AN EVALUATION OF THE ROLE OF PROSECUTORIAL DISCRETION IN THE ANTI-MONEY LAUNDERING REGIME OF NIGERIA.

A thesis submitted in partial fulfilment of the requirements of Nottingham Trent University, for the Degree of Doctor of Philosophy.

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Acknowledgement

Great is thy faithfulness, o' God my father. I dedicate this research to the centre of my heart, Kamarachi, who was denied her fatherly attention in her infant years due to this research and my lovely wife Ihuoma, who has stood by me like the rock of Gibraltar. I love you, I can't thank you enough.

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Abstract

Corruption related money laundering is a peculiar and systemic challenge, that can undermine development. This is the problem in Nigeria.

The roots of money laundering in Nigeria are different from the drug crime and later terrorist financing. The typology of money laundering offence prevalent in Nigeria is by politically exposed persons. Since the nation's independence, the problems of corruption and abuse of office by those who have been appointed by her citizens, persists. Corruption by politically exposed persons, has affected the growth and development of every aspect of the Nigerian economy. The potential consequence of corruption and money laundering in a nation is underdevelopment and a rapid decline of institutions, particularly the anti-money laundering regime.

To understand this problem, the application of prosecutorial discretion in the anti-money laundering regime is examined. An analysis of discretionary powers by prosecutorial agencies and anti-money laundering regulatory bodies and its application of such powers. Prosecutorial discretion in the criminal justice system and the anti-money laundering regime encounters challenges. One of which is the delegation of discretionary powers, solely to the Attorney General of the Federation by the constitution. These powers include the discontinuance of cases at will, plea bargaining and charging. The application of prosecutorial discretion rightfully or wrongfully, plays a key role in the prosecution of politically exposed persons and the anti-money laundering regime. The rule of law is central to the rightful application of prosecutorial discretion.

If the rule of law is central to the appropriate application of prosecutorial discretion, then the ethical stand of those who have powers to apply this discretion should not be in question. Hence, ethical consideration of lawyers, particularly prosecutors play an important role in ensuring the appropriate application of prosecutorial discretion in the anti-money laundering regime. The consideration of ethics could be central in the

application of discretionary techniques, particularly in the prosecution of politically exposed persons for money laundering related offences. Our findings reveals a need to re-examine S174 of the constitution, which gives sole discretionary powers to the Attorney General and the integration of the rule of law in the anti-money laundering regime, amongst others.

For this reason, the methodology of this research is doctrinal. Lon Fuller's work is used as a means to analyse the role of the rule of law in the application of prosecutorial discretion in the anti-money laundering regime in Nigeria.

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List of Abbreviations

AML- Anti-money laundering

EFCC- Economic and Financial Crimes Commission ICPC- Independent Corrupt Practices and Other related offences Commission IAP- International Association of Prosecutors NFIU- Nigerian Financial Intelligence Unit

PEP- Politically Exposed Person

FATF – Financial Action Task Force

FRN- Federal Republic of Nigeria

CBN- Central Bank of Nigeria

MLPA- Money Laundering Prohibition Act 2004

MLPA-Money Laundering Prohibition Act 2011

AG- Attorney General

AGF- Attorney General of the Federation

LPA- Legal Practitioners Act

RPC- Rules of Professional Conduct

EA- Evidence Act

NBS- National Bureau of Statistics

LFN- Laws of the Federation of Nigeria

EU- European Union

USA- United States of America

NPF- Nigerian Police Force

FHC- Federal High Court

DNFI- Designated Non-financial Institution

Table of Cases

Whitehorn v The Queen [1983] 152 CLR 657

Edwardian Group Ltd and another v Singh and ors [2017] EWHC 2805

Dryburgh v Scott's Media Tax [2011] CSOH 147

Bristol and West Building Society v Mothew [1996] EWCA Civ 533

R v Da Silva [2007] Crim LR 77.

R v Saik [2006] UKHL

Chapter 1

INTRODUCTION

Aim and Objectives of Research

To investigate and evaluate the efficacy of the AML regime in Nigeria

To investigate and evaluate the efficacy of prosecutorial discretion in the anti-money laundering regime in Nigeria.

To examine the integration the of prosecutorial discretion in the anti-money laundering regime in Nigeria and the application of this discretion in the prosecution of politically exposed persons [PEP].

To evaluate the constitutional authority delegated to the office of the Attorney- General as the sole administrator of prosecutorial discretion, and the role of the rule of the AG in the integration of prosecutorial discretion with the anti-money laundering regime

To evaluate the integration of professional ethics of lawyers and other professionals and the anti-money laundering regime in Nigeria.

To identify reforms that might bridge the gap between the successful prosecution of other typology of money laundering offences and the unsuccessful prosecution of the typology of PEP.

Methodology

A doctrinal approach has been implemented in this thesis as the methodological approach. This has provided an in-depth understanding to analyse and evaluate the critical nature of Nigeria's anti-money laundering regime, with regards to the typology of Politically exposed persons. This research has been carried out using a wide range of domestic and international sources, which includes primary and secondary sources of law relevant to the challenge this research addresses. In this research, an outline of relevant comprehensive discussions with the aim of contributing to the existing literature of money laundering and corruption by PEP. These include Textbooks, case law, statues, government reports, regulations and publications.

"The doctrinal research thus involves systematic analysis of statutory provision and of legal principles involving therein, or derived there from, and logical or rational ordering of the legal propositions and principles". It also said that doctrinal research is basically a research into law. Mostly the researchers also give more emphasis on substantive law, rules, doctrines, concept and judicial pronouncements. Doctrinal research is based on the legal proposition and judicial pronouncement of the appellants' courts and other conventional legal material such as parliamentary debates, revealing the legislative intent, policy and history of the rule or doctrine.[1]

In doing so, the structure of the AML regime is examined using legal theory which gives the thesis the theoretical framework it needs to discuss the challenge. In this research Lon Fuller's work is used to examine the criminal justice system of Nigeria and indeed the AML regime.[2] It examines how laws are made, the applicability of these laws and the potential challenges if there are lapses in these laws that regulate AML regime and the criminal justice system in general. The application fuller's work provides the fundamental element in which societies must operate, which is the rule of law. The integration of the works of theorist for example Aristotle, Tom Bingham, A.V Dicey and other theorist provides the theoretical framework to discuss the intricate issues and challenges of the anti-money laundering regime in Nigeria.

1.0 Evaluative Frame

This research tackles the negative effect of corruption and its effect on prosecutorial discretion. It also takes cognisance of the policy and aims of the anti-money laundering [AML] policy as enacted in Nigeria. It also takes as valid, the assumption that the effective application of the rule of law will improve the efficacy of the Nigerian regime. In this regard, the perspective is internal to the Nigerian regime and its internal policy discourse which also reflects policy discourse at international level.

The role of rule of law, and how well the Nigerian legal system manages to deal with the interface between high level politics and the criminal justice system in Nigeria cannot be

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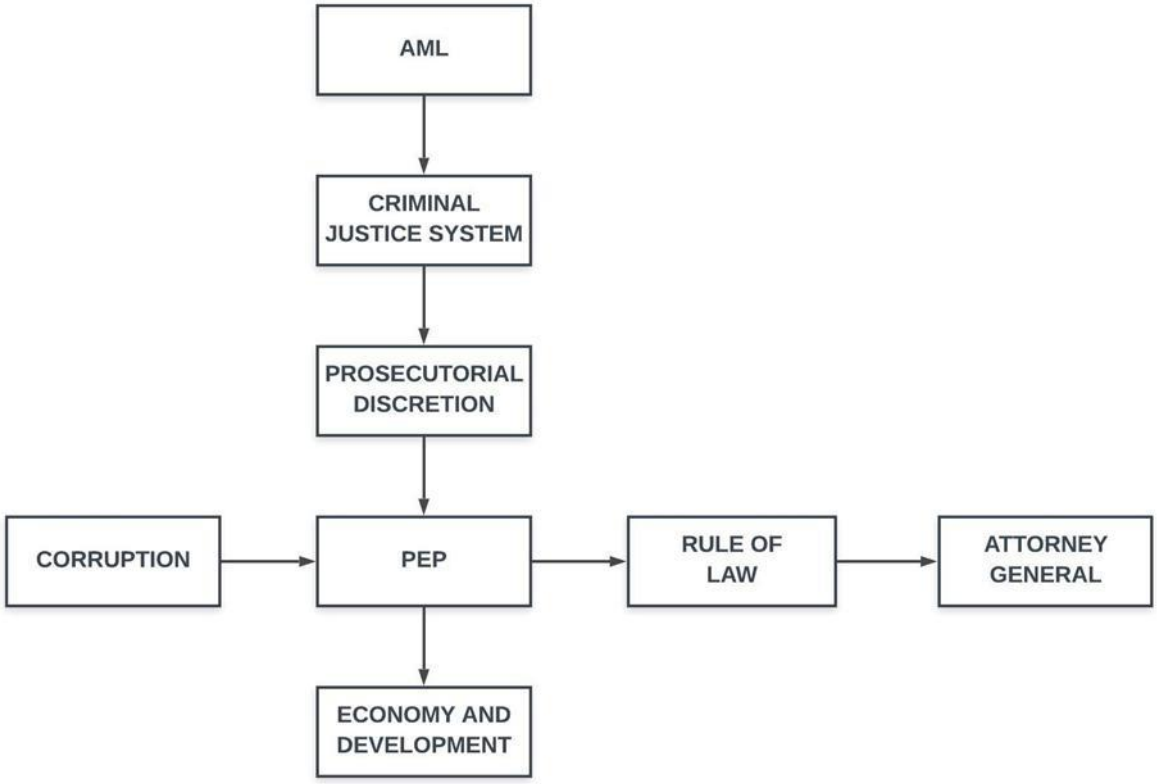
Vijay Gawas, 'Doctrinal Legal research Method a Guiding Principle in Reforming the Law and Legal System Towards the Research Development'[2017]3 International Journal of Law 128.

Lon L Fuller, *The Morality of Law* (revd.ed, Yale University Press 1977).

understood from internal sources but must be developed as a genuine but critical account informed by perspectives external to the Nigerian regime. If the efficacy of the regime is to be assessed in view of notorious failures of the regime, an external assessment is needed. In this research, Fuller's *Morality of law* is a source used to evaluate the application of prosecutorial discretion in the AML regime.

This research takes notice of the typology of money laundering offences that most affects Nigeria, which hinges on corruption and abuse of office by a specific type of person, politically exposed persons [PEP].



1.2 An Introduction to Lon Fuller's Morality of Law

Fuller a renowned legal philosopher has been famous for his views concerning law and morality, particularly in his debate with Hart. Fuller disagrees with Hart over law and morality but agrees on the fundamental issues of the rule of law.[3] Fuller's approach on the rule of law appears to institutionalise certain core principles. Fuller believes that the application of the rule of law must be internalised and accepted by members of the society. The rule of law is not a document or data that can be transplanted.[4] The internalisation of core principles could serve as a guide in the formation of laws, and the application of laws.

3 Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart'[1958]71 Harvard Law Review 630.

4 Graham Ferris, 'The Path-dependent Problem of Exporting the Rule of Law'[2012] 101 The Commonwealth Journal of International Affairs 364.

It can be argued that from Fuller's assertion, the acceptability of law and the integration of law in a society is dependent on the core principles which necessitated the formation of the law in the first instance. Hence, for the successful integration of the rule of law in any society, there should be an element of moral value in the formation of a law. This moral value could in turn form a strong basis for the acceptability of the law and make the citizens of state willingly subject themselves to the superiority of the law. A bad law is a bad law. A law that is repugnant to equity natural justice and good conscience is a bad law. A law that subject's citizens to oppression, anarchy, destruction and death is a bad law. The distinguishing factor between good and bad is morality and not legality. However, nations are not governed based on morality but legality. Hence in my opinion, Fuller attempts to create an atmosphere of legality, from an inspiration of morality.[5]

Fuller sets eight principles in his morality of law, which could serve as a guide to the application of rule of law in societies, and a template in determining the difference between a good law from a bad law. First and foremost, there must be set rules, and these rules must be general.[6] The generality of the laws and its acceptability are inter linked. These rules must be in existence and must be clear to everyone in that particular society. It is important that laws are not enacted with the intention of applying these laws to a particular class of persons, either because these persons appear to have more privileged status in the society or for any other reason. The generality of a law is central to the integration of the rule of law in any society.

From Fuller's assertions, it can be argued that the existence of set rules in a society cannot be enough for the successful implementation of the ideals of the rule of law. The applicability of these rules across all classes of persons in a society appear to be more important. In any justice driven society, equity is usually of primary consideration. The reason why equity is considered first is because, it is natural that in any society there would be different categories or classes of persons. These categories of persons are usually classed according to either status, wealth, intellect, tribe, race, sex etc. However, the

5 See note on Positivism and Fidelity of Law.

6 Lon Fuller*, Morality of Law* (rev.ed ,1977)46.

central principle which connects these categories of persons is the equality before the law. No matter how highly or lowly placed one is, everyone is equal before the law. Hence, it can also be argued that there is a connection between the existence of set rules, the generality of these rules and the acceptability of these rules.

Laws must be widely promulgated or widely accessible. Fuller asserts that laws must be publicized. [7] It's important that the members of a society must be able to know and understand that there is a law which is in existence. This could pass as a guide for members of the society. For a law to pass as a guide for the members of a society, the law must be publicly accessible. Most nations that lack institutional transparency, with autocratic leaders do not promulgate laws. A law is made by a decree and such laws may not even be known to members of the public. Often these laws are made to punish dissenting voices or opposition in the country.

In Nigeria, the Abacha regime issued the decree 109. It was mainly for the abolition of gathering in public places, either as civil right groups or activism. This decree was not known and was nonexistent until the agitation of the Niger Delta Emancipation movement, headed by Ken Saro Wiwa, who requested for a better sharing formula of the oil revenue, in favor of the oil producing region in Nigeria.[8] Decree 109 was promulgated and announced months into the trial of Ken Saro Wiwa, he was subsequently sentenced to death in accordance with the decree.

The non-promulgation of laws and its inaccessibility can create an opportunity for anarchy. It is impossible for the members of the society to obey rules that they are not aware of. In democratic systems of government, the parliament makes laws , efforts are made to publicize these laws. Hence, Fullers assertions that laws must be promulgated and widely accessible are very applicable to the integration of the rule of law in societies.

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7 Ibid, 49.

8 'Why Nigerian Activist Ken Saro-Wiwa was Executed' (Africa Magazine,9 November 2015) < https://www.dw.com/en/why-nigerian-activist-ken-saro-wiwa-was-executed/a-18837442 > assessed 30th may 2019.

