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EFCC, Money Laundering regulation and Politically
Exposed Persons: Evidential burden and the cobweb of
legalism

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**EFCC, MONEY LAUNDERING REGULATION AND POLITICALLY
EXPOSED PERSONS: EVIDENTIAL BURDEN AND THE COBWEB OF
LEGALISM.**

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Dissertation overall aims/introduction

“We never rigged, we never cheated, we never knowingly abused state funds. We simply did what we thought was best for Zambia”. Former Zambian President, Rupiah Banda¹.

This cryptic statement from a notable Politically Exposed Person (PEP) is at once a note of defiance and a nod to a culture of permissiveness in the administration of state resources. It expresses a sentiment that is more widely shared amongst political elites across Africa than is presently appreciated outside the continent. It is a sentiment that envisages no clear separation between the interests of the ruling party and the wider interests of the state. The operative word here is “knowingly”. So, the converse of the statement would mean that state funds could be abused as long as it was done unintentionally, or more precisely, ‘unknowingly’. It is instructive of some of the analysis covered in the latter part of this work.

In relation to Anti-Money Laundering (AML) legislation and PEPs, the statement is also a reflection of the absence of a joined-up thinking in the extraterritorial aims of international legislation in this regard. This is underlined by the cobweb of legalism which has stymied the efforts of various AML enforcement agencies in Africa. This

¹ See; “Zambia election: Banda accepts defeat to Michael Sata” ‘BBC News Africa’ 23/09/2011. <http://www.bbc.co.uk/news/world-africa-15034127?print=true>

Also, “What next for Rupiah Banda?” ‘The Southern Times’, 24/10/2011. [http://www.southerntimesafrica.com/news_article.php?id=6274&type=News&title=What next for Rupiah Banda?](http://www.southerntimesafrica.com/news_article.php?id=6274&type=News&title=What%20next%20for%20Rupiah%20Banda?)

“Rupiah explains his corruption stance” ‘The Post Online’, 07/09/2011. [http://www.postzambia.com/post-read_article.php?articleId=22909&highlight=rupiah explains his corruption stance.](http://www.postzambia.com/post-read_article.php?articleId=22909&highlight=rupiah%20explains%20his%20corruption%20stance)

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research illuminates the legal discourse and travails of one such agency; the Economic and Financial Crime Commission (EFCC) in Nigeria. It is generally accepted that a great deal of money laundering issues involving PEPs emanate from Africa and other developing economies around the world. The legal discourse and limits of the law in this area, however, are being conducted more prominently within the upper judicial/political echelons of Western governments², where the concerns of political leaders over the perceived moral turpitude of PEPs in the developing world is being given expression in government policy and legislative intervention.

Thus, the international framework for addressing the issue was first given expression in the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the 'Vienna Convention'. This was followed by the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (The Strasbourg Convention, 1990), then, the European Union Directive, 1991, the Egmont Group of Financial Intelligence Units 'Resolution on combating money laundering', 1996, the UN Convention for the Suppression of the Financing of Terrorism, 1999, the UN Convention Against Transnational Organised Crime, (The Palermo Convention, 2000), the European Union Directive 2001 (updated 2005) and the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions, 2011. In addition to these, the US has enacted the Foreign Corrupt Practices Act since 1977, which was tightened up with the enactment of the Patriot Act in 2001 to "deter and punish terrorist acts in the US and around the world", but also used in the investigation of money laundering activity more generally. The UK

² According to the latest (unclassified) working paper on this issue produced by the UK's Treasury department, PEPs are defined within the Money Laundering Regulations 2007 as those individuals who hold (or have held within the preceding year) a prominent public functions for a state outside the UK, a Community institution or an international body. The definition encompasses immediate family members and known close associates.

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works within the framework of the Money Laundering Regulations 2007, the Financial Action Task Force, the EU Directives and the Proceeds of Crimes Act (POCA) 2008.

These international efforts have been complimented by similar moves in many African states to address the issues of bribery, corruption and money laundering as these, above all, have the most potential corrosive international ramifications for Western financial institutions as, “until the end of the 1990s, it was commonplace for large multinational firms to bribe foreign public officials, and in many instances, these payments were even tax-deductible”³. The UK’s Bribery Act, 2010 is thus another testament to its determination to criminalise this kind of conduct. It imposes, for the first time in any jurisdiction, a positive obligation on companies not only to refrain from taking or offering bribes, but to take steps to “prevent” its occurrence. The Economic and Financial Crimes Commission (Establishment) Act 2002 in Nigeria, for example, created the main AML agency, the EFCC, prosecuting cases involving PEPs and others implicated in financial crimes. Soon after, Nigeria became a leading proponent of the establishment of an Africa-wide legislation against bribery, PEPs and money laundering, culminating in the African Union Convention of 2003. The Convention, signed and binding on all fifty three African states, urges state parties to “adopt such legislative and other measures as may be necessary to establish as criminal offences laundering of the proceeds of corruption”⁴.

³ A. D’Souza. “The OECD anti-bribery convention: changing the currents of trade” in, ‘Journal of Development Economics’, 97 (2012) 73-87.

⁴ Article 6, African Union on Preventing and Combating Corruption, 2003.

<http://www.africaunion.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>

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The unmistakable thread running through these legislative acts, and the glue which keeps them in one bundle, are the international norms which reify criminal sanction, cemented by a belief in their universal application. Both the Foreign Corrupt Practices Act (FCPA) and Bribery Act contain provisions which criminalise behaviours by their citizens abroad even where the host state does not recognise them as constituting criminal offences. It was to this end that the US Attorney General, Eric Holder, in an address to African leaders at the AU summit in Uganda in 2010, launched the much vaunted 'Kleptocracy Asset Recovery Initiative' aimed at what he described as: "large-scale foreign official corruption and recovering public funds for their intended and proper use"⁵. He was, of course, referring to the leaders in the auditorium themselves, many of whom stand accused of siphoning huge resources from their state coffers into various financial institutions in the West.

Against this background, therefore, it is my contention in this research that the excessive use of criminal jurisdiction in this area of the law, in respect to African PEPs, is misplaced. A criminal sanction and the opprobrium attached to it, in respect to political figures, does not have the same resonance in Africa as it does in Western jurisdictions. As a result, the rush for criminal indictment of officials by many AML agencies in Africa, regardless of the implausibility of the evidence masks a fundamental divergence of values in the way a criminal indictment is conceptualised across different jurisdictions.

Consequently, the pressure on African leaders from Western governments and donor agencies to intensify criminal prosecution of PEPs only serves to encourage the

⁵ See; Attorney General Holder at the African Union Summit:
<http://www.justice.gov/ag/speeches/2010/ag-speech-100725.html>

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adoption of the line of least resistance by the choice of method those agencies use to enforce the law. A few illustrations of the divergent values that exist between different regions might be of use here. When the former governor of Bayelsa state in Southern Nigeria, Mr. Diepreye Solomon Peters Alameiyeseigha, was detained in London on money laundering charges involving several millions of dollars of stolen wealth, he jumped bail and escaped from the UK in 2005, and on arrival in his home town was greeted by a throng of enthusiastic well-wishers. He had “driven in a convoy of cars from his hometown of Amassma, to his office, where he addressed his supporters in his local ijaw language”⁶. He was later prosecuted and sentenced to a somewhat lenient two years in jail in Nigeria. Similarly, a former vice chairman of the ruling People’s Democratic Party (PDP) in Nigeria, Bode George, was arrested, prosecuted and sentenced to thirty months in prison for misappropriating public funds to the tune US\$600m in 2009. He got out of jail one year later to an elaborate reception by his well-wishers designed to “shake Lagos”⁷

In another prominent PEP case involving a mixture of money and politics, a stalwart of the PDP, Iyiola Omisore, was the prime suspect in the audacious assassination of the then Attorney General and Minister of Justice of Nigeria, Bola Ige, in 2002.

Omisore was still in detention the following year, during the 2003 general elections,

⁶ See; “Nigeria governor’s escape from London makes headlines”. <http://www.panapress.com/Nigerian-governor-s-escape-from-London-makes-headlines--13-576269-17-lang2-index.html>

⁷ See; “Bode George out of Kirikiri prison tomorrow”. <http://www.nairaland.com/611836/bode-george-out-kirikiri-prison>. The people who came out to “shake Lagos” upon the release of PEP Bode George, were largely beneficiaries of his largesse and were saying, in effect, he may be a political thief, but he is our political thief. As it turned out, he is now back in the mainstream of politics plying his trade within the ruling Peoples’ Democratic Party. His jail term has bizarrely added panache to his political appeal at least among his own people.

Also, “Fanfare over Bode George’s release sparks outrage”. <http://saharareporters.com/news-page/fanfare-over-bode-george%E2%80%99s-release-sparks-outrage>

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while he mounted a campaign for a seat in the Nigerian senate, which he ‘won’ from jail. He was released to assume his new role as a “distinguished senator” from Osun state. He was re-elected in 2007 and held prominent positions on various senate committees. The assassination, meanwhile, has never been solved. Another recent case in a similar vein is that of the former governor of Delta state, James Ibori, who pleaded guilty to money laundering charges at Southwark Crown Court, in London⁸ in 2012. He had attended court with a coterie of his highly enthusiastic supporters outside court, and in the public gallery, inside the well of the court, where they were able to make eye contact with the accused in the dock⁹. What, in light of the foregoing discussion of increased legislative efforts, is the explanation for this apparently high tolerance of political criminality in Nigeria, which can also be seen across a number of other African states? Any credible explanation for this phenomenon must necessarily go beyond the clichéd rationales of ‘corruption’, ‘maladministration’, ‘crisis of governance’ ‘ineptitude’ ‘dearth of resources’ or attributing the situation to be an unavoidable ‘third world problem’ if it is to illuminate¹⁰.

⁸ See; “James Ibori – How a thief almost became Nigeria’s president”.
<http://www.bbc.co.uk/news/world-africa-17184075>

⁹ Author’s eye witness account.

¹⁰ Steven Salbu has drawn attention to the “delicate balance” between legislation and institutional change, singling out the ‘socio-cultural’ genesis of bribery in many societies outside the West which, if not fully addressed, would render any legislation impotent. According to him, if bribery and similar crimes have become ‘embedded’ in a particular society, no amount of criminal legislation would be sufficient to eradicate it. He proposes “structural solutions” to go alongside “extraterritorial anti-bribery legislation”. Salbu’s examination brings together a host of other academic writings broadly in support of this viewpoint. See; “Delicate Balance: Legislation, Institutional Change, and Transnational Bribery” ‘Cornell International Law Journal’ 33, 657-688, (2000). While Salbu and others have done well to highlight the need to look beyond current assumptions in the extraterritoriality of bribery legislation, the thrust of their contention, however, takes us rather close to an element of the clichéd rationale we set out to avoid in this research. This research’s central thesis draws attention to one element above any others: the colonial state in Africa, and its legal superstructure.

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Public ambivalence towards political criminality in Africa can be traced back to the nature of the colonial state on the continent. The colonial state, at its core, was an authoritarian bastion of Western supremacist rule, where law was used mainly as an instrument of coercion and domination. Although colonial subjugation of much of Africa was happening at about the same time as the “enlightenment” and the “rights of man” were being proclaimed in the West, any talks of liberty, fundamental rights, freedom and citizenship by Africans at the time were viewed as the idle chatter of nationalist malcontents and were quickly suppressed by the colonial administrations, often with brute force. The system was uncompromising in seeking (and for a long time achieving) a total surrender of its subjects. What made the situation worse was also the fact that “most African colonial territories did not correspond at all with the pre-colonial states, and were united only by boundaries fixed arbitrarily during the partition of Africa”¹¹. Moreover, these “arbitrary and haphazard partitions soon formed the basis upon which the colonial and later the post-colonial states came into being”¹². To the African, therefore, the colonial state was a classic Hobbesian Leviathan at its best.

Most of the African ‘subjects’ were unable or unwilling to engage their colonial masters in direct warfare, and although harbouring a deep sense of alienation from the oppressive state, key individuals amongst the indigenous elites acquiesced to, encouraged, or took part in the systematic pilfering of state resources, as a measure of ‘redress’ and ‘economic empowerment’. In fact, the appropriation of state resources for personal purposes was seen in various local communities as a patriotic duty for the

¹¹ J. Derrick. *Africa’s ‘Agitators’ – Militant anti-colonialism in Africa and the West, 1918-1939*. London: Hurst and Co, 2008, page 65. The partition of Africa into different states took place at the “Berlin Conference” of European powers in 1885.

¹² S.Y. Hameso. *Ethnicity and Nationalism in Africa*. New-York: Nova Science Publishers Inc, 1997, page 58.

