. FATF⁸⁶⁶ enjoins countries "*to adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate*" in three instances namely⁸⁶⁷:

1. Confiscation of the (instrumentum sceleris) instrumentalities of crime, this applies to the object used to facilitate crime

⁸⁶⁴ [2005] 2 Cr App R 618

⁸⁶⁵ Nicholas Ryder, "To confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States of America and the United Kingdom", JBL 8

⁸⁶⁶ 2012, FATF Rules 4 and 38, (1988) Vienna Convention Art. 5(1)(a) and (b), Palermo Convention, Art. 12, UNCAC, Art.31; Vienna Conventions is restrictive limited to proceeds of drug, excluding the proceeds of other criminal offences; asset freezing provisions of Resolution 1373 and International Convention for the Suppression of Terrorist Financing Art.8, requiring each country to seize terrorism financing under the International Convention for the Suppression of Terrorist Financing Art. 2; also, the 1990 (EU) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, requiring member States to implement legislation that permits the confiscation of "instrumentalities and proceeds or property the value of which corresponds to such proceeds". This is broader than the Vienna Convention and it has been extended by 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime

⁸⁶⁷ Nicholas Ryder, "To confiscate or not to confiscate? (n 865)

2. Confiscation of the (objectum sceleris) the subject of crime, like the laundered money, layered deposit or the illicit drug itself.
3. Confiscation of (fructum sceleris) the fruits of crime, that is, the gain and benefit that has accrued to the launderer like tax evasion, profits from successful money laundering or its investment like proceeds of illicit drug.

8.4 Forfeiture of proceeds of crime

The clandestine nature of money laundering makes it often difficult to meet the high standard of proof in criminal proceedings and the challenges of predicate crime; to overcome this, jurisdictions like the US and UK have introduced civil forfeiture which Smellie said has been operational in the US as far back as 1869⁸⁶⁸; justifying conviction based confiscation, Ivan Peare⁸⁶⁹ observed that forfeiture of the proceeds of crime and reversal of presumptions of innocence in holding criminals responsible for their crime confirmed by the Court of Appeal in *R v Benjafield and Revzi*⁸⁷⁰ and later affirmed by the House of Lords⁸⁷¹ where Lord Woolf of the Appeal Court explained the legislation thus:

"The . . . legislation gives the courts the power to make confiscation orders and the reason why it creates statutory assumptions which interfere with the onus and burden of proof which normally exist in criminal proceedings . . . it is very much in the public interest that they are not able to profit from their crimes. If offenders are likely to lose their ill gotten benefits, then this in itself will be a significant deterrent to the commission of further offences. In particular, in relation to drug trafficking, justice requires that the profits made by the commission of those especially anti-social offences should be confiscated. Their profits are usually achieved at immense cost to those to whom the drugs are ultimately supplied. It is notoriously difficult to combat the trafficker, activities

⁸⁶⁸ Pelham V. Rose 76 US (9 wall),103, 106 (1869)

⁸⁶⁹ An Overview of the Proceeds of Crime Act 2002, Oxford Conference on Mutual Legal Assistance, 2002, 29 Commw. L. Bull. 2003 (986) 986

⁸⁷⁰ [2001] 3 WLR 75

⁸⁷¹ [2003] AC 1

and the dangers that they create for society provide a justification for action out of the ordinary. In addition, those, at whom the legislation is aimed, whether repeat offenders or drug traffickers, are usually adept at concealing their profits and unless they are called upon to explain the source of their assets, it will be frequently difficult and often impossible to identify the proceeds of their crimes."

The House of Lords explained further in **R v. Benjafield**⁸⁷² that the right to be presumed innocent under European Union Convention on Human Rights (ECHR) Art.6(2) applies only to the charged offence but confiscation order is not a criminal charge, it is a sentencing process, which follows the conviction proceedings, therefore, the right to be presumed innocent under the ECHR Art.6(2) is inapplicable, the burden of proof shifts on the defendant (in confiscation proceedings or sentencing process) to explain the source of his assets, income and expenditure; confiscation order is a penalty for the offence of which the defendant is convicted and not a fresh allegation, consequently, the defendant is only entitled to the protection of ECHR Art.6(1)⁸⁷³, apart from conviction based confiscation, there is a non-conviction based civil recovery of proceeds of crime, both of which shall be fully discussed seriatim.

Criminal liability for money laundering is determined by domestic law, such that what may be lawful in one jurisdiction may not necessarily be an offence in another jurisdiction⁸⁷⁴, in the same vein, predicate offence under POCA in the UK may not be applicable under RICO or Patriot Act in the US or under Money Laundering Act in Nigeria; however, confiscation being an integral part of criminal proceedings (by imposing confiscation order in personam on a convicted offender) is enforceable against an offender to recover the property used in or obtained with the proceeds or the property

⁸⁷² [2002] UK HL 815

⁸⁷³ Jordan, Confiscation of the proceeds of crime and the fair-trial rights of an accused person-recent developments in the European Community, (2000) 15 S. Afr. J. Crim. Just. 41

⁸⁷⁴ Paul Marshall, Part 7 of the proceeds of crime Act 2002: Double criminality, legal certainty, proportionality and trouble ahead, (2003) JFC 11 (2) 114

utilised in the commission of the illegal activity; the offender could be required to pay a financial penalty, recompense the victims of the crime and or the property used in the commission of the criminal offence⁸⁷⁵. There have been concerns regarding the effectiveness and adequacy of confiscation measures in the UK criminal justice system by the National Audit Office that the amount confiscated is relatively low compared to the estimated profits of criminal enterprises; however, Young argued that it was misleading to measure the impact or performance of confiscation by a simple calculation of cost of the total amount of resources dedicated to recovery of crime proceeds and benefit of the total amount forfeited.

The UK forfeiture of proceeds of crime was initially applicable to the crime of treason and later under the Forfeiture Act 1870⁸⁷⁶ but the decision in *R v Cuthbertson*⁸⁷⁷ where the House of Lords refused to strip the offenders of the proceeds of crime and held that the forfeitures power under s.27 of the Misuse of Drug 1971 were restricted to the physical items used to commit the crime; this decision led to the creation of the Hodgson Committee, asked to review “the limited forfeiture powers in recovering the proceeds of crime, the Hodgson Committee recommended inter alia, that only crown courts in criminal proceedings should have power to order the confiscation of proceeds of convicted offenders, a prescribed minimum amount for confiscation order with no maximum limit while magistrates could commit offenders to the crown court for confiscation order even if the offence could only be tried summarily, as earlier discussed in pages 231 and 234.

The second method through civil recovery allows the state or its appropriate agency to commence civil proceedings or tax proceedings in the Crown Court whether or not a

⁸⁷⁵ Nicholas Ryder, To confiscate or not to confiscate? (n 865)

⁸⁷⁶ reintroduced by the Obscene Publications Act 1959, S.3(3); the Misuse of Drugs Act 1971, S.27; Powers of Criminal Courts Act 1973, S.22(6)(a); Customs and Excise Management Act 1979, S.48-50, 88-90; 124; 139-141 174 the Drug Trafficking Act 1994, s. 43; and the Immigration and Asylum Act 1999, ss. 48-49

⁸⁷⁷ [1981] AC 470, [1980] 2 All ER 401 HL)

criminal prosecution has been brought⁸⁷⁸. The civil burden of proof has proven to be extremely controversial and has been subjected to legal challenges as demonstrated by the Supreme Court in *Gale v Serious Organised Crime Agency*⁸⁷⁹. These controversial measures were famously endorsed by the US Supreme Court in *Holland v US*⁸⁸⁰ and are used as a means of targeting people “with a high standard of living but no visible lawful means of financing it”. Under the POCA, the NCA prosecutes whenever it is satisfied that there are reasonable grounds to suspect that “income, profits or gains arising or accruing to a person (including a company) in respect of a chargeable period are chargeable to tax and arise or accrue as a result of that person’s or another’s criminal conduct”⁸⁸¹. The same taxation enforcement power by civil recovery has proved to be more successful in the US than in the UK. The Serious Organised Crime Act 2007 widened the civil recovery and tax powers of SOCA beyond the customary criminal conviction and are often used when the assets in question are in the UK but the defendant is out of the county or has fled⁸⁸² or when criminal confiscation order is inadequate and thus requires civil forfeiture⁸⁸³ which allows the recovery of proceeds of crime even in the absence of criminal prosecution⁸⁸⁴.

Both criminal confiscation and civil asset forfeiture require a measure of proportionality because if all the assets of a convicted offender are confiscated without any proof of a link to illicit source, it would infringe his fundamental right to own property⁸⁸⁵ and the Eighth

⁸⁷⁸ POCA, S.240(2)

⁸⁷⁹ [2011] UKSC 49

⁸⁸⁰ 348 U.S. 121 (1954)

⁸⁸¹ s. 317(1)(a) and (b)

⁸⁸² Nicholas Ryder, “To confiscate or not to confiscate?” (n 865)

⁸⁸³ Stefan Cassella, The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime (2008) JMLC 11 (1)

⁸⁸⁴ *ibid*

⁸⁸⁵ Anna Maugeri, The Criminal Sanctions Against The Illicit Proceeds Of Criminal Organisations, (2012) New Journal Of European Criminal Law 3 (3-4) 259

Amendment, that prohibits excessive punishments, cruel and unusual punishments and the Due Process Clause of the Fourteenth Amendment, in *US v Sarbello*⁸⁸⁶, the US Supreme Court affirmed that criminal forfeiture under RICO must be subjected to a proportionality test under the Eighth Amendment thus nullifying RICO clause s.1963(a)(2)(A) that allows the entire property of the offender in the criminal enterprise to be subjected to forfeiture even if those 'interests are acquired legitimately and the enterprise is primarily engaged in legitimate activity' except where the untainted assets of a convicted person reveals that it is going to be used for criminal purpose or in case of strong suspicion that such asset belong to criminal organisation, consequently, the origin, destination or purpose of an asset even without a criminal offence may determine its forfeiture, therefore, a money laundering offender may avoid confiscation by establishing the legal origin of the proceeds, while a person accused of financing terrorism must establish lawful destination or purpose of his fund, since the essence of the law in the latter circumstance is to starve criminal organisation of resources⁸⁸⁷. In UK, the attempt to ensure proportionality of punishment was taken by restricting the recovery of proceeds to 6 years period of criminal lifestyle as explained on pages 240-241. Again, where the fund derived from fraud or corruption is laundered and the offender could not account for his wealth, such asset may be confiscated by the state applying various rules of presumptions and shifting burden of proof⁸⁸⁸. Forfeitures and Excessive Fines Clause of the Eighth Amendment was again considered in *United States v Bajakajian*⁸⁸⁹ the CTR being one of the pillars on which US AML structure stands, the offender was caught carrying huge amount of money at the point of leaving the US via an international flight, he was charged inter alia, with attempting to leave the US without reporting the fund, as required under 31 U. S. C. § 5316(a)(I)(A), that he was transporting more than \$10,000 in currency. The state sought forfeiture of the entire amount under 18 U. S. C. § 982(a)(I),

⁸⁸⁶ 985 F.2d 716, 724 & n.13 (3d Cir. 1993)

⁸⁸⁷ Maugeri, The Criminal Sanctions (n 887)

⁸⁸⁸ Ibid

⁸⁸⁹ 524 U.S. 321 (1998)

which provides that a person convicted of wilfully violating § 5316 shall forfeit "any property so involved in such an offence; the offender pleaded guilty to the failure to report, the court refused to order a forfeiture of the entire amount, as the funds were not connected to any crime, the offender was transporting the money to repay a lawful debt; it was further held that forfeiture of the entire fund would be grossly disproportional to the offence in question and amount to violation of the Excessive Fines Clause of the Eighth Amendment, consequently, the court ordered forfeiture of \$15,000, in addition to three years' probation and the maximum fine of \$5,000 under the Sentencing Guidelines. The Ninth Circuit affirmed this decision and held that forfeiture order must satisfy two conditions: The property forfeited must be an "instrumentality" of the crime committed, and the value of the property must be proportional to the owner's culpability.

Though there has been no consensus on application of the constitutional provisions on excessive fine to forfeiture proceedings, Cassella, pointed out the emerging trends in the court decision⁸⁹⁰ thus:

1. Although **Bajakajian**⁸⁹¹ is a criminal proceeding, its rationale on proportionality and excessive fine is applicable to civil forfeiture.
2. **Bajakajian**⁸⁹² is inapplicable when the undeclared money is a proceed of another crime⁸⁹³ or is intended to be used to commit another crime⁸⁹⁴

⁸⁹⁰ Stefan Cassella (n 801)

⁸⁹¹ 524 U.S. 321 (1998)

⁸⁹² *ibid*

⁸⁹³ full forfeiture under § 5317(c) of drug money transported into the United States without filing a CMIR)

⁸⁹⁴ United States v. U.S. Currency (\$898,719.00), 2003 WL 21544283 (W.D. Mo. 2003)

3. If the money is unconnected to another crime, **Bajakajian** only mitigates the forfeiture in order to avoid excessive fine under the Eighth Amendment, it neither prohibits, set aside the forfeiture nor allow arbitrary estimate of the value of asset to be forfeited, rather, it determines the actual value of the proceeds of crime⁸⁹⁵
4. Structuring of deposit is different from infraction of CTR or CMIR for the purpose of Eighth Amendment, thus in **United States v. Ahmad**⁸⁹⁶, the court applying **Bajakajian** to structuring, held that forfeiture of structured deposit is not excessive as structuring is more serious than a reporting violation, it is a repeated and affirmative conduct and not an infrequent occurrence involving innocent parties like bank and to a third party whose money is being structured and being exposed to forfeiture.

Despite the various AML strategies, the world still grapple with the scourge, it appears there must be a global paradigm shift of approach but on the contrary, Gallant⁸⁹⁷ delved into the positive dividends of global AML measures which though has failed to reduce international money laundering, illicit drug trade and terrorist financing, considering the global surge of incidences of financial crime and the emergence of transnational terrorist groups like ISIS, Al-Qaida, Boko Haram and many others. It could however be imagined what our world would have been without the FATF Recommendations and other international and national AML in place, it appears obvious that the world would have become more precarious to live in. For instance, prior to the global AML regime, it was very difficult to foster international cooperation in identifying, tracing and interrupting criminal resources, however, the current efforts though has not eradicated money laundering, it has curbed the impunity and velocity of money laundering; secrecy, confidentiality, anonymous or numbered bank accounts which had hitherto afforded

⁸⁹⁵ Stefan Cassella (n 801)

⁸⁹⁶ 213 F.3d 805 (4th Cir. 2000)

⁸⁹⁷ Michelle Gallant, Money laundering consequences Recovering wealth, piercing secrecy, disrupting tax havens and distorting international law (2014) JMLC 17 (3) 298

proceeds of laundered fund especially in OFC, it is no longer easy to continue, especially for the PEP in Africa. Again, states have devised means of civil forfeiture to simplify seizure of tainted wealth without prior conviction which has been yielding result. Money laundering measures have changed global jurisprudence on drug law, terrorist financing, corruption and recently tax evasion which hitherto was restricted to revenue law of each country and beyond the purview of INTERPOL⁸⁹⁸. Furthermore, the modern money laundering regime has altered the gamut of international law and diplomatic relations which before now was usually based on mutual or multi lateral negotiation as validated by intervention of the UN Security Council Resolution mandating member states to implement specific domestic anti terrorism laws and the incursion of FATF Recommendations in areas of law which would have been considered a strict domestic or business law⁸⁹⁹.

However, despite of the global improvement in the interdiction and disruption of proceeds of money laundering, Nigeria has not been able to creatively unleash the full force of potential legal weapons like civil and regulatory enforcement to obviate the standard of proof and privileges of an offender in criminal proceedings, and the international cooperation to confront this problem due to many factors which shall be discussed in the next chapter.

⁸⁹⁸ Ibid

⁸⁹⁹ Ibid

Chapter 9

How to deal with identified problems in the context of the legal system: jurisdiction, complexity, standard of proof as a model for Nigeria.

The previous chapters have extensively evaluated the various domestic legislations and policies as influenced by the international financial crime control but this chapter shall appraise the various ways in which domestic measures have frustrated the effective interdiction of transnational crimes. It evaluates the problems related legal system, jurisdiction complexity and standard of proof by identifying the difference between international crimes and transnational crimes. It reiterates that the development and the use of Information technology and telecommunications in business transaction has demystified the concept of sovereignty of states in investigation and prosecution of crime, thus raising the issue of appropriate exclusive or concurrent venue of prosecution of transnational crime as illustrated in the UK decision of *R V James Ibori*, the lack of international cooperation is also identified as a major challenge to investigation, prosecution, punishment and seizure of proceeds of transnational financial crime. This chapter evaluates the difficulties associated with the use of letters rogatory and police to police cooperation which are slow and the ambiguity surrounding political offence which the constitution of the INTERPOL prohibits and the existing MLA regime under the FATF recommendations, observed to be of binding authority but has the challenges of dual criminality and difference in procedure between common law and civil law jurisdictions. The chapter re-emphasises the need for every jurisdiction, especially Nigeria to ensure compliance with TATF Recommendation 37 in drafting its MLA.

The Commonwealth's earlier initiative on MLA is analysed, although it was the harbinger of the current modern initiatives, however, it is observed to be of little impact because it was not a treaty and consequently had no binding effect. Again, many literatures are relied upon in appraising MLAT, especially, Sundarah Menon's recommendation on multilateral international structure with ability to formulate binding obligations and

coercive powers transcending the existing traditional structures and MLAT. However, due to issues of sovereignty and possible loss of control over states, the thesis rejected the recommendation and opted for the review of the existing modalities under the FATF by designing a more practical peer review mechanism. The chapter also analysed the concept of standard of proof in litigations, in view of the high standard of proof in criminal matters, the thesis recommends for Nigeria, the use of quitam action, merger of criminal and civil proceedings to avoid the dichotomy in the standard of proof and thirdly, decriminalisation of financial crime by introducing the law of wrongs, as this will further obviate the challenges of double jeopardy and parallel proceedings.

As earlier stated, technological development and globalisation of business have aided the increase of organised criminal activities, international terrorism and international financial crime which the old principles of territoriality and sovereignty in international crime prosecution failed to adequately resolved, this deficiency requires a paradigm shift in the control of transnational crime. This problem is further aggravated by the fact that the provisions of treaty crimes like the UNCAC 2004, UN Convention Against Transnational Organized, 2000 and others (to foster international cooperation against transnational crimes) are different from international criminal law; treaty crimes are created by treaties with expectations that the national legislation will be enacted to criminalise them unlike the international crime which are largely perceived as threats to international peace and security and are so egregious as to shock the conscience of humanity⁹⁰⁰, its jurisdiction is restrictively defined under the Rome Statute of the International Criminal Court 2002, Art.5, namely: genocide, crimes against humanity, war crimes and crime of aggression, this serves as a big challenge for many national criminal jurisdictions to control treaty crimes within their jurisdictions and there have been proposals for the expansion of the jurisdiction of the ICC to cover treaty crimes as this would result in greater certainty in control of transnational crimes by serving as a

⁹⁰⁰ Jessie Ingle, 'The International criminal court and financial crime', in Barry Rider (ed) *Research handbook on international financial crime* (Edward Elgar Publishing 2015) 670; see also Neil Boister, 'Treaty crimes and international criminal court?' (2009) 12 NEW Crim.LR 346

forum for resolving jurisdictional disputes between nations over extradition of offenders and avoid conflicts similar to the alleged illegal attempted deportation of Umaru Dikko from the UK by Nigeria in the 1984. Furthermore, the global harmful effect of financial crime, organised criminals and terrorist organisations all strengthen the demand for making treaty crime an international crime⁹⁰¹, also, the ICC has sufficient resources for investigation than many national courts (in developing nations) to assume jurisdiction over transnational borders⁹⁰² but presently, there appears to be little support for change in international policy as argued at the Rome conference of 1998 (apart from fear of violating state jurisdiction), it may trivialise the role of ICC and stretch its resources⁹⁰³.

The term jurisdiction has many interpretations which at the national level represents power of the judicial authority in a given state and at international level, it is the right of the state to regulate matters that are within its domestic jurisdiction, it connotes legislative, judicial and executive power to prescribe, adjudicate and enforce laws and policies by different organs of a given state within its borders⁹⁰⁴, it is based on the principle of territoriality, sovereignty and reciprocity⁹⁰⁵. A state has the judicial power under the international law to enforce its prescribed legislations and rules, enforce orders and decisions emanating from its judiciary, the prescriptive and adjudicatory jurisdiction of a given state may coincide but its prescriptive and enforcing jurisdictions may not coincide because under the international law, a sovereign state cannot exercise jurisdiction of enforcing its laws in another territory except if allowed by international

⁹⁰¹ Ibid 671

⁹⁰² Molly McCoville, 'A global war on Drugs: why the US should support the prosecution of drug traffickers before the international criminal court' (2000) 37 Am Crim LR 75, 96

⁹⁰³ Neil Bioster, "The exclusion of Treaty crimes from the jurisdiction of the proposed international criminal court: Law, pragmatism, politics" (1983) J. Conflict security L. 3 (1) 27, 35, see also Jessie Ingle (no 902) 66

⁹⁰⁴ Guy Stessens, Money Laundering: A New International Law Enforcement Model (Cambridge University Press 2000) 209

⁹⁰⁵ Ibid 211

custom, convention⁹⁰⁶ or any existing treaties. In Hodgson's analysis⁹⁰⁷, early English criminal jurisdiction has always been based on this same territorial principle in line with the majority decision of the International Court of Justice in the *S.S. Lotus, France v Turkey*⁹⁰⁸ which held that territorial application of international law is subject to international custom and convention. Hodgson thinks this rule was designed for the preservation of English national and European colonial interests over their conquered territories by preventing other nations from making incursions into the colonised territory of one another; arguing further, Hodgson explained that the low level of technological advancement at the time when the rule was formulated justified its successful application but the recent pace and volume of transnational financial crime witnessed in the modern generation, eradication of territorial colonisation, development of information telecommunication and technologies far beyond the level anticipated 100 years ago demand a new approach to the prosecution of transnational crime; to reflect this reality, the courts have devised new theories to assume jurisdiction over transnational crime as territorial principle in contemporary jurisprudence is no longer interpreted or understood in the same context as 100 years ago but it is now informed and influenced by the international comity principle dependent on gradual recognition by lawmakers and the judiciary that the funding of modern criminal enterprises are increasingly international in scope and nature⁹⁰⁹ as demonstrated when the House of Lords permitted the extradition of parties implicated in conspiracy to bomb the American

⁹⁰⁶ *ibid* 213; see also *Lotus ss, France v Turkey* (1927) PCIJ Series A, no.10, ICGJ 248 (PCIJ 1927), 7th sept. 1927

⁹⁰⁷ Tyler Hodgson, *From famine to feast The prosecution of multi-jurisdictional financial crime in the electronic age*, (2008) JFC 15 (3) 322

⁹⁰⁸ *Lotus ss, France v Turkey* (n 908)

⁹⁰⁹ Per Lord Griffiths in *Liangsiriprasert (Somchai) v Government of the United States of America* [1991] 1 AC 225 (PC) 251: "Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality"; cited in Tyler Hodgson, *From famine to feast* (n 909)

embassies in Kenya and Tanzania by Osama bin Laden, despite the fact that no overt criminal act occurred within the territorial USA⁹¹⁰ but despite this new awareness, the international comity principle has not been static as it has been very difficult in the modern world for a single nation to lay exclusive claim to jurisdiction over transnational crime⁹¹¹, furthermore, judicial attitude towards criminal jurisdiction in the past century has been inconsistent, conflicting and has resulted in a state of “doctrinal confusion”⁹¹², decisions have varied from developing and applying the ‘last act’ theory of criminal jurisdiction by the British courts divided into two categories of result crimes and conduct crimes⁹¹³, in *R v Ellis*⁹¹⁴, the court applied the last act theory and assumed jurisdiction for result crimes for consequences of the offender’s physical acts where the offence was completed on British territory; conversely, where the last ingredient of the offence was continuing in nature, English courts could assume jurisdiction if any part of the last act occurred in England⁹¹⁵ but the last act theory was rejected in *Treacy v DPP*⁹¹⁶ by Lord Diplock who reasoned that distinguishing offences into result or conduct crimes under the last act theory were mere semantics and proposed the rules of international comity where a state can prosecute an accused for any act forming a part of the offence that occurred in the state, regardless of whether it was the last act or not, so any person present in the UK who contravenes UK domestic law, effect of which materialises in another country can be prosecuted in either country⁹¹⁷; this is what John Obrien⁹¹⁸ referred to as ubiquity theory, similar to the US subjective territorial theory which gives

⁹¹⁰ In re Al-Fawwaz, [2001] UKHL 69

⁹¹¹ Tyler Hodgson, From famine to feast (no 909) 322

⁹¹² Per La Forest in Canadian case of R v Libman [1985] 2 S.C.R. 178

⁹¹³ completed by the physical actions of the accused, irrespective of any further consequences

⁹¹⁴ [1899] 1 Q.B. 230

⁹¹⁵ Secretary of State for Trade v. Markus [1976] A.C. 35 (HL); see also R. v. Manning, [1998] EWCA Crim 2074 (24 June 1998) 5

⁹¹⁶ [1971] AC 537 HL

⁹¹⁷ Tyler Hodgson, From famine to feast (no 909)

⁹¹⁸ John Obrien, International law (Cavendish Publishing 2002) 218

US courts the power to assume jurisdiction over offences initiated on US territory even if consummated on another territory, deductively, this ensures that whoever commits an offence within one territory resulting in harm to another person in another territory would be duly prosecuted for the offence⁹¹⁹. As explained by Hodgson, international comity theory marks a shift from exclusive to concurrent jurisdiction⁹²⁰, to the extent that even where a state cannot prosecute a resident offender because the offence is not within its prescriptive jurisdiction, prosecution can be effected whenever such an offender enters the other territory where the consequences of offence took place.