Fuller asserts that laws must be prospective. A good law should serve a guide as to how individuals ought to behave in the future rather than prohibiting a behavior that happened in the past. [9]

A good law should not be retroactive. This is because a person cannot be charged for an offence that was not existing in law, at the time the offence was committed. A good law should take effect from the day it is enacted. A law should be prospective, what this means is that it should be able regulate future occurrences and not past deeds that are prior to the date of the enactment. Any law that does not take effect from the day it is enacted is a Laws must be non-contradictory. [10] Fuller asserts that law must not contradict itself. One law cannot prohibit what another permits. It can be argued that there is a linkage between Fullers clarity and non- contradiction. This is because if laws are clear, then the issue of contradiction may not arise. However, legislators who's responsibilities are to make these laws may be ignorant of the fact there is a law in existence which contradicts a law that has been promulgated. This could be a potential problem for the successful administration of justice in societies, as there could be no clear stand on the position of the law with regards to the issues before the court. Hence, Fullers principle of non-contradiction is pivotal for the existence of the rule of law in any society.

Laws must not ask the impossible.[11] This is an essential element in the administration of justice and the application of the rule of law. In any situation where a law asks for the impossible, those who are responsible for enacting the law should be blamed. The test of reasonableness should be applied when enacting laws that regulate human behavior in a society. This is sacrosanct to the development of the rule of law and the administration of justice in a society. A law that asks for the impossible might also be impossible to implement, hence it makes a mockery of the law itself and the legal system at large.

Fuller,n(2) 51.

Fuller n(2)65.

Fuller n(2) 70.

Another principle which Fuller advocates for is that, laws must be constant.[12] A law should not change too frequently. The stability of laws that have been enacted could determine how stable the justice system of any society is. One of the elements of developed societies is the predictability and stability of their justice system. The predictability and stability of thriving nations could be attributed to the stability of their laws.[13] It is almost impossible for nations to thrive when laws have the tendency of changing very fast. This could not only have a negative effect on the administration of justice but could also stifle the economy.

For example, Nigeria prior to the advent of democracy in 1999, suffered from successive military regimes.[14] Military regimes are notable for getting power through coups and the government governs by decree. Apart from the autocratic nature of military governments, the problems this causes is that the laws otherwise known as decrees could change very fast. This is because most military governments do not have a parliament which makes and deliberates laws. Such powers are left with the military dictator who issues new decrees and repeals these decrees at will.

This was enough reason to make the economy very unattractive to invest in, as investors need to be sure that their investments wouldn't face regulatory problems as a result of the instability of laws. Hence, the inconsistency of laws can have a negative effect on the administration of justice and the economy. This is also because it would be hard to give a persuasive commitment to safeguard the investment if the law is unreasonably flexible.

Fuller is of the opinion that there should be a congruence between written laws and how officials enforce these statute's.[15] Government officials whose responsibility is to enforce these laws, should ensure that these laws are enforced. Those who have been given this responsibility must not also abuse the privilege bestowed on them by the state. Such abuse

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Fuller,n(2)79.

Katerina Kocevska, 'Rule of Law –Condition for Economic Development (Republic of Macedonia)' [2015]11 See Review 185.

14 Ehi Oshio, 'Rule of Law, Military Governments and Dilemma of Nigeria Courts'[1988]30 Journal of the Indian Law Institute 459.

15 Fuller(n2),81.

could be in form of corruption or abuse of public office, which is primary source for concern in developing nations particularly in Nigeria.

Government officials cannot effectively enforce or expect members of the society to obey laws when those who are given the responsibility to serve as gatekeepers in the realm of law and order, disobey the law. For any society to develop and integrate the principles of the rule of law in the administration of justice, officials must be ready to enforce these laws and in enforcing these laws, they must do so with regards to ethical principles and values. Government officials must possess virtue, which could assist in enforcing deontological principles (rules or laws) in the society. How officials enforce these rules could be a reflection on the application of the rule of law in a society.

Fuller's principles are very essential to the successful application of the rule of law in the AML regime in Nigeria. His eight principles in the inner morality, forms a cardinal point for the successful integration of the rule of law in prosecutorial discretion, in the AML regime of Nigeria.

1.3 An Introduction to the Concept of the Rule of Law: A Reflection on Aristotle

The concept of the rule of law is an ideal concept which has shaped the administration of justice and governance globally. This concept has no precise origin however, the concept can be dated back to Aristotle between 355- 370 BC.[16] This concept of rule of law has no precise definition. Many legal scholars have made positive attempts to define and expand the framework of the rule of law which notably includes AV Dicey, Tom Bingham and Lon Fuller amongst others. However, priority will be given to Lon Fuller by using the morality of law to integrate the role of the rule of law in the AML regime of Nigeria.

Some philosophers argue that, in pre-law society all rules are customary. Proponents of this thought argues that these customary rules eventually evolve into laws. These rules exist within members of a group because it is acceptable to these members. Overtime,

16 Jill Frank 'Aristotle on Constitutionalism and the Rule of Law' [2007]8 Theoretical Inquiries in Law Journal 39.

these rules evolve into a constitution which is more or less an amalgamation of certain rules and practices of members of a society. Followers of Hart's argument, also argue that in societies there must be a guide otherwise known as a constitution, which should serve as a binding rule on its citizens. These rules which could be in form of a constitution, should set limits on powers. The constitution should serve as a guide in limiting the excesses of those in power and the people, who those in power are to govern.[17] The application of rules and limitation of powers by persons in the government of a society, provides grounds for orderliness and a sense of volition from the common members of the society to obey the rules.

The application of these rules or constitution irrespective of whom it's been applied to, makes the acceptability of rules easier by the members of the society. This in itself, is the rule of law.[18]

Aristotle argues that in societies there should be rule of law which overrides powers being held by the state or individuals. He further argues that these powers held by individuals on behalf of the state and the people could be overreaching at some point, which could provide grounds for abuse of powers by persons who hold these powers. [19]

Aristotle proposes that there should be laws in every society which should serve as a guide to human behaviour no matter how highly placed these humans are in the society. Aristotle distinguishes between political or rotational rule one the hand and mastery on the other hand.[20] He is of the view that mastery could be inimical to political life. Aristotle argues that the rule of law is a primary ingredient of any regime or government that is worthy of being

17 H.L.A. Hart, *The Concept of Law* (2d ed, Clarendon Law 1994).

18 Robert Stein 'Rule of Law: What Does It Mean?' [2009]18 Minnesota Journal for International Law 294.

19 Larry Alexander*, Constitutionalism: Philosophical Foundations* (revd eds, Cambridge University Press 2001).

Patrick Coby, 'Aristotle's Four Conceptions of Politics'[1986]39 The Western Political Quarterly 482

referred to as a government.[21] He further argues that there should be a consistent feature in any regime, and this consistent feature is the rule of law.

However, to have a better understanding of Aristotle's argument, it is important a brief introduction of the concept of virtue ethics, which Aristotle is a proponent of. A brief introduction of deontological ethics will also be given which contradicts the principles of virtue ethics.

What is virtue ethics? Virtue ethics are positive traits which deals with the motive and not the form. Virtue ethics deals with the inner qualities of human behaviour which separates right from wrong. Virtue looks at the motive and rationale behind the actions taken. Virtue might be described as the conscience that guides the thought process.[22] Hence virtue looks at moral nature of the act, unlike deontology which deals with the laws or regulation that governs the act.

Deontology as a kind of ethics deals and focuses on the rules that guide a particular class of persons or members of a society. These ethical approach is founded on Immanuel Kant's principles. Deontology focuses on the strict adherence to rules irrespective of the moral nature of the rule. Proponents of deontology unlike virtue ethics, insist on the application of rules rather than taking into account the moral nature of the action. For deontology, it is irrelevant whether the action is morally right or wrong.[23] What is important is that the action is backed by law and the law is obeyed. Hence, Aristotle's rule of men can be likened to the principles of virtue ethics.

Aristotle argues that there is a clear difference between the rule of law and the rule of men. From Aristotle's perspective, it can be argued that the rule of law is the binding rule of nation or a society, that all members of the society must obey, which should be sovereign. While the rule of men is the good judgement of citizens of a society, which helps to

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Frank Dauman, 'Evolution of the Rule of Law, Hayeks Concept of the Liberal Order Reconsidered'[2007]21 Journal of Libertarian Studies 126.

See Chapter 3.2 on the discussion on virtue ethics.

See chapter 3.3 on deontology ethics.

moderate the excesses of the potential over reaching powers of the sovereignty of law.[24] Proponents of Aristotle's concept on rule of law argue that, bad laws should not be obeyed by good people. If a law is considered unjust, then the citizens of the society should not obey the law. He further argues that the rule of men which could moderate the excesses of the sovereignty of law plays a key role in the administration of justice. This rule of men could be the conscience, or the ability to differentiate from good and evil.[25] Hence, the importance of virtue ethics in the application of the rule of law in the administration of criminal justice. It can be argued that there is a connection with Aristotle's rule of men and virtue. If the rule of men is determined by the inner decision or conscience in determining whether or not to obey a bad law, then it can be argued that there is a role virtue ethics plays in the rule of men and the application of the rule of law. If Aristotle argues that the conscience of man should serve as a guide in obeying laid down rules and regulation in a society, then it can be argued that what guides the conscience in the separation of good from bad while obeying these laws is virtue.

However, it is important to also note that the rule of law moderates' men and invariably moderates the rule of men. From Aristotle's proposition, we can argue that there is an amalgamation between the rule of men and the rule of law. This enables a check and balance on the activity of men in the society and the activity of the government. It can be argued further, that if we are to go by Aristotle's concept of good judgement in the application of the rule of law, it means that ethical consideration plays a pivotal role in the application of the rule of law.[26] The application of "good judgement" by men in the application of the rule of law, gives the citizens the moral obligation of choice as to whether or not to obey a law just because it is a law. It can be argued that there is a relationship between good judgement and virtue ethics.[27] In fact, man cannot exercise good judgement

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24 James Wilson, 'Deliberation, Democracy, and the Rule of Reason in Aristotle's Politics'[2011]105 American Political Science Review 260.

25 Jill Frank, 'Aristotle on the Rule of Law and the Rule of Men' [2005]7 International Studies Review 509.

26 Christopher May 'The Rule of Law: Athenian Antecedents to Contemporary Debates'[2012]4 Hague Journal on the Rule of Law 239.

27 Ibid

without virtue. Man needs certain "inner qualities" to exercise good judgement either as a spectator of an event or a facilitator.[28] The same applies to the application of the law in the dispensation of justice. In the dispensation of justice, there are facilitators and there are spectators. The prosecutor and the defence lawyer need to have certain positive traits in distinguishing right from wrong as a facilitator, for justice to be dispensed. These positive traits which could be described as good judgement by Aristotle or inner qualities, is virtue.[29]

The Judge (in a non-jury system e.g. Nigeria) in the process of trial acts as facilitator, but as an unbiased facilitator. However the "inner qualities" or "good judgement" or "virtue", serves as a guide alongside with the laid down rules (laws) for justice to be dispensed. This could mean that, for the effective application of the rule of law, there has to be an integration of good judgement. The essence of existing laws is not to have these laws in existence but to give justice to the citizens of the society. A society could have laws in existence yet at the same time, there could be an absence of an effective justice system. The sovereignty of these laws will be present but the dispensation of justice will be absent.[30]

The application of the rule of law in the governing of the affairs of man should be sacrosanct, however, it can be argued that the application of strict rules without cognisance to conscience in the governing of mankind is a deontological aberration. Hence it cannot be overemphasised that the importance of virtue/ good conscience or rule of men as Aristotle may put it, should be applicable alongside with the strict adherence to rules (deontology). When this is done, it would create an environment where the rule of law is supreme with an element of a humane touch.

The absence of good judgement or judgement of men or virtue is what differentiates the application of the rule of law in dictatorships from democracies. This is because in countries governed by dictators, it can be argued that the "rule of law" is applied to governance.

Ibid

Maureen Cavanaugh, ' Order in Multiplicity: Aristotle on the Text, Context, and of Rule of Law'[2001] North Carolina Law Review 582.

30 Amy Swiffen, 'Law without a Lawgiver: Legal Authority after Sovereignty' [2011]7 Law, Culture and the Humanities 69.

There could be a "formal existence" of the principles of separation of powers, where there is a parliament which makes laws and a judiciary, however the dictator governs the citizens in the most draconian style.[31] It can be argued that a nation with laws that are considered very unreasonable, e.g. nations with laws where adultery is punishable by death.[32]

The criminalisation of adultery with the penalty of a death sentence is against the principles of equity natural justice and good conscience, and by all standards, goes against the principles of virtue ethics. However, it can be also argued that the law is the law and the law is supreme. In this situation most draconian leaders with draconian laws will insist that the rule of law is supreme, and that forms the basis for their decision to execute the law in detail. Dictators could even go a step further to state that the law wasn't made by them but by the parliament, hence the law is the law. The members of the parliament who make these laws must make laws that are in accordance with the rationale behind the separation of powers, and not to give the "executive" more powers.[33]At the end, it makes a mockery of the basis of the rule of law, which is to govern the citizenry based on justice and fairness. Hence, the importance of the application of virtue ethics in the integration of the rule of law in a nations justice system.

Another example of a society with the absence of good judgement in the application of the rule of law is the apartheid past of South Africa. There were separate systems and separate laws which regulated the activities of citizens of the society. A different legal system and set of laws were administered to the black majority of South Africans while there was a

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31 Dyzenhaus D*, Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2nd ed, Oxford University Press).

32 Rhiannon Redpath 'Women Around the World Are Being Stoned to Death. Do You Know the Facts?'(mic articles,16 October 2013) > https://mic.com/articles/68431/women-around-the-world-are-being-stoned-to-death-do-you-know-the-facts#.hiDskeePj > assessed 05 January 2019.

33 Stewart Iain 'Men of Class: Aristotle, Montesquieu and Dicey on 'Separation Powers' and 'The Rule of Law'[2004]4 Macquarie Law Journal.

separate one for the apartheid rulers.[34] The application of laws in the criminal Justice system was anchored on the colour of one's skin rather than the general application of laws within the society, yet it was the law. One could argue that the provisions of the law are supreme, and members of the society must obey the law to avert a breakdown of law and order. However, can such a law be considered a good law where separate laws are enacted for separate classes of persons in a society, particularly if it's considered repugnant to equity, natural justice and good conscience? Such draconian laws show the absence of good judgement or judgement of men as Aristotle would put it, in the administration and integration of the rule of law in the society.

1.4 An Introduction to AV Dicey's Concept on Rule of Law

A renowned proponent of the rule of law was Dicey. A.V Dicey coined the phrase " rule of law". Dicey's discussions on the rule of law focused on institutional arrangement and the perils of institutional lawlessness, rather than political ideals and the application of law to political ideals. Dicey's ideas of the rule of law has sparked ideas in contemporary debates on this issue, particularly with regards to constitutional theory and the application of the constitution to governance.[35]

Dicey advocates for the supremacy of the rule of law and criticises extreme imperialists of the nineteenth century. He argues that there should be liberal imperialism and advocated for the preservation of the British empire and patriotic projects of national greatness in the world of imperial states.[36] He argues that this can only be achieved through the rule of law.