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elites. Those who returned to their villages and shied away from handing out gratuities and distributing the largesse expected of them were viewed with a scorn of derision in the community. Far from being seen as the grand larceny that it was, the most egregious appropriation of state resources of this type was often embraced within local communities as an admirable feat in restorative justice. This is arguably what created the 'Robin Hood Syndrome' in some of the political elites, some of whom even went to jail for daring to oppose colonial rule in their homelands. They, almost invariably, returned from their various jail terms as heroes and champions of their people. In many respects, community leadership and jail terms became the rite of passage to statesmanship in colonial Africa. It is no coincidence to note, therefore, that the novelty of political leaders going to jail in Africa waned over time as a result. While this may no longer be the stated strategic aim of any political group, it is our contention in this research that, in respect of state resources, this colonial structure of reference still permeates the interplay of politics in contemporary Africa. The post-colonial state in one significant instance, was seen as "definitely and absolutely British in substance and nature; it was certainly not African"¹³. Nonetheless, the indigenous elites who took over the reins of power opted to keep the coercive apparatus of the colonial state intact, thereby affording the people a change of personnel but not a wholesome change of regime.

A practical manifestation of the above can be gleaned from the several dozens of states across Africa still struggling to carve out viable nation-states amidst the divergent ethnic groups lumped together as one unit by colonial diktat, and managed

¹³ K. Nkrumah. *Africa Must Unite*. London: Heinemann, 1963, page 87. Dr. Nkrumah was the foremost anti-colonial and Pan-Africanist intellectual of his generation. He went on to become Ghana's first democratically elected head of state in 1957. He was perceived by some section of the Ghanaian elite as the man who had killed an elephant (the colonial state), which then made it possible for them to indulge in a perpetual feast on its carcass.

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by an overarching, overwhelming and semi-detached central authority: in effect a modern-day Leviathan, “threatened, according to Claude Ake, by strong centrifugal forces of political instability, conflict and war”¹⁴. Consequently, in a society like Nigeria, for example, where nationality and ethnicity are still hotly contested issues; where there is a fundamental lack of a sense of ownership of the legal superstructure; where the norm is to rule by coercion rather than by consent, and where the judiciary is heavily politicized, the value of criminal sanction for political malfeasance is, ipso-facto, diminished. Conversely, the value of property and personal aggrandisement is enhanced by default. Given a choice between a loss of property and a loss of liberty, a typical PEP in Africa would opt for the latter. This is not as counter-intuitive as it sounds considering that in a society with a high appetite for local champions; property, however tainted, gives a measure of self-definition and relevance that can outlast the effect of any temporary loss of liberty imposed through criminal sanctions. The main object of this research, therefore, is not only to shed light on the foregoing discussion, but to propose a more creative way of dealing with the intricate problems of enforcing AML provisions using the EFCC as our reference point.

The extent to which the EFCC organisation’s ability to enforce AML provisions has been hampered by the cobweb of legalism that surrounds it will be explored as the running theme of this research. This paper has already mentioned the myriad and interconnecting webs of international legislation aimed at prohibiting and criminalising money laundering in respect of PEPs, which until recently had been focused on “getting governments to put in place the institutions to hold to account

¹⁴ J. O. Arowosegbe. “Claude E. Ake: Political integration and the challenges of nationhood in Africa” in, ‘Development and Change’, 42(1): 349-365. See also, C. Ake. “Political integration and political stability: A hypothesis” in, ‘World Politics’ 19(3): 486-99.

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abusers of high office”¹⁵, but now involves a much wider remit. For instance, at the domestic level, there are a number of anti-corruption measures that have been passed into law in Nigeria, and there is still pressure on the government to do more. A further contention of this paper is that it is the confluence of legislation in this area of the law that has generated the cobweb referred to in the title of this project. The spider in the web comes in two forms: first, the accused (i.e. the PEP), and second, the accuser (i.e. the AML agency). When excessive use of criminal provisions on the part of the accuser is met with excessive use of court procedure on the part of the accused, the unintended consequence (at least on the part the accuser) is the development of an impasse and the eventual collapse of the case at hand. It should be recognised, however, that sophistry and punctiliousness are familiar traits in any judicial process and as a result most judicial systems are well adapted to such situations. However, this state of affairs gives rise to legalism when it becomes deployed as an end in itself and is utilised as a mode of reasoning.

Outline of dissertation structure

So, with the above clarifications in mind, we can proceed to the substantive analysis of the issues by exploring in chapter one below, the conceptions, as well as some of the contentious issues, surrounding the identification of PEPs as it concerns Africa. “Since [the] early 1990s Western governments have indicated that political reform was a necessary condition for further assistance to Africa”¹⁶, and AML measures have been regarded almost as a panacea capable of solving all the societal problems faced

¹⁵ See the Editorial: “Demanding development” in, ‘Review of African Political Economy’, Vol 37, No 124, June 2010, 119-121.

¹⁶ S. P. Riley. “Political adjustment or domestic pressure: democratic politics and political choice in Africa” in, ‘Third World Quarterly’ Vol 13, No 3, 1992, 539-551.

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by African leaders. It was no coincidence, therefore, that Western financial institutions such as the OECD, the Basel Committee, the Financial Action Task Force and the Wolfsberg Group have enacted various proposals for the identification and criminalisation of money laundering activities by PEPs, but the Western initiatives are fundamentally deficient in the assumptions they hold of the course and causes of PEP in Africa.

In order to highlight some of these deficiencies, this paper touches on the key international regulatory frameworks, designed to serve as benchmarks for subsequent legislative initiatives from within Africa, and shed some light on the extent of their contribution to curbing the effect of money laundering as envisaged by the international instruments. As this paper will demonstrate (particularly in the study of EFCC in chapter two), it is clear that these AML initiatives were/are rooted in a Eurocentric view of crime and criminal sanctions and it is this which contributed in great measure to some of the difficulties in implementing them in Africa. This chapter also presents the EFCC organisation as existing at the crossroad of judicial and political ambivalence towards the phenomenon of PEPs and AML initiatives. The chapter examines the enormous burden placed on the agency by law and policy and highlights some of the most notorious cases the organisation has had to deal with. In addition, the consequences of failure on the organisation are considered, and how they open the way for viable alternatives, including the impact that these may have on the domestic and international agencies which strongly desire its success.

Having provided an incisive expose on the critical work of the organisation, chapter three is devoted to discussing alternative means of achieving its goals. The

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jurisprudence of criminal jurisdiction is analysed and juxtaposed with civil jurisdiction, exploring legal norms (positive law in terms of criminal legislation, and ‘traditional’ or natural law in terms of moral denunciation of specific behaviour), leading us to a full analysis of the relevance of the law of trusts as a potent weapon in the attainment of the objectives of the EFCC. The thesis holds throughout that the problems posed by PEPs in Africa cannot be adequately addressed by reference solely to international criteria, however well intentioned, except by reference to the historical and political realities of the continent as an entity.

The international legislative framework is largely based on the ‘benevolent’ desire of Western leaders not only to protect their financial institutions from the corrosive effect of money laundering, but also it is couched within the language of the tried and tested “saving Africa” orientation¹⁷, and bears upon the “portrayal of Africa’s plight as a moral crisis which often disguises the structural and political causes of the current state of affairs”¹⁸. It is all too often the case that “whatever the ‘key issue’ identified, whether the environment, tribal allegiances, corruption or bad governance, the conclusion points in one direction: people and systems in African countries have to change and fit in with what the external agent thinks is needed for future sustainability”¹⁹. The conclusion reached from the discussion in this work, draws from the breadth of some these sentiments and builds on them, not necessarily rejecting out-of-hand the prescriptive approach of the international initiatives on money laundering and PEPs, but instead strengthening them, having highlighted their

¹⁷ M. C. Lee. “The 21st century scramble for Africa” in, ‘Journal of Contemporary African Studies’, 24, 3, Sept, 2006, 303-330.

¹⁸ S.R. Hurt. “Mission impossible: A critique of the Commission for Africa” *ibid.*, 25, 3, Sept, 2007, 355-368.

¹⁹ H. Hintjens and S. Pavan. “illusions of peace, illusions of war” in, ‘Development and Change’, 42(3): 859-871 (2011).

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inherent inadequacies. The ultimate aim of this paper is to supplement rather than supplant; to generate additional tools rather than seek to dismantle any current ones.

Chapter One: POLITICALLY EXPOSED PERSONS (PEPs): Concept and Contentions

1.1 Genesis

It is a truism to say that the bulk of the laundered money from Africa finds its way into various financial institutions and investment portfolios in the West, for reasons we shall explore further in this chapter. Suffice to say that per capita income in a typical “low income” African state can be as little as US\$750, compared to a typical OECD country of over US\$40,000²⁰. Africa is still a continent where, according to the UN human development index²¹, a huge number live on less than US\$2 a day. The destination of choice for African PEPs engaged in money laundering appears to be the apparent ‘safe’ havens of the affluent West. It is fair to say, however, that in the last ten years both the UK and USA have been at the forefront of a series of initiatives which seek to criminalise bribery and money laundering, with particular reference to PEPs from Africa. The reason for this is related to the paradigmatic shifts in African relations with the West in the last five decades. The old paradigm represented the post-independence period, when the West saw dealings with the newly independent African states only through the prism of the ‘East-West’ conflict.

The main concern of Western leaders at that time had the rather paternalistic mission of preventing the corrosive effect of communist ideology from reaching and taking roots on African soil. The elite, who had just taken over the reins of government in

²⁰ <http://www.doingbusiness.org/data/exploreeconomies/economycharacteristics> (accessed 16/04/12). OECD is the acronym for Organisation for Economic Cooperation and Development, a collection of thirty four countries comprising Europe and several other developed nations outside the continent.

²¹ http://hdr.undp.org/en/media/HDR_2011_EN_Summary.pdf (accessed 17/04/12)

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Africa were meanwhile also preoccupied with maintaining “law and order” and entrenching their hold on power. They accomplished this, for the most part, by enforcing the old repressive laws of the former colonial masters with an even greater determination. The African elite’s attitude to state resources in the post-independence period and the attendant flight of capital from their economies, did not appear to be a major concern for Western political leaders at this time, as long as the new leaders were willing to commit themselves to an anti-Communist Western foreign policy posture²² vis-a-vis the then ‘Eastern bloc’ countries²³. Consequently, it was the desire of Western powers to maintain a patron-client relationship with the post-independence African leaders, coupled with the desire of the African political elite to maintain a grip on their newly acquired power over the state apparatus which sowed the seeds of political corruption on the continent. To state it clearly, this situation was the foundation for the phenomena of PEP in Africa as we know it. It is this relationship which Western policy makers have sought to disentangle themselves from after the fall of the Eastern bloc; instigating the series of international and extra-territorial criminal initiatives that were discussed in the introduction, but thus far, without much success.

As the economic conditions in post-independent Africa deteriorated partly due to the substantial impacts of corruption and maladministration in the late 1970s and early 1980s, Western policy makers embarked upon a series of measures designed to help ease the economic crisis by offering loans through the Structural Adjustment

²² Franklin D. Roosevelt (FDR), president of the United States (1933-45) once said of Nicaragua’s dictator, Somoza; “he may be a son of a bitch, but he is our son of a bitch”. Former colonial masters in Africa namely; Britain and France, displayed a similar attitude towards numerous dictators and “life presidents” who dominated the African political landscape for a generation after independence.

²³ Eastern bloc was the term used to describe the Communist Alliance of most East European countries under the leadership of the former Soviet Union.

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Programmes (SAPs) of the IMF. African political leaders were told to ‘liberalise’ their economies and loosen their grip on political power by allowing opposition parties to take part in open elections. These ‘adjustment loans’ had, in many instances, to be made multiple times as the crisis was simply too deep rooted to be alleviated in one fell swoop of a loan²⁴. The real problem of the policy however was that, to be effective, the policy- which insisted on privatisation, deregulation and a host of other austerity measures- needed to be enforced by strong authoritarian mechanisms imposed on economies that were already weak and lopsided. Such an agenda clearly runs counter to the Western policy makers’ demand for ‘political reform’ through the establishment of open and democratic elections as this would inevitably introduce a loss of central authority. The end result of the IMF’s SAP programs then was a massive failure because, “having taken large external debts in the 1970s, African countries watched their markets and their terms of trade weaken while the interest rates on their debts soared”²⁵. So, far from bringing about reform in the way anticipated, the policies of adjustment and liberalisation actually strengthened the authoritarian political leaders in Africa, who still today form the bulk of PEPs engaged in money laundering activity.

The new paradigmatic shift in the relationship of Western leaders with authoritarian political leaders in Africa happened in the wake of the collapse of the Eastern bloc in the late 1980s. African states were no longer in need of ‘protection’ from

²⁴ The loan was originally intended to last for a period of seven years, but has lasted over two decades for many of them. In an extreme case, adjustment loans have been granted for Argentina thirty times, Ghana and Cote d’Ivoire, 26 times. For more on this see; W. Easterly. “What did structural adjustment adjust?: The association of politics and growth with repeated IMF and World Bank adjustment loans” in ‘Journal of Development Economics’ Vol76, No1, Feb 2005, pages 1-22.