The international comity theory is the prevailing test for assuming international criminal jurisdiction in most common law jurisdictions⁹²¹ including the US and Nigeria; application of this principle ensures recovery of proceeds of crime, particularly, in view of the rapid phenomenal surge in global cybercrime that has complicated the identification of an appropriate territorial jurisdiction of an offence, applying the international comity theory to cybercrime ensures concurrent assumption of jurisdiction, especially, in cyber economic crimes which affects multiple jurisdictions simultaneously. Fletcher⁹²² in his analysis of cybercrime observed its multi jurisdictional impact arising from global access to internet in business transaction and thereby constituting a global problem as there could possibly be many applicable laws which the existing international law did not envisage⁹²³ and though jurisdictional or territorial law is still an evolving area of law, the appropriate jurisdiction in the event of Cybercrime remains ambiguous, it is not yet clear whether it should be governed by the domestic laws of the state where the web site is

⁹¹⁹ Tyler Hodgson, *From famine to feast* (n 909) 325

⁹²⁰ *Ibid* 326

⁹²¹ *Wallace Duncan Smith* (No. 1), [1996] 2 Cr App R 1; Canadian cases of *R. v. Libman*, [1985] 2 S.C.R. 178; *R v Rowbotham*; *R. v. Roblin*, [1993] 4 S.C.R. 834; Singaporean case of *Lau v. DPP* (Court of Appeal, 18 November 1988), and Jamaican case of *Shervin Emmanuel v. DPP* (2004)

⁹²² Nigel Fletcher, *Challenges for regulating financial fraud in cyberspace*, *JFC* (2007) 14 (2) 198

⁹²³ *Ibid*

hoisted or the domestic law of where the internet service provider is located or the laws of the state where the offender is located or a combination of laws of all these jurisdictions⁹²⁴; one of the plausible suggestions so far made by Johnson and Post is that “cyberspace should be treated as a separate jurisdiction”⁹²⁵ because investigation and prosecution of cybercrime is difficult, it has no uniform acceptable definition, an example is Brazil where hacking alone without proof of fraud is not a crime. Therefore, how would the question of appropriate forum for criminal prosecution be determined where multiple states lay claim to competing criminal jurisdiction? An answer could possibly be found in Hodgson’s⁹²⁶ suggestion of applying forum non conveniens principle, a civil law doctrine relevant in determining the appropriate forum for legal proceedings in concurrent claims over jurisdiction in line with the Canadian supreme court case of *R. v. Cook*⁹²⁷ where it was held that where there is a conflict between two legal systems, the state with a ‘*reasonable connection*’ to the events should assume jurisdiction, where two states have reasonable connection to the events, the state which is ‘*most clearly connected*’ to the events should assume jurisdiction under international law principles, secondly, where a state prohibits an act which is allowed in another territory, such concurrent claims to jurisdiction should be carefully defined such that the state laying claims to jurisdiction over the events occurring abroad must have a ‘*significant connection*’ or the state with the ‘*most significant connection*’ to the events in question. This laid down principles are ambiguous as they do not adequately and specifically address what circumstance foreign territories should assume jurisdiction over transnational crime in the event of conflicting claim of jurisdiction, although Hodgson⁹²⁸ argued that this decision may equally be extended to proceedings where no conflict exists and where there is concurrent claim to criminal jurisdiction. However, there may be

⁹²⁴ Sundaresh Menon (no 857)

⁹²⁵ David Johnson, Law and borders – the rise of law in cyberspace” (1996) 48 Stanford, L. Rev. 1357

⁹²⁶ From famine to feast (no 909)327

⁹²⁷ [1998] 2 S.C.R. 597, 136

⁹²⁸ Tyler Hodgson, From famine to feast (n 909) 328

some other considerations like the nationality of the offender, where ‘*active nationality principle*’ dictates that a state should exercise jurisdiction over its nationals⁹²⁹ for domestic offence committed abroad⁹³⁰ but in practical terms, judicial efficiency and fairness of proceedings, the range of available remedies in a particular jurisdiction may be preferable or superior to those available in another⁹³¹ like Nigeria that has no civil recovery of proceeds of crime legislation, it may be preferable to recover the loot of criminal wealth by acceding to foreign trials of its national involved in transnational money laundering, corruption and fraud offences like *R v Ibori*⁹³², convicted in the UK after a perceived corrupt Nigerian judicial system discharged and acquitted the offender of all charges. The location of the witnesses and evidence such as where a Nigerian PEP, Diepreye Alamiyeseigha arrested in the UK for money laundering offence, the evidence was in the UK, he was immune from criminal proceedings in Nigeria and the suitability of the UK court in the determination of issues at trial and the consequence of declining jurisdiction⁹³³ by the UK court. It could therefore be deduced from the aforementioned that Sovereignty rather than being a weapon against organised crime could be a shield against detection and prosecution in OFC; it allows transnational criminals to take

⁹²⁹ FATF, Recommendation 39

⁹³⁰ Obrien, International law (n 920); see also UK Bribery Act, 2010; see also Nigeria Advance Fee Fraud Act, US corruption law

⁹³¹ Tyler Hodgson, From famine to feast (n 909)

⁹³² [2013] EWCA Crim 815; [2014] 1 Cr. App. R. (S.); Andrew Walker, “James Ibori: How a thief almost became Nigeria's president” <<http://www.bbc.co.uk/news/world-africa-17184075>> accessed on 08/10/2015; Nigeria ex-governor James Ibori arrested in Dubai” <<http://news.bbc.co.uk/1/hi/world/africa/8680569.stm>> accessed 08/10/2015

⁹³³ *Muscatt v Courcelles* CanLII 44957 (Ont.C.A.) (2002), identifies the factors to be considered when applying the doctrine of forum non conveniens as (1) location of the majority of the parties; (2) location of key witnesses and evidence; (3) contractual provisions that specify applicable law or accord jurisdiction; (4) avoidance of a multiplicity of proceedings; (5) applicable law and its weight compared to the factual questions to be decided; (6) geographical factors suggesting the natural forum; (7) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

advantage of differences in legal systems, bureaucracies and lack of international cooperation in criminal investigation, prosecution, mutual assistance and extradition.

9.1 Mutual legal assistance

Apart from the conflicting right of jurisdiction in adjudication of transnational crime, there are further challenges of international crime investigation and defence that demands cooperation in disclosure request among nations for access to evidence for thorough examinations and cross examination, pre-trial search, seizure, freezing and confiscation of the proceeds of crime in order to prevent dissipation of the proceeds of crime; this process is governed by the *locus regit actum*, (the relevant legal procedure for obtaining evidence in a foreign jurisdiction) that is, the *lex situs* (the law of the place), in this case, the jurisdiction where the required evidence is located⁹³⁴, these different procedural rules tend to frustrate successful investigation, hamper successful prosecution and enforcement of foreign court judgement; denial of access to adequate gathering of evidence affects successful prosecution, aids evasion of justice, allows the offender to retain the proceeds of crime and conversely, the offender could be denied relevant adequate defence, resulting in miscarriage of justice or if the proceeds of crime are not preserved from dissipation, the judgement would be in vacuum as there would be nothing to recover after a successful prosecution and where foreign judgement could not be executed in another jurisdiction, the entire proceedings would amount to a waste of public fund and victory for the organised crime.

Hitherto, as earlier mentioned, the traditional attitude of states in international criminal investigation was non-cooperative, although national police forces have always assisted each other through INTERPOL but such efforts were insufficient to meet the growing demand for speedy and effective assistance in transnational crime, consequently, some jurisdictions resorted to unilateral efforts like the USA issuing subpoenas *duces tecum*

⁹³⁴ Guy Stessens (n 906) 303; see also Art.6 UN Model Treaty on Assistance in criminal matter 1990; see also Art.7 (12) Vienna Convention

compelling a person to appear in court to produce document or other tangible documents or subpoena ad testificandum compelling a person to give oral testimony in criminal proceedings, a major challenge of which is the lack of mechanism for enforcing the attendance of witnesses from other jurisdictions. This unilateral effort can only succeed where the witness (legal, natural person or subsidiary of a foreign holding company) or their legal representatives are located or present (even if as a visitor) in the jurisdiction issuing the subpoena; it is immaterial that the testimony would hold such a witness liable to criminal prosecution in other state⁹³⁵ or even if it amounts to violation of non disclosure rules of the other state⁹³⁶.

In the absence of a binding treaty; extra territorial disclosure orders seem to violate sovereignty, as such orders aim to compel obtaining of information or document protected by laws of another state but even where there are existing legal assistance treaties, procedure for gathering evidence remains problematic due to divergent procedure for obtaining evidence between the requesting and requested states. However, admissibility of such evidence depends on domestic procedural law which varies within countries⁹³⁷. One of the earliest solutions to this quandary was the utilisation of voluntary disclosure whereby the offender is encouraged to waive his rights and privileges by instructing his financial institution to disclose information that pertains to him, secondly, the court may compel an account holder within its jurisdiction to direct his bank or other financial institution to disclose an information protected by foreign law⁹³⁸, this has been held not to violate the 5th amendment privilege against self incrimination⁹³⁹, nevertheless,

⁹³⁵ USA v Field, 532 F.2d at 407, see James Springer, 'Obtaining foreign assistance to prosecute money laundering cases: A US perspective', (2001) JFC (9) 2 159

⁹³⁶ USA v Bove, 694 F.2d at 1258, see also Springer, Obtaining foreign assistance, *ibid* 159

⁹³⁷ R v Radak [1999] 1 Cr.App.R.187 which held that where foreign testimony was obtained by the prosecution, the defence solicitor has a right to cross examine such a witness

⁹³⁸ Doe v US, 487 US 201, (1988); see also Springer, Obtaining foreign assistance (n 30) 160

⁹³⁹ *ibid*

such a compelling order does not guaranty that the requested state would comply with the order⁹⁴⁰. Again, subpoenas can be issued to a US citizen resident in a foreign country to testify or produce a document⁹⁴¹, a procedure which any common law country also should be able to apply to its citizen living abroad but there could be problem where an obtained evidence contradicts the domestic procedural law where it is to be used, like involuntariness of evidence or violation of human right law like in *R v P (Telephone Intercepts: Admissibility of Evidence)*⁹⁴², here, the evidence consisting of transcripts and recordings of telephone intercepts obtained in conformity with the law of an EU country by police authorities, which would have been inadmissible under the UK Interception of Communications Act 1985 if the intercepts had been made in UK was allowed in UK Court.

Further, international coordination in criminal matters relied on extradition and mutual legal assistance treaties as the main international legal means of apprehending international fugitives and means of obtaining foreign evidence⁹⁴³, in its absence, letters of request or letters rogatory at the diplomatic level could be used⁹⁴⁴ and police to police assistance is also of considerable relevance⁹⁴⁵ but these were fraught with delay, in all circumstances, evidence obtained may be subjected to domestic human right laws and most treaties deny extradition when the crime is deemed a "political offence" without defining what constitutes a political offence⁹⁴⁶, the interpretation of which depends on

⁹⁴⁰ In Re ABC Ltd, 1984 CILR 130, 134 – 135 (Grand Court of the Cayman Islands, 1984)

⁹⁴¹ 28 USC s. 1783 and punishable under s.1784 for failure to comply; see also Springer, Pg.160

⁹⁴² Times, May 23, 2000 (CA (Crim Div)

⁹⁴³ Thomas Snow, The Investigation and Prosecution of White-Collar Crime: International Challenges and the Legal Tools Available to Address Them, William & Mary Bill of Rights Journal, (11)1

<<http://scholarship.law.wm.edu/wmborj/vol11/iss1/7/>> accessed 21/09/2015, 211

⁹⁴⁴ Ibid 223

⁹⁴⁵ Ibid 234

⁹⁴⁶ R v Governor of Brixton Prison, ex parte Enahoro [1963] 2 QB 455, [1963] 2 AER 477, [1963] 2 WLR 1260; see also Momodu Kassim-Momodu, 'Extradition of Fugitives by Nigeria', (1986) The International and

the law of the requested state, conversely, in foreign investigation or prosecution, mutual legal assistance assists in obtaining foreign evidence because it is an international obligation unlike the traditional letters rogatory approach where request assistance is discretionary, except that the process of implementing among states in implementing bilateral or multilateral agreements on judicial cooperation has been slow and complex⁹⁴⁷, thus providing organised criminal group with the means of hiding illicit profit from detection and beyond the claws of domestic law enforcement and courts. These challenges have galvanised the growth of mutual legal assistance treaties, in the absence of which transnational legal cooperation on criminal investigations of illicit profits would remain a mirage. A MLAT could either be a bilateral agreement or a multilateral convention, it is a binding legal instrument on enforcement of foreign orders, examination of records, witnesses and collection of fines; it is however fraught with problems where such treaties are complex, where terms of cooperation depends on definition of offence in each jurisdiction, where tedious or complex processes of certification or authentication of documents are required to enforce the court orders and conviction and due to the differences between civil and common law jurisdictions procedure of obtaining evidence and definition of crime; these challenges retard recovery process in a generation where rapid growth in telecommunication technology aids speedy cybercrime and possible destruction of evidence within a short period; more proactive

Comparative Law Quarterly 235 (3) 514, the extradition request by Nigeria government for Anthony Enahoro, a Nigerian fugitive in the UK, pursuant to the 1881, Fugitive Offenders Act, because of the political nature of the allegation against him, the British Courts approved his extradition to Nigeria, the case exposed the lapses in the colonial extradition legislation which necessitated the convening of 1965 and 1966 Commonwealth law minister meeting to amend and harmonise the Extradition legislations of commonwealth states; perhaps, extradition is often political and not a legal consideration which must have influenced the attempted abduction of **Umaru Dikko**, a fugitive offender alleged corrupt person wanted in Nigeria.

⁹⁴⁷ Robert Kroeker, The pursuit of illicit proceeds: from historical origins to modern applications, JMLC (2014) 17 (3) 269

legislations still need to be enacted to improve the existing MLATs so as to target proceeds of transnational financial crime without neglecting the substantive and adjectival law on the same subject matter, in addition to Kroeker's⁹⁴⁸ proposal for specific cybercrime legislation to ensure certainty in resolving the perennial challenges in transnational criminal law because while organised criminals speedily pierces through transnational frontiers, coordination of international investigation and enforcement remained frustrated by the formality of procedures in many MLAT, differences in domestic legislation between requesting and requested states, where many jurisdictions are concerned, investigations are delayed while information and investigative techniques amongst nations may affect admissibility of evidence⁹⁴⁹.

Bilateral cooperation are restrictive in application as they fail to cover multiple jurisdictions which may allow organised crime to “forum shop” and structure their criminal enterprise across liberal jurisdictions with favourable laws but even with multilateral agreements, there are likely problems of coordinating investigation which is made aggravated by possible lack of generally acceptable definition of offences and requirement for dual criminality which demands that the underlying criminal act must be a crime in both the requesting and requested states before offering any legal assistance or judicial cooperation⁹⁵⁰; this can be difficult to achieve where there are technical discrepancies in the definition of the offence between states in question. However, the influence of FATF⁹⁵¹ has engendered change in the modern approach to MLAT by providing a minimum guide on what a MLAT should provide in order to obviate typical frustration that confronts such treaties like dual criminality with a shift from emphasis on technical definitions to a focus on substantive conduct constituting the crime, such that if the alleged conduct constitutes a criminal offence in the requested state, it should be

⁹⁴⁸ Ibid

⁹⁴⁹ Sundaresh Menon (n 857)

⁹⁵⁰ Sundaresh Menon (n 857) 245

⁹⁵¹ Recommendation 37, through peer review, any non compliant jurisdiction could be influenced to comply

immaterial if the offence in the two states has different name or elements, consequently, FATF assists states by ensuring that during FATF Peer review, any dual criminality clause in a MLAT is expected to be noted as noncompliance which the affected state would be advised to rectify; with this new approach, the international legal assistance process has improved.

One of the earlier initiatives to encourage multilateral cooperation was the 1986, Commonwealth Scheme on Mutual Assistance in Criminal Matters agreed in Harare; others are regional international organisations like the 1959, European Convention on Mutual Assistance in Criminal Matters,⁹⁵² but the Commonwealth multilateral schemes is neither a treaty nor a convention, therefore, it has no binding effect on member states, more so, it is not registered under the UN Charter Art. 102, therefore, it remains merely an agreed set of recommendations for legislative implementation by each government which inter alia, contains search, seizure and tracing and forfeiting the proceeds of criminal activities, obtaining and production of judicial or official records⁹⁵³.

Nigeria is not isolated from the challenges related to poor assistance in international legal assistance, partially due to the sordid and slipshod drafting of its Foreign Judgement (Reciprocal Enforcement) Act, 1990, derived from the colonial statute, enforceable among commonwealth nations, this law is fraught with ambiguity relating to the applicable law⁹⁵⁴ and the requirement for the presence and submission of the defendant to the jurisdiction of a presiding foreign court⁹⁵⁵ which could be difficult where a defaulting defendant refused to submit to the jurisdiction of the presiding court by migrating to

⁹⁵² David McClean, 'Mutual Assistance in Criminal Matters: The Commonwealth Initiative' (Jan. 1988) *The International and Comparative Law Quarterly*, 37 (1) 178

⁹⁵³ Ibid 180

⁹⁵⁴ Adewale Olawoyin, *Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws*, *Journal of Private International Law*, (2014) 10 (1) argued that failure to repeal the *Reciprocal Enforcement of Judgments Ordinance 1922* in the revised 1990 Laws of Nigeria

⁹⁵⁵ s.3 (2)

another country, this prompted the Nigeria Supreme court in *Grosvenor Casinos Limited v Ghassan Halaou*⁹⁵⁶, to demand for urgent law reform of the extant Nigerian law on enforcement of foreign judgement as the present law constitutes an open invitation to fraud and frustration of international trade. However, in international cooperation and assistance in investigation, interrogation and seizure of proceeds of crime, Mareva injunction⁹⁵⁷ within the commonwealth jurisdictions and Commonwealth multilateral schemes in criminal matters is relevant among participating states. Invariably, the relative success in international cooperation is attributable to the recent international outcry against money laundering without which the Europe, especially the Swiss banks, the UK and the US banks would have remained safe havens for laundering of African wealth by corrupt African politicians.

In view of these challenges, Sundaresh Menon⁹⁵⁸ recommended the setting up of a multilateral international structure that transcends the existing traditional territorial structures and MLAT, this proposed new structure would facilitate permanent international cooperation in the fight against transnational economic and cybercrimes; according to Menon, such a new system of collaboration would require the establishment of an institution with coercive powers, with ability to formulate binding obligations through multilateral convention, and set standards and guidelines, the investigative and adjudicatory jurisdiction of such a proposed anti international financial crime institution would complement and not override the jurisdiction of national courts similar to the ICC, in support of this recommendation, Menon⁹⁵⁹ cited the proposed European Public Prosecutor (EPP) aimed at coordinating, investigating and prosecuting (at the national level) fraud against the financial interests of the European Union (EU), the proposed EPP is expected to have coercive powers of directing investigations by national enforcement agencies and expected to coordinate such prosecutions by member states; it is expected to

⁹⁵⁶ (2009) 10 NWLR (Pt 1149) 309

⁹⁵⁷ SA [1980] 1 All ER 213; see also (no 710)

⁹⁵⁸ Sundaresh Menon (no 857) 244

⁹⁵⁹ Ibid 249

be a creation of multilateral convention so that it could impose binding obligations on member states.

The second proposal by Menon⁹⁶⁰ is an intermediate body similar to the FATF and Eurojust⁹⁶¹ to fight international financial crime; though it was conceded that the extensive similarity of legal standards and social norms among the EU states support the establishment of an institution such as the EPP which would probably encounter problems of attaining political agreement and harmonisation of various national laws and procedures if attempted at the global level⁹⁶²; nevertheless, Menon thinks such an established body would be an agency or secretariat under the auspices of an international organisation like the World Bank, to coordinate and facilitate cooperation among national prosecutors, judges, investigators and regulatory authorities⁹⁶³ which would provide investigative and prosecutorial network and at the same time leverage on the existing networks of INTERPOL, EUROJUST and FATF; although Menon conceded that this hybrid model lacks binding and coercive authority over member states as each state retains its investigatory and prosecution autonomy⁹⁶⁴ but thinks this may be extended to the establishment of soft law on legal assistance, admissibility of evidence, mutual recognition of processes, international asset recovery⁹⁶⁵ and lastly, eventual effectiveness of such a “soft law” would be ensured by periodic peer reviews and mutual assessments similar to the FATF scheme⁹⁶⁶.