Looking at Dicey's account of the rule of law, in his *Law of the Constitution* [LOTC] Dicey analysed the application of the rule of law from three perspectives. The first is the 'rule through law'. Dicey is of the opinion that government should have laid down procedures

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Wizarat, Talat A. 'Apartheid and Racial Discrimination in South Africa— An Overview of the Control Network.'1980]33Pakistan Horizon Law Journal 84–87.

35 Lino Dylan, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context'[2018]81 Modern Law Review 741.

36 D. Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860–1900* (Princeton, NJ: Princeton University Press, 2007).

on how to govern the people.[37] The institutional framework of a society is sacrosanct and Dicey argued that it is a fundamental element of the society, which must be adhered to. Dicey argued that the business of government must be carried out according to legally established procedures, which would reduce the potential risk of an abuse of power or the arbitrary use of power. Going by Dicey argument in this principle of the ' the rule through law', it provides a platform for those who have the responsibility of governing the people to be held accountable, if they do not follow the necessary procedure in the administration of governance. This is very essential to the administration of governance and justice in a developed society.

The institutional framework of a country plays a crucial role to the development of a nation. This institutional framework focuses on established legally acceptable norms, which in turn assists to regulate the behaviour of citizens of the society. The institutions of government and the way these institutions are run should be done in the most transparent and procedural manner.[38]

From Dicey's argument, it can be argued further that nations grow stronger due to strong institutions and not because of strong leaders. This means that the institutions of a nation should be more powerful than those who govern these institutions and the government. In more advanced societies where the rule of law thrives, these institutions have been empowered as a means to check the excesses of government.[39] The phrase 'strong leader', cannot translate into an effective government with intentions of providing good governance to the people. There is no such thing as a strong leader without strong institutions. In fact, it can be argued that there is a relationship between strong institutions and good governance. This might be one of the problems facing the AML regime in Nigeria.

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37 Lino Dylan, 'Albert Venn Dicey and the Constitutional Theory of Empire'[2016]36 Oxford Journal of Legal Studies 756.

38 Ibid, Bell,17

39 Alessandro Pellegata, Vincenzo Memoli 'Can Corruption Erode Confidence in Political Institutions Among European Countries? Comparing the Effects of Different Measures of Perceived Corruption'[2016]128 Social indicators research Journal 394.

The strength and efficacy of the regime should be in the institutions that regulate the regime, and not the individual actors in the institution.

The second perspective Dicey raises in his LOTC on the rule of law is that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.'[40] Dicey argues that a fundamental element in the application of the rule of law in any society, is the equality before the law. For the development of the justice system of any society, all persons no matter how highly placed they are, should be subject to the rules and institutions that govern the society.

The third perspective from which Dicey analyses the rule of law is on civil rights and civil liberties.[41] Dicey is of the opinion that in every society, the rights and liberties of members of the society should be guaranteed from bottom – top, rather than from top – bottom.

These civil rights and liberties should not only reflect in the constitution but also be applied to the daily lives of the citizens of the state. Some of these civil rights and liberties include the freedom of speech, freedom of association, right to fair hearing and the presumption of innocence until proven guilty by a court of competent jurisdiction.[42]

The application of the rule of should know no class and status, irrespective of whom an offender is, the rights and liberties of the offender must be respected.

1.5 An Analysis on Tom Bingham's Rule of Law

Tom Bingham who was an eminent jurist, has given his views on the rule of law and the application of this principle in societies. Bingham's perspective on the rule of law is that there must be certain principles present in the application of the rule of law in societies. Just like Fuller, Bingham highlights eight principles which should be central to the application of the rule of law. In his book *rule of law*, Bingham advocates as follows :

40 Ibid, Bell.

41 Ibid, Bell.

42 Liora Lazarus, Ryann Goss 'Criminal Justice Under the United Kingdom Human Rights Act: Dynamic Interaction between Domestic and International Law' [2013]25 Singapore Academy of Law 756.

> All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of the laws publicly and prospectively promulgated and publicly administered in the courts.
>
> Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
>
> The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation
>
> The law must afford adequate protection of fundamental human rights.
>
> Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
>
> Ministers and public officers at all levels must exercise the powers conferred on them in good faith, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
>
> Adjudicative procedures provided by the state should be fair.
>
> The rule of law requires compliance by the state with its obligations in international law as in national law.

Bingham advocates that, the equality before the law is essential and plays a significant role in the application of the rule of law in societies. This is advocated in his first principle. The justice system in nations cannot afford to be discriminatory or have set rules applied to a particular class of persons and another set of rules applied to another group of persons. Bingham argues that, no matter how highly placed a person in the society, the long arm of the law is far above the person. Equality before the allow is a fundamental principle for the integration of the rule of law in a justice system. As argued earlier, the rule of law means the application of set rules to all categories of persons in a society. The application of these rules must be done in accordance to the rule of law, irrespective of one's class in the

society.[43] One of the problems with the integration of the rule of law in the administration of justice in Nigeria is equality before the law. The integration of the rule of law in the criminal justice system appears to be lopsided. For example, the application of plea bargain as a discretionary technique appears to favour only PEP and high net worth individuals.[44]

When a PEP who has stolen the funds meant for the development of the country is given the opportunity for a plea bargain as seen in the Cecilia Ibru and Igbinedion cases, and other typology of money laundering offenders are not given the same opportunity, then we can say there is a lopsided application of rules in the AML regime. Hence, Binghams argument for equality before the law as it plays essential role in the rule of law is eroded. Same treatment melted out to PEP must be given to other typology of money laundering offenders.

Bingham also advocates that the legal rights of individuals should be enforced through the application of the law and not through discretionary actions. The individual rights of persons in a society are essential for the advocacy of the rule of law. For any society to pride itself as a society that adheres to the rule of law, individual rights must be respected.[45] However, the application of these individual rights must be done in accordance to the set laws of the land. These rights cannot be enforced or resolved without recourse to extant laws and regulation that govern the society, else there will be a breakdown of law and order. To enforce a right, members of a society do not need to resort to self-help. The organs of government are there to enforce these rights, hence the importance of law enforcement in societies.[46] This could avert any potential danger in a society, particularly when the organs of government responsible for enforcing these laws carry out their functions.

Bingham's principles can be directly linked and applied to the Nigerian state. Nigeria as a nation has had reported issues of human right abuses especially by officials that are meant

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43 Tom Bingham, *Rule of Law* (Penguin UK, 2010) 55.

See 4.2 on the integration of the rule of law in the application of prosecutorial discretion.

Ibid,66.

Héctor Olásolo, 'Criminal Justice and Human Rights'[2012] 27 Utrecht Journal of International and European Law 2.

to protect the citizens. For example, the problem of police brutality in Nigeria is a clear violation of the rights of the citizens.[47] The maltreatment and abuse of suspects goes against the principles of "innocent until proven guilty". It is important that for the sustainability of the Nigerian state, the rights of the citizens are respected in the enforcement of laws.

Bingham argues that the law must afford adequate protection of fundamental human rights.[48] The fundamental human rights of the citizens of any society must be guaranteed. Bingham's argument extends to Dicey's argument that the fundamental rights and liberties of citizens must be respected. This is essential to the growth of the justice system of any nation. The justice system of a nation is centred on the rule of law, and the fundamental human rights of the citizens of that nation is central to the rule of law. It can be argued that there is a linkage between the rule of law, justice systems and fundamental human rights. In the enforcement of the rule of law, the fundamental human rights of the citizens must be respected.

Having introduced Fuller, Dicey, Aristotle and Bingham to this discussion, their works would be used as a reference, with emphasis on Fuller, in analysing the application of prosecutorial discretion in money laundering offences by PEP.

1.6 Problem of Money Laundering in Nigeria

Nigeria gained independence from United Kingdom in 1960. Nigeria, a nation of diverse people and diverse mineral resources has not developed as much as she should have which is the side effect of political corruption and abuse of office by PEP. This has not only affected the development of the nation but also the perception she has from the international community. It has been proven that there is a link between the underdevelopment of the nation and political corruption.[49] This link is responsible for the absence of many basic

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Adetoro Rasheed, 'Challeges of Human Right Abuses in Nigerian Democratic Governance'[2014]1 Journal of Social Economics Research

Bingham,(n,43) 66.

Amah Ognonanya, 'Effect of Corruption in Nigeria Economy: A Critical View' [2018] 8 Journal of Academic Research in Business and Social Sciences 122.

amenities for example: good schools, health care, infrastructure and an effective justice system. These are some of the side effects of institutional corruption.[50]

Monies appropriated for the development of the nation are stolen and are laundered by these PEP hence, the health of the commonwealth is jeopardised by the self-interest of a few powerful individuals who have unjustly enriched themselves. This is the reason why the AML regime of Nigeria needs to be focused on a typology of money laundering offence, which is institutional corruption by PEP. Of course, as in other jurisdictions, there exist other typology of money laundering offences in Nigeria. However, what affects the nations development the most and the prevalent typology in Nigeria is money laundering by PEP.[51]

If we agree that there is a link between institutional corruption by PEP and underdevelopment, then we could also agree that Nigeria needs to have a strong AML regime where offenders no matter their class or status are prosecuted diligently.

1.7 Definition and Process of Money Laundering

It is accepted that money laundering is a global issue which undermines the economic stability of states.[52] Money laundering is a criminal offence and the definition of this offence varies. The distinction between the various definitions depends on the context, jurisdiction and typology of the parent crime.

However, money laundering can be defined as the disguise of the proceeds of crime. The Financial Action Task Force [FATF] defines money laundering as "the processing of criminal proceeds to disguise their origin".[53] S.15 of the Money Laundering Prohibition Act[MLPA]

Ibid.

Ibid.

Selina Keesony, 'International anti-money laundering laws: the problems with enforcement' [2015]19 Journal of Money Laundering Control 131.

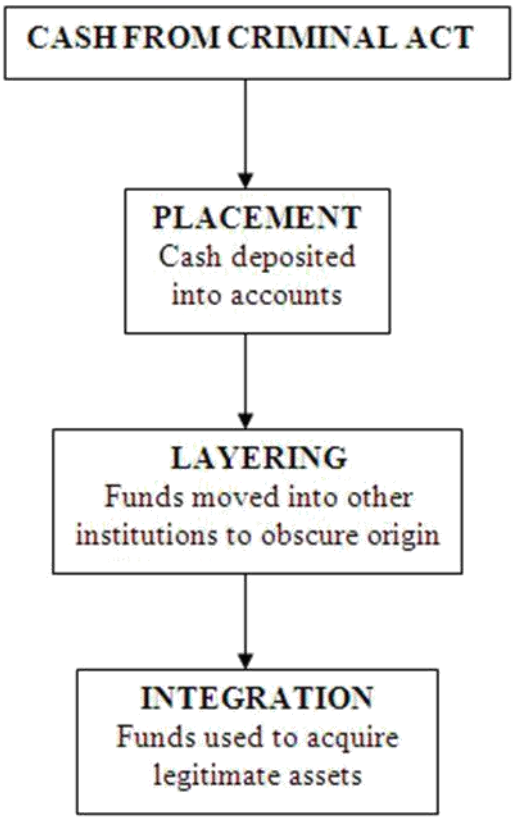
Financial Action Task Force Regulation (2012) Available at < http://www.fatfgafi.org/faq/moneylaundering/ > Accessed on 10 may, 2019.

2011 has defined money laundering as the conversion and transfer of resources and proceeds that is derived directly from any form of crime.[54]

This process involves the placement of the proceeds of crime, layering and integration which is the final stage of the chain of event. Placement means the entry of “dirty cash” or illicit money into the financial system. Layering is more complex as it entails the movements of funds. Sometimes this needs some international assistance to avoid trail and sever link with origin of crime. Integration is when the money is returned to the criminal to make it look as if the source is legitimate. At the point of integration, it is more difficult to trace the origin if funds as it has been converted to clean money. Below is the classic typology of money laundering. This classic typology is quite different from how money laundering is perpetuated in Nigeria. The criminal act in the Nigerian context is mostly from the proceeds of corruption.[55]

54 Money Laundering Prohibition Act, S15 [2011].

55 Anna Markovska, 'Political corruption and money laundering: lessons from Nigeria' [2014] 18 Journal of Money Laundering Control 168.



The diagram above, shows the typical technique of money laundering. This technique is at best a classical approach, as the movement of illicit money has evolved over time. The evolution of the movement of illicit funds evolves the same way the typology of money laundering evolves. This diagram above is at best connected with the typology of Drugs and narcotics, human trafficking, arms trafficking and other money laundering related offences, but PEP.

The typical PEP might not move funds from the proceeds of corruption and abuse of office through his technique. The sophistication and influence of the PEP makes the movement of funds more sophisticated than the typical typology of drugs and narcotics. The issues of beneficial ownership and fronts by blue chip companies are easier ways the PEP can move proceeds of corruption without going through the stress of placement and integration. Contract kickbacks through contract inflation, using gatekeepers within the AML regime otherwise known as Designated Non-financial institutions, law firms, and blue chip

companies are certain “privileges” which the typical drug baron might not be able to access. Hence, this diagram is at best applicable to the typical typology other than PEP.

Money laundering has had a devastating effect on the economic development of countries particularly developing nations. [56] The offence of money laundering and its impact on nations has been a major topic in the heart of national and international policy discourse. The effect of money laundering can stunt the growth of emerging economies and could weaken developed economies. Money laundering offences ranges from the proceeds from the sale of drugs and narcotics, human trafficking, arms dealing, terrorist financing, and corruption.

The nature of money laundering offences in Nigeria differs from what is frequent in other jurisdictions. The discourse of money laundering is more affiliated with proceeds of sale from drugs and narcotics or insider dealings in financial regulation and terrorist financing, as it is a more related offence in other jurisdiction.[57] This is not the typology of money laundering offence in Nigeria. The issue in the Nigerian context is corruption by PEP and stealing of public funds.

First, who is a PEP? The Financial Action Task Force [FATF] has defined a PEP as a person who has been entrusted with a prominent public office for example Heads of State or government, senior politicians, senior government officials, judicial or military officials, senior executives of state owned corporations, important political party leaders etc. [58] From the definition of PEP, we can say that a PEP is someone to whom the citizens or members of a society or state have handed a responsibility. The continuous abuse of office

56 Ayodeji Aluko, Mahmood Bagheri, ‘The Impact of Money Laundering on Economic and Financial Stability and on Political Development in Developing Countries: The case of Nigeria’[2012]15 Journal of Money Laundering Control 453.

Ibid.