²⁵ <http://www.imf.org/external/pubs/ft/history/2001/ch13.pdf> (accessed 17/04/12)

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Communism and could now be allowed to take part in ‘free trade’²⁶. There were also two additional factors: First, pressure on employment fuelled by increased economic migration to the West from Africa and elsewhere and, second, the systemic risk that money laundering by PEPs posed to the financial system of major Western economies- most notably; the UK and USA. A lot of the international AML initiatives that have been launched therefore have been inspired by domestic legislation from these two countries. As illustrated below, the definition of PEP adopted by Western institutions and political leaders is an expansive one, covering almost every conceivable scenario. The adoption of such an expansive definition is designed to take account of the fluidity in the circle of officials, families and politics at any one period and to demonstrate the resolve of policy makers in the West. However, this paper will demonstrate, that adopting this particular approach has proved to be both a source of strength and a weakness in the fight against PEP and money laundering.

Furthermore, as explained earlier, the range of PEPs in Africa was initially contained to public officials with the closest proximity to the seats of power. They first acquired their positions of prominence in the aftermath of independence and were bolstered by the patron-client relationship established with the former colonial powers. The 1970s and 1980s saw a cluster of “life presidents” and dictatorial regimes in Africa such as Mobutu Sese Seko (DRC), Teodoro Obiang (Equatorial Guinea), Jose Eduardo dos Santos, (Angola), Robert Mugabe (Zimbabwe), Yoweri Museveni (Uganda), Omar

²⁶ Some of the worst examples of leaders in this mould included: Presidents Hastings Kamuzu Banda (Malawi), 1963-1994, Daniel Toroitich Arap Moi (Kenya), 1978-2002, vice-president, 1967-1978, Kenneth David Kaunda (Zambia), 1964-1991, all supported and sustained in power by Britain. President Mobutu Sese Seko (DRC), 1965-1997, supported and sustained in office by America’s CIA. Presidents Felix Houphouet-Boigny (Ivory Coast), 1960-1993, Leopold Sedar Senghor (Senegal), 1960-1980, Habib Bourguiba (Tunisia), 1957-1987, all supported and sustained in power by France, to cite but a few examples.

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Bashir (Sudan) and Paul Biya (Cameroon), to name a few²⁷. When these leaders' Western political allies insisted on imposing 'liberalisation' and 'privatisation' as conditions of continued aid in the 1980s paradoxically, this meant that more authoritarian and repressive modes of governance were required to implement and manage the fallout from these harsh economic measures. These measures, therefore, augmented rather than reduced the ranks of PEPs, who have since regrouped as latter-day 'democrats' in national parliaments across Africa, from the 1990s until present, with the concomitant problems of corruption and graft continuing to be linked with many of them²⁸. As this paper shall explore in greater detail below, the raft of legislative initiatives implemented through various international bodies in the last decade concerning PEPs, reflect a concern that African states lack the necessary internal capacity to enforce an appropriate level of accountability or to adequately exert democratic controls over political leaders and state resources. It also reflects the belief that a standardised approach at the international level is necessary to reduce the risk posed to Western financial institutions from the money laundering activity of PEPs in Africa. It is no coincidence, therefore, that the global approach to tackling the problem was spearheaded by the Organisation for Economic Cooperation and Development (OECD). Its involvement gave the political impetus for other international bodies to establish a direct link between corruption and PEP, thereby focusing, for the first time, on the 'supply side' of bribery transactions.

²⁷ See The Economist – African Dictators in: <http://www.africandictator.org/?p=6601> (accessed 24/04/12)

²⁸ For a detailed analysis of democratic transitions in Africa following the collapse of the Soviet Union, see; M. Bratton and N. Van de Walle. *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*. Cambridge University Press, 1997. For example, we find on page 208, that as of December 1994, 16 African countries had experienced democratic transitions, 12 flawed, another 12 blocked, and 2 precluded.

1.2 OECD Anti-Bribery Convention, 1999²⁹

This Convention was negotiated in 1997 and, it established legally binding standards to criminalise the bribery of foreign public officials in international business transactions. According to Article 1 (4) (a) of the Convention, “foreign public official” means “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation”. While this signals the first concerted effort at facing up to the challenge of corruption and PEP, as noted in the introduction, this attempt to move away from corrupt African political leaders coincided with the collapse of the Soviet bloc. The West was no longer willing to tolerate corrupt regimes as a price for their loyalty³⁰ and as such the West became vociferous in its support for various ‘pro-democracy movements’ within and outside Africa, and relentless in targeting the financial activity of PEPs. This is reflected in the first policy paper on PEP produced for bank supervisors on this issue as discussed below.

1.3 Basel Committee on Banking Supervision – Oct 2001³¹

The report presented by the OECD committee was notable for the attention paid, for the first time, to PEPs. It promotes the concept of due diligence as a way of measuring the activity of new and existing customers and identified deficiencies in the Know Your Customer (KYC) policy of a large number of banks, including banks in

²⁹ <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (accessed 24/04/12)

³⁰ H Shams. “The Fight Against Extraterritorial Corruption and the Use of Money Laundering Control” ‘Law and Bus. Rev. Am., 85 2001, page 90.

³¹ See, Bank for International Settlements (BIS) <http://www.bis.org/publ/bcbs85.pdf> (accessed 24/04/12). Established in 1930, it has its headquarters in Basel, Switzerland. It coordinates regulations of central banks views towards fostering stability in the global financial sector.

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developed economies. The recommendations submitted by its working group on cross-border banking reform was adopted and distributed to bank supervisors around the world. The KYC policy is most closely associated with the fight against money laundering and it is therefore important to provide a detailed and precise overview of its essential elements. Deficiencies in the KYC policy can expose banks to serious risks, especially: Reputational (erosion of public confidence through adverse publicity), Operational (direct and indirect losses through inadequate or botched internal processes), Legal (arising from failure to observe KYC) and Concentration (concerns around the assets side of a bank's balance sheet). Most banks set out prudential limits to reduce exposure to single borrowers/depositors. However, without full awareness of all the customers and their relationship to one another, it becomes difficult for a bank to measure its concentration risk, especially in situations involving the sudden withdrawals of funds by large depositors.

The Report (in paragraph 40 [2.2.5]) addresses the issue of PEP, which it defines as: individuals who are or have been entrusted with prominent public functions, including heads of state or of government, senior politicians, senior government, judicial or military officials etc. They identify people within this group as being most exposed to the possibility of corruption and abuse of powers. Without due diligence, there is a risk that bank managers and employees, themselves, will be exposed to money laundering charges, law suits and pressure from law enforcement agents around the world. Banks are therefore required to carry out extensive research on their customers to ascertain whether they are PEPs. This policy encourages banks to open accounts to such people, only with the approval of senior managers. The Basel Committee came

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up with their recommendations while having knowledge of a similar initiative being prepared by the FATF.

1.4 Financial Action Task Force (FATF)³²

Originally tasked to look into the growing problem of money laundering, the FATF expanded its mandate in 2001 to embrace the issue of terrorism and terrorist financing. Recommendations (4) and (5) requested countries to ensure that the various banking and financial institutions secrecy laws are not used to inhibit its work and requested financial institutions to undertake due diligence with customers and end the practice of permitting anonymous bank accounts. In relation to PEPs, recommendation (6) requires countries to have appropriate risk management system to ascertain whether new or existing customers are PEPs before establishing or carrying on business relationships. Banks are also required to ascertain the source of wealth of particular individuals suspected of being PEPs and maintain an on-going monitoring of such customers. Recommendation (10) requires financial institutions to retain details of customers' transactions for at least five years. It is doubtful, however, whether considering how long and complex cases involving PEPs tend to be, this is a sufficient period to maintain records³³. Recommendation (11) requires financial institutions to pay particular attention to all complex, unusually large transactions, which have no apparent economic or visible lawful purpose. This is particularly useful for identifying PEP, but it might also encourage such individuals to find more creative ways of disguising their illegal transactions. Being an inter-governmental

³² <http://www.fatf-gafi.org/pages/aboutus/> (accessed 24/04/12). FATF is an intergovernmental “policy making” organisation in respect of financial regulations and money laundering for its members, comprising 34 members and 2 observers, covering most major financial centers around the world. The G7 members, the EU, and eight other countries convened the Task Force in 1989.

³³ A longer period of ten years might seem more proportionate and realistic.

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agency, the action taken by the FATF became a spur for the subsequent UN initiative that followed.

1.5 The United Nations Convention against Corruption, 2003³⁴

Under the auspices of the United Nations Office on Drugs and Crime (UNODC), the UN Convention built on the previous initiatives discussed above, and it became the first world-wide Convention which specifically focused on the issue of corruption, particularly with African states and PEP in mind. This is not surprising as the organisation at this time was being led, for the first time, by an indigene of sub-Saharan Africa³⁵. Thus, Article 5 (1) of the Convention enjoined members to put in place anti-corruption policies, to promote wider participation and its contents reflect the principles of the rule of law, transparency and accountability. Article 14 (1) (a) requires members to adopt anti-money laundering measures in respect of their financial institutions, emphasising the requirements for customer and, where appropriate, beneficial owner identification, detailed record keeping and the reporting of any suspicious transactions. Very important Articles are 15 (a) and (b), which criminalise the bribery of national public officials: focusing on “the promise, offering or giving to a public official...”, and “the solicitation or acceptance by a public official...”. Moreover, Article 16 concerns the bribery of foreign public officials and officials of public organisations along the same principles as those outlined in (15) .

Article 23 (1) is directly targeted at money laundering processes in all its

³⁴ http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed 24/04/12)

³⁵ The then Secretary General of the United Nations, Kofi Annan, stated in his foreword to the Convention document, in an oblique reference to Africa, that ‘the evil phenomenon of corruption is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive’.

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ramifications. It requires members to criminalise the conversion or transfer of proceeds of crime and forbids the “concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime”. To ensure the effectiveness of this provision, Article 52 (1) (2) requires members to verify the identity of customers and beneficial owners of accounts, especially the high-valued ones, and to conduct enhanced scrutiny of accounts held by or on behalf of PEPs.

In a UN policy paper on “StAR”³⁶ where a “low level of compliance with international standards across jurisdictions” was observed, there was the first indication of compliance fatigue amongst major banks in regards the conduct of enhanced due diligence on PEPs. The paper reflects the banks’ perception that there is “scant evidence” of corrupt PEP activity either within the banks or within the wider financial sector³⁷. If this proves correct, the banks and the financial sector as a whole face the choice of becoming complacent or more anxious due to concerns that the corrupt PEPs have found other means of covering their tracks. The policy of enhanced due diligence being impressed on banks and financial institutions constitutes a direct challenge to corrupt PEPs to devise smarter ways of evading scrutiny. On a wider platform, “due diligence” is a much heralded concept in the AML policy proposed by major financial institutions around the world. It is doubtful, however, whether the concept is not already being overused. Due diligence encourages a cautious approach to banking and financial transactions involving PEPs, however it is also a concept that

³⁶ Stolen Assets Recovery Initiative.

³⁷ For the full report see, Theodoros. S. Greeberg et al, “Stolen Asset Recovery – Politically Exposed Persons. A policy paper on strengthening preventive measures”, The World Bank, Washington, USA, 2009. <http://siteresources.worldbank.org/EXTSARI/Resources/5570284-1257172052492/PEPs-ful.pdf?resourceurlname=PEPs-ful.pdf> (accessed 24/04/12)

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could generate a move towards the adoption of the lowest common denominator through excessive formalism and the ritual of box-ticking³⁸. Effective diligence, on the other hand, involves a more tailored approach to the same problem. While ‘due’ diligence leaves room for ambiguity, ‘effective’ diligence carries an element of compulsion as well as the freedom to resort to creative means of exercising control over the affairs of suspected PEP involved in illegal financial activity. A measure of diligence may in fact be deemed due, but not necessarily found to be effective³⁹.

Some aspects of these concerns came up at the meeting of the group of twenty, the “G20” in 2009. The G20 is the ‘premier league’ of the group of leading economies in the world⁴⁰. They called for an increase in the flow of capital to the developing world, and to attempt to prevent its “illicit outflow”⁴¹. They also pledged to strengthen support for the work of FATF in its efforts to improve standards on customer due diligence, and urged members to ratify the UNCAC even though, it does not directly address itself to the issue of PEP. It was, therefore, in another group, the “Wolfsberg group”, that this was more specifically addressed.

³⁸ The process by which banks compile mountains of useless reporting information.

³⁹ Due diligence here refers to bureaucratic compliance with rules even where they are shown to be ineffective.

⁴⁰ <http://www.iasplus.com/en/binary/crunch/0909g20finalstatement.pdf> (accessed 26/04/12)

G20 Heads of State Meeting – The Pittsburgh Summit, 2009. It is made up of finance ministers and central bank governors from 19 countries and the European Union: Argentina, Australia, Brazil, Canada, China, EU, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia Saudi Arabia, South-Africa, South-Korea, Turkey, UK and USA.

⁴¹ Ibid.