⁹⁶⁰ Ibid

⁹⁶¹ EU regional body of national prosecutors, magistrates or police officers established by Council Decision 2002/187/JHA to improve judicial cooperation in the fight against serious crime, it coordinates investigations and prosecutions of transnational crimes in EU. It operates through a collegiate system as each state remains subject to its national law.

⁹⁶² Sundaresh Menon (n 857)

⁹⁶³ Ibid

⁹⁶⁴ Ibid

⁹⁶⁵ Ibid

⁹⁶⁶ Ibid

There is no doubt that Menon had good intentions of providing a suitable alternative to the existing challenges in international legal cooperation but the proposal has not provided a pragmatic better option than the existing scheme; the hypothesis only reiterated the obvious challenges; considering the fact that the existing arrangement under the FATF has been relatively effective, any attempt to introduce a coercive measure would backfire like the FATF which at the inception had to reconsider its coercive measures against erring states in order not to lose control despite the support and backing of the World bank. Again, Menon's hypothesis would infringe principle of sovereignty and deepen suspicion amongst states and ultimately lead to uncooperative attitude among states in international fight against financial crime as witnessed by complaints from African heads of states that the ICC has mainly focussed on prosecuting only African leaders while their counterparts in Israel, Syria, Europe and America appear immune from prosecution for war crime. Therefore, it is right to assert that any proposed improvement in international fight against transnational financial ought to concentrate on strengthening the FATF Recommendations by reinforcing peer review, more support for the list of NCCT and surreptitious international gang up against non cooperative nations by subjecting the international financial transactions emanating from such NCCT to a more stringent due diligence requirements until compliance is ensured in line with the FATF standards without necessarily applying sanctions.

Presently, the Nigeria MLAT Bill is pending before the parliament, it is expected that it would uphold the ideals of the UN Model MLAT⁹⁶⁷ in criminal matters and the FATF Recommendation on international cooperation. Furthermore, it is expected that Nigerian FIU would be able to analyse, identify and disrupt the laundering of money out of Nigeria (and prevent future incidence of unexplained wealth as revealed by Panama papers) and assist the state in identifying the money laundering axis with a view to assisting in identifying the major foreign nations to enter into MLAT with, so as to facilitate seamless assistance in financial crime investigation and recovery of proceeds of crime, as it could

⁹⁶⁷ Adopted UN General Assembly Resolution 45/117, as amended by Resolution 53/112

be seen that successful investigation is key to establishing the culpability of the offender with the best evidence.

9.2 Standard of Proof and recovery of proceeds of crime

The classical criminal justice system had focused on arrest, prosecution and imprisonment although there have been deliberate mixture of criminal and civil remedies as part of single law enforcement strategy pursued by regulatory agencies in antitrust, securities trading and customs control, however, there have now been shifts from an exclusive criminal prosecution of financial crime to non conviction based civil recovery of proceeds of crime which does not focus on mens rea but an action in rem against the property in the US, to ensure a return to status quo ante⁹⁶⁸, it differs from conviction based confiscation proceeds of crime⁹⁶⁹, it is also different from administrative proceedings of taxing the proceeds of crime without involving the court⁹⁷⁰; owing to the evolution of crime, the problems of conventional criminal justice system to extricate proceeds of crime, the success of legislations like RICO asset forfeiture and asset forfeiture rules in drug cases in prevention and punishment of crime⁹⁷¹. The focus of financial crime control is now tilting towards combination of civil forfeiture of criminal asset and (or) criminal confiscation of proceeds of crime, depending on several factors dictated by national policies. Normally, two causes of action are open to ensure justice in financial crime, either by instituting criminal or civil proceedings⁹⁷², the unique dichotomy between the two proceedings is fast receding, following an increasing complimentary use of traditional civil remedies in criminal proceedings, thus amounting to an admixture of criminal

⁹⁶⁸ Anthony Kennedy, *Justifying the Civil Recovery of Criminal Proceeds*, JFC (2004) 12 (1) 16

⁹⁶⁹ POCA, Part 2, see also 18 US s.982 – criminal forfeiture

⁹⁷⁰ POCA, Part 6

⁹⁷¹ Mary Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, (1990-1991) 42 *Hastings L.J.* 1325, 1332

⁹⁷² *Ibid* 1333

sanctions and civil remedies in a single proceeding⁹⁷³; Cheh⁹⁷⁴ noted that with this development, a victim does not need to commence a separate civil trial for restitution or damages and accordingly, this ensures speedy trial, prevents delay of justice, offers addition remedies to punishment and shields the victim from bearing the costs and burdens of a separate civil proceedings; similarly, there has been an introduction of civil or quasi civil proceedings as an alternative to financial and organised crime trial to disgorge proceeds of crime, this effort is pioneered by the US but now gradually becoming a global phenomenon⁹⁷⁵ because of difficulty in conducting successful criminal investigation, burden of proof beyond reasonable doubt and the shield afforded an offender in criminal trial⁹⁷⁶ but despite some advantages of non conviction based civil recovery of criminal proceeds, it has been criticised for possible erosion of human right protections afforded in criminal trials like the proof beyond reasonable doubt, trial by jury, right to remain silent and right to solicitor⁹⁷⁷, the required standard in civil trial, though not as high in criminal proceedings, must nevertheless be fair, it is hinged on common law principle of fairness and justice like *audi alteram partem*, *nemo iudex in causa sua* and standard of proof on preponderance of evidence; although it resembles obtaining of justice by circumventing due process of criminal procedure and indirectly obtaining of evidence of crime through civil proceedings, as disclosures orders granted in such civil proceeding may incriminate the property and may be used in a subsequent criminal proceedings⁹⁷⁸, it provides an assured way of establishing and verifying the truth and disgorging the proceeds of crime, nevertheless, it does permit the state to pursue the path of civil recovery of crime proceeds without abrogating human right and protection

⁹⁷³ Anthony Kennedy, *Justifying the Civil Recovery of Criminal Proceeds* (n 968); example of civil remedy in criminal proceeding under FSMA 2000, Pt.25, S.380-386

⁹⁷⁴ Mary Cheh (n 971) 1327

⁹⁷⁵ Anthony Kennedy, *Justifying the Civil Recovery of Criminal Proceeds* (n 968)

⁹⁷⁶ *Ibid* 10; see also S. Klein, *Redefining the criminal boundary*; (1999) 2 *Buffalo Criminal law Report*, 679

⁹⁷⁷ Mary Cheh (n 971) 1329

⁹⁷⁸ Kennedy, *Justifying the Civil Recovery of Criminal Proceeds* (n 968)

of innocent 3rd parties⁹⁷⁹ whose property is liable to forfeiture following the unforeseeable or unknown illegal activity of an offender⁹⁸⁰ through a defence of bonafide purchaser of value without notice of defect in title of the owner.

Klein in her treatise identifies civil forfeiture as one of the ancient traditional doctrines affecting ownership of property⁹⁸¹ which dates back to the biblical injunction in *Exodus 21:28*⁹⁸² of destroying any object or instrument that has caused a person's death which later influenced the English common law doctrine of Deodand remedy, traditionally, a civil in rem remedial action by the government against an inanimate object, real or personal property, not in personam criminal actions against the owner of the property, they served the remedial function of protecting society from the particular pieces of offending property, not the punitive purpose of deterrence or retribution against the owner of the property and hence not a criminal prosecution against a person and cannot constitute initial or cumulative punishment⁹⁸³; civil in rem action had practically gone into abeyance in the UK in the 17th century as witnessed in *Baker v Bolton*⁹⁸⁴ where the court refused to award damages for death of a person caused by accident while travelling on a train even when it has caused emotional and economic loss to the dependants except for physical damage to property and person but the industrial revolution and the revolution of railway business resuscitated the demand for Deodands remedy (which had earlier been repealed due to pressure from the railway companies) consequently, the 1845, Fatal Accident Act was enacted to correct the perceived injustice in *Baker v Bolton*⁹⁸⁵. While civil in rem action was abolished since 1845 in UK, it remained in force

⁹⁷⁹ Ibid 14

⁹⁸⁰ 18 USC 983(d) in the US

⁹⁸¹ Susan Klein, Civil In Rem Forfeiture and Double Jeopardy, Iowa L. Rev. (1996-1997) 82, 183

⁹⁸² Ibid

⁹⁸³ Anthony Kennedy, Justifying the Civil Recovery of Criminal Proceeds (n 968)

⁹⁸⁴ (1808) 170 E.R 1033, 1 Camp 493

⁹⁸⁵ ibid

in the US and has been reinforced by several enactments⁹⁸⁶; although the new forfeiture statutes in the US differ fundamentally from their historical antecedents and are now relevant in the drug and financial crime control, it is now being reintroduced in the UK via civil recovery of proceeds of crime provision in the UK, POCA 2000 as earlier discussed on pages 231-234 and 250 -254.

The UK civil forfeiture of asset under Pt.5 2002 POCA (Non conviction based asset forfeiture) allows the NCA to commence civil proceedings to recover proceeds of crime, referred to as criminal property⁹⁸⁷; it must be proved by civil standard of proof on balance of probability that the property is derived from crime⁹⁸⁸. The 2000 Report of cabinet office's performance and innovation unit, Recovery of proceeds of crime observed that civil procedure must be used only where there is no prospect of the offender being convicted like when the offender is deceased or is a fugitive and cannot be extradited but it ought not to be used as a convenient alternative to prosecution as criminals should be prosecuted and sentenced where possible and their asset be confiscated⁹⁸⁹. However, In the US, civil recovery is not used mainly for the proceeds of crime but also against instrumentality of crime, namely, any property used to facilitate crime (which applies in exceptional circumstances in the UK and not part of POCA) where requirement for proportionality between the value of the instrumentality and the gravity of the offence is immaterial⁹⁹⁰. In the UK civil recovery under POCA s.266(3), if an innocent party establishes that he (1) obtained the property in good faith, (2) taken all precautionary steps before obtaining the property, (3) has no notice of the defect in the property (4) recovery order would be detrimental to him and (5) it is just and equitable for the court to make the order⁹⁹¹, in *National Crime Agency v Amir Azam (No.2)*⁹⁹² it was held that the

⁹⁸⁶ Anthony Kennedy, Justifying the Civil Recovery of Criminal Proceeds (n 968)

⁹⁸⁷ Richard Alexander (n 800)

⁹⁸⁸ Ibid, 453

⁹⁸⁹ Ibid, 457

⁹⁹⁰ Ibid, 458

⁹⁹¹ Ibid, 460

⁹⁹² 2014 EWHC 3573

court has no discretion in favour of innocent third party as it must either satisfy the condition in POCA s.266(3)(4) or not, the innocence of the owner of the property or hardship that might be caused was irrelevant.

Although Cassella⁹⁹³ identified six but inexhaustive instances where action in rem would be used in the US, namely, where:

1. There is no counter claim
2. The offender dies before conclusion of the criminal proceedings, thereby terminating the criminal forfeiture proceedings
3. The identity of the offender is unknown while the criminal proceeds are in possession of a third party⁹⁹⁴
4. The property belongs to a third party who knows or is reckless concerning his property being used for a criminal purpose except an innocent third party
5. Interests of justice disfavour criminal prosecution like young offenders and corporate crimes, such as "too big to fail" corporations agreeing to pecuniary forfeiture and lastly
6. The wrongdoer is a fugitive⁹⁹⁵.

The civil recovery procedure in the US is different from the UK even though in the US, forfeiture order has been the most effective AML⁹⁹⁶ as espoused in the US RICO Act

⁹⁹³ The case for civil forfeiture (n 885) 8; see also Stefan Cassella, 'Civil asset recovery: the American experience' in Barry Rider (ed), *Research Handbook on International Financial Crime*, (Edward Elgar 2105)

⁹⁹⁴ *United States v. \$252,300.00 in U.S. Currency*, 484 F.3d 1271, 1274-75 (10th Cir.2007)

⁹⁹⁵ *United States V \$6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30 (D.D.C. 2007), the USA filed a civil forfeiture action against the correspondent account of a foreign bank for the amount kept therein by the fugitive; the court deny the defendant's attempt to contest the forfeiture until he surrendered to criminal prosecution. Again, in *United States v. Union Bank for Savings and Investment (Jordan)*, 487 F.3d 8, (1st Cir. 2007), proceeds of a fraud was kept in bank accounts controlled by money exchangers in the Middle East, forfeiture action was commenced against a Jordanian bank's correspondent account in New York and the fund was recovered by the Jordanian bank debiting its customer's account in Jordan.

1970⁹⁹⁷ which provides a pre-indictment restraining order and the forfeiture of any property even if transferred to third parties⁹⁹⁸, also the US Patriot Act permits the forfeiture of all assets within and outside the US in relation to terrorism and the financing of terrorism⁹⁹⁹. There are many reasons that call for recourse to exclusive pursuit of civil recovery by the state that goes beyond the scope enumerated above, which includes especially, for a country like Nigeria, difficulty in obtaining evidence to prove the case beyond reasonable doubt and possibility of failed prosecution, possible collusion, connivance and corrupt activities of the law enforcement agencies and the judiciary defeating the criminal proceedings, and to a greater extent, crime investigators are authorised to rely on provisions for seizure of suspected criminal proceeds and used such evidence as proof of guilt where the unexplained wealth does not correlate with the source of income especially in advanced fee fraud and money laundering cases. The situation would have been made easier if Nigeria had a single legislation like the UK, POCA, 2002 on non conviction civil recovery confiscation of proceeds of crime, as the standard of proof is not beyond reasonable doubt, burden of proof also shifts and right to silence attracts loss of asset on establishment of criminal lifestyle, unlike in criminal proceedings. Again, the existing Nigerian legislations on confiscation are disjointed, scattered¹⁰⁰⁰ and only relate to conviction based forfeiture which encourages delayed criminal prosecutions and has constituted a great hindrance to Nigeria anti financial crime regime and the entire criminal justice system. Furthermore, the US style civil forfeiture¹⁰⁰¹ is not based on the established guilt of the offender but on civil trial against the property, perhaps Nigeria criminal justice system can benefit from the combination of the UK and the US variation of civil recovery by introducing such measures

⁹⁹⁶ Nicholas Ryder, *Financial crime in the 21st century*, Law and Policy (Edward Elgar Publishing 2012) 14

⁹⁹⁷ *ibid*

⁹⁹⁸ 18 U.S.C. § 1963(d)(1)(B) and § 1963(c)

⁹⁹⁹ Title 18 USC 2339A, 2339B and 2339(C), 18 USC 981

¹⁰⁰⁰ The EFCC Act 2004, S.29, Recovery of Property (Special Provision) Act, 1990, S.10(1), Advance Fee fraud Act, 2006, S.17, NDLEA Act, 1989 - s.34

¹⁰⁰¹ USC 18 USC § 981

Ryder¹⁰⁰² while quoting Gallant¹⁰⁰³ noted that civil forfeiture in the context of the US jurisdiction is a peculiar crime control device devoid of regular criminal proceedings; it is a civil action in rem¹⁰⁰⁴ proceeding against property rather than an action in personam, an action against the property and not the offender¹⁰⁰⁵. It allows the government to control property that has been obtained with the proceeds of illegal activities which Maxeiner¹⁰⁰⁶ thinks is not a punishment for the offence but mere forfeiture of property, an assertion which is challengeable because stripping a defendant the proceeds of his crime is a labour loss and pinching where it pains most. Its main advantage is that the standard of proof is not beyond reasonable doubt but rather on preponderance of evidence. Cassella¹⁰⁰⁷ further explained that although civil forfeiture proceedings operate differently from criminal proceedings, it achieves the same objective as criminal confiscation but the latter goes beyond interdicting the proceeds of crime as there is social stigma attached to conviction in criminal record that may affect job opportunities and public office holding. Again, in a non conviction based civil forfeiture, the government is the plaintiff, the property is the defendant and persons objecting to the forfeiture are interveners or claimants which explains why civil forfeiture cases in the US have curious titles¹⁰⁰⁸ since anyone with an interest in the property has a right of audience, including co-owner and right of lien of a lender¹⁰⁰⁹. This is far better than bringing separate in personam action

¹⁰⁰² Nicholas Ryder, 'To confiscate or not to confiscate?' (n 865)

¹⁰⁰³ Mitchell Gallant, Money laundering and the proceeds of crime (Edward Elgar 2005) 89

¹⁰⁰⁴ the use of *in rem* proceedings was extended to include the forfeiture of real property purchased with the illegal proceeds of crime by the Comprehensive Crime Control Act 1984

¹⁰⁰⁵ United States v Various Items of Personal Property, 82 US 577, 581

¹⁰⁰⁶ J. Maxeiner, 'Bane of American forfeiture law: a banished at last?' (1977) Cornell Law Review 62(4) 768

¹⁰⁰⁷ The case for civil forfeiture (n 885)

¹⁰⁰⁸ such as United States v. \$6,976,934.65 Plus Interest, 478 F. Supp. 2d 30 (D.D.C. 2007)

¹⁰⁰⁹ The case for civil forfeiture (n 885)

against each party who has an interest in the property which would be burdensome and expensive with no certainty of success.

However, will it not be appropriate to recommend the introduction of *qui tam* action for control of financial crime? Secondly, will it also not be appropriate to merge the criminal and civil proceedings such that there would not be any dichotomy in the standard of proof in both proceedings? Thirdly, could there not be an outright decriminalisation of financial crime or crime in general by abolishing both civil and criminal proceedings and restrict the standard of proof in all proceedings to preponderance of evidence and in consequence eradicate the undue advantage afforded offenders in criminal proceedings; after all, what is the relevance of conferring presumption of innocence and a higher burden of proof on criminal without a correspondent right to a defendant in civil proceedings? Although it has been argued that the social stigma and punishment attached to criminal proceedings justifies the conferment of such privileges and rights¹⁰¹⁰ but does it not sound illogical and immoral to permit a suspect to stand aloof in his trial? This viewpoint was buttressed by Cheh's¹⁰¹¹ recommendation of a return to the 5th century, Anglo-Saxon laws when crime was regarded as private wrong prosecuted by private individual. Cheh had argued that a legal system need not distinguish between criminal and civil trials and suggested a possible introduction of 'law of wrongs' with each wrongdoing distinctly defined along with its penalty and process of enforcement, according to this hypothesis, the police and prosecutors or private citizens such as victims or their representatives should be able to commence an action to enforce justice against the wrongdoer¹⁰¹² through 'law of wrongs' without distinguishing between civil and criminal trial and it would eliminate the earlier mentioned undue protection in criminal proceedings, Cheh argued that this would serve to improve the administration of criminal

¹⁰¹⁰ Kennedy, Justifying the Civil Recovery of Criminal Proceeds (n 968)

¹⁰¹¹ Mary Cheh (n 971) 1348

¹⁰¹² The emergence of modern state confers the duty of ensuring public peace and prosecution of wrongdoers to state and thereby giving rise to "public wrongs." now criminal law as distinguished from civil law

justice, ensure the award of appropriate punishment, ranging from punitive fine, imprisonment, confiscation and restitution without any designation of civil or criminal proceedings; after all, the state has the moral right to adopt the most cost effective and human right compliant means of recovering the proceeds of crime by adopting either civil or criminal proceedings¹⁰¹³. In a civil proceeding where an allegation of crime is levelled against the defendant; the standard of proof in the three jurisdictions vary, though logic dictates that criminal allegations even in civil proceedings ought to be proved by standards of criminal trials, that is, beyond reasonable doubt as applicable under S.135(1) of the Nigeria Evidence Act 2011 (including proceedings before a quasi judicial authority), there was an attempt to enthrone a third, intermediate standard of proof, higher than balanced of probability but lower than proof beyond reasonable doubt per Denning, L.J in *Bater v Bater*¹⁰¹⁴ that a civil court, when considering an allegation such as fraud would require a higher degree of probability than the required standard on allegation of negligence and would not need to be high as beyond reasonable doubt, commensurate with the facts of each given proceedings. British courts have rigidly maintained the dichotomy of standard of proof in civil and criminal proceedings while the US criminal justice system maintain an intermediate standard of proof with "clear and convincing evidence"¹⁰¹⁵, in UK and Nigeria, there is no such intermediate standard, however, as explained by Haynes¹⁰¹⁶, civil proceedings involving antisocial behaviour orders, disciplinary proceedings relating to professional bodies where serious or grievous allegations are levelled, though, the standard of proof remains the balance of probabilities, however, stronger evidence would be required, this includes market abuse or civil fraud; stronger evidence will be required by the regulatory tribunal or the court, immaterial of the preferred standard of proof, the essence of any proceedings is to ensure that justice is meted out to all parties depending on the relevance, admissibility and

¹⁰¹³ Kennedy, Justifying the Civil Recovery of Criminal Proceeds (n 968)

¹⁰¹⁴ [1951] 35

¹⁰¹⁵ Addington v. Texas (1979) 441 US 418

¹⁰¹⁶ Andrew Haynes, Market abuse, fraud and misleading communications, (2012) JFC 19 (3) 247

probative value of the evidence adduced in support or in defence of an assertion, and this is a mirage where preventive, detective and investigative system is poor, if the judicial system is neither independent, computerised nor supported by electronic system, as this will lead to delayed and denial of justice.

Again, the dichotomy between civil enforcement in criminal matters brought forward the issues of the plea of double jeopardy which traditionally is inapplicable if the subsequent trial against a defendant is civil in nature. For example, where civil proceedings for damages, monetary penalties or forfeiture is commenced against a person already convicted based on the same conduct as the criminal prosecution, although this would traditionally not be regarded as a violation of double jeopardy because the state is entitled to a civil remedy for its losses even if the defendant had previously been criminally convicted¹⁰¹⁷; however, Cheh argued that the US courts would consider if the civil proceedings in question is remedial or punitive, in the latter case, the plea of double jeopardy would apply in a subsequent criminal proceedings¹⁰¹⁸ deductively, in a civil forfeiture proceedings pursued as an alternative to criminal prosecution and remedial actions were imposed, a plea of previous conviction would not be sustained in the event of a subsequent criminal trial¹⁰¹⁹. Similar to the plea of previous conviction is a parallel proceedings, they both involve two separate legal actions in respect of the same parties and facts, the difference being that while in parallel proceedings, the civil and criminal proceeding run concurrently, previous conviction applies to consecutive proceedings. Therefore, where for example, the state commences civil action and criminal prosecution

¹⁰¹⁷ United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 549-50 (1943)

¹⁰¹⁸One Lot Emerald Cut Stones v. United States, 409 U.S. 232 0(1972), this decision was reinforced by the US Supreme court in United States v Halper, 490 U.S. 435 (1989) to the effect that the state may not institute civil proceedings against a defendant who has already been criminally convicted for the same offence where a punitive rather than remedial sanction is sought subsequent civil action; thus rendering the distinction between criminal and civil proceedings irrelevant in the context of double jeopardy.