Financial Action Task Force [2012] “Politically Exposed Persons Recommendation 12AND 22” > http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf > accessed 3rd May 2019.

and corruption by government officials, theft, and money laundering in Nigeria has reduced the confidence bestowed on PEP by the citizens of the country.[59]

The problems of corruption by PEP and money laundering in Nigeria goes beyond the underdevelopment this crime causes. It goes further to weaken institutions like the criminal justice system which has made it difficult in the application of the rule of law and the successful prosecution of money laundering cases involving PEP.[60]

The FATF, which is the international organisation regulating AML has not paid enough attention to the typology of money laundering offences that are prevalent in Nigeria. The FATF came up with 40 recommendations at the formation of this body, to regulate the activities of money laundering globally. This regulatory guideline focused on the proceeds from the sale of drugs and narcotics, financial services and other money laundering offences with no clear guideline for money laundering offences by PEP prior to 2003. Many countries including Nigeria did not include corruption by public officials in their AML framework. This created a gap which PEP's could capitalise on and perpetuate money laundering. Nigeria suffered because of this gap in her AML regime.[61] The Abacha case, was a clear example that the world had neglected money laundering offences by PEP's. This was the turning point on AML regulations with regards to PEP.[62] The damage caused from Abacha's case and lessons learned was that, nations should have an internal mechanism to regulate AML activities to attract investment opportunities.

This is because there is a strong link between political corruption and underdevelopment. Where there is corruption, there is a high tendency of the presence of weak and corrupt institutions. Investors are not ready to invest funds in an environment that is considered to be unstable or where there is a perception, that if a problem arises, they might not be able

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Ibid, Aluko, 454.

Ibid, Aluko, 454.

Jeremy Sandbrook, 'The 10 Most Corrupt World Leaders of Recent History' (*Integritas 360*, may 15 2016) http://integritas360.org/2016/07/10-most-corrupt-world-leaders/ accessed 15 may 2019.

to get justice. The chain effect of political corruption is enormous hence, there was a need to have an internal mechanism to regulate money laundering with emphasis on PEP.

Nigeria is populated with about 180 million people.[63] The nation possesses several mineral resources, including crude oil. Nigeria is the largest producer of oil in Africa and the 6th largest producer of oil in the world.[64] Despite her huge natural resources and wealth, Nigeria has not been able to achieve her potential by creating wealth for her citizens, developing infrastructure, and providing an enabling environment for foreign direct investment, due to corruption.[65] The successful prosecution of money laundering offenders particularly PEP, would have positive impact in the AML regime and the nations development to a substantial extent.

One measure by which the efficacy of a nation's AML regime can be measured, is by the number of convictions the prosecution has recorded, as against the number that are been prosecuted with regards to the prevalent typology. This is because if the AML regime records more conviction of PEP, it would be a clear indication that the AML regime is effective. More convictions within the regime would deter people from corruption if people suffered, it would serve as a form of punishment for offenders, the loss of asset and proceeds of crimes could deter offenders. Nigeria would also reclaim her stolen wealth from public officers that have stolen her wealth. This could also serve as a preventive measure on those who intend to steal and launder public funds. These are some of the issues this research addresses.[66]

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63 Nigerian population, 'Population 2018' (*Nigerian Population Review*, January 2018) > http://worldpopulationreview.com/countries/nigeria-population/ > accessed 12 may 2019.

64 Nnpc, 'Oil Production' (Nigerian National Petroleum Corporation, February 2018) < http://nnpcgroup.com/NNPCBusiness/UpstreamVentures/OilProduction.aspx > accessed 12 May 2019.

65 Duncan Ekweremadu, 'Anti-Corruption Policies in Nigeria' [2010] 6 National Library of Nigeria Journal 236.

Aluko,(n52) 454.

1.8 A Brief History International Recommendations and the Typology Gap in Nigeria

At the beginning of Nigeria's AML regime, the regime had a stereotype focus. The focus on the regime was on the proceeds of crimes from drugs and narcotics This focus was as a result of the global money laundering awareness in the 1980's, arising from the drug trade in South America, particularly Pablo Escobar's notorious activity.[67] Nations acted on the recommendation of the Vienna convention of 1988, and established their various AML regimes. Nigeria as a sovereign state, was not left out and established her AML regime with the enactment of the National Drug Law and Enforcement Agency Act in 1989.[68]

Prior to 2004, the typology of the AML regime in Nigerian revolved around the proceeds of crime from drugs and narcotics. This created a gap in the regulation of other money laundering offences, particularly offences committed by PEP. The establishment of the AML regime in Nigeria was done with the intention to abide by the recommendations of the Vienna Convention, thereby omitting the typology of money laundering offences in Nigeria and making it almost impossible to categorise proceeds from political corruption as a money laundering offence. Hence, it is safe to state that the Nigerian AML regime got it wrong from the beginning by incorporating international conventions and recommendations without looking inwards to assess the uniqueness of the regime.[69]

The MLPA 2004 was enacted due to pressure from the international community for a more effective AML regime in Nigeria. The MLPA 2004 was the parent legislation regulating money laundering and other related offences. However, like many other legislations, the MLPA 2004 has some lapses which led to its repeal and the enactment of the MLPA 2011.[70] One of the major lapses of the MLPA 2004 was the ambiguity and lack of clarity in the definition of money laundering. The definition of money laundering was centred on the proceeds of drugs and narcotics, which made it difficult for prosecutors to

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Robin Booth, Simon Farrell : *Money Laundering Regulation*(Oxford University Press,2011)4.

Adegboyega Ige," A Review of the Legislative and Institutional Frameworks for Combating Money

Ibid.

See chapter 2.11 on the internal mechanism of the AML regime in Nigeria.

successfully prosecute other typologies of money laundering offences, as seen in the *FRN v James Ibori* case. [71]

The enactment of the MLP 2011 broadens the scope of money laundering offences in Nigeria, including the introduction of DNFI and the classification of lawyers as DNFI.[72]

The Nigerian government appeared to have been more interested in showing the world that it complied with international conventions and best practices than solving the real problem which is unique to the country. The uniqueness of the problem of Nigeria's AML regime has always been in its typology and enacting an AML regime based on international best practice at the time without consultation locally was clearly a mistake.[73] The symptoms of corruption continues to be prevalent because there was no effective mechanism at that time to prosecute money laundering offenders who had political privilege.[74]

Abuse of office, misappropriation of public funds, contract inflation, stealing public funds are not linked to drugs and narcotics. Nigeria is not a high consumer of narcotics neither is it a traffic destination or route, hence it made no sense having a regime centred only on drugs and narcotics. Maybe if Nigeria had a wider AML regime as early as in the 1980's, the regime would have been more effective than it is today. The problem of transplantation of laws without recourse to local norms, problems and characteristics has been one of the problems facing Nigeria's development. The transplantation of laws without examining the peculiarity of the AML regime in Nigeria prior to 2004 appears to have laid the weak foundation of the AML regime.[75] These are some of the problems of the AML regime this research addressees further in the AML chapter.

Another problem confronting the AML regime is the weak measurement and metrics of successful AML regime by international organisations like the FATF. The enactment of a

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See chapter 2.11 on the internal mechanism on the AML regime in Nigeria and a better analysis on the James ibori case.

See chapter 2.9 on the role of designated non-financial institution in the AML regime.

Wole Iyaniwura, 'Corruption and Military Rule in Nigeria: An Over View 1966-1999' [2014] 14 Global Journal of Human-Social Science: F Political Science 3.

Fuller(n2),81

ibid

money laundering Act thereby creating an AML regime, might not necessary translate into adhering with international best practices. The FATF appears to be more concerned with nations like Nigeria having an AML regime rather than ensuring that the AML regime is effective and regulates the prevalent typology of PEP.[76] The evaluation and measurement of the effectiveness of an AML regime should be in the number of cases that have been successfully prosecuted with regards to the prevalent typology in the jurisdiction. Hence, international organisations might have a role in ensuring that the nations do not only have an AML regime, but also have the political will to ensure that the AML regime is effective. The current metric is focused on prosecutions and not convictions of AML offences by PEP.

We may argue that no amount of pressure mounted on a nation from international organisations can metamorphose into political will. Despite enormous pressure mounted by the international community on Nigeria, the achievements of the AML regime is subject to the local leadership.[77] The will to effect change in the society has to emanate from within, which includes a conscious decision by the leaders of the nation to do what is considered right, in accordance to international best practices, to enhance the AML regime. These are also some of the problems of transplantation of laws and regulations. Nations due to pressure from international organisations and the world order, might decide to setup an AML regime with the intent to merely please these influential organisations. [78]

The intent in setting up the AML regime within the jurisdiction might not be to combat the prevalent typology but to please these organisations and defend any prospect of criticism. There is no reciprocity on the part of the nation in implementing an effective AML regime that portrays the intention of these organisation's recommending they do so. Hence, the

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Wolfsberg, 'Wolfsberg Guidance on Politically Exposed Persons (PEPs)' (Wolfsberg Group, may 2017) https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/4.%20Wolfsberg-Guidance-on-PEPs-May-2017.pdf> accessed 13 February 2018

Lewis Paul, 'US Seeking Tougher Sanctions to Press Nigeria for Democracy' (The New York Times, 12th March) <http://www.nytimes.com/1996/03/12/world/us-seeking-tougher-sanctions-to-press-nigeria-for-democracy.html> accessed 15 may 2019

Ibid.

need to integrate some of Fullers principles in the AML regime. This reciprocity is a fundamental element of Fullers principle of law.[79] There must be some element of reciprocity in the application of laws. The guideline on money laundering offences in Nigeria and the Prosecution of these offences is an adoption of FATF regulation.

The FATF regulations were basically transplanted to the Nigerian AML regime. When certain laws are transplanted without taking into consideration other local factors in the absence of political will, it might not be as effective as it should be. There could also be some disparity between local criminal jurisprudence and the international recommendations like the FATF guideline. There has to be a meeting point or understanding or reciprocity as Fuller puts it between the AML regime in Nigeria and FATF. If issues of transplanting are not well managed, there may not be a willingness on the part of the law enforcement in Nigeria to reciprocate international recommendations.

The absence of mutual understanding and a beneficial relationship might be one of the factors combatting an effective AML regime in Nigeria, thereby creating room for the misapplication of prosecutorial discretion in the AML regime. These are some of the issues that would be examined in the AML chapter.[80]

1.9 Prosecutorial Discretion

The importance of prosecutorial discretion in the AML regime in Nigeria cannot be overemphasised. Prosecutors play a crucial role in the administration of the criminal justice system of any nation. Prosecutors exercise discretion, deciding who to charge with a crime, what charges to file, when to drop the charges, whether to accept a plea bargain, and how to allocate prosecutorial resources.[81] The decision to charge and what to charge with can be more effective than it is, currently in Nigeria. As a reflection of a major political trend globally, policy makers in the administration of justice have criticised the discretionary

Fuller n(2) 70.

See AML Chapter.

Lauren Shermer and Brian Johnson, 'Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in US Federal District Courts' [2009] 1 Justice Quarterly Journal 20.

powers of prosecutors.[82] This is because, when persons are given powers without adequate checks and balances, there is a tendency to abuse such powers. There is a possibility of prosecutors arrogating themselves more powers than that which has been associated in the regulatory framework.[83] The independence and the discretion of prosecutors is important for the development of the justice system, particularly for the AML regime. The focal concern of charging is the primary responsibility of the prosecutor. The extent to which the prosecutor uses such powers, particularly with the influential in the society, would determine how justiciable and transparent the administration of the criminal justice system is.

The independence of the prosecutor and the extent to which prosecutors can act without recourse to external and superior factors, are one of the issues which will be analysed.[84] The lack of independence of a prosecutor, and undue interference with the prosecution can obstruct the course of justice. If there is an obstruction of justice, then the concept of the rule of law is undermined. The AG prosecutes on behalf of the government, and all discretionary powers lies in the office of the AG. Other prosecutorial agencies prosecute by executive fiat on behalf of the AG. Executive fiat can be defined as a formal authorisation, directing someone or an office to carry out certain functions on behalf of a superior or a government. In Nigeria, **S174** of the Nigerian Constitution 1999, has vested in the AG of the federation powers to prosecute and discontinue all criminal cases.[85]

The problems with an individual wielding such discretionary powers are enormous. This could raise issues of abuse office of discretionary powers. The problems of corruption, and the tendency to compromise the office of a prosecutor, are not unconnected with the sole discretionary powers conferred in S174 1999 of the Nigerian Constitution on the AG. This

82 Jeffery Ulmer and Kulyech Megan, 'Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences' [2007] 44 Journal of Research in Crime and Delinquency 428.

Ibid.

Commonwealth Secretariat; Prosecution independence and accountability: principles, challenges and recommendation [2017] 0305 Commonwealth Law Bulletin.

Nigerian Constitution 1999, S 174.

could be attributed as one of the probable causes of unsuccessful prosecution of PEPS in the AML regime in Nigeria.

A scenario where an AG is appointed from the same political party forming the government and is an appointee of the President may create an avenue for inappropriate compromise.[86] The integrity of the AG is very important if prosecutorial discretion is to be applied appropriately. The application of prosecutorial discretion in prosecuting money laundering offences could determine how successful a charge will be. It is the prosecutor's responsibility to draft a charge that would be in accordance with the legislation. [87]

Prosecutorial discretion should not be one sided. Prosecuting on a less weighty charge, or outright discontinuance of a case, should not be at the sole discretion of the AG and at the sole benefit of a PEP who has been alleged to have committed the offence of money laundering.[88]

The generality in the application of laws is a prerequisite in the acceptability of laws.[89] If laws are accepted by the people, laws would be obeyed. There is a linkage between the generality, acceptability and obedience of laws. Fuller asserts that Laws must be General.[90] For the enshrinement of the rule of law in a society, the generality of the law should be sacrosanct. The application of laid down rules and regulations should not be for the common citizens at the exclusion of the rich and influential. The centre of a nation's justice system is the rule of law, how successful the justice system is could be determined by generality and the application of the laws.

Fuller asserts that there must be a congruence between written laws and how officials enforce these written laws.[91] It is important that officials whose responsibilities are to

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86 Taiwo Oyetibo, 'Nigeria: Challenges of Prosecution and Defence Counsel in Corruption Prosecution' [2014] 10 Acta Universitatis Danubius Juridica 5

ibid

For further development of this argument, see chapter on prosecutorial discretion below

Fuller,n(2) 51.

Fuller,n(2) 51.

Fuller n(2) 65.

enforce these AML laws do enforce them regardless of whom is involved. The application of prosecutorial discretion in deciding whether or not to prosecute an alleged money laundering offender, shouldn't be an exclusive benefit of a PEP. For the acceptance of these regulations in the AML regime, officials must enforce and be seen to enforce the laid down rules and regulations governing the regime. A PEP should be subject to the rigours of the law as a drug dealer or any other money laundering offender would be.