1.6 The Wolfsberg Group⁴²

According to this powerful world financial group of bankers, the term PEP applies to “persons who perform important public functions of state. This should be understood to include persons whose current or former (one year after leaving office) position can attract publicity beyond the borders of the country concerned and whose financial circumstances may be the subject of additional public interest”⁴³. However, it also adds in the proviso that the local political and social environment should be taken into account in assessing the merits of transactions involving PEPs. This is an important point as an apparently ‘low level’ Parish Councillor in some remote village in Africa can be as susceptible to money laundering as an urban ‘high level’ political figure in an urban area could. In terms of family members of PEPs, the group indicates that the term families include: “spouses, children, parents and siblings and may also include other blood relatives and relatives by marriage”⁴⁴. However, this proposition is problematic in many respects; first, the expectation that small or medium-sized firms will be able to determine the true family members of PEPs “in some obscure overseas state is patently absurd”⁴⁵.

⁴² It is an association of eleven leading banks in the world formed in 2000 at a meeting in Chateau Wolfsberg, Switzerland, principally to tackle the growing problem of money laundering and to limit systemic risk to global financial transactions. Their members make up more than 60% of the world market in private banking with 50% of the market share in each key offshore destination. For a detailed analysis of how the group’s AML principles were formulated see, Mark Pieth and Gemma Aiolfi. “The Private Sector Becomes Active: The Wolfsberg Process”: <http://www.wolfsberg-principles.com/pdf/Wolfsberg-Process.pdf> (accessed 26/04/12)

⁴³ See, “how to define a politically exposed person?” <http://www.wolfsberg-principles.com/faq-persons.html#1> (accessed 26/04/12)

⁴⁴ Ibid.

⁴⁵ A. Hayes. “Money Laundering: From Failure to Absurdity” in ‘Journal of Money Laundering Control’, vol 11 No 4, 2008, pages 303-319

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Second, the Eurocentric assumptions in the concept of 'family' as applied by the Wolfsberg group represent even more significant problems as while family in the West is defined by blood, in Africa, it can equally be defined by culture. Consequently, if the verification of a customer's family is restricted to those with blood ties, it would exclude a whole number of significant people, who could potentially prove to be the missing links in a chain. If, on the other hand, cultural nuances of family are given prominence over the certainty entailed with blood ties, this could throw open the way to an unmanageable avalanche of people needing to be investigated and scrutinised. In a fast-moving, multi-faceted global financial organisation focusing on such things would not be a productive use of resources, especially for small and medium-sized enterprises. Yet, family members and family affiliation is an important ingredient in Africa's social life, and even more so, in the life of a PEP. Thus, from the foregoing, it is not an easy issue that can be resolved by establishing a far reaching 'rule of thumb'. A better way forward might be, in a liberal sense, to focus on the PEP and his 'agents'. This would mean that anyone (family and others) involved in the financial dealings of a suspected corrupt PEP automatically assumes the capacity of an agent and are thus liable to investigation and/or verification however, only time will tell whether this approach can prove workable.

1.7 US Foreign Corrupt Practices Act 1977⁴⁶

All of the above global or globalised efforts aimed at tackling the continuing problems of PEPs and money laundering have been supplemented by two crucial governmental initiatives by the USA and UK which require individual consideration. Financial institutions and private companies are particularly impacted by the groundbreaking anti-corruption law of the US Foreign Corrupt Practices Act 1977 as they are required to adhere to some stringent restrictions relating to undue influence, abuse of official positions, bribery and corruption. Due diligence of financial transactions with customers constitutes an important requirement of this Act and the Act is extra-territorial in nature. The US is a joint signatory along with thirty three other OECD member governments to the Convention on Bribery of Foreign Public Officials in International Business Transactions. It generally prohibits US citizens and companies, and any person acting while on US soil, from illegally paying or offering to pay, directly or indirectly, money or anything of value to a foreign official to obtain or retain business. Prior to 1998, foreign companies with the exception of those who qualify as “issuers”, and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals.

In respect of PEPs and Africa, The US Attorney General, Eric Holder, has attempted to refine this Act to tackle the problem of corruption and graft by introducing the

⁴⁶<http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>
<http://www.fcpa.us/> (accessed 26/04/12). The Act has been in place since 1977, but has been given prominence in recent years due to some high profile prosecutions and convictions. According to statements on the above website, some 400 American firms have collectively paid £300 million bribes and other questionable payments to foreign governments political parties and also directly to the accounts of government officials.

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“Kleptocracy Asset Recovery Initiative”, “to combat large-scale foreign official corruption and recover public funds for their intended – and proper – use: for the people of our nations”⁴⁷. In justifying this move Mr. Holder highlighted the World Bank estimate that a total of one trillion was being paid in bribes from the 30 trillion dollar world economy⁴⁸.

1.8 The UK Bribery Act 2010⁴⁹

Turning to the UK, section one of the UK Bribery Act 2010 makes it an offence to “offer, promise or give a financial or other advantage to another person with the intention of inducing them to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity”⁵⁰. It is important to note that the ‘function or activity’ referred to need not have anything to do directly with the UK. Sections 6 (5) and (6) deal specifically with bribery of “foreign public officials” and “public international organisation” respectively. This is obviously aimed at PEPs and also domestic and international non-governmental organisations of which there are literally hundreds across Africa. According to this imaginative Act, simply being passive or turning a blind eye to corruption involving public officials would no longer be tolerated, as section 7 creates an offence of “failure to prevent bribery” by commercial organisations. The only defence for such organisations is to prove they have put “adequate procedures” in place to prevent any person associated with them from engaging in such behaviour.

⁴⁷ See, “Attorney General Holder at the African Union Summit”. Kampala, Uganda, July 25, 2010. It was arguably the biggest gathering of PEPs (and, may be, kleptocrats) the Attorney General has had to address while in office. <http://www.justice.gov/ag/speeches/2010/ag-speech-100725.html> (accessed 26/04/12).

⁴⁸ It is hard to imagine how much of the one trillion dollars can be attributed to the activity of many of his audience, the US-based companies operating in Africa, but the point is well made.

⁴⁹ http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf (accessed 26/04/12)

⁵⁰ UK Bribery Act 2010, section one.

The provisions contained in this Act have been supplemented by a recent document: “combating money laundering by politically exposed persons”⁵¹. While acknowledging that the majority of PEPs “undertake legitimate business”, the document defines PEPs within the Money Laundering Regulations 2007 as: “those individuals who hold (or have held within the preceding year) a prominent public function for a state outside the UK, a Community institution or an international body”. This is thus, generally in line with the approach taken by the FATF, and, taken together with the Bribery Act, which makes “failure to prevent corruption” a specific offence, it provides the UK with a robust legislative tool for addressing corruption and bribery which is almost without parallel.

1.9 International Regulatory Framework In A Context

This paper, thus far, has reviewed its evolution from the standpoint of a particular group of PEPs in Africa and juxtaposed this analysis against the various legislative proposals emanating from the advanced market economies, where the problem of PEP and money laundering are equally acute in their impacts. We have reviewed the genesis of PEPs and their continued spread on the African continent. From the standpoint of Western policy makers, however, PEPs are independent variables that can be discerned, dissected and possibly removed from the Western financial and banking institutions. Contrasted with this is another view of PEPs which regards them as an embodiment of Africa’s recent political history. Hence, far from being isolated variables, they are an integral part of the international economic (patron-

⁵¹ This is an unclassified HM government core narrative and action plan obtained for this research. For an earlier discussion of the guidelines issued to the public on customer due diligence and politically exposed persons see, http://www.hmrc.gov.uk/mlr/mlr_hvd.pdf (accessed 26/04/12)

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client) relationships created by the very Western institutions, from which the same institutions now strive to disentangle themselves. None of the initiatives adopted by the various global bodies and discussed have addressed this important issue concerning the rationale for the growth and origins PEPs. The following sections seek to redress this imbalance by considering these issues and their relationship with AML initiatives directly.

The international legal framework on money laundering has been largely spearheaded by the USA and UK, although, other countries in Western Europe have been supportive in the setting up of new institutions for this purpose, and/or using existing international institutions to articulate the goals of various AML initiatives.

Recognising this point helps to set the position of PEPs in the following analysis in a wider international legislative context.

1.10 AML Initiatives

The AML initiatives have tended, on the whole, to focus heavily on finance and the financial system. Global attention to the issue of money laundering was aroused with the signing of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the ‘Vienna Convention’ of 1988⁵² and the Political Declaration and Action Plan Against Money Laundering (1988)⁵³, This resolution has been accompanied by the Convention on Laundering, Search, Seizure and

⁵² http://www.unodc.org/pdf/convention_1988_en.pdf

⁵³ <http://www.imolin.org/imolin/ungadec.html>

The conference designed to “countering the world drug problem together” put much emphasis on the debilitating effect of drugs on humans, but little or no reference was made to money laundering even though it was organised and published by the UN ‘International Money Laundering Network’ IMoLIN.

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Confiscation of the Proceeds of Crime (The Strasbourg Convention) (1993), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (1997)⁵⁴, the International Convention for the Suppression of the Financing of Terrorism (1999)⁵⁵ and the Palermo Convention Against Transnational Organised Crime, (2000)⁵⁶. The last of these conventions was billed as the main international instrument for fighting transnational organised crime and participating states were instructed to criminalise participation in organised criminal groups, money laundering, corruption and the obstruction of justice in their domestic legislation.

The UN Security Council Resolution 1373 (2001)⁵⁷, which urged all states to “prevent and suppress the financing of terrorist acts” was aimed at discouraging monetary donations to political groups deemed by the US and its allies to be involved in ‘terrorist’ activity. In addition, the UN Security Council Resolution 1390 (2002)⁵⁸ was hurriedly pushed through in the aftermath of the September 2001 attack on the New York, in order to enable the known accounts of Osama Bin Laden and his associates to be frozen in an attempt to restrict their movements. In Europe, initiatives have tended to follow a similar path. For instance, the Basel Committee on Banking

⁵⁴ http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html

⁵⁵ <http://www.un.org/law/cod/finterr.htm>

⁵⁶ <http://www.unodc.org/unodc/en/treaties/CTOC/>

⁵⁷ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

⁵⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/216/02/PDF/N0221602.pdf?OpenElement>

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Supervision (Preventing Criminal Use of Bank System 1988)⁵⁹ was specifically targeted at money laundering in its international context, furthermore the Egmont Group of Financial Intelligence Units, (1995) and the Wolfsberg Group of Banks, (2000) came together to issue guidelines on appropriate anti-money laundering operations for banks including due diligence and the IMF code of good practices on transparency in monetary and financial policies (2007), Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, (2008) and the 40 Recommendations of FATF. The overall aim of all the recommendations provided is to help member states to: “better safeguard the integrity of the public sector; protect designated private sector from abuse; increase transparency of the financial system; facilitate the detection, investigation and prosecution of corruption and money laundering and the recovery of stolen assets”⁶⁰ .

1.11 The US Response

The US response to the issue of money laundering has been to link the activity to the equally menacing issue of terrorism, especially in the wake of September 11 2001 bombing of the World Trades Centre in New York. The authorities regarded financial transactions as key to their investigative preventive efforts and it was within this context that the US PATRIOT Act 2001, “Uniting and Strengthening America by

⁵⁹ <http://www.bis.org/publ/bcbssc137.pdf> See in addition, a series of updates from the committee: Caribbean Financial Action Task Force, 19 Recommendations 1990, Kingston Declaration 1992, Customer Due Diligence, 2001.

⁶⁰ For more information on the content of the recommendations see <http://www.fatf-gafi.org/dataoecd/59/44/46252454.pdf>

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Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”⁶¹ was passed.

1.12 The EU Response

The US response has also been complemented by tough EU initiatives. These began with the declaration following the European Council meeting in Tampere, Finland, in October 1999, “towards a union of freedom, security and justice: the Tampere milestones”. This declaration urged “special action against money laundering, which it describes as being at the very heart of organised crime. It should be rooted out wherever it occurs, by taking concrete steps to trace, freeze, and confiscate the proceeds of crime”⁶².

In addition to the above, the EU’s International Criminal Police Organisation (Interpol) is recognised as taking the issue of money laundering particularly seriously by taking an aggressive stance toward towards asset forfeiture, and developing model legislation for member states, assisting with the implementation of AML programmes and providing tailored training for members⁶³. Moreover, although its headquarters are located in France the organisation has considerable international reach-, with one hundred and sixty eight member nations world-wide- and each member co-ordinating activity through a National Central Bureau (NCB). It should be recognised however,

⁶¹ http://www.fincen.gov/statutes_regs/patriot/

⁶² http://www.europarl.europa.eu/summits/tam_en.htm

⁶³ J. Madinger. Money Laundering – A guide for Criminal investigators, 3rd ed. CRC Press, 2012, page69.

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that such efforts can only be effective if the jurisdictional obstacles involved in prosecuting money laundering offences can be overcome. Internationalisation is in reality sometimes “deliberately sought by culprits in order to frustrate investigations that cut across national boundaries”⁶⁴. The extent to which the prohibition regimes enunciated thus far can succeed depends on whether the norms that underlie them are shared by other nations, beyond the ones involved in setting them up. As international prohibition regimes in the end are intended to minimise or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment⁶⁵.