¹⁰¹⁹ Mary Cheh (n 971) 1376

simultaneously against a particular defendant based on the same facts¹⁰²⁰, it would raise some constitutional problems like putting pressure on a defendant's privilege against self-incrimination which if the defendant invokes in a civil proceeding may weaken his defence in civil claim, in return, he will be denied the use of such evidence, the civil court may draw an adverse inference from a party's refusal to testify on grounds of privilege against self incrimination which could deny the plaintiff access to vital information; secondly, parallel proceedings may weaken the right to due process of the defendant because the state, simultaneously being a prosecutor and plaintiff, may benefit from the discovery of evidence afforded by civil proceedings¹⁰²¹ including attorney-client privilege information and thus impugn on the right of the defendant to effective assistance of counsel and consequently affect the defendant in a subsequent criminal proceeding unless the court resolve the problem by issuing orders restricting access to the discoveries to parties only or by ordering a stay of the civil proceedings until final determination of the criminal proceedings¹⁰²² or an order limiting the scope of discovery with respect to particular matters and thus removing the fear of self incrimination in a criminal proceedings¹⁰²³. It could therefore be concluded that the use of parallel proceedings is beneficial to the state in complex criminal investigation to obtain information otherwise protected by rights and privileges, an abuse of which could be prevented by protective court order; this bears a resemblance to some process in inquisitorial criminal system that aims to ensure justice devoid of technicalities and process that prevents injustice.

To ensure an effective administration of criminal justice system, Nigeria needs a legislation similar to the UK POCA that would introduce civil forfeiture regime, presently, there is a proposed Proceeds Of Crime Bill before the Nigerian Senate seeking

¹⁰²⁰ Ibid 1389; for example, civil suit to revoke a professional license and a criminal indictment for professional negligence

¹⁰²¹ Mary Cheh (n 971) 1390

¹⁰²² Ibid 1391

¹⁰²³ Ibid 1392

to introduce non conviction civil forfeiture and management of properties derived from unlawful activities; and to provide legal and institutional framework for the recovery and management of proceeds of crime; it is expected to harmonise and consolidate the existing legislative provisions on the recovery of proceeds of crime and related matters in Nigeria, and ensure that financial criminals will no longer be able to hold on to their ill-gotten assets which the absence of a civil forfeiture law in Nigeria has encouraged and thus made the fight against financial crime a travesty of criminal justice, presently, the lacuna in the Nigerian anti financial crime law serves no deterrence, rather, it has encouraged financial crime as offenders are not being stripped of the benefits of their loot, it is expected that it would also ensure taxation of criminal enterprise by empowering the revenue office to impose punitive tax on offender's criminal profits without neglecting the need to set a time frame or proportionality test and also capture proceeds of crime transferred to third parties, including gift even in the absence of the third party's knowledge of the crime committed provided such transfer was made without consideration or at a discounted low price. In view of the challenges confronting control of money laundering, it is expedient to explore other means of controlling, recovering and disrupting financial crime without necessarily going through the problems discussed herein, consequently, the next chapter shall appraise the alternative means of dealing with financial crime through regulatory action, civil enforcement action by victims and disqualified proceedings which are more potent in disrupting and disgorging illicit criminal proceeds than the traditional criminal prosecution.

Chapter 10

Alternative ways of dealing with financial crime through regulatory action, civil enforcement action by victims and disqualified Proceedings

10.1 Regulatory Action

In chapter 9, it was demonstrated that the national and international criminal justice systems have not been effective enough in controlling financial crime with regards to gathering of admissible evidence, inadequate domestic and international cooperation and the exclusion of treaty crime from the jurisdiction of international criminal court. However, this chapter shall assess the alternative ways of controlling financial crime especially, regulatory action because the criminal prosecution has not been adequately effective in controlling financial crime and appraises the alternative ways of financial crime control, such as regulatory action, civil enforcement by victim and disqualified proceedings, especially where there are no proof of dishonesty, where there is no public concern for punishment and where the offender cooperates in the investigation and in complex crimes that are difficult to detect. In this context, the use of NPA, DPA and Plea bargain are appraised as it affects effective resolution of corporate misconduct. It observes that there is no equivalence of DPA and NPA in Nigeria and the UK, while a Plea bargain concept different from the US style operates in the UK, it observes the misinterpretation of S.14(2) EFCC Act 2004 and S. 180 CPA as it relates to plea bargain in the Nigeria case of *FRN V Igbinedion* and concludes that plea bargain is a novel concept in Nigeria criminal justice system until recently when few states like Lagos enacted the Administration of Criminal Justice Law 2011 s.75 and 76 and the federal Administration of Criminal Justice Act 2015. The chapter also observes that the UK decision in *R v Dougall* differentiated the concept of plea bargain in UK from the US style, in addition to the UK A-G Guideline on plea bargain in serious and complex cases, a position reinforced in *R v Innospec Ltd*. It is further observed that in order to prevent the abuse of the use of

plea bargain, particularly in weak legal systems, there must a clearly defined guideline for its effective implementation.

The chapter further evaluates the importance of civil enforcement as a substitute to criminal prosecution mainly in breach of fiduciary relationships, though an equitable principle of trust, it has been extended to directors' duties of trust, by exploiting the constructive trust principle to ensure that the recipient and facilitators of illicit wealth are held accountable as seen in *Selangor United Rubber Estate v Cradorck and the recent case of FHR Euroean Ventures llp v Cedar Capital Partners llc*, the latter decision which overturned over 100 years position of the UK courts and allowed a principal to trace and recover stolen asset including bribe into an investment even in the hands of a third party. The thesis compares the application of the same principle in Nigeria and prescribes the expansion of the applicable law in Nigeria. Again, this chapter prescribes for Nigeria financial crime control, the provisions of S.7 UK Bribery Act, secondly, the provision of senior manager certification regime, to hold designated senior members responsible for misconduct within an organisation. It also weighs the inadequacy of victim support which is means tested compared to the available third party immunity for company directors thus defeating the deterrence effect of litigation, and it recommends the need for Nigeria to develop a modality for supporting victims of financial crime.

Financial crime prosecution often involve lengthy, complex proceedings which may eventually result in fail prosecution¹⁰²⁴ as seen in the failure to prosecute no UK FI despite their roles in the global financial crisis precipitated by sub-prime loan scandals¹⁰²⁵, also out of the 81,631 suspected business fraud reported in London between 2013 to 2014, there were only 9 successful convictions, again, out of 103,000 suspected cases of business

¹⁰²⁴ Blue Arrows trial in the UK

¹⁰²⁵ David Fitzpatrick, 'The traditional Criminal Justice system: its efficiency in dealing with financial and economically motivated crime' in Barry Rider (ed), *Research Handbook on International financial crime* (Edward Elgar 2015) 558

related crime in UK, only 758 were considered solvable by the police¹⁰²⁶, consequently, there is a need for a paradigm shift to other more pragmatic means of controlling financial crime which regulatory actions seem to be one of the viable options. Regulatory legislations are supplementary and good alternative to criminal prosecution of financial crime, it is a flexible series of non criminal measures¹⁰²⁷ to interdict, interrupt and sanction regulated bodies with a view to ensuring compliance with internal control measures and standards of conduct without relying on criminal prosecution as a primary mode of enforcement; it is cheaper and more certain than criminal prosecution. It operates through regulatory powers delegated by an enabling Act that confers on regulatory authorities, government departments or agencies to make subsidiary, secondary legislations. It could however, be argued that criminalisation of financial misconduct should be reserved for only the most serious, complex cases of regulatory non-compliance¹⁰²⁸, such that criminal offence would be the exclusive preserve of serious wrongdoings on proof of mens rea, another option could be Rider's proposition of redefining specific crimes, creating presumptions or creating new procedures that cannot be characterised as penal in nature to control corporate crime¹⁰²⁹. These and other related issues like civil enforcement action, civil action by victims and disqualified proceedings shall be the crux of this chapter and they shall be considered seriatim.

Regulatory actions apply to specific regulated entities and persons only; it aids courts' decongestion of relatively trivial or technical breaches of the law and ought to apply to cases where specialised knowledge beyond ordinary criminal court is required in

¹⁰²⁶ H. Warrell, 'Police urged to crack down on business crime' Financial Times, 23 July 2014 cited in Barry Rider, Research Handbook, International financial crime (Edward Elgar 2015) 737

¹⁰²⁷ Some of which impose strict liability, some reasonable standard of behaviour or mens rea

¹⁰²⁸ Richard Macrory, Regulatory Justice: Making Sanctions Effective, (Final Report, 2006)

< <http://webarchive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/files/file44593.pdf>>

Accessed 24/10/2016

¹⁰²⁹ Barry Rider, Civilizing the law – The use of civil and administrative proceedings to enforce financial services law, (1995) JFC 3 (1) 15

evaluating the gravity of the infraction and appropriate penalty¹⁰³⁰. However, it is often difficult to distinguish between criminal and regulatory offences¹⁰³¹ as seen in *Sweet v Parsley*¹⁰³², where Lord Diplock described regulatory offence as ‘*regulation of a particular activity involving potential danger*’, forgetting that in reality many criminal offences also portend danger to the society¹⁰³³ but nevertheless, the difference is in the type of proceedings required for their enforcement, as civil penalties, orders and remedies are applied without criminal proceedings commenced by regulatory authorities; the type of investigation may also differentiate between the two process as regulatory offence is investigated and enforced by the regulatory authority while the police often investigate and the state prosecutes criminal offence¹⁰³⁴. Again, Croall¹⁰³⁵ compared regulatory and criminal sanctions to the different roles of the SFO and FCA in England, such that where there are evidence of serious dishonesty, a high level of public concern for punishment and a need for urgent action or where the nature of the offence requires strong criminal deterrence and there is little cooperation from the offending party, criminal sanctions may be the appropriate action. However, regulatory actions are more effective in dealing with complex crime that are difficult to detect or where prosecution would be lengthy, costly, technical or falls within 'grey area'; where regulatory penalties seem sufficiently severe and are publicly known; where regulators can take urgent action as opposed to going through a long process of prosecution, where greed is not the motivation for the misconduct; where the fundamental issue at stake is the protection of the financial or securities markets rather than serious dishonesty, where the offender is likely to

¹⁰³⁰ Richard Macrory, Regulatory Justice (n 1028) Para 3.25

¹⁰³¹ Ibid 3.46

¹⁰³² [1970] AC 132, 163

¹⁰³³ Macrory, Regulatory Justice (no 1028) para 3.46

¹⁰³⁴ Ian Dennis, Regulation and criminal justice, CLR, 2006 Editorial, 675

¹⁰³⁵ Hazel Croall, Combating financial crime: Regulatory versus crime control approaches, JFC (2004) 11 (1)

cooperate and where necessary in public interest, the regulatory body is satisfied that its action is imperative. However, despite the glaring advantages of regulatory enforcement, it is feared that because it requires specialised authority for its administration, the regulator may be sympathetically lenient in resolving infractions, also independence and impartiality of the regulators may be impaired, thereby infringing the sacred principle of *nemo iudex in causa sua* and *audi alteram partem*¹⁰³⁶ except the courts serve as a check to decisions of regulatory bodies¹⁰³⁷.

There are divergent views between the conservative, the liberal and the radical schools of thought on the extent of using regulatory or criminal law to regulate financial crime; while the conservatives recommends a free market principles and minimum regulatory intervention by allowing market forces to regulate the market; the liberals like Barry Rider accepts regulation as a means of balance between regulatory and criminal sanctions and finally, the radical school advocates strong criminalisation of financial misconduct¹⁰³⁸. Regulatory control could be persuasive or coercive, like threat of prosecution, it could be administrative sanctions like granting or revoking operating licences, it recognises the importance of balancing the commercial and public protection, in contrast to the criminal justice system that lays emphasis on prosecution and punitive measures; again, while regulatory approach highlights self-regulation and private justice, criminal justice system stresses state prosecution and public justice¹⁰³⁹. Furthermore, regulatory sanction lays emphasis on compliance rather than punishment; it is arguably, a negation of moral and deterrence role of the criminal law, a challenge to retributive justice and validation of Edwin Sutherland hypothesis that the upper class criminals are treated more favourably than lower class offenders. Rider also argued that although regulatory enforcements are cheaper and faster, nonetheless, he questioned the rational for exonerating a person who

¹⁰³⁶ ECHR, Art. 6

¹⁰³⁷ Richard Macrory, *Regulatory Justice* (n 1028) para 3.166

¹⁰³⁸ Hazel Croall (n 1035)

¹⁰³⁹ *Ibid* 45

has committed a crime from prosecution in the regular court like any other criminal as theft is no less egregious because it took place within a corporate entity or due to some privilege; again Rider challenged the idea of creating special offences like insider dealing and market manipulation when traditional offences like theft and deceit could be the reliable tool for prosecution but he drew attention to the fact that the special offences were created ab inito because of inadequacies in the existing traditional offences to capture peculiarities of the new offences such as the impossibility of stealing an information under the Theft Act, as a result of which special new law to regulate securities market were introduced¹⁰⁴⁰.

Furthermore, Karen Yeung¹⁰⁴¹ while justifying the difference between traditional crime and regulatory offence in relation to *mala in se* and *mala prohibita* crime, in the case of the former, responsibility for wrongdoing depends on a degree of mens rea of the act and its consequences but in the breach of *mala in prohibita* like most regulatory offences, the same degree of moral indignation is not required. The punishment for regulatory offences serve to modify behaviour rather than to express moral condemnation of the offence¹⁰⁴² unlike traditional crimes; however, Yeung relying on Vilhelm Aubert's argument thinks moral opprobrium was attached to traditional crimes only because they have been labelled criminal for a long period of time and there is no reason why moral wrongdoing could not be attached to regulatory offences as well¹⁰⁴³, however. Yeung attempted to find a middle-ground of ascribing element of blame worthiness to regulatory offences such as where the offence amounts to negligence in carrying out the regulated activity but it must be noted that the question of social resentment against a wrongful act depends on attached social value, for example, where greed, lack of care for social protection in health and safety, environmental and national economy are the basis for failure to

¹⁰⁴⁰ Rider, *Civilizing the law* (n 1029)

¹⁰⁴¹ Karen Yeung, *Quantifying regulatory penalties: Australian competition law penalties in perspective*

¹⁰⁴² *Ibid*

¹⁰⁴³ Vilhelm Aubert, 'White-Collar Crime and Social Structure' *AJS* (1952) 58 (3) 263

exercise due diligence in complying with regulatory offences, the society would hold such wrong doing in the same category as traditional heinous offences like rape and murder and would expect it to be punished appropriately; again, immaterial of any facade of mala prohibita, it may entail elements of mala in se as well and consequently, over a given period of time, such misconducts could attain the status of mala in se such as the thin line between tax avoidance and tax evasion on one hand and money laundering and capital flight on the other hand, which over a period of time have evolved from mere prohibitive legislation to generally reprehensible crime. In this vein, the cost of regulatory enforcement regime must be delicately balanced against the benefit derivable from non compliance or else there may be public sympathy and invariably lack of investigation and prosecution where the cost outweighs the benefit. Again, while criminal offences typically depend on proof of mens rea, many regulatory offences are strict liability offences and thus jettison the requirement for mens rea as it may be committed without establishing any mental element on the part of the offender which means that even if the offender exercises due care to avoid committing the offence and it eventually occur by accident, culpability may still be established¹⁰⁴⁴, the absence of establishing the offender's culpability justifies punishment even where there is no moral blameworthiness which negates the deterrence and just deserts theories of punishment¹⁰⁴⁵. Relying on law and economy theorists¹⁰⁴⁶ who believe that law and legal institutions are tools for ensuring expected social norms, Yeung posits that for an effective regulatory regime, punishment must be fair, just and sufficiently severe to deter the offender and potential offenders from engaging in the proscribed conduct, failing which, it will not encourage offenders to realise the depth of wrongfulness of the regulated conduct and the regulatory scheme (just like the traditional criminal regime)¹⁰⁴⁷. Therefore, a regulatory penalty scheme devoid of moral consensus and lack of stigma of moral social control weakens its

¹⁰⁴⁴ Andrew Ashworth, *Principles of Criminal Law*, (Clarendon Press 1995)

¹⁰⁴⁵ Yeung, *Quantifying regulatory penalties* (n 1043)

¹⁰⁴⁶ Richard Posner, *Economic Analysis of Law* (2nd ed, Walters and Kluwer 1977)

¹⁰⁴⁷ Yeung, *Quantifying regulatory penalties* (n 1043)

legitimacy¹⁰⁴⁸ and bring the regulation into disrepute and ultimately defeats the desired regulatory goals; this view was supported by Croall¹⁰⁴⁹, that an effective financial crime control regime must take cognisance of both regulatory and crime control strategies, without neglecting the moral considerations of the infraction.

Regulatory enforcement does not preclude simultaneous or subsequent criminal prosecution, invariably; non-compliance with regulatory duties could be an offence subject to prosecution, which could be used to negotiate compliance and remedial action in DPA, NPA and plea bargain or in mitigation of plea in the event of prosecution. As earlier mentioned, effective criminal and or regulatory regime require penalties or remedial actions which must serve as adequate deterrent¹⁰⁵⁰. In England, there has been an evolution of financial control from reliance on strictly self-regulation at a stage, to state imposed risk based self regulatory regime¹⁰⁵¹, to encourage and protect all stake holders from the risks and consequences of free market economy¹⁰⁵² as regulatory control schemes appreciate the required expertise, the cost of crime detection and prosecution, the challenges of obtaining sufficient evidence which make regulatory sanctions attractive, particularly for revenue collection agencies¹⁰⁵³, which has been the approach in the US since the 1930s¹⁰⁵⁴ whereby the SEC generally prioritises cases in terms of (1) the message delivered to the industry and public about the reach of SEC's enforcement efforts, (2) the amount of investor harm done, (3) the deterrent value of the action, and (4) SEC's visibility in certain areas such as insider trading and financial fraud. Regulatory action has been effective despite the scandals like the mis-selling of pensions,

¹⁰⁴⁸ Ibid

¹⁰⁴⁹ Hazel Croall, *Combating financial crime* (n 1035)

¹⁰⁵⁰ Ian Dennis, *Regulation and criminal justice* (n 1034)

¹⁰⁵¹ 2000, the Financial Services Authority took over Self Regulatory Organisations

¹⁰⁵² Hazel Croall, *Combating financial crime* (n 1035)

¹⁰⁵³ Ibid

¹⁰⁵⁴ James Cox, Randall Thomas and Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, *Duke Law Journal* (2003) 53 (2) 751

endowment policies¹⁰⁵⁵ and the BCCI case¹⁰⁵⁶. The management structure of an organisation affects its compliance level such as placing the compliance, legal or safety departments under sales or marketing department, where profits are prioritised over standards and where employees are remunerated by commission rather than salaries, consequently, deceit becomes an integral part of corporate business culture¹⁰⁵⁷ because competition to earn profit would be prioritised over compliance with due process and internal control measures; this is why the *Senior Managers' Regime* introduced to hold Senior Managers personally responsible for regulatory infraction in UK is appropriate, since company management often have special skill of internal procedures, they can monitor compliance and are in the best position to enforce remedial action. However, the major drawback of self-regulatory regime is its cost on the regulated entities and has therefore constituted a drain on their profitability; nevertheless, it is a necessary evil to supplement criminal enforcement measures, with more coercive sanctions and strong punishment for recidivists¹⁰⁵⁸ Although regulatory sanctions appear to negate the importance of deterrence in terms naming and shaming the culprits¹⁰⁵⁹ but despite all these, Croall suggested that the lack of public stigma in regulatory action unlike criminal prosecutions could be resolved by greater publicity and attempts to 'name and shame' offenders by publicity orders.

¹⁰⁵⁵ Viral Acharya and others, Market Failures And Regulatory Failures: Lessons From Past And Present Financial Crises First Draft, pp.4, 16 and 17

<http://pages.stern.nyu.edu/sternfin/vacharya/public_html/market_failures.pdf>accessed 25/10/2015

argued that the financial regulations introduced in the USA in 1930 was successful as it addressed the challenges at the time but became obsolete in controlling modern challenges when banks embarked inter alia on excessive risk shifting, the use information technology and stiff competition

¹⁰⁵⁶ Hazel Croall, Combating financial crime (n 1035)

¹⁰⁵⁷ Ibid

¹⁰⁵⁸ Ibid

¹⁰⁵⁹ ibid

10.2 Negotiated Pleas

This plays a significant role in enforcing regulatory and criminal sanctions, over the years, US Department of Justice and the U.S. Sentencing Commission have reshaped the approach and practice of holding corporations accountable for their misconducts which appears to have yielded positive results far more than corporate crime prosecution in the UK. In the past few years, only a small number of corporations are convicted in full criminal trial in the US because in order to avoid criminal liability, corporations are often ready to enter into either Deferred Prosecution agreements, Non Prosecution Agreement and plea bargaining, the terms of which often entail changes in corporate business practices, corporate governance, introduction of effective internal control to ensure compliance, cooperation with regulators and prosecutors and pursuance of settlement of claims of misconduct.

Deferred prosecution (also known as Pre-trial Diversion) was initially invented by the US Courts in 1914 as an alternative way of ensuring effective rehabilitation of juvenile and drug offenders by which prosecutors file charges against an offender but defers its prosecution in exchange for commitments to reform and restitution from the offender; it was formally endorsed by the Judicial Conference in 1947 and became prominent in the 1960s as a way of diverting adjudication of juvenile offences from the courts by allowing offenders to escape the consequences of conviction¹⁰⁶⁰, it is a means of applying sanctions on the offender without a record of criminal conviction¹⁰⁶¹. If the offender complies with the obligations, the indictment is dismissed and the offender continues his normal life without the stigma of conviction and its attendant serious collateral consequences. However, due to the increase in corporate crime, huge cost of corporate prosecution, adverse effects of conviction on corporations and stakeholders (shareholders, investors,

¹⁰⁶⁰ Benjamin Greenblum, 'What happens to a prosecution deferred? Judicial Oversight Of Corporate Deferred Prosecution Agreements', *Columbia Law Review* (2005) 105 (6) 1866

¹⁰⁶¹ Ibid

employees, contractors, clients and the economy in general), as reflected in ‘Too big to fail corporations’, the US federal prosecutors have extended the refuge of deferred prosecution to corporations by procuring an indictment against an offender but defers prosecution in exchange for an admission of wrongdoing, purging of guilty executives, waiving the right to a speedy trial and attorney-client privilege, an admission may be used to impeach the offender at trial if the DPA fails; this no doubt constitutes a dubious way of obtaining privileged information and a breach of right to silence in criminal proceedings, though a waived privilege, it would have been induced by the prospect of non criminal trial, which ought to be unenforceable when parties to the agreement have unequal bargaining powers; as seen in the U.S Supreme Court in *Fuentes v Shevin*¹⁰⁶² which declared a statute unconstitutional because it allowed repossessions without judicial hearings and in response to the claim that the buyers involved had waived their rights to such hearings, the Court replied: ‘*There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power*’¹⁰⁶³

If the prosecutor agrees at the expiration of deferral period that the offender has complied with the terms of DPA, he may withdraw the indictment, free the offender from the burden of criminal prosecution and adverse consequences but should the offender breach the agreement, the prosecutor may proceed to prosecute the indictment and use the offender's admissions against him; the offender cannot challenge the stringent terms of the DPA in courts, as the courts only intervene by interpreting the terms of the deferral agreement¹⁰⁶⁴, this restrictive role played by the judiciary in deferred prosecutions has been largely criticised due to possible distortion of prosecutor's deferral decision, lack of transparency and lack of proof that deferral has successfully reduced recidivism and most importantly, lack of due process arising from absence of judicial oversight in DPA,

¹⁰⁶² 407 U.S. 67 (1972)

¹⁰⁶³ *Fuentes v. Shevin*, 407 U.S. 67 (1972) 95

¹⁰⁶⁴ Greenblum, What happens to a prosecution deferred? (n 1062)

without forgetting the prosecutorial autonomy¹⁰⁶⁵ which has raised concerns for potential abuse and thus jeopardising the interests of stakeholders and markets which the scheme aimed to protect¹⁰⁶⁶. Whereas, an effective judicial involvement could have reduced excesses of prosecutor's discretion and fortify the scheme¹⁰⁶⁷.