These issues are critically analysed, and its intricacies discussed in the prosecutorial discretion chapter

1.10 The collision Course Between the Gatekeeper Approach in the AML legislation and Legal Ethics of Professionals

Central to any legal system are lawyers, whose professional ethics support the public interest. Any AML regime must earn the cooperation of lawyers if it is to succeed. In Nigeria there are problems with the integration of the AML regime with both the legal ethics of confidentiality, and the ethical exercise of prosecutorial discretion. Lawyers must not place themselves in a position of compromise or appear to get conviction by any means.[92]

The centrality of legal ethics to the rule of law and the AML regime means we need to consider how best to approach legal ethics in Nigeria.[93] The role of deontological ethics and its stereotype approach in regulating the code of conduct of lawyers might not be the best ethical approach. The adherence to strict rules could create a gap, particularly in scenarios where there is conflict of rules or where the rule is silent on an issue. The factor which should inspire or encourage lawyers to do what is right should not only be rules or regulations, but the inner will to do what is right. This inner will which motivates a person from separating right from wrong is virtue.[94] Virtue ethics appears not to play a considerable role in the regulation of lawyers conduct in Nigeria. Hence, the adherence to

92 Wilfrid Rumble, 'Jerome Frank and His Critics: Certainty and Fantasy in the Judicial Process' ' [2010] 10 Journal of Public Law 13.

This Topic is explained in chapter 3 below.

This Concept is explained in detail below in chapter 3.

these strict rules has created some problems with regards to ensuring that lawyers as gatekeepers, play their role effectively in the AML regime.

Adherence to strict rules than doing what is considered right has made the regulation of money laundering with regards to the typology of PEP more difficult than it should be. The problems arising from what to disclose and what not to disclose as lawyers is frustrating the AML regime and the successful prosecution of PEP. The rule which regulates the conduct of lawyers forbids lawyers from disclosing financial transactions made by their clients. One wonders if this rule also encourages lawyers to look the other way on the suspicion of money laundering by their client, on the guise of adherence to strict rules and regulations.[95]

The problem arising from conflict between the duty of confidentiality which is sacrosanct in the ethics of lawyers, and the provisions of S3&5 MLPA 2011 which mandates lawyers to report suspicious activities are worthy of consideration. In the case of *Nigerian Bar Association v FGN & CBN*,[96] it was held that lawyers could not contravene the provisions in the Rules of Professional Conduct 2007 [RPC] and the Legal Practitioners ACT 1975 by disregarding duty of confidentiality between a client and a lawyer.

With this judgement, lawyers have declined to abide by the provision in S3&5 which mandates them to report. This could undermine the AML regime and can hinder an effective prosecution of money laundering offenders, particularly offenders that fall within the typology, which is prevalent in Nigeria, [PEP]. The practice in the AML regime, also appears to authenticate the superiority and importance of deontological ethics over Virtue ethics, which should not be the case.

These are some of the problems this research discusses with intricacy, in the chapter on ethical consideration of lawyers in the AML regime.

This issue is explained further below in chapter 3.

Ndidi Ahiauzu, "Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA V. FGN & CBN",(2016) 19 Journal of Money Laundering Control 339.

Chapter 2

INTERNATIONAL STANDARDS AND THE ANTI MONEY LAUNDERING REGIME OF NIGERIA.

2.1 Pre- Colonisation: History of Criminal Prosecution in Nigeria's Justice System

Before colonisation in Africa, particularly Nigeria, there was a traditional system in place to resolve disputes that were considered to be criminal in nature. The traditional African society was an all-inclusive society. It was all-inclusive because those who took decisions on behalf of a community were representatives from all families. In most communities in Nigeria at the time, each family were to nominate two elderly males that would represent them as members of the Council of Elders.[97] The Council of Elders was typical in almost every traditional society in Africa, particularly Nigeria. When issues arose, particularly cases that were criminal in nature, the Council of Elders would summon the person who has been accused of an offence. The accused person would answer certain questions asked by the Council of Elders. At that time, the Council of Elders had a dual function, it acted as the prosecutorial authority and the jury in the land. [98]

The traditional African society happened to have understood the tendencies and dangers of abuse of power; hence, the Council of Elders was like the typical Jury system. Members of the council of elders were to vote to determine whether or not the accused person should be found guilty.[99] However, the decision of the jury was not a binding decision as the Kings had the final decision on the proclamation of guilt on a person.

The decision of the council of elders was highly persuasive, as the King was guided by the decisions of the members of the Council. The King acted as Judge in the traditional society

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97 Noel Otu, 'Colonialism and the Criminal Justice System In Nigeria'[1999]23 International Journal for Comparative and Applied Criminal Justice 294.

ibid

Kalu Ezera, 'Constitutional Developments in Nigeria: An Analytical Study of Nigeria's Constitution-Making Developments and the Historical and Political Factors That Affected Constitutional Change'[1961]336 The Annals of the American Academy of Political and Social Science 196.

while the council acted as both prosecutor and jury. The accused/defendant would represent himself before the Council, as the concept of legal representation was alien to the traditional African society.[100] The traditional Nigerian community prior to colonialism had no clear rules. There was no codification of laws, that determined what a crime was, or what was acceptable within the society. In fact, there was no Nigeria Prior to 1914. The amalgamation of communities by Lord Lugard, the naming of these amalgamated communities, was done in 1914 and was named Nigeria.[101] It is important to note that each of these communities had an independent a traditional system of justice. Despite the absence of any form of codification of laws, there was an understanding of an established prosecutorial system in these communities.[102] The Council of Elders had the discretionary powers on whom and what offence to prosecute. Minor offences in traditional African communities might attract a fine without a need to appear before the Council of elders. An offence like murder, stealing or rape, the defendant would have to appear before the council of elders and defend himself. The prosecutors who were the elders had the discretion on the punishment. This discretion was to recommend to the king, who had the powers to give the final judgement.[103]

It is important to note that the criminal justice system prior to the colonial era of the British, was based on customary law, particularly in the southern region of Nigeria.[104] The prosecutorial system, where the Council of Elders decided who to prosecute and the offence to prosecute, was in accordance to the norms and customs of the people at that time. Each prosecutorial system and criminal justice system were peculiar to each

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ibid

Paul Eric, 'The Amalgamation of Nigeria: Revisiting 1914 and the Centenary Celebrations'[2016]12 Journal for Canadian Social Science 66-68

ibid

Peter Nwankwo, *Criminal Justice in the Pre-colonial, Colonial, and Postcolonial Era: An Application of the Colonial Model to Changes in the Severity of Punishment in Nigerian Law* (University Press of America, 2009)87

Matthew Nwocha, 'Customary Law, Social Development and Administration of Justice in Nigeria'[2016]7 Beijing Law Review 436

community. This is because each community within the southern region of Nigeria, had a monarchical system of government, and the monarch's at the time were in charge of both the executive, legislature and the judiciary.[105] The monarchs had an enormous influence on the Council of Elders, and this influence guided the decisions the prosecutorial establishments (Council of Elders) made at the time.

Despite the autonomy of each of these communities and a little variation in their customary laws and justice system in the southern part of Nigeria, the prosecutorial system was almost the same. Most communities had a decision-making body made up of the elders in the community and a king, who makes a final decision based on the decision of the Council of Elders.[106] This was the predominant practice in southern Nigeria prior to the colonial rule.

In the northern part of Nigeria, the written Muslim law of the Maliki school was what guided the prosecutorial system at the time. The justice system in northern Nigeria was based on Islamic law. Islamic scholars at that time, were the only ones authorised to interpret the Koran. Their interpretation of the Koran in accordance to criminal offences was a system of justice on its own. This is because prior to the colonisation of the British, the Trans -Sahara trade brought Islamic scholars to the Northern region of Nigeria from Futa Jallon (now Guinea). This made Islam the predominant religion in the northern part of Nigeria.[107]

The practice of Islam took over the culture and traditional institutions in northern Nigeria, even before colonialism in Northern Nigeria. Hence, the culture and religion in northern Nigeria appears to be inter-linked. The culture in northern Nigeria (Islamic culture) happened to be the centre of their justice system pre colonialism. The prosecutorial system in northern Nigeria, was based on the principles and teaching of Islam.[108]

Ibid.

Ibid.

Adesina Yusuf Raji, 'The Growth of Islam in Pre-colonial Igbomina' [1999]19 Journal of Muslim Minority Affairs 213.

Ibid.

The Islamic scholars at the time oversaw the prosecutorial system.[109] The Islamic scholars acted as both prosecutor and judge over cases that were referred to them. This was because the justice system at that time, which was based on Islam, prohibited members of the society who were not Islamic scholars from interpreting the Koran. The Islamic scholars were believed to be "knowledgeable" which validated their mandate in the Northern-Nigerian society to interpret the Koran and apply it to the cases that were refer to them.[110]

The prosecutorial system in pre- colonial northern Nigeria appeared to be effective at the time, as there were no bureaucratic processes before justice could be dispensed. It was easy for justice to be dispensed as the king would simply assemble the Alkali to preside over a case.[111] The Alkali's are revered Islamic teachers and are common in Islamic societies. The criminal justice system was less complicated than it is currently; however, it had its own disadvantages. Some of the disadvantages of the criminal justice system was the centralisation of prosecutorial powers and dual role of the Alkali. The Alkali determined the offences to prosecute and gave judgement on cases subject to the king's approval. This was the norm in Northern Nigeria at the time, which gave room for dictatorial tendencies by the monarch and Alkalis.[112] The centralisation of prosecutorial powers in pre- colonial Nigeria could be interpreted as an abuse of prosecutorial discretion in its own form.

However, it is worthy of note that societies in pre-colonial Africa had her own systems, which includes the criminal justice system. The application of prosecutorial discretion in the criminal justice system in Nigeria had been existing before the colonisation by the British and before Nigeria as a nation had any formal criminal procedure. Even if there was no clear guide to determine the application of prosecutorial discretion in the pre-colonial era, the discretionary powers the Alkalis in Northern Nigeria had and the Council of elders

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109 Yushau Sadiq 'A History of Islamic Law in Nigeria Past and Present' [1992]31 Journal of Islamic Studies 85.

110 Audu Jacob 'Pre Colonial Political Administration in the North Central Nigeria: A Study of the Igala Kingdom' [2014]10 European Scientific Journal 392.

Ibid.

Ogechi E. Anyanwu 'Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari'ah' [2006]21 Journal of Law and Religion 317.

in southern Nigeria, was prosecutorial discretion in its own form.[113] Of course, it was not a perfect system as there are no perfect systems, the traditional prosecutorial system pre - colonial era, which had its own flaws, contributes richly to the history of the criminal justice system in Nigeria.

2.2 Colonisation: History of Criminal Prosecution in Nigeria's Justice System

Upon the arrival of the colonial rulers in Nigeria, the colonialist had to liaise with the local traditional leaders particularly in the southern part of Nigeria to establish their consular services. The colonialist first point of call was Lagos and Bonny Kingdom. This was because these areas in the southern part of Nigeria, are on the coast and the predominant means of transportation was by sea.[114] By 1861, the British had succeeded in convincing the traditional leaders in Lagos that it was best for the traditional leaders to allow them take charge of their consular services, in exchange for European protection. The treaty that proclaimed Lagos as a colony was signed in 1861, which gave room for a gradual and systematic introduction of the European norms and culture in Lagos and indeed the southern part of Nigeria, as Lagos was a major converging point because of the sea port.[115]

Soon after, the traditional leaders within Lagos colony saw that the British appeared to have wanted more than just consular services. The imposition of the way of life and administration of the running of the society, became the colonialist primary interest. This brought about a resistance from the locals, some of which became bloody. In other for the British to control the Lagos market and their commercial interest, they established the police which was controlled by the British. At the initial time, they had only British recruits in the police. This was done to ensure that there were no locals in the police, and when they eventually recruited the locals, the colonialist ensures that the locals in the police bore no arms.[116] The British police at that time, domiciled in Lagos, ensured orderliness amongst the locals and enforced some element of western civilisation. Soon, the power of the

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Ibid.

Noel Otu, 'Colonialism and the criminal justice system in Nigeria'[1999]23 International Journal for Comparative and Applied Criminal Justice 295.

Ibid.

Ibid.

consular service and police, spread across the southern region, which necessitated the establishment of unwritten laws and courts by 1871.

By 1872 the British established they Consular courts and the courts of equity across Nigeria. These courts had jurisdiction to entertain trade disputes. However, Lagos being the first point of call of the colonial leaders, was ahead of other regions. On 4th of March 1863, Lagos was subject to English law and a supreme court was established by the supreme court Ordinance of 1863. This court had jurisdiction to hear both criminal and civil matters arising from persons residing within the Jurisdiction. Soon after, the powers of the courts spread across other regions in Nigeria. The new law set out precise punishments for specific crimes. Punishments were assessed by individual wealth, title and peculiar circumstances of the offender.[117] It is important to note that the customary law was not totally set aside with the advent of English law. The English law and customary law were operating side by side in the criminal justice system of Nigeria. In most cases, the English law was applied to fit into the norms and customs of the particular village, in which it was applied. There was a meeting ground in the application of both laws, however if there was a conflict of laws which was considered not to be to the advantage of the colonial leaders, the English law prevailed over the criminal justice system.[118]

By 1900, there was the native court proclamation. The native courts were of two categories, the minor court which handled disputes with fines not exceeding 25 pounds, which had a district commissioner who acted as the president of the court. The native council was also established, which served as the court of appeal for the minor court. At that time, the courts would summon offenders for both criminal and civil offences and appoint a district officer to stand in as attorney, prosecuting the defendant.[119] A district officer acted as a prosecutor and determined the charges that the offender would be prosecuted with. The Supreme Court Ordinance of 1863 and the native court proclamation of 1900 were enabling laws that regulated the criminal jurisprudence during the colonial

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Oilade A, *Nigerian Legal System*(Sweet &Maxwell1979)12.

Ume Fredrick, *The Courts and Administration of Law in Nigeria: Enugu Nigeria* (Fourth Dimension Publishing 1989)9.

Ibid.

era. Hence, there was a need to establish the prison system, which was done in 1863. The concept of correctional facilities had not existed in the country before then, the sentencing of offenders was based on the supreme court ordinance of 1863 and the type of offence that had been committed.[120]

The colonialist brought some level of orderliness to the criminal justice system in Nigeria and laid the foundation for a more effective prosecutorial system in Nigeria.

2.3 Post Colonisation: History of Criminal Prosecution in Nigeria's Justice System.

Immediately after Nigeria gained independence from United Kingdom in 1960, the Nigerian police force had the primary responsibility of prosecuting criminal cases. Part of the responsibility of the police, was to investigate and prosecute suspects who had been accused of committing crimes against the state. The Nigerian police had the discretionary powers at that time to prosecute all offences on behalf of the government.[121] However in the modern system, S 23 Nigerian Police Act gives powers to the police to prosecute pursuant to provisions of S174 of the Nigerian constitution. S23 of the police act states: Conduct of prosecutions

> "Subject to the provisions of sections 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (which relate to the power of the Attorney-General of the Federation and of a State to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria), any police officer may conduct in person all prosecutions before any court, whether or not the information or complaint is laid in his name." [122]

It can be argued that, the introduction of prosecutorial discretion in the Nigerian criminal justice system post colonisation was through the Nigerian police force, which prosecuted on behalf of the government. However, even as at the time of the enactment of the Police Act, the Nigerian police could not have prosecuted without the interference of the

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Ibid.