The underlying rationale for many of these prohibition regimes then is the school of thought in international political theory which emphasises the emergence of an “international society” encompassing a universality of norms developed initially by European powers⁶⁶. As a concomitant to this, it has been argued, with some justification, that “virtually all of the norms that are now identified as essential ingredients of international law and global society have their roots in the jurisprudence of European scholars of international law and in the notions and patterns of acceptable behaviour established by the more powerful western European states”⁶⁷.

⁶⁴ G. Sterrens(?). *A New International Law Enforcement Model*. Cambridge University Press, 2000, page 212.

⁶⁵ See E. A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society”, in N. Passas (ed), *Transnational Crime*. Ashgate, 1999, page 481.

⁶⁶ See M. Wright “Western Values in International Relations”, in Herbert Butterfield and Martin Wright, eds, *Diplomatic Investigations – Essays in the Theory of International Politics*. Allen and Unwin, 1966, pages 89-131.

⁶⁷ *Ibid*, Passas, page 484.

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The European powers did not just develop the international criminal norms; they established the institutions through which the norms are validated, the United Nations and the International Court of Justice being two notable examples. The United States has built on this tradition in the conduct of its international affairs, and in particular, in the extraterritorial nature of its anti-corruption laws. This is understandable, even if controversial, since according to the World Bank, corruption is the single most damaging obstacle to both economic and social development worldwide⁶⁸. However, the developing world, from where much of the criminal activity relating to money laundering emanates, have remained outside players in the construction of the international prohibition regimes. Moreover, Africa has repeatedly had its legal structures and governmental institutions arbitrarily co-opted into the existing international regimes⁶⁹. This point is clearly demonstrated by the establishment of the main AML agency in Nigeria; the EFCC.

⁶⁸ www.worldbank.org/publicsector/anticorrupt/index.cfm

⁶⁹ Some have even done no more than cut and paste legislative provisions on money laundering from existing international frameworks on their domestic legislation.

Chapter Two: EFCC and Evidential Burden: Between Legal Certainty and Exigency of Policy

2.1 Burden of an agency

The Economic and Financial Crimes Commission (EFCC), was established in 2004⁷⁰. Despite the wish of some, the organisation was not an original Nigerian invention; instead, it was pushed on the country's political leaders by the international financial institutions, donor agencies and Western governments- anxious to recast their relationships with Africa in a new light. The then Nigerian president, Olusegun Obasanjo, appointed a relatively inexperienced young officer from the Nigerian police force, Nuhu Ribadu, to be its first head. The Nigerian political establishment could have weathered the storm of any homegrown pressure for such an institution, but since it relied so heavily on financial patronage from the West in terms of loans, aid and foreign investment, it felt compelled to establish such a body. Consequently, the Obasanjo regime that set it up did so more out of expediency than conviction⁷¹, and this fact helps put some of the difficulties the organization has encountered in prosecuting financial crime involving PEPs into perspective.

According to the organisation's spokesperson its "mandate begins with prevention, investigation, arrest and ends with charging accused persons to court"⁷². In its fight

⁷⁰ See, the Economic and Financial Crimes Commission (Establishment Act) 2004. http://www.efccnigeria.org/efcc_homepage_files/establishment_act_2004.pdf (accessed 21/07/12)

⁷¹ See, T. Oke, "EFCC's growing crisis of confidence", 'The Punch', June 22, 2012. <http://www.punchng.com/opinion/efccs-growing-crisis-of-confidence/> (accessed 21/07/12)

⁷² See, F. Babafemi. "Placing efcc mandate in proper perspective" 'The Nation', 29/10/2011. <http://www.thenationonlineng.net/2011/index.php/mobile/editorial/discourse/24419-placing-efcc%E2%80%99s-mandate-in-proper-perspective.html> (accessed 21/07/12)

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against money laundering involving PEPs, the EFCC's struggle to maintain equilibrium between legal certainty and exigency of policy rests upon two fundamental, and at times sharply contradictory, objectives. First, considering the legal position; "The burden of proof in a suit or proceeding, lies on that person who would fail if no evidence at all were given on either side... If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt"⁷³. Second, the general policy states: "The EFCC will curb the menace of the corruption that constitutes the cog in the wheel of progress; protect national and foreign investments in the country; imbue the spirit of hard work in the citizenry and discourage ill-gotten wealth; identify illegally acquired wealth and confiscate it; build an upright workforce in both public and private sectors of the economy and; contribute to the global war against financial crimes"⁷⁴. It is clear from the latter that the EFCC is a result-oriented organisation, whose existence needs to be justified against measurable yardsticks. In the same breadth, it is a publically accountable organisation, whose activity is necessarily circumscribed by the due process of law. To succeed, the EFCC needs to have the benefit of a functioning administrative and judicial system devoid of corruption and undue influence. The country's law makers, on their part, need to eschew party loyalty and personal interests in order to ensure that the organisation brings to fruition the task legally assigned to it. This situation is made all the more cumbersome by the fact that many of the law makers are themselves the PEPs involved in the illegal activity which the EFCC is determined to eradicate. The extent to which the organisation has managed to untie this Gordian knot of a desire to emphasis the

⁷³ Laws of the Federation of Nigeria, vol 5, LexisNexis, 2011. Part VII – Burden of Proof (136) and (138) (1) respectively.

⁷⁴ Economic and Financial Crimes Commission, mission statement. See; <http://www.efccnigeria.org/> (accessed 16/06/12).

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establishment of effective legal policy while simultaneously promoting the achievement of immediate results, remains open to debate. However, an examination of some of their attempts can help to illuminate the problems faced.

2.2 The most egregious cases

The first case to be considered is that of the former Delta state governor, James Onofe Ibori, who pleaded guilty in February 2012, at Southwark Crown Court, to ten counts of conspiracy to launder the proceeds of crimes from the state, and was sentenced to thirteen years in jail. The honourable justice Anthony Pitts describing the amount of money involved suggested that it could be in excesses of two hundred million pounds and commented that “the confiscation proceedings may shed some further light on enormity of the sums involved”⁷⁵. In a swift reaction to the sentence the UK International Development Secretary, Andrew Mitchell said, “James Ibori’s sentence sends a strong and important message to those who seek to use Britain as a refuge for their crime”⁷⁶. In press coverage in the UK media sources were universal in their condemnation of the former governor producing numerous eye-catching headlines such as: “Former Wickes cashier James Ibori stole £50 million to ‘live like royalty’ after winning election in Nigeria – court told”⁷⁷, “Former Wickes cashier who became governor of oil-rich Nigerian state jailed for 13 years as judge says £50

⁷⁵ See; Mark Tran: “Former Nigerian state governor James Ibori receives 13 year-year sentence”. The Guardian, Tues, April 17th 2012. Front page. <http://www.guardian.co.uk/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced> (accessed 17/06/12)

⁷⁶ Ibid.

⁷⁷ ‘Daily Telegraph’, April 16th, 2012. <http://www.telegraph.co.uk/news/9207852/Former-Wickes-cashier-James-Ibori-stole-50m-to-live-like-royalty-after-winning-election-in-Nigeria-court-told.html> (accessed 17/06/12)

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million fraud figure may be ‘ludicrously low’⁷⁸ and on a more low key note on the BBC ‘Former Nigerian governor James Ibori jailed for 13 years’⁷⁹.

Ibori had come to live in the UK in the 1980s, and worked as a cashier at a Wickes DIY store in Ruislip, North West London. He was convicted of stealing from the store in 1991, but later returned to Nigeria to enter into politics. On arriving in Nigeria, he changed his date of birth to hide his criminal conviction, the fact of which would have been an impediment to his ambition to become governor. Finding accommodation in the ruling party, the People’s Democratic Party (PDP), he soon achieved his goal of winning a disputed election as governor in 1999, securing two terms in office. According to Anthony Pitts, the presiding judge at his trial, ‘it was during those two terms that he turned himself in short order into a multi-millionaire through corruption and theft in his powerful position as Delta state governor’⁸⁰.

While the British press were hailing the outcome as a landmark case of money laundering involving a prominent PEP, the Nigerian government and citizens were left wondering how the former governor managed to evade justice for a number of years in his home country, despite several attempts by the EFCC to prosecute him. Ibori had managed to get every case proffered against him thrown out of court, including that presented in the country’s Supreme Court, according to the testimony given by his Nigerian lawyer at Southwark Crown Court⁸¹. Thus, Ibori had pleaded guilty in the UK to money laundering offences which he had successfully denied in Nigerian courts. The question that arose for many observers is whether it was the

⁷⁸ ‘Daily Mail’, April 18th, 2012. <http://www.dailymail.co.uk/news/article-2130593/James-Ibori-Wickes-cashier-governor-oil-rich-Nigerian-state-scam.html> (accessed 17/06/12)

⁷⁹ ‘BBC’ April 17th, 2012. <http://www.bbc.co.uk/news/world-africa-17739388> (accessed 17/06/12)

⁸⁰ Ibid.

⁸¹ See; Tayo Oke, ‘Ibori’s day of reckoning’. ‘The Punch’ April 27th, 2012. <http://www.punchng.com/opinion/iboris-day-of-reckoning/> (accessed 17/06/12)

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incompetence of the prosecution or the corruption of the judiciary that ensured his acquittal in all the previous proceedings against him conducted in Nigeria. Why was the burden of proving his guilt in the UK overcome, but failed in Nigeria? Or, if the burden of proving his guilt was adequately discharged by the EFCC, what then stood in the way of his conviction?

It is difficult to answer either of the above questions with precision. There is, however, a general perception of judicial corruption with 'impunity'⁸², which makes high profile criminal cases against PEPs in Nigeria an arduous task. The US State Department Human Rights Report 2011⁸³ for instance commented on the Nigerian judiciary stating that: "Although the constitution and law provide for an independent judiciary, the judicial branch remains susceptible to pressure from the executive and legislative branches and the business sector... political leaders influenced the judiciary, particularly at the state and local level... official corruption and lack of will to implement court decisions also interfered with due process"⁸⁴. When asked to comment on the supposedly corrupt Nigerian judiciary, a veteran Nigeria lawyer, Dr. Tunji Braithwaite, replied with an illustrative example, "...one cannot trust some of the judges in these (PEPs) cases, I remember not long ago, a young lawyer swore to an affidavit alleging that this same Ibori bribed Supreme Court judges with \$50 million. Either that the young lawyer was mad or he had evidence, it was deadly risky for him to swear such an affidavit, but he did. Yet, the ex-governor got away"⁸⁵. As

⁸² See; "US: Nigerian Judiciary Corrupt With Impunity", 'This Day', May 25th 2012. <http://www.thisdaylive.com/articles/us-nigerian-judiciary-corrupt-with-impunity/116562/> (accessed 17/06/12)

⁸³ See; US Department of State Report. 2011 Human Rights Reports: Nigeria. Section1(e). <http://www.state.gov/j/drl/rls/hrrpt/2011/af/186229.htm> (accessed 17/06/12)

⁸⁴ Ibid.

⁸⁵ See; a rare interview conducted with Dr. Tunji Braithwaite, upon the conferment of the award of "Most Outstanding Nigerian Human Rights Legal icon" by the African Leadership Magazine, Washington D.C, USA. 'The Punch' April 29th 2012. <http://www.punchng.com/feature/when-the-subsidy-scam-protest-starts-even-policemen-will-join-us-braithwaite/> (accessed 17/06/12)

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noted, “it is one thing for a law to be on the statute books and it is another to enforce it”⁸⁶. In an earlier case of graft involving another high profile PEP, the former speaker of the House of Representative, Dimeji Bankole, was arrested by the EFCC for taking in excess of \$66m (£40m) in ‘loans’ for his personal office from a Nigerian bank, the United Bank for Africa PLC⁸⁷. This was on top of his salary and the money already budgeted for his office⁸⁸. Upon presentation of the case against him and his deputy, Usman Nafada, before a High Court Judge in the capital, Abuja, they were granted bail but were immediately re-arrested and charged at a different court, also in Abuja, only for the charges against them to be thrown out by a judge at a later hearing⁸⁹. The same situation arises in the Ibori’s and similar cases. Nigeria’s mainstream media were quick to condemn what they saw as another glaring missed opportunity for the EFCC to demonstrate resolve and the headlines bemoaned the “EFCC’s litany of woes”⁹⁰ and “Nigeria’s high profile corruption burden”⁹¹. Although, the anti-corruption agency insists the speaker and his deputy still “have a case to answer”⁹², it acknowledged that it faces some fundamental problems,

⁸⁶ E.F.Fadayomi “Eradication of Corruption and Other Economic Crimes Within the Administration of Justice System; Problems and Prospects” in B. Ajibola (ed) Perspectives on Corruption and Other Economic Crimes in Nigeria. Federal Ministry of Justice Law Review. Federal Ministry of Justice Publications, 1991, page 208.

⁸⁷ See; “Nigerian Speaker Dimeji Bankole Arrested” ‘The Guardian’, June 6th 2011. <http://www.guardian.co.uk/world/2011/jun/06/nigerian-politician-dimeli-bankole-arrested> (accessed 17/06/12)

⁸⁸ Ibid. The paper highlights what is already common knowledge to Nigerians that membership of the country’s National Assembly is one of the most lucrative in the world. Even low ranking members can expect to earn a take-home pay of over \$1m annually, coupled with the ability to divert other budgetary allocations for their personal convenience in a nation where billions of dollars of oil revenue routinely go missing.