Another related alternative means of obtaining justice in the USA is the Deferred Prosecution Agreements, this is different from Non Prosecution Agreement in that while criminal charges are filed in the former with prosecution deferred and such charges may be subsequently dismissed if the company fully complies with terms in the DPA within the specified period of time, no criminal charges are filed in the NPA but the investigation remains pending until the company fulfils the conditions set in therein, also NPA is different from¹⁰⁶⁸ state declining to prosecute, also plea bargaining and declination is at prosecutor's discretion, it offers no sanctions and it is unlikely to reform the offender; it is not subject to judicial review like DPA and but unlike DPA it is usually bereft of a formal agreement (with the offender) even where declination agreement exists¹⁰⁶⁹, it is usually informal, whereas DPA is an enforceable contract between the prosecutor and the offender. There is no equivalence of DPA or NPA in Nigeria and UK criminal justice system but with proper executive or Attorney-General guideline or an enabling Act similar to the Accountability in Deferred Prosecution Bill presently before the US Congress, introducing DPA to the UK and Nigeria would go far in effective corporate criminal prosecution, reduce cost of prosecution, decongest the courts and ultimately serve the essence of criminal justice.

¹⁰⁶⁵ Charles Shireman and Frederic Reamer, *Rehabilitating Juvenile Justice* (Columbia University Press 1986)135

¹⁰⁶⁶ Greenblum, *What happens to a prosecution deferred?* (n 1062)

¹⁰⁶⁷ *Ibid* 1864

¹⁰⁶⁸ *Ibid*

¹⁰⁶⁹ *Ibid* 1869

Plea bargain is another form of negotiated plea used in the US to curb financial crime, Mary Vogel¹⁰⁷⁰ reveals that the practice of plea bargain existed as far back as 1920s and 1930s though writers like Walker¹⁰⁷¹ had insinuated that its historical origin is obscure¹⁰⁷² but Vogel insisted that contrary to popular perception, data from the lower courts in Boston demonstrated that plea bargaining emerged during the 1830s and 1840s, much earlier than previously speculated, it initially arose in offences against property and personal security, it involves both entry of guilty pleas and the granting of attendant concessions, it was in place even in England until the last quarter of the nineteenth century, though state pardon and grants of clemency had long existed prior to the 1830s, they do not share same the characteristics with plea bargaining¹⁰⁷³. In his treatise on classical understanding of plea settlements, Mike McConville¹⁰⁷⁴ observes its compliance with accusatorial criminal justice system and traditional sentencing theory (retribution, deterrence and retribution), he narrated that plea bargain operates by giving a reduced sentence to a remorseful offender who had given up his right to trial by pleading guilty, it is deemed a gesture towards rehabilitation, an essence of criminal sentence but not for ancillary benefits expected from guilty plea; consequently, if guilty plea is purely tactical due to the weight of evidence and circumstances of the case rather than a product of repentance and remorse or because the offender has no alternative except to plead guilty, it would be absolutely inconsistent with the classical theory of plea bargain, in such case,

¹⁰⁷⁰ Mary Vogel, *The Social Origins of Plea Bargaining: An Approach to the Empirical Study of Discretionary Leniency? Law's Reality: Case Studies in Empirical Research on Law*, (2008) Cardiff University Journal of Law and Society (35) (1) 201

¹⁰⁷¹ Samuel Walker, *Popular Justice: A History of the American Criminal Justice* (OUP 1980)

¹⁰⁷² Vogel (n 1072)

¹⁰⁷³ *Ibid* 210

¹⁰⁷⁴ Mike McConville, *Plea Bargaining: Ethics and Politics*, Cardiff University Journal of Law and Society (1998) 25 (4) 562

there ought to be no basis for mitigation of sentence¹⁰⁷⁵, however, over time, administrative considerations such as court decongestion and cost of criminal trials have replaced the classical consideration of remorse and repentance in plea bargaining¹⁰⁷⁶. Presently, criminals benefit from plea bargaining by avoiding appropriate sanction for their crime and state's bargaining power can coerce or induce innocent defendants to plead guilty¹⁰⁷⁷, it could subvert values of criminal justice system where rigorous standards of due process and proof are imposed during trials, hence, defendant's guilt is decided without a full investigation, presentation of testimony or evidence or any impartial fact finding. The determination of the defendant's culpability and the required punishment become administrative determination by the prosecutor¹⁰⁷⁸ and allows criminals to escape justice with lenient sentences, prosecutor here performs the dual role of an adversary and administrator of justice and he weighs the 'interests of justice', his chances of success at trial which undermines his negotiating position unlike the defence counsel who maintains the singular role of an 'adversarial negotiator' and thus produces more effective results for the defendant.

Plea bargaining costs less and is faster than full-scale criminal proceedings¹⁰⁷⁹, however, concerns against plea bargain may be addressed through enactment of more specific reforms that address the problems, rather than abolish the practice¹⁰⁸⁰, although the criticism against plea bargain has certain degree of merit to it but the extent to which the plea bargaining subverts the values of the criminal justice system may have been

¹⁰⁷⁵ Ibid 564

¹⁰⁷⁶ Ibid

¹⁰⁷⁷ Nancy McDonough, Plea Bargaining: A Necessary Evil? UALR L.J., (1979) 2 (2) 387; see also Douglas Guidorizzi, Should We Really "Ban" Plea Bargaining? The Core Concerns of Plea Bargain Critics, Emory LJ (1998) (47) 753

¹⁰⁷⁸ Ibid

¹⁰⁷⁹ Ibid

¹⁰⁸⁰ ibid

exaggerated because the standards of due process and proof beyond reasonable doubt do not become irrelevant with plea bargaining but it actually influences the nature of the bargain reached. In calculating the plea offer, the prosecutor considers inter alia, the chance of conviction, with the primary consideration the circumstances of the offence, characteristics of the offender and the interests of justice¹⁰⁸¹. In the US, the court is not a party to plea bargaining agreement but the rule of procedure requires judicial scrutiny of approval or rejection¹⁰⁸², a position confirmed by the decision in *Bryan v. United States*¹⁰⁸³ where the court held that plea agreements would be considered even if it would be ultimately rejected. An offender that decides to plead guilty rather than opting for trial relinquishes several privileges guaranteed by the constitution especially, the privilege against compulsory self-incrimination, right to a trial by jury and right to cross examine state witnesses and thus relieves the state from the burden of proving its case beyond reasonable doubt¹⁰⁸⁴.

In the same vein, Hockman and Medcroft¹⁰⁸⁵ had stated that plea negotiation have long existed in the British courts while Baldwin and Mcconville¹⁰⁸⁶ differentiated the plea bargain approach in the US from the UK which rejects the American style of plea bargain; UK courts allows voluntary guilty pleas in the open court devoid of influence of the

¹⁰⁸¹ Ibid

¹⁰⁸² Rule 11(c)(1)(b) plea bargain not binding on the court and 11(c)(1)(c) binding plea bargain on the court

¹⁰⁸³ 492 F.2d 775 (5th Cir. 1974)

¹⁰⁸⁴ McDonough, Plea Bargaining: A Necessary Evil? (n 57)

¹⁰⁸⁵ Stephen Hockman and Nicholas Medcroft, Plea Negotiation—Dead or Alive? The Attorney General guidelines on plea discussions in cases of serious or complex fraud, *Criminal Bar Quarterly*, (2011) 1

¹⁰⁸⁶ J Baldwin & M Mcconville, Plea Bargaining And Plea Negotiation. *England Law & Society Review*, (1979) 13 (2) 287

judge, inducement by the prosecutor or coercion from the defence solicitor. This position is confirmed by the UK decision In **R v Dougall**¹⁰⁸⁷:

'In this jurisdiction, a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle that applies to cases of this kind, as it does to others. No such agreement is envisaged in the "Guidelines on Plea Discussions" issued by the Attorney General. These guidelines, which are said to have governed the plea agreement with which this case is concerned, are framed in unequivocal language'

Baldwin and Mcconville reasoned that because American criminal system is imbued with fixed sentences with little judicial discretion which puts pressure on the courts to find means of mitigating the harshness of the law by informal procedures and devises like plea bargain unlike the English criminal justice system where judges retain sentencing discretion and no consequent pressure on the court to devise means of ameliorating harsh sentences; this discretion over sentence makes it unnecessary for the prosecution to offer the defence any promise with respect to the sentence, as any plea concession by the prosecution must be made in the open court; secondly, while prosecutors in the US wield considerable power in decision of reducing charges and recommending sentences to the court¹⁰⁸⁸, English prosecutors lack unfettered discretion to impose terms of plea settlement on courts without the judge's effective contribution in the open court¹⁰⁸⁹, in fact, up till 1970, it was acceptable in England for defence counsel to seek the trial judge's opinion in chambers on advance sentence indication, should an offender pleads guilty until the decision in **R v Turner**¹⁰⁹⁰, overruled such conduct and decided inter alia, that any necessary informal discussion with the judge over a pending trial must involve both defence and prosecution, and the judge in pre trial discussion cannot give advance

¹⁰⁸⁷ [2010] EWCA Crim 1048, Paras.19 and 20

¹⁰⁸⁸ Baldwin & Mcconville, Plea Bargaining (n 1088)

¹⁰⁸⁹ Ibid

¹⁰⁹⁰ 54 Crim. App. R. 352, 1970

indication of sentence to solicitor except in open court and only when it has no effect if the offender pleads guilty or not so as to ensure voluntariness and avoid inducement or coercion of guilty plea¹⁰⁹¹. 35 years after, this decision was partly overruled in the Appeal court case of *R v Goodyear*¹⁰⁹² which laid down the guidance for applicable procedure in advance indication of sentence, the essence of which is to maintain court's impartiality, transparency, fairness and voluntariness of guilty plea in a criminal trial in crown court. Presently, in England, prosecutor's role in crime sentencing has increased (hitherto an exclusive of the preserve of the Judge), they now assist Judges in drawing attention to any aggravating or mitigating factors and in complex cases, provide names of relevant sentencing authorities and guidelines¹⁰⁹³.

The Attorney General Guidelines on Plea Discussions in cases of Serious or Complex Fraud, 2009¹⁰⁹⁴ regulates plea negotiation in serious or complex fraud¹⁰⁹⁵, it sets the process by which a prosecutor may discuss an allegation of serious or complex fraud with a person (or his legal representative) being or to be prosecuted¹⁰⁹⁶, the prosecutor may initiate plea discussions with legal representative of an offender under investigation or prosecution, this must be treated confidential (subject to the general law of disclosure) and cannot be relied on in a prosecution of the offender in relation to the offence in question if the discussions fail; should a plea agreement be reached, the parties need to

¹⁰⁹¹ The principle was subsequently consolidated in Part IV paragraph 45 of Practice Direction (Criminal Proceedings: Consolidation) and the Attorney General guidance to counsel for the prosecution on the acceptance of pleas

¹⁰⁹² [2005] EWCA Crim 88

¹⁰⁹³ The Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise, as revised December 1, 2009

¹⁰⁹⁴ The Plea Negotiation Guidelines were endorsed by the Judiciary in Practice Direction (Criminal Proceedings: Consolidation) IV.45.18 – 28

¹⁰⁹⁵ serious or complex fraud involves at least £500,000 or a significant international dimension or public interest, inter alia,

¹⁰⁹⁶ Hockman and Medcroft, Plea Negotiation–Dead or Alive (n 1087)

address the appropriate sentence to be presented as a joint written realistic submission to the court which shall list the aggravating and mitigating features arising from the agreed facts, set out any personal mitigation for the offender with reference to any relevant sentencing range in guidelines or authorities¹⁰⁹⁷. Hockman and Medcroft observed¹⁰⁹⁸ the increase and successful use of plea negotiation by the Serious Fraud Office (SFO), thereby reducing cost and risky criminal litigation, the SFO has been involved in plea negotiations in line with the AG's Guidelines on Plea Discussions and where the offender has self-referred, agreed a civil settlement and thus avoiding criminal proceedings but recent court decisions have challenged the SFO's plea agreement and the use of the AG's Guidelines in recovering serious fraud. For instance, in *R v Innospec Ltd*¹⁰⁹⁹, the trial judge, Thomas LJ observed at para.27 of the sentencing:

*“The Practice Direction reflects the constitutional principle that the imposition of a sentence is a matter for the judiciary. . . Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence. It is in the public interest, particularly in relation to the crime of corruption, that although, in accordance with the Practice Direction, there may be discussion and agreement as to the basis of plea, a court must rigorously scrutinize in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest.”*¹¹⁰⁰

¹⁰⁹⁷ Ibid

¹⁰⁹⁸ Ibid

¹⁰⁹⁹ (2010) Crim LR 665

¹¹⁰⁰ Hockman and Medcroft, Plea Negotiation—Dead or Alive? (n 1087) 5

However, unlike the US and the UK, Plea bargain in strict sense was first applied in Nigeria in 2005 by the EFCC¹¹⁰¹, It is a novel concept in Nigeria criminal jurisprudence, despite the provisions S.14 (2), EFCC Act, 2004 which is arguably similar to plea bargain and S.180, Criminal Procedure Act, Ogunwumiju (JCA) in *Federal Republic of Nigeria v Igbinedion*¹¹⁰² held that ‘... *plea bargain is as at now generally unknown to our criminal justice administration and indeed our criminal jurisprudence*’. Further, S.180 of the CPA is applicable where prosecutor withdraws other charges in a trial after conviction of some other charges, this is definitely not a plea bargaining as it is devoid of all ingredients and requirements of plea agreement also, S.14(2) EFCC Act, 2004 relates to discontinuance, withdrawal or non prosecution of a charge by the prosecution (EFCC) in return for acceptance of money equivalent of payable fine which an offender would have paid if he had been convicted of the offence but fails to address forfeiture of proceeds crime and restitution to the victim which is normally captured in a plea bargain; out of many states in Nigeria, (only few states) and the Lagos State Administration of Criminal Justice Law, 2011 S.75 & 76 expressly provided for plea bargain in its criminal justice system¹¹⁰³ presently, plea bargaining remains inapplicable in many other states of Nigeria while at the Federal jurisdiction, the recently enacted Administration of Criminal Justice Act, 2015 is now in force and provides for plea bargaining but before its enactment, the Nigeria criminal justice system was subjected to abuse by the judiciary as evidenced in the scandalous judgment delivered in the pension fund fraud where plea bargain was attempted by the court accepting the guilty plea of a defendant in return for light a sentence without any known guideline.

¹¹⁰¹ In the trials of a former Nigeria Police boss (Tafa Balogun) and a fugitive offender, Diepreye Alamieyeseigha, the ex-Governor of Bayelsa State and subsequently in many other corruption and fraud trials

¹¹⁰² [2014] All FWLR Pt. 734, 101, 144

¹¹⁰³ It empowers the state Attorney-General to accept a plea bargain in the public interest, the interest of justice and the need to prevent abuse of legal process.

The use of negotiated plea as a solution to fraud or financial crime control requires a cautious approach, while there are no hard and fast solutions to this question, Alkon and Dion¹¹⁰⁴ noted that plea bargaining is inseparable from the legal and political system in which it is introduced, an informal unregulated plea negotiation is vulnerable to abuse in a weak and corrupt legal system, also, lack of independent judiciary amplifies fraud and corruption as seen in the reckless abusive use plea bargain was subjected to in Nigeria; secondly, the learned authors¹¹⁰⁵ observed that court decongestion is often the justification for introduction of negotiated pleas but they¹¹⁰⁶ observed that a thorough assessment of the root cause of the court congestion is required before tinkering with the idea of introducing plea bargain; invariably, court congestion might have developed from administrative and logistic lapses, lack of expert investigators resulting in delays or due to the scarcity of judicial officers, cumbersome and manual court process. These underlying problems could not be resolved by mere introduction of plea bargain; nevertheless, negotiated plea has gone a long way in fraud control in the US and to some extent in the UK because of the high level of development in criminal justice system, rule of law and the use of advance technology in crime investigation but England still has a lot to learn from the US model of DPA and NPA with particular reference to the innovations in the proposed US Accountability in Deferred Prosecution bill because of US record of more expeditious and effective corporate and individual fraud conviction than England.

¹¹⁰⁴ Cynthia Alkon and Ena Dion, Introducing Plea Bargaining into Post Conflict Legal Systems, Research Memorandum of International Network to promote the rule of law

<http://inprol.org/sites/default/files/publications/2014/introducing_plea_bargaining_0.pdf>accessed 12/02/2015

¹¹⁰⁵ *ibid*

¹¹⁰⁶ *Ibid*

10.3 Civil enforcement by victims

Civil enforcement (as distinguished from self regulation¹¹⁰⁷) is an addition or substitute to criminal prosecution of financial misconduct. As mentioned in earlier chapters, opposition to civil enforcement of financial misconduct hinged largely on possible lowering of standard of proof as guaranteed by international human rights and infraction of inherent privileges protecting an accused from injustice in criminal prosecution, this is buttressed by Rider's succinct position that no state has ever succeeded in using criminal law alone to combat abusive activities in capital market as inbuilt human right protection serves as barrier to effective prosecution¹¹⁰⁸ but nevertheless, he argued against reducing the standard of proof in criminal or administrative proceeding for offences under criminal law especially where dishonesty is involved¹¹⁰⁹; in what amounts to validation of Kerr's exposition on 'Fraud and Mistake', Rider stated that civil and criminal fraud are the same, as they are based on the concept of deceit and misrepresentation resulting in a loss with only difference being the enforcement procedures¹¹¹⁰, Rider further argued that in the absence of proof of dishonesty, criminal law is an inappropriate means of regularising misconduct¹¹¹¹ and advocated improvement of civil law to deprive offenders' proceeds of crime by exploring all regulatory enforcement before embarking on criminal proceedings, the latter which may not be as effective as administrative remedy¹¹¹². Rider further elaborated that in cases of fraud, the difference between required standard of proof in civil and criminal courts may be a question of semantics with no proof that a better result

¹¹⁰⁷ an extra legal scheme adopted by finance and securities market practitioners, pre 1986 in UK, Pre 1930s in the US legal intervention for compliance and standard enforce but with legal intervention came the risk based approach regulatory scheme and civil recovery of proceeds of crime

¹¹⁰⁸ Barry Rider, 'Combating international commercial crime ', (1985) *Lloyds Maritime and Commercial law Quarterly*, 217

¹¹⁰⁹ Rider, *Civilizing the law* (n 1029)

¹¹¹⁰ William Kerr on *Fraud and Mistake* (n 460) 3

¹¹¹¹ Rider, *Civilizing the law* (n 1029)

¹¹¹² *ibid*

would be achieved if criminal charges were transmuted to civil suit¹¹¹³. Despite the glaring difficulty of the preferred option between the two procedures, civil liability to disgorge the proceeds of illicit wealth and crime in financial market may arise in five basic instances:

1. The company suing its director or senior officers for breach of fiduciary duties
2. The company suing a third party who is a party to breach of directors duty or whose direct behavior results in damages to the company
3. A third party suing a company for infraction of law, regulations or internal control procedure resulting in damage to the plaintiff
4. A shareholder suing a company director where the director holds himself out in special relationship
5. Minority shareholder suing the company, though any wrong against the company can only be defended by the company itself except when minority shareholders commence a derivative action on behalf of the company against the majority wrong doing shareholders¹¹¹⁴.

A culprit of financial misconduct could either be an insider employee, the corporation itself or an outsider; where the misconduct or crime is committed by a third party against a company because of the loophole in the system such as failure to enforce standard or lack of compliance with internal control procedures, a combination of regulatory enforcement and civil litigation may be appropriate, by the company suing the third party but the regulatory authority may want to investigate the internal control lapses that allows permit the successful fraudulent activities, again where such loophole creates an opportunity for an insider to defraud a third party, the defrauded third party, being a victim of crime may commence civil action against the company; fraud by an insider against a company is enough to put the regulators on alert and demand for scrutiny of the possible weakness within the financial organization or the system and this may attract

¹¹¹³ *ibid*

¹¹¹⁴ *Foss v Harbottle* (1843) 67 ER 189

appropriate sanctions but regulators lack locus standi to regulate outside the purview of their authority and therefore cannot commence civil action against an offending third party except a defrauded company but legal and reputational risk need be considered before commencing civil proceedings against a fraudster.

Civil law relies extensively on fiduciary relationship to find a ground for cause of action¹¹¹⁵, whenever the court deems confidential or fiduciary relationship to exist between parties, the person in whom confidence is reposed or who possesses influence over another person cannot bind such other person to the contract unless it can be proved that it is advantageous to the other party and has disclosed all material relevant information within his knowledge¹¹¹⁶. This is an equitable principle of trust developed by analogy to the rules relating to duties of trust and agency relationship¹¹¹⁷, the standard of this traditional duty has moved from subjective¹¹¹⁸ to an objective standard¹¹¹⁹ and though there are conflicting authorities on fiduciary, it is applied whenever a party deliberately and voluntarily places himself in duty to act fairly in common law and statutory duty of care to customers; of relevance is the directors' duties developed by courts, now codified in many jurisdictions¹¹²⁰ despite the fear that codification would freeze the growth of such duties to accommodate new development and modern business realities, although it is arguable that codification makes law certain¹¹²¹. Directors of companies owe fiduciary duties to the company that appointed them¹¹²² and not to the individual shareholders even if it involves non disclosure of price sensitive information when shares are purchased by directors from shareholders in anticipation of sale of the company's

¹¹¹⁵ Kerr on Fraud (n 460)

¹¹¹⁶ Moody v Cox and Hall [1917] 2 ch 71, 88, per Scrutton LJ

¹¹¹⁷ Paul Davies and Sarah Worthington, Gower and Davies Principles of Modern Company Law, (9th ed. Sweet and Maxwell 2102) 479

¹¹¹⁸ City Equitable Fire Insurance co, Re [1925] ch.407

¹¹¹⁹ Dorchester Finance Company v Stebbing [1989] BCLC 498

¹¹²⁰ 2006, English Company Act, 1990 Nigeria Companies And Allied Matters Act and USA

¹¹²¹ Gower and Davies, Principles of Modern Company Law (n 1118)

¹¹²² Percival v Wright [1902] 2 ch 421; Bell v Lever Brothers [1932] 2 AC 161 HL

undertaking at a favourable price but where there exists a special relationship between any director and any shareholder, a fiduciary duty would be inferred, for example, where a director consents to be an agent of a shareholder for a specific purpose¹¹²³. Again, a company may release its directors from fiduciary obligations by authorising directors' prospective approval, ratification of retrospective approval¹¹²⁴ or affirmation by adoption of breach of duty beyond the director's power, except that in the latter case, the director may still be asked to compensate or account for profit¹¹²⁵. By this remedy, the company can hold its directors accountable for breach of disclosure and for any secret profit, compensate the company for any loss suffered, and could be held as a constructive trustee for any property of the company that has come into his hands as a result of the breach of duty.