Ibid.

Nigerian Police Act, 1943, S23.

Attorney general[AG], if he so wished.[123] The Nigerian police, had multiple prosecutorial functions at the time its formal enactment. These multiple prosecutorial functions arose from the fact that there were no agencies created at the time with the primary responsibility of prosecuting specific offences.

For example, the National Drug Law and Enforcement Agency [NDLEA] was formed in 1989 , with specific duties of prosecuting offences relating to drugs and narcotics. [124] Prior to the enactment of the NDLEA Act, the Nigerian Police prosecuted all drug and related offences. The Nigerian customs had been established in 1945 by the colonial administration, with no prosecutorial powers attached to the agency. The Nigerian Customs had its prosecutorial powers attached to it in 1992, prior to that the Nigerian police prosecuted on behalf of the Nigerian customs. The Nigeria police prosecuted on behalf of all government agencies prior to when these government agencies obtaining their establishment Act, which eventually empowers these agencies to prosecute. It is important to note that despite having an enabling act, which empowered most government agencies to prosecute offences relating to their specific duties, these agencies do not possess the absolute discretion to prosecute. For any government agency to prosecute, it has to be through an executive fiat issued by the Attorney -General [AG], to prosecute on behalf of the government.

This process known as "executive fiat" has been an object of criticism by legal scholars and advocates for the rule of law. Garrison Author criticises the use of executive fiat and the possibilities of the abuse of this executive privilege, particularly as it undermines the rule of law.[125] This is because, there is a tendency particularly in developing nations, that the administrator of executive fiat could abuse such powers. With regards to the criminal justice system particularly in Nigeria, the administrator of executive fiat is the AG, who issues this order to agencies to prosecute on behalf of the government, in accordance to their specific functions. The potential danger with this existing arrangement is that,

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Out (n100),297.

National Drug Law and Enforcement Agency Act, 1989.

Garrison Arthur 'The Rule of Law and Rise of Executive Power'[2014]18 Texas Review of Law and Politics 308.

government agencies with prosecutorial powers would not be quick to prosecuting a suspect upon the conclusion of their investigation. The bureaucracy of seeking an approval from the office of the AG before prosecuting could delay the course of justice, or even tamper with the outcome of the investigation. These are some of the challenges the existing criminal justice system in Nigeria faces.[126]

It is important to note that private persons can institute criminal proceedings on behalf of the government, however the law gives a certain condition for private persons to prosecute. The criminal justice system allows for private prosecution of criminal cases, subject to the discretion and approval of the AG. Private persons can institute criminal proceedings on the condition that a fiat is obtained from the office of the AG. There is legal and judicial backing for this in the Nigerian criminal justice system, approved by the Supreme Court. In the case of *Fawehinmi v Akilu,* the supreme court held that all criminal cases are instituted by the AG, however in the case where a private individual intends to prosecute a criminal case, the person could do so by obtaining a fiat from the AG.[127]

Despite this judgement by the supreme court, the practicability of a private individual to institute criminal proceedings is almost impossible. The office of the AG still takes responsibility for the prosecution of criminal cases and may never grant a fiat to private persons to prosecute on behalf of the state. In other jurisdictions particularly in the USA, it is common to find private persons prosecute on behalf of the government.[128] Private prosecutors do not need permission from government prosecutors to institute criminal proceeding against a suspect. A qualified lawyer could institute legal proceedings against a

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126 John Agbonika, Elewo Musa ' Delay in the Administration of Criminal Justice in Nigeria: Issues from a Nigerian Viewpoint'[2014]26 Journal of Law, Policy and Globalization 131.

127 Fawehinmi v Akilu (1987) 4NWLR (pt 67) 797.

Roger Fairfax 'Delegation of the Criminal Prosecution Function to Private Actors'[2009]43 University of California Law Journal 415.

suspect if there is a need to do so. This has helped to reduce the workload on government prosecutors and could aid a quick dispensation of justice.[129]

The prosecution of criminal cases by private persons has its advantages. One of it is that it circumvents the bureaucratic nature of the office of the AG, and other government agencies empowered to prosecute criminal cases. This makes the dispensation of justice faster.[130] However, it could be that influential individuals in the criminal justice system in Nigeria [AG], do not want the "unnecessary" privatisation of the criminal justice system by issuing fiats to private persons to prosecute and represent the state, as if it were a civil case. Some persons have theorised that government should privatise the criminal justice arena to reduce the burden on the office of the AG and government prosecutors, while some have opposed this on the basis that the functionality of the criminal justice system of a nation is the primary responsibility of the government.[131]

It is important to also note that there is a difference between the briefing of private lawyers to prosecute on behalf of the state and private persons prosecuting criminal offences. The difference between both is that, when private persons are briefed to prosecute on behalf of the state, the person is only acting as a legal representation for the state. The person is being briefed as any other lawyer would be briefed to represent a client. In this case the government [AG] is the client of the prosecutor and the prosecutor takes instructions from the client [AG], on whether or not to prosecute.

While in the latter, private person prosecuting on behalf of the state means that any individual who is desirous of institution of a criminal charge against a person, could do so in the person's personal capacity as if the person is the aggrieved party or the litigant. It could be argued that this goes against the fundamental principle of the doctrine of the criminal law, which states that all crimes are committed against the state.[132] If we are to

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Ibid.

Ibid.

Roger Fairfax 'Outsourcing Criminal Prosecution? - The Limits of Criminal Justice Privatization'[2010]10 University of Chicago Legal Forum 267 .

132 Ibid.

go by way of this fundamental principle, then we could argue that the advocates for the privatisation of the criminal justice system, who are arguing against the bureaucracy of the office of the AG and for the speedy dispensation of justice, may lose the fundamental element of criminal law. If crimes are committed against the state then, the state or its representative should be responsible for the prosecution of criminal cases.

Whether or not legal scholars continue to argue on the privatisation of prosecution, the applicability of it in the criminal justice system of Nigeria is almost impossible, despite it been settled law as far back as 1987. It is almost impossible for private persons to prosecute criminal offences, as the bureaucracy of obtaining a fiat from the AG makes it almost impossible.[133] More so, it could be argued that in a developing nation like Nigeria, the AG may not want the devolution of prosecutorial powers, which could serve as a check and balance on the occupant of the office.

The prosecutorial duties of government agencies like Nigerian Customs, Immigration Service, National Drug Law and Enforcement Agency, National Food and Drug Administration Agency and all other prosecutorial agencies including the Economic and Financial Crimes Commission [EFCC], which is directly responsible for prosecuting money laundering related offences, are subject to the approval of the Attorney General. This clearly means that prosecutorial discretion has a major role to play in the criminal justice system of Nigeria and the office AG has oversight and ultimate responsibility for the exercise of prosecutorial discretion. Hence, the need to examine the role of prosecutorial discretion in the AML regime in Nigeria.

2.4 The Definition of Corruption Within the Nigerian Context.

For an elaborate discussion on the issue of PEP related money laundering offences, it is important that there is a conceptualization of the definition of corruption. This is because of the role corruption plays in the application of prosecutorial discretion in the AML regime in Nigeria.

Jamil Mujuzi, 'Private Prosecution in Nigeria under the Administration of Criminal Justice Act, 2015'[2019] Journal of African Law 63 226.

What is Corruption? Corruption can be found everywhere. It can be found in the private sector, media, business, civil society and public sector. From health to education, sports and infrastructure, corruption can be found. When people hear the word corruption, there is a general presumption that it is government related corruption or misappropriation of public funds by some government official. In as much as this is a type of corruption, the problem of corruption is also visible in the private sector.[134] According to the UN "The analysis so far has pertained specifically to the experience and perceptions of bribery in relation to public sector officials. However, the issue of corruption and, more specifically, of bribe-paying also extends to the private sector. In addition to public officials, both the 2016 and 2019 surveys inquired about respondents' experiences with six types of private sector employee: doctors in private hospitals, nurses in private hospitals, teachers in private schools, employees in private banks, employees in private insurance companies, and other employees in private business. In 2019, 28 per cent of citizens reported having had a contact with one such private sector employee in the 12 months prior to the survey, some 3 percentage points more than the 25 per cent in the 2016 survey"[135]

According to the Webster dictionary, corruption can be defined as a departure from the original or from what is considered pure. If we are to expatiate further on this definition, it means that any interference, infiltration, dilution, or deviation from "what it ought to be" can be defined as corruption. It can be further enumerated to mean that deliberate actions with intent to deviate from the original plan or sequence, to the unjust advantage of persons deviating from such original plan, can be defined as corruption.

This further means that when senior executives in the private sector, divert shareholders' funds without their consent due to insider dealings, it is an example of corruption. When a doctor who works in a busy hospital, gives his friends kids a priority treatment and ignoring other patients who have been on the line waiting to see a doctor, that is corruption. When undue advantage is given to a person in an interview panel amongst other candidates. Hence, corruption is not limited to the elected or appointed government official, who has

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Carolina Pancotto, 'Corruption in the Eyes of the World Bank: Implications for the Institution's Policies and Developing Countries'[2008]26 Pen state International Law Review.

Corruption in Nigeria: Patterns and Trends Second Survey on Corruption as Experienced by the Population In collaboration With The United Nations Office on Drugs and Crime and UK Aid, December 2019.

abused the oath of office or unjustly enriched himself. Hence, there are several definitions of corruption. However, for purpose of this discussion, emphasis will be placed on institutional corruption.

The OECD, the United Nations and the Council of Europe has no clear definition of corruption, however, they establish offences of a range of corrupt behavior, for example, bribery, abuse of office etc. Hence, the OECD convention makes provision for the establishment of bribery as a corrupt practice by foreign public officials, the Council of Europe makes provision for the offences such as trading in influence and bribing domestic and foreign public officials. In addition to these types of conduct, the mandatory provisions of the UN Convention also include embezzlement, misappropriation or other diversion of property by a public official and obstruction of justice. at is corruption.

These conventions define international standards on the criminalization of corruption by prescribing specific offences, rather than through a generic definition or offence of corruption.

Article 15-20 of the UN Convention on Convention Against Corruption 2003 clearly makes provision for the criminalization of corruption.

Article 15 :"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."[136]

…….

Article 17 : "Embezzlement, misappropriation or other diversion of property by a public official.

[136] United Nations Convention on Convention Against Corruption, Article 15.

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position."[137]

…….

Article 20: "Illicit enrichment Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."[138]

Furthermore, the Council of Europe Convention Against Corruption 2002 makes provision for the criminalization of corruption by public officials.

Article 3:" Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions."[139]

Furthermore, the UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, Palermo 2000, mandates states to criminalize proceeds of serious crimes. It also mandates member states to confiscate these proceeds. Article 6 sates:

"1. Each State Party shall adopt, in accordance with fundamental

principles of its domestic law, such legislative and other measures as may

be necessary to establish as criminal offences, when committed

United Nations Convention on Convention Against Corruption, Article 17
United Nations Convention on Convention Against Corruption, Article 20
Council of Europe Convention against corruption, Article 3

intentionally:

(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

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;

Subject to the basic concepts of its legal system:

The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article."[140]

Furthoremore, article 8 and 9 of the Palermo convention mandates member nations to criminalize corruption. It states:

> "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

[140] United Nations Convention on Serious Crime 2000, Article 6.

The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.

Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

4. For the purposes of paragraph 1 of this article and article 9 of this Convention, “public official” shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

Article 9

Measures against corruption

1. In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with

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adequate independence to deter the exertion of inappropriate influence on their actions."[141]

From the above discussions, it is quite clear that there are international instruments that have defined and criminalized corruption, particularly by public officials. It is important to also note that Article 21 and 22 of the UN Convention against corruption makes provisions for the criminalization of corruption in the private sector. The Palermo Convention on serious Crime makes provision for the criminalization of corruption in both private and public sectors. However, our discussion focuses on money laundering by PEP, which is an integral type of corruption by public officials.

Within the Nigerian context, the definition of corruption is the abuse of office by public officials who are representing the people. The context of corruption within the Nigerian state is taking advantage of an office or position to unjustly enrich oneself. According to the UN office on Drugs and Crime, the problem of corruption in Nigeria appears to be institutional. The PEP that occupy these institutions have corrupted the system consciously or subconsciously, that the problem might have grown more than the corrupt individual or PEP who is occupying the office.[142] It is important to note that unfortunately, an instrument

Ibid.

Corruption in Nigeria Patterns and Trends [2019], United Nations Office on Drugs and Crime.

which is the systemic corruption in Nigeria is the Constitution.[143] This is because the criminal justice system of Nigeria is centered around the office of the AG by virtue of S174 of the Constitution.[144]

The over concentration of powers in the office of the AG has made it difficult to successfully prosecute PEP for corruption related offences. Hence, the refusal to prosecute or the discontinuance of corruption cases has made the fight against corruption not is effective as it should be, despite having laws regulating anti-corruption and money laundering.

An AG who refuses to accept a bribe but refuses to approve the prosecution of PEP or discontinues the prosecution of the PEP, is as corrupt as who has received a bribe. Hence, definition of corruption within the Nigerian context goes beyond receiving bribe or converting public funds for private use, but miss-use and abuse of office.

2.5 Brief History of the Development of Anti Money Laundering Regimes Before Financial Action Task Force

The global awareness and measures on the fight against money laundering and related offences began around the 1980's led by the European Council. It promoted the "know your customer" principles in banking. The reason for this, was for the names on bank accounts to reflect the true beneficial owner.[145] Despite these efforts, nations were not interested in forming domestic AML policies. Nations had not criminalized money laundering prior to 1986. The United States was among the first nations to criminalize money laundering and enact an AML framework to tackle this crime and its related offences domestically.[146]

In the 1980's, the proceeds from the sale of drugs and narcotics particularly from nations within Latin America had been of considerable concern to the international community.[147]

Igiebor Osiyekemwe 'Political Corruption in Nigeria: Implications for Economic Development in the Fourth Republic'[2019]34 Journal of Developing Societies 62.

See chapter on power of the constitutional role of the AG.

Mark Nance, 'The regime that FATF built: an introduction to the Financial Action Task Force'[2018] Journal of Crime, Law and Social Change 112.

146 US Money Laundering Control Act, 1986.

147 Robin, (n62,)4.

This was because, the typology of money laundering related offences at the time was from drugs and narcotics. In Northern Ireland, the drug cartels almost caused some instability. These respective nations at the time recorded a significant increase in the use of LSD, cannabis, cocaine and ecstasy. These factors led to the formation of a new Government policy in Northern Island, with clear priorities for action on education, treatment, enforcement, research and evaluation.[148]

The height of the drug trade was between the 1980's and early 1990's, during the reign of the drug baron Pablo Escobar. His cartel at that time, was able to launder over $70m (seventy million dollars) a day, at the peak of his career. Part of these funds were used to destabilise the Colombian government which led to mass killing within the Latin America.[149] There was a need for concerted efforts by the international community to check the illicit flow of funds from drug cartels.