⁸⁹ See; “Nigeria ex-speaker Dimeji Bankole cleared of fraud”, BBC World, January 31st, 2012. <http://www.bbc.co.uk/news/world-africa-16821097> (17/06/12)

⁹⁰ Nigerian Compass, April 12th 2012. http://www.compassnewspaper.org/index.php?option=com_content&view=article&id=1848:efccs-litany-of-woes&catid=67:analysis&Itemid=217 (accessed 17/06/12)

⁹¹ Punch May 12th 2012 <http://www.punchng.com/opinion/nigerias-high-profile-corruption-burden/> (accessed 17/06/12)

⁹² See EFCC Press release, January 23rd, 2012. http://www.efccnigeria.org/20120123_N38Bn_Scam.html (accessed 17/06/12)

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including corruption within its own ranks⁹³. The claims that a “string of acquittals and dismissals of its [the EFCC’s] litigations against some prominent Nigerians being traced to conspiracy of external prosecutors hired by the immediate past leadership of the organisation”⁹⁴ is unproven and unverifiable, but it reflects clearly the growing concern surrounding its ability to effectively prosecute PEP corruption cases. The past leadership of the EFCC had, in fact, published what it called the ‘advisory list’ of corrupt PEPs prior to the country’s general election in 2010. This was first published on the EFCC website but was quickly withdrawn following a storm of protests by key national politicians.

The names included that of several prominent PEPs of which a few shall be highlighted below. The first example is Mr. Ayo Fayose, the former governor of Ekiti State who was arraigned on fifty one counts of fraud. His case was originally filed in Lagos, the former capital city and then transferred to his home state. Several applications for adjournment of the case have since gone through the courts, and no resolution one way or the other has been reached since 2006. Second, is Ms Adenike Grange, the former minister of health, who was arraigned on fifty six counts of fraud. Her case has been on-going since 2008. Third, is Orji Uzor Kalu, the former governor of Abia State arraigned on 107 counts of fraud with his case on-going since 2007 and

⁹³ See, “There is corruption in EFCC – Lamorde”, February 16th 2012. This is a report of a statement by Ibrahim Lamorde in a testimony to the Nigerian Senate following his confirmation as Chairman of EFCC. <http://www.vanguardngr.com/2012/02/there-is-corruption-in-efcc-lamorde/> (accessed 17/06/12)

⁹⁴ See; “Why we lose high profile cases – EFCC”, ‘Daily Independent’, April 15th, 2012. <http://dailyindependentnig.com/2012/04/why-we-lose-high-profile-cases-efcc/> (accessed 17/06/12).

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finally, there is Mrs. Iyabo Obasanjo-Bello, the former Senator of the Federal Republic arraigned on fifty six counts of fraud with her case on-going since 2008⁹⁵.

Rather than defend the publication of the list as a matter of policy, the then Chairman of the EFCC, Waziri, hastily retreated from the motive behind its publication when its legality was challenged in Parliament, primarily by the colleagues of some of the affected PEPs. The EFCC Chairman's ambivalence about the list was revealed in a newspaper interview where she was quoted as saying: "I never said that (the EFCC) will publish a list of corrupt politicians. I said we were investigating certain persons and if, and when, anyone requests – these are public documents, they are in court, the people appearing in court are in public domain. So, if anybody asks, we will give them, although, it is on our internet"⁹⁶. In the tone of an organisation under siege, she remarked: "I have taken a lot of bashing for something I never knew about...the advisory list was posted on the EFCC website. I never compiled any list, neither did I send any to any political party"⁹⁷.

In their eagerness to achieve tangible results towards the policy objective of eliminating the "menace of corruption", discouraging "ill-gotten wealth", building "an upright workforce" and imbuing "the spirit of hard work in the citizenry" etc., the

⁹⁵ The List was widely publicised in numerous Nigerian media outlets. For example, visit: <http://www.nairaland.com/538620/efcc-advisory-list> (accessed 17/06/12). There were no less than fifty five names on the list at the last count, but it is certain to have increased considerably since the initial publication. A lack of judgement at the Supreme Court level on these cases makes judicial pronouncements difficult to weave into an analysis of this kind.

⁹⁶ See "No plan to publish the list of corrupt Nigerian politicians – EFCC", 'African Outlook', (undated). http://www.africanoutlookonline.com/index.php?option=com_content&view=article&id=1238:no-plan-to-publish-list-of-corrupt-nigerian-politicians-efcc&Itemid=53 (accessed 17/06/12)

⁹⁷ See; "Nigeria: Corruption list not from EFCC – Waziri" AllAfrica.com, October 29th, 2010. <http://allafrica.com/stories/201011010607.html> (accessed 17/06/12)

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EFCC, it seems adopted the mind-set of the ‘ends-justify-the-means’ above legal certainty. Moreover, it appears that the organisation has on-going cases that are well beyond its capacity to sustain. On indictments, it enters counts against individual suspects averaging at around thirty or in some cases fifty and even one hundred and seven in the case of the former governor of Abia State, Orji Kalu. James Ibori, considered one of the most notorious PEPs, had a staggering one hundred and seventy counts on the charge sheet against him, yet the EFCC failed in its attempt to mount a successful case against him. In contrast, the counts against him at Southwark Crown Court in the UK totalled just fourteen (reduced to thirteen at the commencement of the trial). He pleaded guilty to all of them and was jailed for thirteen years; a result the EFCC would have been proud of. However it should be noted that the EFCC faced an array of obstacles including the widely acknowledged corruption within the judiciary and legislature in Nigeria. This was coupled with inadequate accounting practices in the financial sector which hampered investigations, strong pressure from the media, powerful vested interests, personnel incompetence and even corruption within the EFCC itself. Thus, all of these factors contributed to make attaining the required criminal standard of “proof beyond a reasonable doubt” a herculean task for the EFCC when dealing with such high profile cases.

2.3 Consequences of failure

The consequence of the above is to create a state of affairs whereby the rule of law becomes circumscribed and prosecution becomes an event rather than a process. This form of legalism takes the dimension of a cobweb when the substance of the charges against a suspect also, simultaneously, acquires less significance than the process

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through which the case is being prosecuted. This scenario was described as an ‘abuse of court’ by a justice of the Supreme Court in a previously decided Nigerian case and his summary statement makes for interesting reading: “Abuse of court processes has been variously defined by this court over the years and includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice. Where two or more similar processes are issued by a party against the same party/parties in respect of the exercise of the same right and same subject matter or where the process of the court has not been used bona fide and properly”⁹⁸. Considering both the high volume of cases being generated by the actions of various PEPs at any particular period of time, and the attitudes to political criminality found across Africa, the reliance on criminal jurisdiction in regards to PEPs and money laundering cases does not necessarily represent a futile effort but it may be tantamount to shooting at a moving target. It is therefore imperative to deploy a more versatile tool that does not supplant, but transcends the narrow confines of criminal jurisdiction.

2.4 Normative value

The denunciation of money laundering as a public crime heightens the need for prosecuting such crimes with all of the enforcement instruments a state can muster.

This is even more so the case when the target is a PEP however it remains the contention of this work that the normative value of an exclusive focus on criminal

⁹⁸ Per Samuel Nkanu Onnoghen , Justice of the Supreme Court (JSC), in *African Continental Bank Plc v Damian Ikechukuwu Nwaigwe, Tony Egwuatu, Ogbonna Mbagwu*, Abuja, January 14th 2011, pages 7-8.
http://easylawonline.files.wordpress.com/2011/01/african-con-bnk-v-nwaigw_000012.pdf (accessed 18/06/12)

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sanction in cases involving PEPs in the African context is overstated. In a case which brought the distinction between criminal sanction and civil settlement into a sharp focus, Lord Justice Thomas was unambiguous on which path to follow when it comes to the wider purpose of applying a criminal sanction: “A civil settlement would not be appropriate because those who commit serious crimes [such] as [the] corruption of senior government officials could not be viewed or treated differently to other criminals. It would be inconsistent with basic principles of justice for criminality of corporations to be glossed over by a civil, as opposed to a criminal, sanction”⁹⁹. It is clear from this and other similar rationales, that the “characterisation of conduct as criminal does have an obvious denunciatory and educative effect”¹⁰⁰. While this is generally correct, when considering facts such as; the constitutional protection of the accused in a criminal process, the enormous resources at the disposal of an accused PEP (for instance to assemble highly paid legal experts to create a cobweb of legalism to keep the case in abeyance), the logistics involved in mounting prosecutions on many fronts by an agency with finite resources and the pervasive corruption of the institutions of government, including the judiciary, the ballast of civil jurisdiction may not only be essential but might indeed be the only option.

⁹⁹ See Thomas, L.J. in *R v Innospec Ltd* [2010] *Lloyd's Rep. F.C.* 462; [2010] *Crim L.R.* 665. The defendant company and their subsidiary in this case had pleaded guilty to conspiracy to corrupt in a case investigated by both the US and UK investigators. The US authorities agreed that in light of the culprits' full admission and cooperation, they should not seek to impose a penalty which would drive them out of business. So, the US court duly approved the fine as requested, to the dissatisfaction of the judge in the UK, who saw extra benefits in a criminal denunciation of the companies involved. He insisted that the UK part of the fine should become payable as a “criminal fine”.

¹⁰⁰ Barry A.K Rider, “Civilising the law: the use of civil and administrative proceedings to enforce financial services law” in ‘*Journal of Financial Crime*’, 1995, 3 (1), 11-33.

Chapter Three: From the Legalism of Criminal Prosecution to the Ballast of Civil Jurisdiction

Précis

The civil jurisdiction of the kind this paper envisions is one that finds logic in the jurisprudence of trusts law. As this paper will demonstrate, trusts law gives effect to equitable remedies, which do not necessarily amount to softer outcomes than would be provided by a criminal sanction in a similar situation. In some cases, the outcome of the civil case might even be harsher. Cases of official corruption and bribery have engaged both criminal and trusts law scholars for centuries in common law jurisdictions and over the decades, both criminal law and trusts law have proved to be equally tough on applying the full rigour of the law and meting out the appropriate sanctions for wrongdoing. In trusts law, the concept of ‘fiduciary’ has been the main tool for dealing with the type of crime involving PEPs.

3.1 Constructing a fiduciary relationship between PEPs and state resources

The concept of a fiduciary revolves around the obligations imposed on a trustee holding property for the benefit of another, namely; the beneficiary. A fiduciary duty is an amalgam of ‘overlapping obligations concerned with the promotion of loyalty and faithfulness’¹⁰¹. It applies mainly in a trustee-beneficiary relationship, but it also applies in other situations, as the word ‘fiduciary’ means ‘trust like’, with its Latin roots in fides, meaning faith and fiducia, meaning trust. The concept was developed by the Chancery, and its obligations rigorously enforced as a matter of public policy,

¹⁰¹ G. Watt. *Trust and Equity*, 4th ed. Oxford University Press, 2010, pages 333-361

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as attested to in *Regal (Hastings) Ltd v Gulliver and Others*¹⁰², where their Lordships made it clear that “the rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides...the liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account”. Since that judgement was made, further attempts have been made to classify all kinds of relationships as falling within the rubrics of a fiduciary. This is for the simple reason that the remedies available to the beneficiaries of a fiduciary relationship are wide-ranging and cover a lot of ground and represent options which are not readily available in contract or tort law.

Based on the discussion presented thus far, the types of potentially fiduciary relationships that are easily recognisable are quite obvious including: employers/employees, directors/board members, partnerships, principal/agent, solicitors/clients and doctors/patients. Broadly speaking, however, “...The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary”¹⁰³. This then represents the core liability of a fiduciary which in itself contains several important elements, namely: A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his interest and duty may conflict; and he may not act for his own benefit or the benefit of a third party without informed consent of his

¹⁰² *Regal (Hastings) Ltd v Gullivers and Others* (House of Lords, 20th Feb 1942) [1967] AC 134, @ page 145.

¹⁰³ Per Millet, L.J. in *Bristol and West Building Society v Mothew* [1997] 2 W.L.R. 436, @ page 18.

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principal¹⁰⁴. Apart from the clarity this definition brings to the nature of a fiduciary's liability, what also emerges from such a definition is that the specific categories of what constitutes a fiduciary are open¹⁰⁵. This is where it might be appropriate to categorise money stolen in corruption as money "held on trust in the interest of countries where it would have originated"¹⁰⁶. The type of theft referred to here comes in form of a bribe; a most potent symbol of a breach of trust, and since "equity insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty"¹⁰⁷, it stands to reason, therefore, that the category of fiduciary could be extended to include PEPs vis-à-vis state resources¹⁰⁸.