Rider¹¹²⁶ while analysing the extension of constructive trust to recipients of property transferred in breach of trust and facilitators of such transfer, observed that the English court devised constructive trust to find liability as set out in **Selangor United Rubber Estate V Cradock**¹¹²⁷ that a person who participates in another's breach of trust will be liable as the trustee, even Hong Kong court in *Nanus Asia Company Inc. v V Standard Chartered Bank*¹¹²⁸ had at a time when it was assumed in England that proceeds of abused confidential or insider information could not be a ground for trust relationship, had held a bank as constructive trustee to account for the money being proceeds of insider abuse in common law; although constructive trust has been extended to the recovery of proceeds of bribery and corruption by identifying and tracing same to any bank account as seen in

¹¹²³ *Peskin v Anderson* [2001] 1 BCLC 372, 379

¹¹²⁴ Gower, *Principles of Modern Company Law* (n 1118)

¹¹²⁵ *Ibid*

¹¹²⁶ Barry Rider *The weapons of war: The use of anti-money laundering laws against terrorist and criminal enterprises*, Part 2, *Journal of International Banking Regulation* (2002) 4 (2) 151

¹¹²⁷ (1968) 1 WLR 1555

¹¹²⁸ (1990) 1HKLR 320

Singaporean case of *Sunmitomo Bank Ltd v Katrika Thahir*¹¹²⁹, the same approach was applied in the Privy Council in *A-G Hong Kong v Reid*¹¹³⁰; that a director must not accept benefit or bribe from a third party, it is a strict liability misconduct. There were conflicting authorities in England despite Gower's¹¹³¹ argument that bribe is like a secret profit for which a person in position of fiduciary relation and a third party beneficiary may be jointly and severally held liable in damages in fraud for loss¹¹³² and the third party jointly liable for money had and received, not based on loss; or by constructive trust in favour of the company as principal and against the director as agent for the bribe; or where a director benefits from insider information, such information is a property belonging to the company and the insider who benefits from it would be held as trustee even if it has been transferred to a third party except a bonafide purchaser for value without notice of defect in owners title¹¹³³. These remedies¹¹³⁴ allow the company to claim any profit made by the director using the company's benefit or goodwill; and such claim prevails over the unsecured creditors in the event of director's insolvency. In *FHR European Ventures LLP v Cedar Capital Partners LLC*¹¹³⁵, a land mark UK Supreme Court decision overruling Appeal court decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*¹¹³⁶ and overturned the over 100 years conflicting decisions¹¹³⁷ of the

¹¹²⁹ (1993) 1SLR 735,151

¹¹³⁰ (1994) 1 All ER 1; see also *Nelson v Rye* (1996) 2 All ER 186

¹¹³¹ Gower Principles of Modern Company Law (n 1118)

¹¹³² *Mahensa v Malaysia govt. Officers' cooperative Housing Society Ltd* [1079] AC 374, 381

¹¹³³ Rider Civilizing the law (n 1029)

¹¹³⁴injunction or declaration, damages or compensation, restoration of company's property, rescission of the contract, account for profits, summary dismissal

¹¹³⁵ [2014] UKSC 45; [2015] A.C. 250; [2014] 4 All E.R. 79

¹¹³⁶ [2011]EWCA 347 and *Tyrrell v Bank of London*,11 E.R. 934; *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319 and *Lister & Co v Stubbs* (1890) 45 Ch. D. 1

¹¹³⁷ The 1890 case of *Lister & Co. v Stubbs* [1890 L. 909] (1890) 45 Ch. D. 1 M

English courts' interpretation of constructive trust principle to trace and recover bribes and secret commissions by an agent against the interest of his principal, especially where such bribe has been invested. It resolved the ambiguity over the feasibility of a principal tracing the stolen asset into the investments¹¹³⁸ and held that an agent who received benefits in breach of his fiduciary duty must account to the principal and refund the equivalent of the benefit by way of equitable compensation representing a personal remedy for the principal against the agent, the agent must be treated as having acquired the benefit on behalf of his principal. Further held that the principal has a proprietary remedy which enables the principal to trace into the agent's assets and the assets of any third party except a bonafide purchaser without notice and claim any proceeds in addition to his personal remedy against the agent; the principal could elect between the two remedies which are deemed held on trust for the principal. In response to the argument that the rule would prejudice the agent's unsecured creditors as it would reduce the agent's estate if he becomes insolvent, the court held that the proceeds of a bribe or secret commission ought not belong to the agent's estate ab initio, it would have actually reduced the principal's benefit from the relevant transaction and therefore could fairly be seen as the latter's property.

Apart from holding those who use their privileged position to benefit from misconduct, there is another relevant category of people who facilitate those who derive benefit from criminal activities by assisting them to hide the ill gotten wealth or proceeds of crime; especially when such facilitators contravene regulatory or legal requirements. Should we hold the employee in the corporation responsible or the professional like lawyers, accountant, estate agent who facilitate the misconduct or the corporation that fails to implement adequate internal control mechanism to prevent fraudulent conduct? Rider¹¹³⁹ submits that those who facilitate crime should be judged against the subjective and

¹¹³⁸ The privy council had rejected the position in *Lister case* in the Singapore case of *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 S.L.R. 735, see also New Zealand case of Attorney General of Hong Kong v Reid [1994] 1 All E.R 1

¹¹³⁹ Barry Rider, *The weapons of war* (n 102)

objective standards, if the given facts would have put a reasonable banker, solicitor, accountant or stock broker on notice of the dishonesty surrounding the transaction and subjectively, if the facilitator within the actual knowledge possessed acted reasonably in facilitating the transfer of the possession of the property? A difficult task which in certain instances, may result in personally holding the professional liable, as held in *AGIP (Africa) Ltd v Jackson*¹¹⁴⁰; an accountant who acted dishonestly to facilitate the laundering of proceeds of crime was personally held liable for knowing the fact of the suspicion and deliberately declined and refused to make enquiries which an honest person would have made to unravel the fraud. In the same vein, where an organisation fails to implement policies and adequate control measures to prevent its system from being used to facilitate fraud and money laundering similar to the UK Bribery Act 2010, s.7, it should be held accountable¹¹⁴¹; in view of the conflicting court decisions especially in the UK, with respect to attribution of knowledge in corporate criminal responsibility which has failed in adequately holding the appropriate culprits responsible, there have been recent developments and change of policies indicating when to hold facilitators culpable and when to hold the corporation responsible, for instance, following the changes set out in the Banking Reform Act 2013 to improve professional standards and culture within the UK banking industry, effective from March 2016, the FCA and PRA now enforce the *Senior Managers and Certification Regime* which aims to lift the standards of corporate governance, increase the culture of personal accountability and help restore confidence in the banking sector, under the regime, organisations must clarify and notify the regulators the roles and responsibility of each person performing senior manager function within an organisation so as to ascertain who to hold personally responsible in the event of regulatory infraction, under the regime, senior managers have statutory duty to take reasonable steps to prevent regulatory breaches in their area of responsibility, in addition, the UK government has proposed a new policy that where an employee is charged with

¹¹⁴⁰ (1990) 1 Ch. 265

¹¹⁴¹ The UK FCA General principle Rule 3, rules and regulations holds FI culpable for not design internal compliance mechanism to preventing bribe

money laundering, the employers will be held liable if it cannot show that it has put in place, an internal procedure to prevent fraud and money laundering similar to the provisions of Bribery Act, S.7.

Taking a deep look of the position of the Nigeria legal system, the use of constructive trust to disgorge proceeds of crime as a result of abuse of trust relations is hazy, the abuse of fiduciary relations in Nigeria banking system is codified in ss.18, 19 and 43 of BOFI Act, 1991, while the common law provisions remains relevant to the interpretation of ambiguous provision of Nigeria code or statute; a review of Nigeria decided cases reveals that civil recovery of proceeds of dishonesty and abuse of fiduciary relations have not relied on constructive trust but rather on equitable remedy of “money had and received”, the essence of which lies in the moral obligation for restitution of the receipt and retention of unjust benefit by a wrongdoer and anyone into whose possession the money may be traced, except, an holder for value without notice¹¹⁴²; this has been applied where money is paid by mistake, failed consideration, oppression, undue influence taken of plaintiff’s position¹¹⁴³, secondly, s.311, Penal Code on criminal breach of trust empowers courts to convict, in criminal proceedings, any person entrusted with property who dishonestly misappropriates or converts it to his own use or disposes in violation of law or legal contract¹¹⁴⁴. Therefore, it could be deduced that civil recovery of proceeds of misconduct arising from abuse of position or trust in Nigeria financial sector does not take the same position as in the UK; constructive trust in Nigeria remains applicable only in strict trustee and beneficiary relationship, breach of codified directors’ duties under the *Nigeria CAMA 1990* and criminal breach of trust cases under *BOFI Act, 1991*, civil courts use the restrictive concept of ‘money had and received’ to disgorge benefits derived from taking undue advantage of other people, though legal and regulatory action can be

¹¹⁴² Quasi-Contracts Action for Money Had and Received Unjust Enrichment in the Absence of Benefit or Exercise of Dominion over Property Source: Columbia Law Review, Vol. 36, No. 5 (May, 1936) 847

¹¹⁴³ Chartered Bank Ltd v FATB (2005) 17 WRN 25

¹¹⁴⁴ Mafa v The state [2013] NWLR CA (Pt.1342) 607

brought pursuant to the breach of ss.18, 19 and 43 BOFI Act, 1991 and s.311, Penal Code, EFCC Act, s.14 – 18 and *ICPC Act, s.8 -26*, there are no civil cases in Nigeria that uses the same definition like dishonesty in both criminal and civil fraud cases; above all, there is no proof that the use of constructive trust to disgorge proceeds of crime in other jurisdictions has any advantage over the existing practice in Nigeria but since Nigeria courts are empowered to enforce the common law principles, availing themselves of the constructive trust principle to interdict illicit wealth will only help to expand the law.

The outcome of civil liability depends largely on the link between cause of the conduct and locus standi, in order to prevent frivolous and vexatious litigation at the expense of a defendant¹¹⁴⁵, the circumstances in which a defendant's dishonest abuse of relation would give rise to a course of action would depend on a causal link to damages from breach of regulatory, statutory duty or contractual duty. It would be difficult and inconceivable to imagine every individual investor establishing loss arising from market abuse, as the insiders could not have misrepresented facts to the whole word except misrepresentation in the company's prospectus and even in such circumstance, the company Acts provide the appropriate consequences. For example, Ruder¹¹⁴⁶ observed that the US courts while interpreting anti securities fraud (SEC rule 10b-5) apply common law approach by relying on materiality and causation such that in the US securities market, it must be proved that the misrepresented or undisclosed fact is material, reasonably relied upon by the plaintiff and that the misrepresentation or omission had caused the alleged damage to the plaintiff but where there is no intention to deceive; innocent misrepresentation may be relied upon but with the remedy limited to rescission. The learned author¹¹⁴⁷ illustrated the position with *List v Fashion Park Inc*¹¹⁴⁸ where, the plaintiff sold stock to corporate insiders who failed to disclose their identity as insiders at a time when there was a board

¹¹⁴⁵Rider, Civilizing the law (n 1029)

¹¹⁴⁶ David Ruder and Neil Cross, Texas Gulf Sulphur-The Second Round: Privity And State Of Mind In Rule 10b-5 Purchase And Sale Cases, North western University Law Review, (1965) 63 (4) 1361

¹¹⁴⁷ Ibid

¹¹⁴⁸ 340 F.2d 457 2d Cir. 1965

resolution on merger and acquisition, though the court agreed that the merger negotiations was not disclosed because at the material time when the plaintiff sold the stock, negotiations were still at preliminary stage and hence "too remote to have influenced the conduct of a reasonable investor"; the court was however, silent on the question of materiality of identity but found that the plaintiff would not have acted differently even if he had known the identity of the insider and therefore the plaintiff had not relied upon such identity. Ruder elucidated further that where an insider purchases the stock of a shareholder and intentionally misrepresented that there are no subsisting negotiations for sale of the corporation to a third party, such an insider would be held liable but in contrast, where a director knows of an important business discovery made by his company, neither purchase his company's stock nor transmits the information nor recommends purchase of the stock, it would be difficult to hold him liable.

Apart from civil enforcement, the extent of supporting victim enforcement is generally cloudy but in UK, the dictum of Lightman J. in *Melton Medes Ltd v SIB*¹⁴⁹ seems to be a guide, where bad faith/fraud is involved, the regulator ought to assist the victim by making the information obtained during investigation and inspection available to help in litigation, although a plaintiff may request for a court order of disclosure of material discoveries from the regulatory authorities so as to aid civil proceedings, admissibility of which depends on materiality, relevance and immunity or privileged protection, information (except where privileged information is waived by the parties), again, in order to encourage amicable and transparent resolution of disputes, parties make 'without prejudice' concessions and compromises statement provided that in the event of breakdown of negotiation, such document would not be used for adversary purposes (similar to s.26 Nigeria Evidence Act), also, classified official state secrets cannot be disclosed and statements made before quasi judicial authorities in violation of fair hearing would not be admissible. While regulators have locus standi by virtue of their enabling

¹⁴⁹ (1995) 2 WLR 247

Act to institute civil action against anyone subject to their rules, separation of corporate ownership from control has put private investors at disadvantage to challenge corporate abuse of authority in the absence of procedure for funding of suit and by intervention of regulatory authority or by POCA to recovery style, the right to sue (*locus standi*) is also a factor against the instituting of civil action involving financial misconduct, in all cases of violation of public right, only the A-G can sue¹¹⁵⁰ but where a public right is under threat, a private litigant may seek an injunction if his independent private right is affected or if he suffers special peculiar damage to himself¹¹⁵¹.

While support for victims (discussed in the next chapter) of financial misconduct remains inadequate and legal aid is often means tested, corporate officials, especially, directors are often protected under third party indemnity against judgment and legal cost except when the company itself is suing the director, Gower noted this as a defeat to the deterrence effect of litigation¹¹⁵². Apart from termination of employment, any director involved in corporate fraud is disqualified from holding position of corporate director for a given period¹¹⁵³. Finally, it could be seen that the UK and the US have devised various strategy and policies to ensure adequate solutions to counter financial crime and counter terrorism financing, the next chapter shall consider the ways in which all such strategies may be considered for adoption to resolve challenges confronting the control of financial crime in Nigeria.

¹¹⁵⁰ *Wave v Regent's Canal Co* (1858) 3 de G & J 212

¹¹⁵¹ *Boyce v Paddington BC* (1930) 1 Ch 109

¹¹⁵² Gower and Davies *Principles of Modern Company Law* (n 1118)

¹¹⁵³ Nigeria Companies And Allied Matters Act ss.253, 254, 257 and 506

Chapter 11

Looking ahead at the future on measures against financial crime in Nigeria

The previous chapters have extensively evaluated the comparative analysis of the control of financial crime in other jurisdictions with a view to finding the most appropriate policies and legislations that may be adapted to the Nigerian circumstance because the control of financial crime in Nigeria is at a cross road that requires a fundamental overhauling of the entire criminal justice system, the police investigation process and a re-evaluation of its social value with a view to emphasising probity, accountability, responsible incorruptible political leadership as a panacea for prevention of the total degradation of Nigeria social values, human and natural resources. This chapter revises and develops pragmatic solutions derived from policies, laws, regulations of other jurisdictions in order to fill the identified lacunae in Nigeria anti-financial control measures.

11.1 The need for paradigm shift in Nigeria criminal justice system

Although the preferred criminal justice system between the accusatorial and inquisitorial system is contestable, the protection afforded offenders in nations with poor scientific means of crime investigation and expeditious criminal proceedings support a recommendation for introducing an hybrid system that extracts legal principles from both systems to create a system that guarantees judicial impartiality and fair proceedings¹¹⁵⁴and allow the judge to probe and ask questions to unravel the truth. It is crucial for Nigeria to adopt the Italian approach which after 1988 discarded the inquisitorial criminal system for an hybrid system of criminal prosecution, this tends to curb the existing abuse of court process whereby frivolous preliminary objections raised and approved by the court stalls successful prosecutions and frustrate justice, an hybrid system allows an independent investigative judge to complement the criminal investigative process commenced by the

¹¹⁵⁴ David Siegel, Training The Hybrid Lawyer And Implementing The Hybrid System: Two Tasks For Italian Legal Education, *Syracuse Journal of International Law & Commerce* (2006) 33 101

police and decide if prosecution is necessary, all preliminary questions would have been fully resolved before the matter proceeds to trial. Harms¹¹⁵⁵ while drawing attention to the evil of accusatorial system of criminal justice explains that fair trial does not necessarily have to translate to a long, tedious proceedings because justice delayed is justice denied either to the state, the accused or the victim, a presiding judge does not have to abdicate the establishment of truth to the prosecution and defence solicitors by staying aloof in the proceedings aimed at establishing truth and justice which aligns with the African traditional criminal justice system, therefore, it is imperative for Nigeria to reject the existing adversarial system and adopt an hybrid criminal justice system similar to the Italians’.

Presently, while organised crime engages and employ the services of skilled experts to perpetuate crime, the law enforcement agencies in Nigeria have limited access to such professional assistance, due to insufficient funding, whereas the contribution of such experts can help in indicting and disrupting economic and financial crime¹¹⁵⁶. Menon and Siew¹¹⁵⁷ further elaborated that the legal and technical complexities involved in investigation, prosecution and asset recovery dictate that investigators and prosecutors be skilful not only in traditional investigative techniques but also in specialised technical skills in relevant **fields** with cross-disciplinary training. Nigeria may need to deepen its relationship with the Stolen Asset Recovery Initiative (StAR)¹¹⁵⁸ for more support in preventing laundering of the proceeds of corruption and facilitating the efficient return of Nigeria stolen assets, advanced training courses on asset recovery, for instance, if there were sufficient manpower training for the Nigeria Judges on the provisions of the new ACJA 2105, the current stalemate in the high profile prosecution like *Federal Republic of*

¹¹⁵⁵ LTC Harms, Demystification of the inquisitorial system, PELJ (2011) (14) 5

¹¹⁵⁶ Kenneth Murray, A suitable case for treatment (828) 100

¹¹⁵⁷ Key challenges in tackling economic and **cybercrimes** Creating a multilateral platform for international co-operation, (2012) JMLC 15 (3) 247

¹¹⁵⁸ A partnership between the World Bank Group and the UNODC that supports international efforts to end safe havens for corrupt funds

*Nigeria v Saraki*¹¹⁵⁹ would not have occurred as the primary rationale for S.306 and 396 ACJA, 2015 is to abolish stay of criminal proceedings and interlocutory requests by merging all preliminary objections with the substantive proceedings such that the ruling on preliminary objection and interlocutory applications would be merged and considered in the final judgement; this aims to put a stop to the interminable criminal proceedings against PEP like *Dariye v Federal Republic of Nigeria*¹¹⁶⁰ and *Abacha v Federal Republic of Nigeria*¹¹⁶¹ where for over a decade, preliminary objections had stalled their prosecution in the Court of first instance and appellate courts and had to commence de novo after a circuitous journey. In the same vein, Rider observed that although creation of specialised unit for investigation is vital in the pursuit of corruption as this obviates the difficulty in recruiting and fostering specialisation within the traditional police organisation because there are often no career structure for specialisation in the regular police¹¹⁶² but despite the advantages of specialisation in crime prevention, the independent structure of such special unit from the government engender isolation from other law enforcement agencies and destruction of flow of information and intelligence¹¹⁶³ as seen in mutual distrust between the Nigeria police, the EFCC, the military and the SSS refusing to share intelligence on terrorist group (Boko Haram) and the conflicting roles between the EFCC and the Nigeria police.

Further, setting up public institutions and enacting laws to fight crime without a thorough re-evaluation of the existing anti crime policies with a view to creating synergy of force and strategy to combat its root cause, will only create a facade of combating financial crime, terrorist financing and corruption; effect of such institutions and legislations will atrophy over a period of time unless Nigeria public institutions are set on

¹¹⁵⁹ CCT/ABJ/01/2015 delivered on the 18th day of September, 2015

¹¹⁶⁰ Suit No: SC.252/2013

¹¹⁶¹ Suit NO: SC.40/2006

¹¹⁶² Barry Rider, 'Strategic tools - for now and perhaps the future?', in Barry Rider (ed), Research Handbook on International financial crime (Edward Elgar 2015) 738

¹¹⁶³ [1943] 59 TLR, 174

rule of law, accountability and transparency in public and private sectors, transparency is vital in control of corruption, it is an effective control mechanism against acquisitive crime but the crime investigation agencies whom the disclosure is made must be skilled in analysing and monitoring such disclosure, transparency hinges on disclosure regime that alerts the law enforcement agencies before the final execution of the crime, such that any non disclosure would be sanctioned by the regulatory authority, and thus serve to control insider trading, secret profit than having to investigate and prove the often complex substantive offence; disrupting the revealed misconduct¹¹⁶⁴.