The foundation of the global fight against money laundering began at the November 25 1988 Vienna Convention. It was agreed at the United Nations [UN] conference, for the need to adopt a convention against illicit traffic in Narcotics Drugs and Psychotropic Substances.[150] The Vienna Convention brought the harmonisation of a global AML regime. Nations decided to implement the recommendation from the Vienna convention and develop a framework to combat AML within their respective jurisdictions. The Vienna Convention can be rightly argued to be the beginning of a global AML regime. The clear focus of Article 3 was on the proceeds from the sale of drugs and narcotics, human trafficking, illegal sale of arms and other offences with the exclusion of white-collar offences and PEPS. These recommendations are stated in article 3 of the Vienna convention.

Article 3 of the Vienna convention recommended:

148: 'The Illegal Drugs Trade and Drug Culture in Northern Ireland'[2002]1, House of Commons Northern Ireland Affairs Committee.

149 JD Rockefeller, *The Rise and Fall of the King of Cocaine* (J.D. Rockefeller, 2015) 9.

150 DP Stewart, 'Internationalizing the war on drugs: The UN convention against illicit traffic in narcotic drugs and psychotropic substances' [1990]18 Denver Journal of International Law & Policy 389.

(a) “Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

……..

The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

…….

Subject to its constitutional principles and the basic concepts of its legal system: i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such offence or offences;

The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences.

……..

Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offence shall be prosecuted and punished in conformity with that law."[151]

If we agree that the Vienna convention of 1988, set the parameters for AML globally, then there was mistake from the beginning. This is because nations went ahead to create an AML framework, integrating and internalising the recommendation from the Vienna convention of 1988, without taking cognisance of how unique each nation is and the type of problem each nation faces.[152] That is, if the nation faces a money laundering problem at all. The problem with the internalisation of the articles of the Vienna convention was in the typology. There should have been a comprehensive overview and definition of what money laundering is from the start [Vienna]. This would have enabled nations to have a more comprehensive approach in establishing an AML regulatory framework in their respective jurisdictions.

Could it be the absence of foresight? Or a total disregard for weaker nations by "superior" powers at the UN, influencing these younger nations to implement an AML regime that is focusing on a typology which is not prevalent in their jurisdiction? For the harmonisation of laws and integration of policies, consultation is important, and it plays a crucial role if the vision for having these policies, recommendations or laws must succeed. Nations should have been carried along from the beginning at Vienna, to express themselves and make input on the typology of money laundering offence that is most prevalent in their respective jurisdictions.[153]

These nations particularly developing nations were not carried along maybe due to the lack of genuine interest on the part of the leaders of these nations. There was no basis for transplanting laws on the orders of a convention without recourse to the local norms and

151 Article 3, United Nations Convention Against Illicit Traffic of Drugs and Narcotics [1988].

See 1.6 in introduction chapter.

Ibid, Ognonanya, 122.

customs, prevalent crimes and vices in the nation. This was indeed the beginning of the problem of the AML regime in Nigeria.

2.6 Internalization of International Recommendations before Financial Action Task Force, [FATF] in the AML Regime of Nigeria.

Nigeria, following the blueprint of Article 3 established an AML regime focusing on drugs and narcotics, with the exclusion of other money laundering related offences particularly offences by PEPS. The internalization of the Vienna Convention 1988, in the AML regime in Nigeria created a gap in the typology of money laundering offences between 1989-1999. This gap in typology in the AML regime of Nigeria, was as a result of the implementation of Article 3 of the Vienna convention locally, by establishing the National Drug Law Enforcement Agency [NDLEA]. The NDLEA focused on money laundering offences from the proceeds of the sale of drugs and narcotics, which has never been the typology of money laundering offence that Nigeria has been facing.[154]

The creation of the NDLEA was the first step by the Nigerian government to set up an AML regime and internalize international recommendations of the Vienna Convention. The AML regime was already deficient from the start as it did not focus on the typology of money laundering offences that Nigeria faces, which is corruption and abuse of office by PEP. Developing nations in Africa, particularly Nigeria, are concerned about the typology of money laundering offence that is predominant, which is corruption and abuse of office by PEP.[155]

When analyzing the context in which the NDLEA was established, it is visible that there was no intention in focusing on other money laundering typologies.

S3 of the NDLEA clearly states its functions.[156] It states:

> "Subject to this Act and in addition to any other functions expressly conferred on it by other provisions of this Act, the Agency shall have responsibility for:

Ibid, Ognonanya,122.

Ibid, Aluko 454.

National Drug Law Enforcement Act, S3 [1989].

adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from drug-related offences or property whose value corresponds to such proceeds;

The movement of proceeds or property derived from the commission of such offences; (iii) the movement of narcotic drugs and psychotropic substances specified in the Second Schedule to this Act, and instrumentalities used or intended for use in the commission of such offences; [Second Schedule.]

……

The establishment and maintenance of a system for monitoring international dealings in narcotic drugs and psychotropic substances in order to identify suspicious transactions and persons engaged in them."

The creation of an AML regime in Nigeria, with a clear focus on a typology that is not predominant in the region, shows clearly the problems of integrating international recommendations, without recourse to domestic problems, typologies and consultation.[157] The NDLEA was set up due to the international growing pressure at the time, particularly from the United Nations. This made nations have an AML framework that would combat money laundering and curtail the illicit flow of the proceeds from the sale of drugs and narcotics.[158] Developing nations like Nigeria at the time, should not have been in a haste to transplant laws and domesticate them. The domestication of international recommendations should be in tune with the typology of offences predominant in the nation. [159]

157 Joseph Gyong 'A Sociological Assessment of the National Drug Law Enforcement Agency's (NDLEA) Strategies of Arrest and Detention in Nigeria'[2010] 2 Current Research Journal of Social Sciences 128.

158 See note on Article 3.

159 Martin De Jong and Susan Stoter, 'Institutional Transplantation and the Rule of Law: How This Interdisciplinary Method can Enhance the Legitimacy of International Organisations' [2009] 2 Erasmus Law Review 314.

The focus on a typology of money laundering, which is totally different from what is predominant in Nigeria, made the NDLEA ineffective from the point of enactment. The peculiarities of money laundering activities in the Nigerian state should have been put into consideration before the internalisation of article 3 of the Vienna convention. This posed a major challenge because the provisions of the legislation did not cover other money laundering offences like human trafficking, terrorist financing and offences committed by PEP. The typology of human trafficking and terrorist financing are prevalent in developing nations however in Nigeria in as much as we have these problems, . The problems arising from corruption and the effects of corruption on the development of Nigeria, makes the typology of PEP more worrisome. Hence, the transplantation of recommendations from the Vienna convention should have been done in such a way that it suits local norms and problems.[160]

Nigeria may have many problems, however the problem of corruption by PEP is a primary challenge. The money laundering related typology that Nigeria faces as a nation, are issues of corruption and abuse of office by PEPs.[161]

2.7 The Integration of International Recommendations Post Financial Action Task Force [FATF] and the Problem of Nigeria's Typology

The problem of money laundering has had a significant but negative effect in the development of Nigeria. This criminality has disrupted economic growth and financial stability in the country.[162] The typology of money laundering Nigeria is dealing with, is the problem of corruption and abuse of office by PEP. Nigeria, an oil rich nation is the 6th largest producer of oil and the 9th producer of liquefied natural gas.[163] Despite the nation's natural resources and wealth, a significant percentage of her population lives below the poverty

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Ibid.

Ibid, Robin,5.

Ibid, Markovska ,168.

Praveen Duddu, "The world's biggest natural gas reserves" (Hydrocarbons Technology,11 November 2013) > http://www.hydrocarbons-technology.com/features/feature-the-worlds-biggest-natural-gas-reserves/ assessed 9 October 2017.

line.[164] Money laundering and corruption particularly by politically exposed persons [PEPS] can be attributed as one of the reasons for the slow pace of development in the country. The collective wealth of her citizens has been misappropriated by a privileged few who have been entrusted into public office and the proceeds have been laundered within and outside the country. [165]

The FATF appears to understand the problem of typology in the AML regime in Nigeria. The pressure mounted by international organisations, particularly the FATF on Nigeria necessitated for a review of the AML framework in Nigeria. The FATF since its formation has recorded some progress however, the integration and implementation of its policies in developing nations particularly Nigeria has not been as successful as it should have been. The integration of FATF recommendations, and the effort made by the Nigerian government to have a comprehensive AML regime is not enough.[166]

The FATF gave its original recommendations in 1990 and has been consistently revised to suit the evolving nature of money laundering. The inclusion of terrorist financing as part of its mandate was done in 2001 and PEP in 2012. Recommendation 1 of the FATF reccomendations in 2012 states:

"1. Assessing risks and applying a risk-based approach *

Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. Based on that assessment, countries should apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This approach should be an essential foundation to efficient allocation of resources across the anti-money

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164 Femi Kale, 'Nigeria's Poverty Index' (*National Bureau of Statistics*, 12/03/2018)<http://www.nigerianstat.gov.ng/> accessed 12 March 2018.

165 Pierce Steven, *Moral Economies of Corruption State Formation and Political Culture in Nigeria* (Duke University Press, 2016) 26.

Ibid, Aluko, 454.

laundering and countering the financing of terrorism (AML/CFT) regime and the implementation of risk-based measures throughout the FATF Recommendations. Where countries identify higher risks, they should ensure that their AML/CFT regime adequately addresses such risks. Where countries identify lower risks, they may decide to allow simplified measures for some of the FATF Recommendations under certain conditions."[167]

……

……

From FATF recommendation 1 of 2012, nations like Nigeria has made attempts internalize these recommendations. As discussed earlier, Nigeria had an AML regime focusing on drugs and narcotics by virtue of the NDLEA ACT.[168] The Nigerian AML regime also evolved and internalized these international recommendations. Hence, the introduction of the EFCC ACT and the MLPA 2004 was an attempt by the Nigerian state to address these issues.[169]

FATF Recommendation 3 of 2012, States:

"Money laundering offence *Countries should criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences."[170]

……

……

FATF Recommendation 3 of 2012 gives the mandate to nations to explore all possibilities of criminalizing any potential typology. What this means is that nations like Nigeria have been given the mandate to review their AML laws from time to time to include evolving typologies within the jurisdiction. For example, the problem of the definition of money laundering as seen in the MLPA 2004, limited the scope of money laundering to the

Financial Action Task Force Recommendations, 2012.
See discussions in 2.6 on formation of the NDLEA.
See discussions in 2.11
Financial Action Task Force Recommendations, 2012.

proceeds from drugs and narcotics.[171] This was the primary problem of the MLPA 2004 which the FATF recommendation 3atempts to address.

FATF Recommendation 12 of 2012 makes provision for the prevalent typology in Nigeria. It states:

"Politically exposed persons * Financial institutions should be required, in relation to foreign politically exposed persons (PEPs) (whether as customer or beneficial owner), in addition to performing normal customer due diligence measures, to:

have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;

obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;

take reasonable measures to establish the source of wealth and source of funds; and

conduct enhanced ongoing monitoring of the business relationship. Financial institutions should be required to take reasonable measures to determine whether a customer or beneficial owner is a domestic PEP or a person who is or has been entrusted with a prominent function by an international organization. In cases of a higher risk business relationship with such persons, financial institutions should be required to apply the measures referred to in paragraphs (b), (c) and (d). The requirements for all types of PEP should also apply to family members or close associates of such PEPs."[172]

This provision gives nations the mandate to regulate the activities of PEP particularly as it deals with the principles of due diligence by financial institutions. In Nigeria, the introduction of DNFI in the S 3 and 5 of the MLPA 2011 is an attempt to integrate these FATF recommendations.[173] The regulation of bankers and other professionals with regards to dealing with PEP is an attempt by the Nigerian to fight the prevalent typology of political

See 2.11 for discussions on internal mechanism regulating the AML regime.
FATF recommendation 12, 2012.
See 2.14 on the role of designated non-financial institution.

corruption and money laundering. This is because there is a possibility that these gatekeepers who are professionals can be used to launder funds for PEP.[174]

FATF appears to have what it takes to ensure that the AML regimes in nations like Nigeria are very effective, with regards to the prevalent typology for PEP in Nigeria. FATF appears to be making the mistake in their assessment and measurement of what a successful and effective AML regime should be, by assessing it based on the laws and prosecution of persons involved in money laundering.[175] This is a wrong assessment. The correct assessment by international organisations like the FATF should be done by taking a look at the number of successful prosecutions of the prevalent typology, with respect to the jurisdiction. With Nigeria, the right assessment should be based on the number of successful prosecution of PEP and recovery of assets. The right questions should be out across to the regulators of the AML regime in Nigeria. These questions should be:

How many PEP have been successfully prosecuted and jailed?

How many assets have been recovered from the proceeds of political corruption?

Any assessment which does not fall within these boundaries, might just be a false assessment and these are some of the problems the AML regime in Nigeria faces. The intent of these international recommendations which is for nations to have effective AML regimes focusing on prevalent typologies in their jurisdiction, might have been eroded. The applicability and enforcement of these international recommendations that have been domesticated seems to be the problem currently facing the AML regime in Nigeria.

The problem of corruption by PEPS and the unsuccessful prosecution of PEPS, has undermined international recommendations of the FATF, that have been integrated in the AML regime in Nigeria. This is because there is a difference between having existing laws and the enforcement of these existing laws. The mere integration of international recommendations by the Nigerian state does not amount to an enforcement of these recommendations.[176]

See 2.4 and 3.8 for further discussion.

See appendix. A detailed chat shows the number of successful prosecutions of PEP.

Fuller(n2),81.

The absence of executive powers of the FATF to ensure that member states implement and enforce its recommendations could be some of the challenges the FATF faces.[177] In order for Nigeria to be perceived by the international community that Nigeria has an effective AML regime, these recommendations of the FATF have to be integrated into Nigeria's AML regime. However, the enforcement of laws that regulate the AML regime cannot be checked by the FATF. It is not within the powers of the FATF to enforce laws that have been domesticated by member nations. If there is a high rate of unsuccessful prosecution of money laundering by PEP, or any other typology of money laundering offence, would the FATF sanction the member state for not enforcing an existing law or not prosecuting diligently?[178]

It could be argued that the international recommendations have been integrated and domesticated by the affected nations. AML regulators in Nigeria could argue that there is an existing framework regulating the regime and indeed the typology prevalent in the country. They could also argue that they have been prosecuting PEP, even if the records of conviction are low. These are some of the problems associated with transplanting laws. There needs to be sincerity and political will with the leadership of the recipient nation. There must be an element of reciprocity in carrying out core mandates from international organisations like the FATF. Without reciprocity, there can't be an effective internalisation any recommendation.