The responsibilities of the fiduciary are entirely based on a standard of utmost good faith in general terms¹⁰⁹ and this is not inconsistent with the standard expected of PEPs in relation to their access to, and control of, state resources. The decision in *Regal v Gulliver* referred to earlier, built on a tradition of judicial intolerance to even the appearance of abuse of a fiduciary position. In the case of *Keech v Sanford*¹¹⁰, where, to prevent a lease from being lost to a stranger, the trustee took advantage of purchasing it for himself since the beneficiary had lost the legal right to have it assigned to him, as a minor. It was thus emphasised that regardless of any

¹⁰⁴ Ibid. His Lordship made clear in the case that this list is not exhaustive, but it is sufficient to indicate the defining characteristics of a fiduciary.

¹⁰⁵ A. Hudson. *Equity and Trusts*, 6th ed. Routledge, 2010, pages 616-628.

¹⁰⁶ N. Mugarura. "The effect of corruption factor in harnessing global anti-money laundering regimes", in 'Journal of Money Laundering Control', 2010, 13(3), 272-281.

¹⁰⁷ M. Halliwell. "The ghost of *Lister and Co v Stubbs*" in 'Conveyancer and Property Lawyer', 2005, Jan/Feb, 88-92.

¹⁰⁸ State resources are broadly defined to embrace any level of monetary or physical assets directly or indirectly at the disposal of the PEP and his agents.

¹⁰⁹ Hudson, *ibid.*

¹¹⁰ *Keech v Sandford*, (1726), Select Case Temp. King 61. 25 E.R. 223.

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wrongdoing on the part of the trustee, “the trustee is the only person of all mankind who could not have it”¹¹¹.

However, perhaps the single best justification for imposing fiduciary obligations on a PEP, from the perspective of fraud investigation agencies, is the creation of what Hudson colourfully describes as “a virtual land of milk and honey in which the fiduciary owes everything to the beneficiary” which in the case of a PEP refers to the state. As Hudson describes, ‘The beneficiary rides in an equitable sedan chair borne by the fiduciary, cushioned against every bump in the road’¹¹² And consequently, once there is a finding of a fiduciary relationship, the property involved, often large amounts of state resources in the case of a PEP, are to become ‘trust property’. The question then is how one arrives at the rationale for the existence of a trust when there is clearly no intention and no undertakings on the part of the PEP to enter into a trust relationship with state resources? The answer to this lies in the examination of trusts implied¹¹³ by law or put another way; a constructive trust.

3.2 Constructive Trust

The imposition of a trust on a party occurs when the courts find that the conscience of a party or parties to a transaction has been affected to such a degree that the court ought to impose a trust. This decision is often taken with the view to stopping an unconscionable behaviour or action. Such trusts come in three different forms: constructive trusts, resulting trusts and estoppels. The most relevant for the purpose

¹¹¹ Ibid.

¹¹² Hudson, *ibid.* It is worth sounding a note of caution against this highly seductive proposition. Within the African context, in respect of PEPs, the possibility of the odd bumpy ride even while sitting inside a lofty sedan chair hangs on the head of any beneficiary like a sword of Damocles. The capability of a determined and wily fiduciary to spring a surprise on any beneficiary and their prosecuting agents ought not to be underestimated. Hudson’s point is well made nonetheless.

¹¹³ ‘implied’ in English law means trusts other than that which was expressly declared by the Settlor.

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of the present discussion is constructive trusts. A demonstration of how the principle of a constructive trust works could be found in the statement of Lord Browne-Wilkinson in the landmark case of *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669: “Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust)”¹¹⁴. To say that a trust is constructive is, in fact, to say that it arises by ‘construction of law’, in other words, by the very operation of law¹¹⁵. When a constructive trust is implied in this way, it happens that the interests of justice are thought to be greater than prioritising the position of ‘certainty’ associated with legal title¹¹⁶. So, the legal owner must not only have behaved unconscionably, they must also have known that they have so-behaved. It is doubtful whether their Lordships are right in emphasising the role of conscience in imposing this particular trust, however, it should be noted that all trusts are indeed predicated on the idea of conscience.

Consequently, where anyone in a fiduciary position (such as a PEP in relation to State resources), obtains a profit or gains by virtue of that position, they may not keep it for themselves but will be liable for it as a constructive trustee. This includes profits made from ‘insider information’ and other dealings in knowledge. In *Boardman v Phipps* [1966] 3 WLR 1009, knowledge of the affairs of a company acquired from the appellants’ vantage negotiating position was held to be trust property for which an

¹¹⁴ G.J Virgo. *Maudsley and Burn’s Trusts and Trustees – Cases and Materials*. 7th ed, Oxford University Press, 2008, pages 280-284.

¹¹⁵ J.E. Penner. *The Law of Trusts*. 7th ed, Oxford University Press, 2010, page 94.

¹¹⁶ S. Wilson. *Todd Wilson’s Textbook on Trusts*. 10th ed, Oxford University Press, 2011, page 141.

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account must be rendered. This was decided even though they had in fact acted in a manner beneficial to the trust . This was not held to be enough as they had placed themselves in a ‘special position of a fiduciary character’ in relations to the negotiations which took place, and from which they profited. The state would thus not have to prove any loss if a PEP where to finds themselves in a similar factual situation as represented by this case. Incidentally, neither would the state have to prove the existence of fraud on the part of the PEP. The case of *Regal (Hastings) Ltd v Gulliver and Others* [1967 2 A.C. 134, underlines this point. It was stated by Lord Russell of Killowen that “the rule of equity which insists on those, who by virtue of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides and other ancillary matters”. The liability arises from the mere fact of a profit having been made and it has nothing to do with intention, honest or otherwise. This is the risk that any profiteering fiduciary carries. Thus far the property ‘vested’ in a trustee or fiduciary, and the knowledge or information that came their way has been discussed but what about the poignant¹¹⁷ situation of bribes and ‘unjust enrichment’?

3.3 Unjust Enrichment

Building on the foregoing discussion, “one of the clearest situations in which a constructive trust will operate is that of unauthorised fiduciary gains”¹¹⁸. This comes in different forms, for instance, where a contract for additional services outside the terms of the original agreement entitles a claimant to seek a *quantum meruit* remedy. *Benedetti v Sawiris* [2010] EWCA Civ 1427 is illustrative of this as the case is held as the authority for the proposition that an underlying claim where a *quantum meruit* is

¹¹⁷ Poignant for our purposes here.

¹¹⁸ M. Haley. Equity and Trusts first ed, London: Sweet and Maxwell, 2006, page 267.

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sought is unjust enrichment¹¹⁹. Unjust enrichment could also appear in the form of an unauthorised (or secret) commission¹²⁰. If extended more liberally, ‘commission’ could well include bribes and related payments. The problem with this, in respect of PEPs, is that the law in this area has been developed in reference to contractual, quasi-contractual and implied contractual relationships only, until the landmark decision in *Westdeutsche Landesbank Girozentrale v Islington LBC*¹²¹ made it clear that in an action for the repayment of money, it was not relevant that the defendant had no contractual relations with the plaintiff. This is just as well, since bribes and illicit monies are not generally derived from legitimate contractual obligations.

It is thought that claims based on unjust enrichment “always results in an obligation to make restitution”¹²² and a number of courts within the Commonwealth jurisdictions have given prominence to the concept of unjust enrichment in terms of the ‘multicausality’ of the awards attached to it. The Supreme Court of Canada, for instance, held that there are at least two distinct categories of restitution for unjust enrichment: (1) wrongdoing and (2) unjust enrichment¹²³. In the same vein, the High Court of Australia distinguished, in a recent case, between unjust enrichment and a breach of fiduciary duty¹²⁴. The House of Lords also affirmed that an action in restitution did not require any loss to be suffered by the claimant, as the focus is on the benefit received by the defendant¹²⁵. The benefit received from the point of view

¹¹⁹ G. Virgo. “Unjust enrichment – valuing services” (Case comment) in, ‘Cambridge Law Journal’, 2011, 70(2), 299-301

¹²⁰ *Williams v Barton* [1927] 2 Ch.9, 11.

¹²¹ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 All E.R. 961

¹²² James Edelman, “The measure of restitution and the future of restitutionary damages” http://www.propertybar.org.uk/data/assets/pdf_file/0006/83778/The_measure_of_restitution_and_the_future_of_restitutionary_damages_J_Edelman (accessed 20/07/12)

¹²³ *Kingstreet Investments Ltd v New Brunswick* [2007] SCC 1; [2007] 1 SCR 3, 33.

¹²⁴ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89, 150.

¹²⁵ *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561, 116.

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of PEPs will usually be illegal, and the place of illegality within the jurisprudence of restitution has been viewed in some quarters as a “vitiating” factor and as a defence, without close consideration or explanation of its role in either context¹²⁶.

To this effect, therefore, the Australia decision in *Equuscorp Pty Limited v Haxton* [2012] HCA 7; (2012) 86 ALJR 296 clarifies the role of illegality for this purpose, referring to it as a “compendious term for the principle that a plaintiff will be allowed or denied recovery where otherwise the law’s prohibition on certain conduct would be stultified”¹²⁷. In the situation of a PEP, this clarification helps to prevent the use of illegality as a potential shield from justice. On the whole, restitution is concerned with reclaiming some profit which is adjudged to be ‘unjust’ as it affects the conscience of the recipient. The profit (or the enrichment) is reversed by a process which involves the disgorgement of any benefit received by the defendant who has done wrong in law, or alternatively where no legal wrong has occurred but benefits have been obtained¹²⁸. This is clearly a useful tool that could help to improve the enforcement of AML legislation in certain respects, but could also prove quite problematic. First, ‘the absence of any agreed theory of what exactly constitutes ‘just’ and ‘unjust’ makes the concept of unjust enrichment currently unsuitable for wider application¹²⁹. This is even more so the case, in the specific context of PEPs in Africa, where the judiciary that would be relied upon to fashion the law are themselves intertwined with the difficulties that are encountered by prosecution agencies across the continent. As said in common parlance it is a huge leap of faith to expect turkeys to vote for Christmas. Moreover, given that ‘the defendant’s ‘unjust enrichment’ is

¹²⁶ E. Bant. “Illegality and the revival of unjust enrichment law in Australia” in, ‘Law Quarterly Review’, 201, 128(Jul), 341-344.

¹²⁷ Ibid.

¹²⁸ See Editorial. “When can deposits be forfeited” in, ‘Property Law Bulletin’, 2012, 32(7), 49-50.

¹²⁹ Endelman, *ibid.*

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not in itself sufficient to provide the claimant with a proprietary remedy¹³⁰, as such remedies are equitable in nature, this calls for the establishment of some type of fiduciary positions. This then is the topic addressed in the following section.

3.4 Attorney General of Hong-Kong v Reid – Revisited¹³¹

An illustrative case related to the issues described in the preceding sections is the above, and it involved a New Zealand solicitor and the deputy crown prosecutor in Hong-Kong, who had accepted bribes from criminals during the course of his career in order to shield them from prosecution. The prosecutor had spent some of the wealth he obtained from bribes on maintain a lavish lifestyle and also invested in properties and real estate. He was prosecuted and convicted for his crimes, but the question arose of what to do with the money which was obtained from the bribes. Following older law; *Lister & Co v Stubbs (1890) 45 CH D 1*, would have meant that all the recipients of such bribes had to do was repay the exact amount of the bribes to their employers. In other words, if an agent took one hundred dollars in bribe, he pays back one hundred dollars to his principal¹³². However, this response does not take account of the value gained from receiving the bribery money. This is why Lord Templeman's judicial creativity in this regard proved to be quite interesting. He held that the bribes and any investments associated with them are held on a proprietary constructive trust, presumably, for the government of Hong-Kong. The value of the investments derived from the bribes per se, could not possibly be said to be 'owned'

¹³⁰ J. E. Martin. *Hanbury and Martin Modern Equity*. 7th ed, London: Sweet and Maxwell, 2005, page 682. For an authoritative discussion on the law of restitution see, P. Birks, *An Introduction to the Law of Restitution*. Oxford: Clarendon Press, 1989.

¹³¹ *Attorney General of Hong-Kong v Reid (Privy Council – New Zealand)* [1994] 1 A.C. 324.

¹³² This makes it look almost like a debtor-creditor relationship. See 'Case Comments' by M.T. Lazarides. "Duties of fiduciaries: recovery of profits", in 'International Company and Commercial Law Review', 1994, 5 (3), C61, and "Constructive trusts: agent receiving bribe will ordinarily be debtor rather than trustee", in 'Journal of International Banking Law', 1986, 1 (4), 161-162.

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by the government, but His Lordship went one step further by deploying the maxim: “Equity deemed as done that which ought to have been done”. Or put another way, “as soon as the bribe was received it should have been paid or transferred *instanter* to the person who suffered from the breach of duty”¹³³. In this case, therefore, since the bribes ought to have been handed back to the government, equity assumed it had indeed been handed over, and any additional value derived from the bribes would as a result also have to be accounted for. Even if the investments made with the bribes had fallen in value, the taker of the bribes, in this case Reid, would be made personally liable for the shortfall. Some have argued that the use of this maxim without reference to a pre-identified asset is entirely novel¹³⁴, while others argue that the use of ‘constructive trusts’ in this way risks endangering “the accepted distinction between proprietary and personal claim; and could lead to a less than satisfactory result in ordering priority between the competing claims in case of an insolvent fiduciary”¹³⁵. The imposition of constructive proprietary claims often results in a windfall for the beneficiary, but “it is not so obvious that such a windfall is justified where the contest is between creditors who have given value and the principal who has not”¹³⁶. Instead, it is suggested that, “where a causative connection can be shown, a personal claim for the profit would still suffice, without the imposition of a trust”¹³⁷.