11.2 Procedural alternatives to criminal prosecution

As part of the criminal justice system, penology in Nigeria has long been identified as one of the major problems in the maintenance of law, order and social equilibrium, for instance, the Nigeria customary criminal justice focused on compensation, restitution for the victims and reconciliation of all parties in proceedings, even as many customary proceedings did not distinguish between civil and criminal unlike the English common criminal law decision which states that courts will not be '*the medium of compelling people to pay debts*' in *R V Peel*¹¹⁶⁵ this general principle of Nigeria criminal law on restitution, inherited from English law, states that offenders must be denied the profit of crime¹¹⁶⁶ by forfeiting it to the state, even if it has been transferred to a third party while an order of restitution can only be made in civil actions, until recently, it was generally doubtful in criminal prosecutions for restitution order to be made in favour of victims of crime¹¹⁶⁷ except there is an express statutory provision to that effect as buttressed by

¹¹⁶⁴ Rider, strategic tools, 729 -730

¹¹⁶⁵ Adekunle Owoade, "Reform of sentencing in Nigeria - A note on compensation, restitution and probation" in compensation and remedies for victims of crime (Federal Ministry of Justice Nigeria Law Review Series 1990) 120

¹¹⁶⁶ Fry L.J in *Cleaver V Mutual Reserve Fund Life Association* (1892)1 QB 147, 156 and Lord Atkin in *Berresford V Royal Insurance Co. ltd* (1938) AC 586, 590

¹¹⁶⁷ Festus Emiri, *The law of restitution in Nigeria* (Malthouse Press 2012) 462

Glidvell L.J in *Halifax Building Society V Thomas*¹¹⁶⁸; consequently, victims of crime often resort to civil action (with attendant cost and time spent on trial) to claim restoration or compensation for loss since a victim is not a party at criminal prosecution, he is only a witness; Emiri¹¹⁶⁹ noted that this judicial position is attributable to the inclination of the court that crime is an offence against the state and not against the victim, hence, imposition of fine, confiscation and imprisonment are sufficient means of disgorging the offender from the profit of crime¹¹⁷⁰, it is however, arguable that Nigeria criminal law is different from the common law of crime as *S.78 of the Nigeria Penal code* empowers the Area courts to award compensation against convicts in favour of victims either in addition to or in substitution for any punishment but despite this provision, Bello¹¹⁷¹ opined that most Nigerian jurists restrict themselves to the UK old principle of law against financial restitution for victim of crime¹¹⁷² unless there are express provisions whereas this is erroneous approach as there are some provisions in the code that empowers the court to make an order of restitution in appropriate instances, like *S.261-263, 270 and 268 CPA and S.357 and 358 CPC*. However, punishing an offender without compensating the victim appears unjust; the criminal justice system considers the offender's interest in award of punishment by measures like retribution, rehabilitation or reformation; Henceforth, it is imperative to recommend that there should be a transition from retributive punishment to rehabilitative justice, this will assuage the pain, loss, deprivation and humiliation of the victim of crime and where necessary, deny criminals

¹¹⁶⁸ (1996) Ch. 217 at 229

¹¹⁶⁹ The law of restitution in Nigeria (no 1168)

¹¹⁷⁰ Peter Gibson L.J in *Halifax Building Society V Thomas* (1996) Ch. 217, 229

¹¹⁷¹ A former CJN, in 'compensation and remedies for victims of crime (no 1166) 10

¹¹⁷² The Nigeria Criminal code S.17, death penalty, imprisonment, canning, fine and forfeiture of assets to the state are permitted) restitution to victims of crime are not recognised, Further, S.19 on punishment for **corruption** (S.98 (a-b), 112, 117,126, 128 and 494) only permitted courts to order forfeiture of **assets** to the state and not an individual victim of crime.

from profiting from their crime¹¹⁷³, despite the UN Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power 1985¹¹⁷⁴ requesting member states, including Nigeria to domesticate its provision on restitution and compensation for victims of crime¹¹⁷⁵, only the federal government, Lagos and few states in Nigeria have expressly made provisions for restitution and compensation of victims of crime¹¹⁷⁶, even the EFCC Act s.24 relates only to forfeiture to the government, many states in Nigeria are yet to follow the steps of the Lagos state Administration of Criminal Justice Law, 2011, notwithstanding, the fact that the UK system which Nigeria inherited has been reformed¹¹⁷⁷ to accommodate restitution and compensation of victim of crime. Therefore, it is time to implement Agbede's¹¹⁷⁸ recommendation that violence resulting from white collar crime and criminal activities in general, should be compensated in Nigeria by setting up a scheme similar the Criminal Injuries Compensation Board which has been in existence in the UK since 1964¹¹⁷⁹ but while an argument in support of compensation for

¹¹⁷³ Emiri, The law of restitution in Nigeria (n 1168)

¹¹⁷⁴ General Assembly Resolution N0.40/34 of 29th November, 1985, Pt A, consisting of 17 Articles on access to justice and fair treatment, restitution, compensation and assistance to victim of crime <<http://legal.un.org/avl/ha/dbpjavcap/dbpjavcap.html>> accessed 03/11/2014

¹¹⁷⁵ since 7th October, 1960

¹¹⁷⁶ Nigeria Administration of Criminal Justice Act, 2015, S.342, see also Lagos state Administration of Criminal Justice law, S.15(2) 2011

¹¹⁷⁷ S.35 (1) of Powers of criminal courts Act, 1963 as amended by Criminal Justice Act, 1982 S.72(a) authorised all criminal courts in UK to make order of compensation on conviction, this compensation is independent of any civil claim the offender- R V Chapel Cr. App.Rep.3 28; S.35(4)(a) authorising the courts give preference to an order of compensation to the victim of crime in the event of a choice between fine to the state and compensation to the victim.

¹¹⁷⁸ Modalities for the enforcement of financial compensation for the victims of crimes, in compensation and remedies for victims of crime (n 1166) 23

¹¹⁷⁹ S.435 CPA provides for compensation in few instances like probation orders for paltry limit of 20 Naira, S.256 on false and vexatious charges 10 Naira; riot cases, Riot Damages law of Northern Nigeria, 1963 in

victim of violent crime is easily comprehensible, as such victims are identifiable, on the other hand, the society in general, is often the victim of financial crime, consequently, the only plausible compensation appears to be the disgorgement of proceeds of crime and possibly in addition to prison terms and fine but Rider¹¹⁸⁰ had reasoned that members of the society who have suffered injury or damages directly from the consequences of corruption (like substandard product or services) should be able to commence court action like the dependants of Nigerian soldiers who died fighting ‘*Boko Haram*’ with substandard weapons supplied by the state due to corruption in the defence ministry but even when such victims or their dependants establish a course of action, legal aid may be needed, while this is available in many developed nations, including the availability of ‘no win no fee’ legal assistance, there is no such assistance in Nigeria, therefore, the existing legal aid system ought to extend legal aid to private prosecutor and victims, which under the current means tested¹¹⁸¹ provision of Nigeria Legal Aid Act¹¹⁸² support is available only in 3 instances, namely: criminal defence, assistance in civil matters and community legal service¹¹⁸³. If the Act is amended to accommodate private persons who intend to commence criminal prosecution of corruption and financial crime whenever the state fails to prosecute, it would go a long way in the fight crime control.

Another alternative to overcome the challenges associated with successful financial crime trial, it is time for Nigeria to consider the possibility of merging the civil and criminal proceedings, consequently, this would eradicate the dichotomy in the standard of proof in both proceedings or a possible decriminalisation of financial crime or crime in general by abolishing the standard proof beyond reasonable doubt and change it to preponderance of

each state in the North 25 Naira damages for riot, this is inadequate and in most cases restitution would have been more appropriate

¹¹⁸⁰ Rider (n 9) 748

¹¹⁸¹ Legal Aid Act, 2011, S.10

¹¹⁸² Legal Aid Council of Nigeria Act 2011

¹¹⁸³ Ibid S.8

evidence and consequently eliminate the undue advantage afforded offenders in criminal proceedings. However, this recommendation would negate the circumstances¹¹⁸⁴ that led to the protection of rights and privileges against deprivation of human dignity, discrimination and protection against inhuman treatment in any circumstance, especially the rights in criminal proceedings due to the stigma of conviction, punishment and consequences of having a criminal records, these rights have always been enshrined in the Nigeria constitution and thus made the decriminalisation of certain conduct difficult without having to amend the constitution, repeal relevant financial crime enactments and rely strictly on civil law provision; the main concern is that if financial crime is decriminalised and the courts depart from applying stringent standard of proof beyond reasonable doubt where serious allegations are involved; the stigma of criminal records and its consequences would also become eradicated and thus make crime appear profitable; maintaining the existing dichotomy between criminal and civil proceedings is therefore necessary and desirable. Having rejected the option of decriminalisation, a more pragmatic option for Nigeria, now a global trend but not yet introduced in Nigeria criminal system is to ensure a successful interdiction of proceeds of financial crime, through the non conviction, civil recovery of proceeds of crime which the US implemented by civil action in rem against the property. As discussed in earlier chapters, the US style is the traditional civil in rem remedial action by the state against an inanimate object, real or personal property, not in personam criminal actions against the owner of the property, this ensures the corrective function of protecting the society from a given piece of offending property, it is not a punitive measure of deterrence or retribution against the owner of the property, as it is not a criminal prosecution against a person and cannot constitute initial or cumulative punishment¹¹⁸⁵. A different version of it is the provisions of the 2002 UK POCA which is the use of civil proceedings against the person to recover illicit wealth; presently, these two options are nonexistent in Nigeria where even the extant conviction based forfeiture laws are not in a single legislation, they

¹¹⁸⁴ The atrocities of the world war two and the holocaust

¹¹⁸⁵ Anthony Kennedy, Justifying the Civil Recovery of Criminal Proceeds (no 970)

are disjointed and scattered¹¹⁸⁶ which encourages delayed criminal prosecutions and has become a great hindrance to Nigeria anti financial crime regime and the entire criminal justice system. Although it may be argued that the fact that such laws exist in other jurisdictions does not translate its successful application in Nigeria, however, in the absence of any factor working against its operation, there is no reason why Nigeria could not consider adopting the same approach which is now a global trend against financial crime and terrorist financing, it is an alternative cost effective and human right compliant means of recovering the proceeds of crime. Introducing such a single legislation in Nigeria would clear all ambiguities, deter and prevent crime, establish justice and foster public confidence in the administration of justice because conviction based recovery of proceeds of crime entails tedious standard and burden proof on the state which does not envisage the modern sophistication of financial criminal activities. It must however be remembered that the essence of criminal prosecution is to show the disapproval of the society against the crime committed with punishment and or fine, with the benefit of keeping the criminal record of the offender and disqualifies offenders from certain public duties, post and social privileges. The civil rights demand that before any citizen would bear the social stigma of criminal indictment with its collateral consequences, he should be availed the civil and human rights and privileges in a criminal proceeding; this legal shield now works against successful prosecutions where technical rules are held above the essentials of justice and consequently frustrates recovery of proceeds of crime but in order to strike a balance between these two conflicting interests of successful conviction and protection of civil rights; non conviction based civil recovery legislation is desirable for Nigeria.

Furthermore, Lusty¹¹⁸⁷ in his argument on ineffectiveness of conviction based recovery of proceeds of crime, a view that has been reinforced by Justice Moffitt to the effect that civil forfeiture, similar to the existing tax laws in many countries, empowers tax

¹¹⁸⁶ The EFCC Act 2004, S.29; Recovery of Property (Special Provision) Act 1990 S.10(1); Advance Fee fraud Act 2006, S.17; NDLEA Act 1989, s.34

¹¹⁸⁷ David Lusty, Civil forfeiture of proceeds of crime in Australia, (2002) JMLC 5 (4) 347

authorities to hold taxpayers accountable for the source of assets in excess of their income, apart from complementing tax law enforcement, it could be adopted as a veritable tool against organised crime, especially in cases that involves complex criminal prosecutions, relying on civil processes, the offender would not, like in criminal proceedings, avail himself of right to silence and burden of proof beyond reasonable doubt while civil proceedings enables scrutiny of defendant's affairs by compulsory production of documents and replying interrogatories, subject to rules of court procedure¹¹⁸⁸. Lusty further argued that in many cases, it is often practically impossible for the prosecution to trace the proceeds of crime to the offence and establish the precise level of exposure of an offender's lifestyle being financed by criminal activities, whenever such attempts fail, the offender retains the proceeds of his crime but in a civil recovery proceedings, there is no hiding place for the defendant who would be expected to file a statement of defence in response to the statement of claim, failing which the plaintiff could obtain judgement based on preponderance of evidence on an imaginary scale of probability, ultimately, the statement of defence compels the defendant to rebut the plaintiff's assertions and explain how fund in excess of income is acquired¹¹⁸⁹, hence, the defendant remains silence at his own peril. To buttress this view, Professor Levi, while evaluating the British experience of enforcing conviction based confiscation laws, observed that relatively few big offenders have been charged or convicted in the courts and few of criminal assets have been frozen or confiscated¹¹⁹⁰, this view depicts the present chaos in Nigeria where convicted criminals are sometimes awarded terms of imprisonment or option of fine, forfeiture of asset to the state without any assessment of the value of the forfeited asset as equivalent of the criminal proceeds and no assessment of the net worth of the offender to rebut the presumption of possession of illicit wealth as

¹¹⁸⁸ Athol Moffitt, 'A Quarter to Midnight The Australian Crisis: Organised Crime and the Decline of the Institutions of State', (Angus and Robertson 1985) 347

¹¹⁸⁹ Lusty, Civil forfeiture of proceeds of crime in Australia (n 1188)

¹¹⁹⁰ Levi 'Taking the Profit Out of Crime: The UK Experience', *European Journal of Crime, Criminal Law and Criminal Policy* (1997) 5, 237

witnessed in the multi billion Naira Federal High court judgement of the Nigerian police pension fraud¹¹⁹¹. This judgement reflects the level of decay in the Nigeria judiciary and an abuse of plea bargain proceedings which has become pattern of scandalous criminal proceedings involving collusion between the judiciary and fraudulent public officials, apposite to this Nigerian situation was the view of Justice Moffitt¹¹⁹² while describing the Australian circumstance that conviction-based confiscation laws have failed because the process is slow, tortuous, expensive and inadequate to secure the conviction of organised or white-collar criminals who are often more highly sophisticated than the police, they have access to the best advice to exploit the weakness and technicality of the law thus avoiding conviction and where necessary, destroy evidence and murder the witnesses.

Another options worthy of consideration as a model for Nigeria is the Malawian¹¹⁹³ style of criminalising illicit enrichment by public officials¹¹⁹⁴ but in Nigeria the burden of proof shifts in a subsisting fraud proceedings, possession of unexplained wealth will only be taken into consideration as corroborative evidence¹¹⁹⁵; even the UK has now opted to criminalise possession of unexplained wealth as a tool for fighting money laundering, hence, it is considered beneficial for Nigeria to adopt the Malawian method of criminalising possession of unexplained wealth by public officials, private sector persons and members of their families.

¹¹⁹¹ FCT/HC/CR/64/2012

¹¹⁹² Moffitt, 'A Quarter to Midnight The Australian Crisis (n 1189) 35

¹¹⁹³ Malawian Corrupt Practices Act, 1995, S.32(2)(C)

¹¹⁹⁴ In such jurisdiction, mere proof of disproportionate wealth to emolument dispenses with the need to prove any underlying crime such as bribery, embezzlement or corruption; such law extends beyond corruption and allow the confiscation of proceeds of other crimes.

¹¹⁹⁵ Advance Fee Fraud and Related Offences Act, 2006, S.14 & EFCC ACT, 2004, S.19(5)

11.3 Financial Crime and Human Right Challenges

Nigerian courts, just like in many other jurisdictions have often had to weigh between the constitutional rights of an arrested offender to remain silent until he has access to a solicitor or any person of his choice¹¹⁹⁶ and the right to liberty against the investigating powers under the ICPC Act¹¹⁹⁷ and EFCC Act¹¹⁹⁸. The main challenge to criminal investigation here is the exigency of keeping a suspect under interrogation in custody and thus hampering his right to liberty and prevent him from interfering with evidence, keep him from escaping justice or be granted bail on provision of adequate sureties but because most cases of corruption involve highly influential public officials who have the means of influencing investigation, law enforcement agencies often prefer to incarcerate them pending the outcome of an investigation, although there are contrasting views on validity of pre-charge detention and holding charge, long settled by the Nigeria supreme court in *Lufadeju v Johnson*¹¹⁹⁹, it would appear that denying a suspect his liberty beyond the statutory prescribed period contravenes s.35(1) of the 1999 constitution but by virtue of , ss.293-299 ACJA 2015 magistrates can issue an order holding a suspect brought before him within a reasonable time, in custody for maximum 14 days (so far the plea of the suspect is not taken before the magistrate) subject to further extension provided the investigation is inconclusive, after which the court may within 28 days summon the appropriate authority to show cause why the suspect should not be unconditionally released, this is subject to power of the High court to enforce his fundamental right.

However, there are mutual distrusts between the law enforcement agencies and the bench, as it may appear that bails are being granted to frustrate the efforts of the investigating agencies, while in contrast, it may appear that the law enforcement agencies often sloppy and slipshod in spending unnecessarily long time on investigation in order to trample on rights of an offender, this creates conflict between the law enforcement

¹¹⁹⁶ S.35(2), 1999 constitution

¹¹⁹⁷ 2000, s.28

¹¹⁹⁸ 2004, S.27

¹¹⁹⁹ (2007) 8 N.W.L.R (PT 1037) 535

agencies and the judiciary and thus puts the rule of law at risk, whereas the rule of law sets the standard of acceptable behaviour, the absence of which is chaos; the rule of law is pivotal to economic development and social cohesion but the main challenge to the rule of law in Nigeria arises from the conflict between a corrupt or dictatorial executive disobeying valid court judgements and a perceived corrupt judiciary granting frivolous orders or bail, although it could be argued that these are few cases and that it would have been better for a million thief to escape justice than for an innocent person to be wrongly incarcerated. However, disobedience to laws based on moral principles or for a good cause is not a recent phenomenon, if the previous human generations had not defied iniquitous and unjust decrees, human race would have been long extinguished, civil disobedience to apartheid, slavery and military dictatorship have been disobeyed and resisted to earn humanity its well deserved dignity, freedom and just society, although the executive (including the law enforcement agencies) may consider it appropriate to disobey irrational and illogical court decisions, this will only herald social/political chaos and anarchy; but rather than an outright disobeying court decisions, appealing against such decisions is appropriate for supremacy of law to prevail or else such disregard for court orders would only perpetuate corruption, without disregarding the need to eradicate corruption in the judiciary.

Eradicating corruption in the judiciary is key to a successful fight against financial crime because corruption in the judiciary impairs its independence, impartiality and fair judgement, corrupt judiciary frustrates crime investigation, whistleblowers, prosecutors and the general public¹²⁰⁰; solutions to which must be sought by formulating pragmatic judicial accountability policies without compromising the principle of judicial independence, build public confidence in the judicial system and the rule of law¹²⁰¹; as noted at the UNODC and Crime Prevention, Global Programme Against Corruption

¹²⁰⁰ Strengthening Judicial Integrity Against Corruption, UNODC And Crime Prevention, Global Programme Against Corruption Conferences, Vienna, 2001 < www.unodc.org > accessed 01/02/2016

¹²⁰¹ Ibid

conference¹²⁰² which is very pertinent to Nigeria, judicial corruption is a perception based on inadequate facts and any solution based on such facts would be ineffective; judicial corruption in Nigeria goes beyond monitoring the judges alone, it involves malpractices at the court registries and surreptitious demand for payment of bribe by lawyers from their clients, allegedly on behalf of the judge when in actual fact, it is meant for personal enrichment of the lawyers; consequently, in the absence of reliable surveys to identify levels of judicial corruption, its causes and locations; offering solutions to generic questions would not precisely provide solutions and would render formulation of counter measures and policies impossible¹²⁰³, in the same vein, Nigeria National Judicial Council can't continue to shield corrupt judges and their accomplice.

Furthermore, open prison system is a viable alternative yet to be fully explored by the Nigeria criminal justice system; introduction of electronic tagging to monitor the location of an offender on bail would also assist in allaying the fear of escape in the event of bail approval which will also assist in decongestion of police cells and prison, in addition to the mandatory expected monthly visit of the chief magistrates to the police stations for the purpose of reviewing case files and decongesting the police cells which has become a source of injustice and abuse of power. There is no doubt that this will work in Nigeria if the country is serious about interdicting financial crime without infringing the right to liberty of a suspect. Another factor frustrating expeditious criminal prosecution is the continuous archaic practice of long hand writing of the court proceedings by presiding judges in this age of global development in technology, therefore, electronic recording, teleconferencing and video technologies must be funded and deployed to assist in gathering of evidence and recording of proceedings which is crucial to facilitating steady, prompt and efficient court proceedings.

¹²⁰² Ibid

¹²⁰³ ibid

11.4 Improved Intelligence Gathering

As observed by Barry Rider¹²⁰⁴, developing intelligence to query the source of wealth is easier than developing systems to process the information. However, because little amount of fund is required in terrorist financing, FIU may play an insignificant role in controlling terrorist financing unlike money laundering, fraud and other financial crime involving huge amount of fund, consequently, there is need to beam a searchlight on the alternative remittance systems as a means of funding terrorism, especially, a stricter control of the Nigeria foreign currency parallel market as these are avenues for financing terrorism; also the social media must be effectively monitored to prevent it from being used to recruit vulnerable persons as terrorists, there is also a need for a stricter control of donations to charity organisations in order to curb terrorist financing.

Although Nigeria shares cultural, social and religious affinity with many of its West African neighbours which made its territorial borders appear artificial and hence very porous, although this has facilitated regional commerce and improved peaceful coexistence and migration of unskilled labour, this also has adverse consequence on Nigeria internal security, increased migration of organised crime and terrorism, consequently, a more effective control of Nigeria territorial borders is needed to assist the global control of arms trafficking and terrorism.

Further, Alan Krueger and Jitka Malečková¹²⁰⁵ argued that poverty and lack of education are not necessarily the cause of terrorism but above all, the strategy and mode of terrorist financing in each country differs which need be identified and resolved before any meaningful CTF strategy can be designed¹²⁰⁶. Nigerian system, in the guise of protecting fundamental right to freedom of thought, conscience and religion¹²⁰⁷ has failed to regulate

¹²⁰⁴ Barry Rider, *Disrupting the disrupters!* (226)

¹²⁰⁵ Alan Krueger, *Education, Poverty and Terrorism* (304) 119

¹²⁰⁶ UK, *Counter-Terrorism and Security Act 2015*, Part 1, S.1-S.2 inter alia focused on tackling issues of radicalisation.

¹²⁰⁷ S.38, 1999 constitution

the proliferation, funding, accountability and transparency of religious bodies which could be susceptible to terrorist financing. Furthermore, despite the state securities power of intelligence gathering under the Nigeria Terrorism (Prevention) Act 2011¹²⁰⁸, success of which would depend on the financial institutions and telecommunication companies keeping and reviewing records of customers and providing the necessary support for the law enforcement agencies, however, the recent Boko Haram terrorism in Nigeria has revealed the lack of coordination and poor intelligence sharing among the key Nigeria security agencies¹²⁰⁹, also there are instances of service rivalry, physical attack of police personnel and destruction of police stations by units of Nigeria military culminating setting police stations ablaze, incidents such as this can only deepen the mistrust and lack of cooperation among law enforcement agencies, with its adverse consequences on international cooperation in crime control.

Furthermore, the international dimension of financial crime demands an efficient cross border cooperation in gathering information, prosecution and recovery of criminal property, bilateral legal assistance are often too restrictive but MLAT legislation could provide legal framework and facilitate wider cooperation in crime investigation, in the absence of which inter alia, it could be difficult for the requesting state to identify the central authority to approach for assistance in a given jurisdiction¹²¹⁰. Nigeria, as a matter of urgency need to enact a MLA law to define the modalities of expected assistance to other jurisdictions whenever such arises.

Again, any jurisdiction operating dual reporting system would have access to information than the UK single reporting system, the former system however; applicable in Nigeria incurs more costs of filling reports. Gallo and Jukes¹²¹¹ have also offered a solution that

¹²⁰⁸ S.24

¹²⁰⁹ US Department of state, Bureau of Counter terrorism, country Reports on terrorism, 2103;
< <http://www.state.gov/j/ct/rls/crt/2013/224820.htm>> seen 12/01/2016

¹²¹⁰ Art.7 UN Convention against illicit Traffic in Narcotic Drugs and psychotropic substances 1988] FATF, Rule 37

¹²¹¹ Peter Gallo, "Threshold transaction disclosures" (no 319) 328

could reduce the cost of running such an amalgam system, namely, by restricting the reporting of TTD only on request from the regulatory authority rather than the existing regime of general reporting even where such report is irrelevant. Here, the FI would generate the internal report within TTD but will not send it to the regulators except on request, such reports will be kept in a manner that makes them searchable directly by the regulator"¹²¹² like in the US where the Money Laundering Suppression Act, § 402(c) has adequately taken care of filling irrelevant CTR by redesigning the format of the reporting CTR to basic information and eliminate the sending of extraneous information to law enforcement, thereby reducing the time and effort to about 30 percent in preparing the required information since 1995. It is expected that Nigeria should reconsider its dual CTR reporting system to the CBN and NFIU, give legal force to the NFIU by legally separating it from the EFCC and empower the reporting institutions to take ownership over the reporting system by filing only relevant and suspicious activities in the interest of efficiency and cost.

11.5 Private sector assistance and improving criminal record keeping

The assistance of the private sector is crucial in crime prevention; such assistance is presently insufficient in Nigeria. It is important to deepen the collaboration between the private and public sector in crime interdiction because the former are more affected as victims, whereas they have the financial capacity and technical knowledge to provide appropriate anti-crime software and technology, as pointed out by Avina¹²¹³, an effective policing entails community and civil society, therefore, Nigeria needs an efficient collaboration between the private and the public sector, although such corporate assistance is largely determined by the corporate social responsibility programs investments of an organisation's area of core competence, which is often community

¹²¹² Ibid

¹²¹³ Jeffrey Avina, Public-private partnerships in the fight against crime, An emerging frontier in corporate social responsibility, JFC (2011) 18 (3) 282

related services¹²¹⁴, presently in Nigeria, many of such assistance have concentrated on logistics support to the law enforcement agencies like providing patrol cars, building or refurbishing of police stations, beyond this meagre gestures, it is not transparently clear how sufficient the private sector has assisted in deploring information technology and telecommunication, software capacity to aid crime investigation and detection, a situation succinctly observed by Avina as being difficult if the government does not influence such initiatives as priorities; consequently, the lack of initiative prioritization by government guarantees minimal private sector engagement in crime fighting¹²¹⁵. Although Avina contended that where such private sector support for the law enforcement exists, companies may reluctantly embark on crime related work due to fear of negative reputational association but it is doubtful if any Nigerian financial institution could attract such an adverse reputation in such instance, rather the reverse should be the case but with government policy, an enabling environments and active social support systems there would be successful private sector initiative¹²¹⁶, such support with the Nigeria private sector practitioners would also indirectly serve as a good response to other social problems of graduate unemployment, reduction of poverty rate and computer illiteracy which would in turn assist in prevention of terrorism and its finance, because a high number of youth unemployment has created room for educated minds but idle hands who are potential fraudsters, terrorists and cyber criminals in the absence of constructive engagement.

Furthermore, keeping records of crime is a crucial tool in interdicting criminal enterprise, though different from but complements FIU reports; relying on Stefanou's paper¹²¹⁷ on database maintenance, a global crime prevention, enforcement and prosecution tool, help

¹²¹⁴ Ibid

¹²¹⁵ ibid

¹²¹⁶ Ibid

¹²¹⁷ Constantin Stefanou, Section II. FOCUS ON ENFORCEMENT Databases as a means of combating organised crime within the EU, JFC (2010) 17 (1) 100

in determining the efficiency of a police organisation and the criminal administrative system, its efficiency has been greatly improved by information technology advancement, it is not clear if the Nigeria police has an electronic/digital base record of crime, in view of the mode of processing and obtaining the certificate of criminal record from the Nigerian police, the existing format is handwritten which is susceptible to manipulation and forgery. In what appears to depict the situation in Nigeria, Stefanou's narrative of the EU-wide databases as a means of combating organised crime, he observed that successful cooperation of national authorities in fighting organised crime relies on the exchange of national data on crime and criminal activities, hidden, inter alia, with problems of databases which do not exist in digital format and even when they do, they do not necessarily exist in a format that allows migration, cross tabulation of data or data sharing, in such situations, sharing of data is not always feasible, in addition to the possibility of its being inadmissible in court and thus defeats the objective of using such data to combat organised crime operations¹²¹⁸.

For further elucidation, examining the effectiveness of Nigeria criminal record keeping against the set criteria (excluding the 7th item) in the research¹²¹⁹ conducted by the Institute of Advanced Legal Studies between 1999 -2000, namely:

1. The national legal framework;
2. Entries to the criminal record;
3. Erasure of entries from the criminal record;
4. Access to the criminal record;
5. Use of criminal record;
6. relevant privacy laws;
7. National legislation on human rights and rehabilitation of ex-offenders;
8. collaboration with foreign authorities for the acquisition of criminal records of foreign individuals

¹²¹⁸ Ibid

¹²¹⁹ Ibid

Against this set criteria, various law enforcement agencies in Nigeria keep records appropriate to the function and performance of their official duties but the Nigeria police keeps criminal record of convicted persons, the courts keep records of proceedings and the prison authority keeps record of inmates, however, the Nigerian national record keeping and criminal record keeping process in all sectors of the economy is poor, even in the financial sector and hence, many financial transactions are susceptible to criminal activities as there are collusions between the service providers (FI) in hiding suspicious transactions to appear legitimate without being detected by the law enforcement agencies, which therefore makes interdiction, tracing and recovery difficult; this makes identity fraud and fake death in life insurance claims remain difficult to unravel because of inadequate record keeping of birth and death, also there have been reports of death of principal witness in police custody¹²²⁰ and suspicions of prisoners being swapped with roaming lunatics in drug and other crimes as reflected in cases of offenders being brought for new criminal proceedings while still serving their jail terms, which implies that such person were never sent into the prison in the place or a roving lunatic must have been swapped to serve the jail term in his place; and thus deny such persons from having criminals records as seen in *Agbi v Ogeh*¹²²¹ where in a previous criminal prosecution, the offender was sentenced to terms of imprisonment with an option fine but owing to the absence of an effective criminal record keeping by the relevant state agencies and collusion with public officials, his record of court proceedings were altered, the record of the police investigation file records were destroyed, consequently, he could not be identified as the offender who was prosecuted in the earlier case and since he was not imprisoned, the prison authority had no record of him; the eye witness account of the presiding judge who convicted the offender in question was rejected; the offender could therefore not be identified and hence could not be disqualified from holding elective

¹²²⁰ 1996 murder in police custody of Innocent Ekeanyanwu, a principal witness in Otokoto criminal proceeding

¹²²¹ [2005] 8 NWLR Pt.926, 40

public office; also even certain cadres of bank employees (with the exception of directors and other executives, as these categories of staff are well known by the public) with previous conviction for fraud are sometimes reemployed into another financial institution due to defective criminal record keeping and poor enforcement of black listed persons by the Central Bank of Nigeria; also it has always been easy for perpetual credit defaulters to obtain fresh credit without payment of previous debts. There is however, some rays of hope with the provision of s.16 of ACJA 2105 relating to the establishment of Central Criminal Record Registry and the recent National Convicts and Criminal Records Bill 2015 passed into law, awaiting the presidential assent, the detail provisions of which is not yet available but it is expected that it would address the sundry issues discussed in this chapter. However, the situation in *Agbi V Ogbe* must not be restricted to poor criminal record keeping procedure alone but also attributable to established culture of impunity culture that allows alteration or destruction criminal records; and even when such illegality is discovered, the pervading culture of impunity ensures that no investigation was conducted with a view to providing a remedial action to safeguard against future occurrence.

While Nigeria must avoid policies that facilitate excluding any group of persons from financial services either because of lack of a valid means of identification as such exclusion creates opportunity for unregulated black market economy that may be a source of funding terrorism, however, the recently introduced Biometric Verification Number (BVN) by the CBN that captures detailed information with a unique identification number of each bank client has gone a long way to assist in providing valid means of identification and hence aid the interdicting of financial crime and terrorist financing in Nigeria but this must be complemented with an unalterable, adequate criminal record keeping or else the BVN would remain relevant only for banking transactions. Also, it would have been expected that the BVN would be linked to other means of identification such as the Nigeria international passport, national identity card, driver's license; voters' registration card and telephone SIM card such that in the event of commission of crime, the inter connected data in place could assist in crime investigation,

however, it may be argued that such vital information is likely to expose the citizens to cybercrime and violation of right to right to privacy, especially in a country where there is no Data Protection law but with proper management, all relevant challenges could be mitigated the same way as the Ireland Criminal Asset Bureau (earlier mentioned chapter 4, pg. 147) has been managed.

Furthermore, data registration of telecommunication subscribers must be ensured even though it is fraught with danger that may soon result in gross abuse of privacy sooner or later as there is no comprehensive Data Protection law existing in Nigeria except under s.37 of 1999 Nigeria constitution dealing with the right of individual privacy, although there are industry based protection of customer data or information from improper or accidental disclosure which is transferrable under the (NCC) Regulations 2007, also although the National Information Technology Development Agency regulates the protection of data transferred to other countries, while Freedom of Information Act 2011 gives public access to official records with several exceptions including s.16 that prevents access to privileged information under an existing law; absence of Data protection law dictating the terms of protection and procedure for disclosure would hamper international cooperation and assistance in divulging crucial information to regulatory or investigative authority whenever Nigeria is in need of such assistance, therefore Nigeria must address this lacuna before it becomes a clog in the wheel of transnational crime control.

11.6 Motivating and Protecting Whistle Blowers

Anti crime or anti money laundering regime in Nigeria would remain futile if special consideration is not given to whistle blowing, which is a vital device in disrupting financial crime¹²²² and crime in general, whistle blowing is an antithesis of the common law duty of loyalty in employment relationship, in public interest it aims to thwart the abuse of office, prevent corporate fraud, foster ethical behaviour in business and

¹²²² Richard Alexander, The role of whistleblowers in the fight against economic crime, (2004) JFC, 12, 2, 131

strengthen the integrity of the market¹²²³, it is aimed at protecting and encouraging insiders either in public or private organisations who in good faith divulge unethical or unlawful inside information concerning a public or private establishment, it could be anonymous or otherwise but in many jurisdictions, it excludes media publication as there are expected channels of reporting wrong doing than in media publication¹²²⁴. In the US, whistle blowing dated back to the 1863 False Claims Act¹²²⁵ which allows whistleblower to file qui tam action on behalf of the government and if the claims are successfully proved, the whistle blower receives a percentage of the judgment depending on the level of state participation in the prosecution¹²²⁶ but while False Claim Act applies narrowly to fraud against the government, the United States in 1989, expanded the Whistleblower Protection Act beyond fraud to general protection of Federal Public officials against retaliatory acts in the event of whistle blowing¹²²⁷; again the US Dodd Frank Act 2010¹²²⁸ was enacted to extend the whistle blowing act with a reward program in private sector by protecting and awarding employees of companies registered with SEC with about 30% of

¹²²³ Terry Dworkin, Sox and Whistleblowing, Michigan Law Review (2007) 105 (8)1757, see also Caroline Bradley, 'Rewards for whistle blowing' in Barry Rider (ed) Research Handbook on International financial crime (Edward Elgar 2015) 602

¹²²⁴ As seen in the consequences of wikiLeaks publication by Julian Asange and Edward Snowden who divulged classified information; see also Anona Armstrong and Ronald Francis, 'Protecting the whistleblower' in Barry Rider (ed), Research Handbook on international financial crime (Edward Elgar 2015) 583

¹²²⁵ as amended by 2009 Fraud Enforcement and Recovery Act and 2010 Patient Protection and Affordable Care Act

¹²²⁶ Dworkin, Sox and Whistleblowing (n 1223)

¹²²⁷ Now further amended by the whistle Blower Protection Enhancement Act, 2007 to include security operatives

¹²²⁸ S.748; The concept of whistle blowing was initially extended to the private sector by federal 2002 Sarbanes-Oxley Act, s.806 by protecting whistle blowers against retaliation and state laws following the unethical conducts of multinational businesses and subsequent attrition arising from the scandals of Enron and WorldCom

any financial penalty resulting from reported allegations¹²²⁹, consequently, companies who fail to report their wrong doing may find their employees blowing the whistle. This measure under the Dodd-Frank Act 2010 unlike the False Claim Act 1863 does not require the whistle blower to embark on qui tam prosecution but only to report organisational misconduct and gets rewarded out of the fund recovered by the state. Apart from external reporting of wrong, internal reporting mechanism also plays a key role in whistle blowing; this facilitates prompt investigation and rectification of the wrongful conduct and minimizes costs of whistle blowing by allowing employers to rectify misconduct confidentially with little interference with the corporate and labour relationship, mutual misunderstanding and reduces potential harm to the organisation and its employees but it may give room for concealment and suppression of truth as observed in the recent scandals¹²³⁰. Going by Dworkin analysis, despite the intended use of whistle blowing to help enforce Sarbanes-Oxley and deter wrongdoing in the securities market; and by implication, economic and financial crime, the statutory scheme merely gives the illusion of protection without meaningful opportunities or remedies for achieving it¹²³¹ as it was based on the assumption of protecting whistle blowers from retaliation as a way of encouraging them but these are ineffective as an encouragement for reporting because fear of retaliation was considered important than many other factors in determining whether witness of wrongdoing would come forward to report but rather the gravity of the wrongdoing, strong evidence, perceived likelihood of the wrongdoing being rectified, a corporate environment of honesty that encourages clear reporting channels¹²³²; and also providing monetary incentive for whistle blowing is much more effective than merely protecting the whistleblower from retaliation or giving the whistleblower a private cause of action for retaliation, this is the approach of most states

¹²²⁹ A proposed Rules issued would obviate the requirement on employees to first raise a matter internally before going to the SEC

¹²³⁰ Dworkin, Sox and Whistleblowing (n 1223)

¹²³¹ Ibid

¹²³² Ibid

that have whistle blower legislation¹²³³; another incentive is the *Corporate Sentencing Guidelines* which unlike the False Claim Act has not been particularly successful in encouraging effective whistle blowing, the Guidelines encourage organisations to establish a well publicised and monitored internal whistle blowing procedure by which complaints are handled without retaliation to the whistleblower, compliance with this ensures a reduced fine and penalties if the organisation be convicted of crime but failure to follow these procedures can result in increased sanctions, punitive fines, corporate probation and mandated negative publicity¹²³⁴; the existing guideline on whistle blowing mechanisms in Nigerian financial institutions¹²³⁵ and capital market¹²³⁶ encourages internal reporting by whistle blower and thus primarily protects the organisation and not the general public this one of the defects pointed out in Dworkin analysis, in addition to EFCC Act s.39 (1) and ICPC Act s.64(1) that protect the source and identity of the informants except by order of the court. Nigeria whistle blowing process fails to provide any monetary incentives to whistle blower similar to provisions of False Claims Act and Dodd Frank Act, 2010, while it could be argued that the fact that an approach works in the US does not conclusively translate to an effective and pragmatic solution to Nigerian situation, however, a provision for monetary incentive in the Nigeria Whistle Blower Protection Bill 2015¹²³⁷ would encourage insiders with information that may expose economic and financial crime. Again in Dworkin analysis, the likelihood of the wrongdoing being rectified, which constitute an impossible task to achieve in the absence

¹²³³ Ibid

¹²³⁴ Ibid

¹²³⁵ CBN Act, 2007 and BOFI Act, 2004 have no provision on whistle blowing but emphasises corporate governance but the CBN circular FPR/DIR/CIR/GEN/01/004 of 2014 on guideline for whistle blowing in the Nigeria banking and other financial institutions - only apply to internal whistle blowing to the bank itself or the CBN which enjoined all FI to put in place whistle blowing policy and guidelines known to all employees which must ensure confidentiality and protection against retaliation. However, EFCC Act 2004, S.39, ICPC Act 2000, s.64, in line with UNCAC 2004, Art.33 all protects the source and information provided to the commission except with order of the court.

¹²³⁶ Nigeria Investment and Securities Act, 2007, S.306

¹²³⁷ Presently awaiting the assent of the President

of political will as witnessed in the Nigeria arms corruption involving the top echelon of Nigeria military and politicians which could never have been unravelled if there was no political support of the presidency for the EFCC and ICPC; considering the fact that impunity has become part of Nigerian culture, Nigeria civil service thrives on systemic corruption, official files are never processed unless bribe is given, public officials are hardly held accountable for living above their income; the problem therefore, is not lack of adequate anti corruption law but a grand conspiracy by every segment of the society against anti corruption law because it has become a dominant culture and the Nigerian society now thrives on it; although it is not expressly stated, the philosophy of the Nigeria EFCC and ICPC had adopted the three pronged attack¹²³⁸ similar to the Hong Kong approach, namely:

1. Investigation through specialised unit, FIU, IT and forensic auditing
2. Prevention through internal control measures and reporting regimes to disrupt misconduct
3. Education, a long term process of public enlightenment focussed on different cadres of the society

It is expected that the Nigeria whistle blowing Bill 2015 would protect and encourage whistle blowing in the media, especially the online and the social media, and should also permit anonymous whistle blowing if made in good faith, this is necessary because of the security implications and threat to lives that may arise from the perceived influence of corrupt PEP and top public office holders over the law enforcement agencies, this view is validated by the high profile cases of corruption that are either partially investigated or inconclusively prosecuted due to interference with the judicial process by the state in James Ibori's case, Joshua Dariye, Peter Odili and many others, which demonstrate an absence of political and social will to eradicate corruption. Majority of financial crime

¹²³⁸ Jean Au Yeung, Fighting Corruption - The Hong Kong Experience, The Seminar on International Experiences on Good Governance and Fighting Corruption, 2000

convictions between 2007 and 2015 are selective, they are either offenders who have fallen out of political favour or those who have no political link. The Nigeria EFCC practically went into coma between the time in question because the state surreptitiously protected PEP from investigation and prosecution, thus showing the importance of the independence of the EFCC and ICPC chairmanship and security of their tenure office, there ought to be legislation to make their appointment and removal from office rigorous to the extent that whosoever is recommended by the executive after due scrutiny and approval of the legislature should not be removable from office except by the two third majority vote of the legislature on proven allegation of crime, this would allow the anti graft leadership to perform his duties without fear of job security or undue influence from the executive or other arms of government, this measure is more relevant in a country where despite the perceived security of tenure of the governor of the Central Bank of Nigeria, he was suspended (technically removed from office) for whistle blowing that exposes corruption in the handling of national treasury, unfortunately, the withdrawal (of the case challenging the suspension from office) from court has set a bad precedent, it has denied Nigeria an opportunity of interpreting the CBN Act, determining if the president of Nigeria can remove or suspend the governor of the CBN.

Again, despite the contrasting views on privatisation of public utilities especially with respect to provision of essential services and the role of the state as regulatory authority to such entities, Rider, observed that state involvement in the ownership and control of enterprise provides opportunity for engaging in misappropriation and diversion of state asset (as seen in the collapse of Nigerian public utilities like the NITEL, NEPA, NPA, NRC etc.), based on cost and benefit analysis, man after assessing the risk against rewards and discomfort determines whether to commit crime or not; which though depends on morality and education, detection and mechanism of punishment. The culture of

impunity encourages corruption, alters social perception, therefore, enforcement action upon detection is vital in ensuring accountability by increasing the risk of detection¹²³⁹.

There have been conflicts of powers between the office of the Attorney General and the EFCC, while EFCC derives its prosecutorial powers from the Attorney General of Federation, the latter may discontinue a criminal proceedings even if commenced by the EFCC, the AG derive his powers from the 1999 constitution and therefore superior to the power of the EFCC; considering the past abuse to which a number of Attorney Generals have subjected this constitutional power to, constitutional amendment needs to be considered such that the office of the AG should neither be able to interfere with proceedings initiated by the EFCC for whatever reason and nor should the office of the Attorney General be able to discontinue any criminal proceedings commenced by the EFCC; similar to this is the overlapping nature of the duties of the Nigeria regular police force and the EFCC, apart from the powers to investigate and prosecute economic and financial crime generally, EFCC does not have a clear guideline and policy on the categories of financial crime to investigate and prosecute, rather than restricting itself to more complex financial crime investigations with international dimension, involving specific threshold amount and public interest, EFCC between 2011 and 2015 appears to have no yardstick with respect to the type and class of financial crime it should be handling, It appears to have abandoned the real white collar criminals, and started pursuing petty swindlers requiring no complex investigations nor of any international significance, which ought to have been left for the regular police to handle. Although, there has been a increased activities and improvement in the performance of the EFCC under the government, however, there is still lack of a transparent and clear policy guideline with respect to the type of operations the EFCC, this would only become a problems in the future.

¹²³⁹ Barry Rider, Research Handbook on International financial crime (Edward Elgar 2015) 732 and 733

11.7 Pre-Trial Crime Resolution

In addition to the earlier mentioned measures, plea bargain is another viable alternative means of financial crime control; until recently, only the Lagos state government introduced plea bargain as part of its criminal law enforcement proceedings, few other states and the federal government¹²⁴⁰ have now adopted it but only after years of its abuse by many courts applying same without any defined guideline, whereas if properly applied, plea bargain aids speedy and efficient criminal justice system, decongestion of courts and prison, it is expected that the states in Nigeria would consider enacting similar laws so as to facilitate efficient delivery of criminal justice, similar to this is the Deferred Prosecution Agreement and Non Prosecution Agreement often used by the US law enforcement agencies in corporate criminal investigations, despite few criticisms against its use, DPA or NPA are useful alternative to complex investigation which can achieve the same far reaching results, stiff penalties, remedial steps and corporate reforms; as it allows investigators to elicit cooperation from the investigated company, especially where discretion dictates that prosecution should be declined by encouraging negotiated plea.

They are good alternative to criminal prosecution as the latter is uncertain, however, in order to avoid its abuse, it must have a guideline¹²⁴¹. A typical well drafted DPA/NPA must elicit from the wrong doer: an admission of wrong doing, restitution or penalties, cooperation with the state investigation, undertaken against future prosecution in return for promise not to reoffend, undertaken for corporate remedial reforms, monitoring of compliance by court and or the prosecution and waiver of statute of limitations. DPA helps build case against corporate offenders, it is a source of huge revenue to the government and the victims, it promotes corporate cultural changes, it is better than plea

¹²⁴⁰ Nigeria ACJA 2015, s.270

¹²⁴¹ 'Thompson Memorandum' – (US Department of Justice, memorandum from Deputy A-G, Larry Thompson, Principles of Federal Prosecutions of Business, 20/01/2013

<<http://www.usdoj.gov/dag/cft/corporate/guidelines.htm>>accessed 17/11/2015

bargain as it keeps offenders from criminal record¹²⁴² and provides satisfactory result, a good means of completing tedious criminal investigation without a costly and publicised criminal trial, it prevents collapse of the affected the investigated organisation, allows the business to retain its license and thus ensures job security, in return for which the government simultaneously obtain admission of wrong doing, cooperation, restitution and corporate reforms¹²⁴³.

Finally, if Nigeria adopts the various alternatives offered in this thesis, it will go far in the control, interruption, punishment and recovery of proceeds of financial crime and help in changing the perceived existing culture of impunity and corruption.

¹²⁴² Scott Michel and Kevin Thorn, Deferred Prosecution Agreements: Implications for Corporate Tax Departments, *Tax Executive* (2006) 58 (1) 51

¹²⁴³ Ibid

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