The above criticisms are valid in an ideal world, but the reality and extent of bribery, theft, graft and money laundering and the involvement of an increasing numbers of PEPs calls for a more creative use of trusts law, especially, in consideration of the

¹³³ A.J Boyle. “Attorney-General v Reid: the company law implications”, in ‘Company Lawyer’, 1995, 16 (5), 131-133.

¹³⁴ S. Gardner. “Two Maxims of Equity”, in Cambridge Law Journal, 54 (1), March 1995, pp 60-68

¹³⁵ D. Cowan. “Lister & Co v Stubbs: Who Profits?” in ‘Journal of Business Law’, 1996, Jan, 22-28

¹³⁶ A. Jones. “Bribing the DPP: should he profit from abusing his position?” in, ‘Conveyancer and Property Lawyer’, 1994, Mar/Apr, 156-165.

¹³⁷ P. Watts. “Bribes and constructive trusts” in, ‘Law Quarterly Review’, 1994, 110(Apr), 178-180.

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difficulties associated with criminal jurisdiction, discussed in detail in the previous chapters. For instance, one of the more obvious advantages of a proprietary remedy in the judgement is “that the property may be traced into the hands of third parties, other than the bona fide purchaser without notice”¹³⁸. The object of this type of equitable remedy is thus to ensure that the fiduciary does not retain profit¹³⁹. As a matter of historical construct, “the trust, the chief creation of equity, began as a right *in personam* against the trustee, but the Court of Chancery over time came to enforce the beneficiary’s rights against so many other people that the rights came to take on a proprietary character”¹⁴⁰. Proprietary interests attached to property are also significant in the way that the US law is enforced in this area. The problem of official corruption involving PEPs in Africa is as a result only novel in regards to its increasing level. As Johnson describes, “in all areas of business and governmental activity there is the danger that business ethics may be ignored and inducement offered or demanded as a price for securing a business opportunity”¹⁴¹. However, “when the issue of corruption (and PEP) is discussed, the category that is most commonly referred to is bribery”¹⁴². Consequently, therefore, in terms of using civil jurisdiction to combat corruption, the case in *Reid* “upholds the clear principle that the recipient of a bribe, given as an inducement to betray a trust, can obtain no benefit from the bribe, and can make no profit from the crime”¹⁴³. ‘It is clear then since *Keech v Sandford (1726) Sel Cas Ch 61* that public policy demands that the fiduciary disgorge all unauthorised profits to the beneficiary, even where the fiduciary acts

¹³⁸ R. Edwards and N. Stockwell. *Trust and Equity*. Pearson, 2007, pp 285-298.

¹³⁹ P. H. Pettit. *Equity and the Law of Trusts*. 11th ed, Oxford University Press, 2009, page 142.

¹⁴⁰ R. C. Nolan. “The wages of sin: iniquity in equity following A-G for Hong-Kong v Reid” in, ‘*Company Lawyer*’ 1994, 15(1), 3-10.

¹⁴¹ H. Johnson. “Dealing with bribes”, in ‘*International Banking and Financial Law*’, 1994, 12 (9), 94-96.

¹⁴² R. Alexander. “Corruption as a financial crime”, in ‘*Company Lawyer*’, 2009, 30(4), 98-104.

¹⁴³ S. Robert-Tissot. “Attorney General of Hong-Kong v Reid: recovery from the corrupt” in, ‘*Journal of Financial Crime*’, 1995, 3(1), 61-63.

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honestly and the beneficiary was not in a position to earn the profit for itself¹⁴⁴. Following these court decisions, there have been further developments of legislation both in the UK, Nigeria and other parts of Africa with a focus on criminalising bribery and money laundering. We have, for instance the POCA (2002, and 2007) in the UK, and in Nigeria we have the Independent Corrupt Practices and Other Related Offences Commission (ICPC), and of course, the EFCC. These are, however, criminal legislations, which this paper has argued, present only a limited contribution for efforts to reduce the incidents of PEP involvement in money laundering. Part V of POCA has within it civil recovery orders which are applied in money laundering and other enforcement cases however, these are usually only invoked at the conclusion of a criminal prosecution.

Bringing the force of civil action against the individuals involved thus goes hand-in-hand with criminal enforcement. In fact with civil actions being brought against former President Suharto of Indonesia, former Zambian President Chiluba, Pakistan's President, Zardari, Prince Bolkiah, the youngest brother of the Sultan of Brunei and so on there has been "an apparent rise in interest in civil actions against corruption"¹⁴⁵ targeted at PEPs around the world. Perhaps the most important aspect of using civil jurisdiction is first, that it does not obviate criminal prosecution and second, there is no need to show the dishonesty normally associated with "corruption". In addition, the victim of grand thefts and grafts, (the state and its resources), will be able to trace any looted assets in equity rather than common law. Furthermore, in terms of fraudulent or inflated contracts, a constructive trust would immediately arise in favour

¹⁴⁴ T. Allen. "Bribes and Constructive Trusts: A-G of Hong-Kong v Reid" in, 'The Modern Law Review', 58:1, Jan, 1995pp 87-94

¹⁴⁵ S. N. M. Young. "Why civil actions against corruption?" in, 'Journal of Financial Crime', 2009, 16(2), 144-159.

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of the victim¹⁴⁶. This is an important additional element offered by the use of civil enforcement powers which would be extremely valuable in dealing with some of the grossest abuses of official positions. While it is true that tracing in common law simply establishes title to one's own property or its "clean" (not mixed) substitute¹⁴⁷, tracing in equity allows the beneficiary to claim against monies deposited in mixed accounts and those invested in properties, shares and offshore accounts. It presupposes the existence of an equitable interest in a property already held on trust¹⁴⁸. Although bribery and corruption are still seen as "a way of life or part of life in Nigeria"¹⁴⁹, it could equally be said that "no sector of society anywhere has been free from bribery, not least the English judiciary"¹⁵⁰.

Nonetheless, it is clear from the discussion thus far that judicial attitudes to bribery (at least in the West) have been evolving over time- with bribery seen by Lord Templeman in *Att-Gen for HK v Reid* as "an evil practice which threatens the foundations of any civilised society". On account of this and various other factors previously discussed, this makes a PEP "who will only perform his or her duties upon payment of a bribe creates a market in the discharge of executive functions of government highly destructive of the rule of law"¹⁵¹. This is a poignant reminder of what needs to be done through civil remedies. For this purpose, in the case of Nigeria a root and branch reform of the judiciary would be necessary in order to make the

¹⁴⁶ T. Mascarenhas. "Constructive trusts in fraud cases" in, 'International Company and Commercial Law Review', 2011, 22(10), 318-321.

¹⁴⁷ *FC Jones & Sons v Jones* [1997] 1 W.L.R. 51.

¹⁴⁸ See *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, *Twinsectra Ltd v Yardely* [2002] UKHL 12. A full, detailed discussion of tracing remedies is beyond the scope of this work.

¹⁴⁹ A. Y. Shehu. "Combating Corruption in Nigeria – bliss or bluster" in, 'Journal of Financial Crime', 2004, 12(1), 69-87.

¹⁵⁰ G. Wilkes. "Aprincely kind of thieving" in, 'Private Client Business', 2002, 1, 55-60.

¹⁵¹ P. Alldridge. "Reforming the criminal law of corruption" in, 'Criminal Law Forum', 2000, 11(3), 287-322.

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criminal prosecution of PEPs involved in money laundering more effective and attractive. Such an outcome is however 'easier said than done', as this paper has demonstrated clearly that reactions in this area are inevitably entangled with wider socio-political considerations meaning that even more complex solutions are called for. That is not to say that reform cannot be achieved; it is only to suggest that while contemplating a fundamental reform of the kind necessary, the use of civil jurisdiction in the pursuit of justice against PEPs and money laundering in the specific context of Africa is potentially an effective weapon, whose value is yet to be fully understood, let alone explored.

Conclusion

Summary of key findings

The research in this paper has focused on addressing the phenomenon of money laundering and 'Politically Exposed Persons'. The paper has attempted to present a thorough examination of this issue specifically within the context of Nigeria, and by extension, Africa. Using the EFCC, Nigeria's main AML enforcement agency, the intricate balance between policy, law and implementation, has been dissected and the agency has been found wanting in a number of ways. Some of the difficulties which face the EFCC can be easily replicated across Africa, where various similar organisations owe their origins more to international pressure than a genuine desire of the elites in their home countries to root out corruption. During the course of this investigation, it has also been established that the growth of PEPs in Africa can be understood as existing as part of a continuum connected with the historical emergence of the continent from its colonial legacy. As such, PEPs are not new, and neither can they be said to represent a homogenous group. Regardless, the risk they pose to the rule of law in Africa, however, has never been more acute.

The international regulatory framework has produced a confluence of legislation across continents and this paper has contextualised these "laws" placing them within the unique African environment in which they are supposed to be operational. This paper has also highlighted that while producing a myriad of legislation to attempt to deal with the common problem of money laundering has served as a useful impetus

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for international cooperation in the area of cross-border crime, it has also had questionable effectiveness in terms of dealing with the issues surrounding corrupt-minded PEPs, whose *raison-d'être* remains ambiguous to policy makers and legislative draftsmen in the West. In view of this, some of the criminal legislation introduced in Africa in order to address these issues bear a striking resemblance to the ones drafted in Western countries.

Examining how one enforcement agency, the EFCC, has been able to utilise the criminal provisions to prosecute PEPs involved in money laundering this paper has shown that the agency has found it difficult to achieve tangible results. The tension between policy exigencies and an insistence on legal certainty (proof beyond a reasonable doubt) has created almost an intolerable burden on the organisation. Ample evidence has been provided in this paper that “the inter-play between the criminal law, especially when viewed from the perspective of anti-money laundering law, and the conduct of business within the environment of the civil law is not always simple or certain”¹⁵² and consequently it has been demonstrated that the cumulative effect of ineffective use of criminal jurisdiction has, ironically, turned the EFCC into the unwitting spider within a cobweb of legalism, created by its opponents in order to stymie its operations.

Furthermore, this research has revealed how the criminal enforcement of AML provisions has thus far been construed only in terms of defined and predictable legal remedies, and how this has contributed to the perception of the “incompetence” of AML agencies, in Nigeria and elsewhere. The normative effect of a whole range of

¹⁵² B. Rider. “A murkey world” in, ‘Company Lawyer’, 2003, 24(7), 193. See also a fascinating report by the same author: “Civilising the law: the use of civil and administrative proceedings to enforce financial services law” in, ‘Journal of Financial Crime’, 1995, 3(1), 11-33.

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criminal sanctions adopted by the West and pressed upon legislators in other countries for replication and implementation during the last decade, represents a distinctly Eurocentric view of crime and punishment. Moreover, as this paper has detailed, these views are not necessarily shared by policy makers in Africa. Indeed, this paper has demonstrated clearly that criminal sanctions concerning political malfeasance prove much less effective in Africa than they do in Western countries. In addition, it has been emphasised that this outcome is not simply a matter of “judicial corruption”, or “administrative incompetence” important though these factors may be in the aggregate trajectory of law enforcement in Africa. Rather, it is the contention of this research that the novelty presented by political leaders serving jail terms has long worn off in the psyche of the average African and as such it has lost much of its value as deterrence. Considering the PEPs involved in grand theft and bribery in Africa themselves it seems that they also have greater fear for the loss of the assets acquired than fears concerning the loss of their liberty. It stands to reason, therefore, that the excessive use of criminal jurisdiction in such a situation is counterproductive. It is for this reason that this paper has proposed a more creative use of civil jurisdiction in this regard and this proposal has led this research paper to identify the nexus between bribery, money laundering and PEPs, and its place within the African’s socio-legal-political milieu. The proposal presented for a shift in focus in favour of civil jurisdiction is not, in any way, intended to decriminalise bribery or money laundering, or indeed delegitimise any of the existing legislative provisions, but instead it is intended to provide AML enforcement agencies with a parallel civil avenue for asset-stripping those who wantonly asset-strip the state in Africa.

Suggestions for further research

This paper could be used as a springboard for further research into the costs and benefits of the criminal jurisdictions as currently applied in money laundering cases in Africa. It could also be an analytical tool for a comparative analysis of the situation in Asia and the Far East. This would greatly improve current understanding of financial crime in Western and non-Western countries. In addition to academic scholarship, there is a palpable need for a public debate around the themes of this paper. This could be in form of seminars in which practitioners and other experts in the field could brainstorm on the African perspective expressed so strongly in this paper. Such a public debate would present the ideal platform to critique the findings of this paper, and also to try and explore the practicalities of the paper's proposals.

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- The Post Online (Zambia)
- The Guardian
- Telegraph
- Daily Mail
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- Wall Street Journal
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