It would be difficult for the FATF to ensure that Nigeria enforces the prosecution of PEP, despite having integrated FATF policies and international recommendations in her AML regime. For the successful regulation of this typology in the Nigerian AML regime, it must come from within. There must be genuine commitment by regulatory authorities and the prosecutorial agencies to enforce these international recommendations, by consistently and successfully prosecuting PEP. Integration of international recommendation is not enough for an effective AML regime. Political will from the leaders in the nation and a

177 JC Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (1 edn, Cornell University Press 2011) 68-71.

See appendix.

genuine interest by regulators of the AML regime might see to the successful prosecution of PEP.

An effective AML regime would discourage people from engaging in the illegal acquisition of wealth, which is the primary rationale of most nation's AML regime.[179] The dangers of injecting proceeds of crime into the financial system of a country is enormous, hence the need for a continuous resistance and an effective prosecutorial system.

Nigeria, an oil rich nation is the 6th largest producer of oil and the 9th producer of liquefied natural gas.[180] Despite the nation's natural resources and wealth, a significant percentage of her population lives below the poverty line.[181] Money laundering and corruption particularly by politically exposed persons [PEPS] can be attributed as one of the reasons for the slow pace of development in the country. The collective wealth of her citizens has been misappropriated by a privileged few who have been entrusted into public office and the proceeds have been laundered within and outside the country. [182]

The FATF appears to understand the problem of typology in the AML regime in Nigeria. The pressure mounted by international organisations, particularly the FATF on Nigeria necessitated for a review of the AML framework in Nigeria. The FATF since its formation has recorded some progress however, the integration and implementation of its policies in developing nations particularly Nigeria has not been as successful as it should have been.

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179 Natalie Skead, 'The Politics of Proceeds of Crime Legislation' [2015] 38 The University of New South Wales Law Journal 480.

180 Praveen Duddu, "The world's biggest natural gas reserves" (Hydrocarbons Technology,11 November 2013) > http://www.hydrocarbons-technology.com/features/feature-the-worlds-biggest-natural-gas-reserves/ assessed 9 October 2017.

181 Femi Kale, 'Nigeria's Poverty Index' (*National Bureau of Statistics*, 12/03/2018)<http://www.nigerianstat.gov.ng/> accessed 12 March 2018.

182 Pierce Steven, *Moral Economies of Corruption State Formation and Political Culture in Nigeria* (Duke University Press, 2016) 26.

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The problem of corruption by PEPS and the unsuccessful prosecution of PEPS, has undermined international recommendations of the FATF, that have been integrated in the AML regime in Nigeria. This is because there is a difference between having existing laws and the enforcement of these existing laws. The mere integration of international recommendations by the Nigerian state does not amount to an enforcement of these recommendations.[185]

Ibid, Aluko, 454.

See appendix. A detailed chat shows the number of successful prosecutions of PEP.

Fuller(n2),81.

The absence of executive powers of the FATF to ensure that member states implement and enforce its recommendations could be some of the challenges the FATF faces.[186] In order for Nigeria to be perceived by the international community that Nigeria has an effective AML regime, these recommendations of the FATF have to be integrated into Nigeria's AML regime. However, the enforcement of laws that regulate the AML regime cannot be checked by the FATF. It is not within the powers of the FATF to enforce laws that have been domesticated by member nations. If there is a high rate of unsuccessful prosecution of money laundering by PEP, or any other typology of money laundering offence, would the FATF sanction the member state for not enforcing an existing law or not prosecuting diligently?[187]

It could be argued that the international recommendations have been integrated and domesticated by the affected nations. AML regulators in Nigeria could argue that there is an existing framework regulating the regime and indeed the typology prevalent in the country. They could also argue that they have been prosecuting PEP, even if the records of conviction are low. These are some of the problems associated with transplanting laws. There needs to be sincerity and political will with the leadership of the recipient nation. There must be an element of reciprocity in carrying out core mandates from international organisations like the FATF. Without reciprocity, there can't be an effective internalisation any recommendation.

It would be difficult for the FATF to ensure that Nigeria enforces the prosecution of PEP, despite having integrated FATF policies and international recommendations in her AML regime. For the successful regulation of this typology in the Nigerian AML regime, it must come from within. There must be genuine commitment by regulatory authorities and the prosecutorial agencies to enforce these international recommendations, by consistently and successfully prosecuting PEP. Integration of international recommendation is not enough for an effective AML regime. Political will from the leaders in the nation and a

186 JC Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (1 edn, Cornell University Press 2011) 68-71.

See appendix.

genuine interest by regulators of the AML regime might see to the successful prosecution of PEP.

It is important to also note that there are several international legal instruments that influence the AML regime in Nigeria. One of which is the Palermo Convention 2000 which criminalizes money laundering from serious offences, the Corruption Convention 2003 and the UN Convention Against Transnational Organized Crime 2004. For example, Article 6 of the UN Convention of Against Transnational Crime recommends member states to criminalize the proceeds of crime and the confiscation of assets. it states:

> "Criminalization of the laundering of proceeds of crime 1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (ii) 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;
>
> Subject to the basic concepts of its legal system: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article."188

The internalization of the international legal instruments in the regulation of money laundering by PEP could assist in the development of Nigeria. If the proceeds from corruption are confiscated, it could serve as deterrent which is the rationale behind article

188 UN Convention Against Transnational Organized Crime 2004, Article 6

6 of the UN convention organized crime. Hence, there is a link between the internalization of international legal instruments against corruption and development in Nigeria.[189]

An effective AML regime will discourage people in the illegal acquisition of wealth, which is the primary rationale of most nation's AML regime.[190] The dangers of injecting proceeds of crime into the financial system of a country is enormous, hence the need for a continuous resistance and an effective prosecutorial system.

2.8 The Influence of the Abacha Administration on the AML regime in Nigeria

In recent years, the government of Nigeria has made efforts to recoup stolen funds, particularly funds in offshore accounts, most of which was stolen by a former military dictator, General Sani Abacha. It is reported that the Abacha regime stole about $5 billion from the nation's treasury and laundered the funds through offshore accounts.[191] Gen. Sani Abacha was the head of state scale, theft and money laundering.[192] The stealing of public funds and laundering of the proceeds has had a negative effect on the economy. The absence of an AML regime which could cover the prevalent typology of PEP created an enabling environment where corruption could thrive. In other jurisdictions, politicians have argued for the justification of a strong AML legislation to be in place, to tackle the negative economic effects this acquisitive crime could have in the economy.[193] Prior to the return of democracy in 1999, Nigeria was governed by several military dictatorships. The military dictatorships, particularly officials that served in these governments looted the nation's treasury and laundered their proceeds. There was misappropriation of public funds, stealing and money laundering by various military dictatorships and PEP. There was no internal mechanism to cross-examine activities of PEP and potential corruption in

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See discussion on law and development

Natalie Skead, 'The Politics of Proceeds of Crime Legislation' [2015] 38 The University of New South Wales Law Journal 480.

191 Ibid, Markovska,168.

192 The Guardian, "Nigeria: World Bank President Explains Role in Abacha Loot Spending"(The Guardian, 13 July 2017)> http://allafrica.com/stories/201707130055.html > assessed 9 October 2017.

193 Peter Aldridge, ' *Money Laundering law: Forfeiture confiscation, civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*' [Hart Publishing,2003] 62.

government. There was no legislature to check the activities of the executive, as the parliament was suspended under the various military regimes. [194]

There was an existing judiciary however, the judiciary couldn't exercise their powers by ensuring that PEP were prosecuted. This was partly because of corruption and the crude display of power by several military dictatorships.[195] Successive military regimes have always sought to regulate the powers of the judiciary and limit their activities.[196] There was no prosecution of PEP for money laundering and related offences for fear of arrest, intimidation or outright removal. The military regimes created an enabling environment for impunity and corruption in government. The revelations of the funds stolen and laundered by the Abacha regime is a clear indication of the level of corruption and abuse of office that military regimes are synonymous with.

The military regimes succeeded in intimidating judges, which led to a lack of an effective justice system. Prosecutorial agencies were weakened, and the agencies like the police were stripped of their discretionary powers to prosecute PEPs. Most PEPS that served under the military regimes in Nigeria were senior military officers, which made it impossible for the office of the Attorney General to institute criminal proceeding against corrupt officials, as it was not within the powers of the Attorney General to prosecute serving military officers.[197] Public funds stolen by serving military officers in the past regimes, were funds meant to build schools, hospitals, roads and infrastructure.[198] It has been estimated that, Nigeria since independence, due to corruption has lost over $400B (four hundred

194 Ibid, Ige.

195 Simeon Igbanibo, 'Military Rule in and the Bane of Corruption in the Nigerian Judiciary' [2017] 2 Research Journal of Humanities, Legal Studies & International Development .

Ibid.

Ibid.

Taiwo Olukayode, 'Corruption in the Civil Society: The Rule of Institutions" ' [2011] 3 Nigerian Institute of Advanced Legal Studies 13.

billion dollars) between 1960- 1999.[199] It is important to note that most of the money stolen is because of corruption by PEP. PEP in Africa, particularly in Nigeria, command a lot of power and influence. The tendency to abuse political office and misappropriate public funds is high, due to cultural and societal factors. This has a resulting effect on the economy, as funds that are appropriated for healthcare, schools and other infrastructure are misappropriated by PEP.[200] The large-scale corruption in the military regimes made the international community particularly the United States and the IMF blacklist Nigeria. Nigeria had economic sanctions because of the corruption and the lack of will to prosecute corrupt officials, who had stolen and laundered funds in the past military regimes. These sanctions were due to the money laundering activities by PEP particularly in the Abacha's government.[201]

Post Abacha regime, the Nigeria government decided to take a comprehensive approach in the establishment of an AML regime. This was necessitated due to the recommendations from the Financial Action Task Force [FATF] and continuous pressure mounted on the government of Nigeria to have an effective AML regime, which could regulate the typology of PEP. This was because after the Abacha regime it was becoming obvious to the international community on the uniqueness of the typology of money laundering offences prevalent in Nigeria. The FATF being the international body with the responsibility of ensuring that nations have money laundering regimes, needed to be sure that Nigeria was in line with the core mandate of the FATF and mounted continuous pressure on Nigeria. It is important to note that the FATF has no executive powers however, it relies on the

199 Ayittey, 'Nigeria's struggle with corruption', Testimony Before the Committee on International Relations Subcommittee on Africa, Global Human Rights and International Operations, US House of Representatives, Washington DC, G. B. N. [2006], 18 May.

200 Mugarura, N, "The effect of corruption factor in harnessing global anti-money laundering regimes", [2010] 13 Journal of Money Laundering Control 274.

201 Kunle Amuwo, Daniel C. Bach, *Nigeria During the Abacha Years 1993-1998* (Ifra Books,2001) 17.

strength of member states to persuade and influence AML policies in non-member states.[202]

With its non-executive powers, the organisation is at best persuasive. The 40 Recommendations by the FATF was to create an institutional framework for AML regimes in member countries and other independent states. This was the rationale behind the creation of the FATF. The FATF a creation of the G7 which were its founding members, now has over 37 members and associate membership of key financial institutions over the world. [203]

These recommendations made provisions for the freezing and confiscation of assets that could be traced to the proceeds of crime and establishes a regulatory framework for banks and other financial institutions. In 2001 following the September 11 attack, the 40 recommendations were supplemented by the 8 special recommendations on terrorist financing.[204] Prior to the 9/11 event, priority by regulatory authorities was on the proceeds from trade in drugs and narcotics. The international institutions at that time paid less attention to terrorist financing. The focus gradually expanded from proceeds of crime to terrorist financing and human trafficking, politically exposed persons and a change in emphasis to focus on counter terrorist financing [CTF]. The property and financial markets were also areas that needed adequate AML regulation. The FATF guidelines on the regulation of property markets and CTF, have assisted nations in strengthening AML their institutions. [205]

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202 Financial Action Task Force,> http://www.fatf-gafi.org/about/membersandobservers/> assessed 10 October 2017.Currently the FATF has 37 members and additional associate members, including the inter-governmental action group against money laundering in west Africa [GIABA].

Ibid.

Robin Booth, Simon Farrell: Money Laundering Regulation (Oxford University Press2011)5.

Financial Action Task Force,> http://www.fatf-gafi.org/media/fatf/content/images/AML%20CFT%20measures%20and%20financial%20inclusion.pdf> assessed 4th January.

Despite the international criticisms of the Abacha regime, corruption and money laundering by PEP in Nigeria is still a major source for concern as of today. This is an essential reason for the implementation of a strong AML regime in Nigeria, hence the need for an effective regulatory framework that governs the regime.[206]

2.9 Regulation of Proceeds of Crime and Asset Recovery from PEP- Post Abacha

One of the problems the AML regime in Nigeria faced prior to the enactment of the money laundering prohibition Act 2004&2011, which is still a challenge to the regime, is the recovery of assets. There was little or no focus on the regulation of the proceeds of crime from PEP, corruption, stealing and misappropriation of public funds. Prior to 1999, money laundering offences were perceived to be related with proceeds of crime from drugs and narcotics in Nigeria. This is a problem, because the rationale behind unjust enrichment and stealing is that, those who have stolen from the public treasury want to enjoy some level of affluence with these dirty monies that have been acquired. Hence, the successful prosecution of PEP is not enough for an effective AML regime that regulates this typology.

Any PEP who has been convicted must be deprived from enjoying the proceeds of crime. For instance, the government of Nigeria has made efforts in recovering looted funds by Abacha, from the Abacha family. However, post Abacha regime, little success has been recorded with regards to asset recovery particularly from PEP. Only recently the government made efforts by issuing an executive order on recovery of assets. On the 6th of July 2018, the President of Nigeria signed an executive Order 6 on the preservation of assets connected with serious corruption and other related offences.[207] This is to enable AML regulatory agencies like the EFCC and the ICPC recover proceeds of crime, particularly assets that are outside jurisdiction.

206 Money Laundering Prohibition Act, S15 [2011].

Famsville Solicitors Blog, "President of Nigeria Signs Executive Order 6 of 2018 on the Preservation of Assets Connected With Serious Corruption and Other Relevant Offences" > https://www.famsvillelaw.com/president-of-nigeria-signs-executive-order-6-of-2018-on-the-preservation-of-assets-connected-with-serious-corruption-and-other-relevant-offences/> assessed 23rd October 2019.

However, one of the potential problems the AML regime could face with regards to asset recovery is proper accountability and abuse of powers by AML regulatory agencies. This is because the AML regulatory agencies are directly under the executive and the executive could use "asset recovery" through the application of executive order 6 as a political witch-hunt against perceived political enemies, even before a conviction by a court of competent jurisdiction.

Another potential problem is the use of asset recovery as a prosecutorial discretion technique. This brings a scenario where a PEP who has unjustly enriched himself with state funds would return some asset in return for a notice of discontinuance otherwise known as a Nole Prosequi. An example can be seen in a recent case of *FRN v Abdullahi Inde Dikko,* the defendant a former chief executive of the Nigerian Customs Service was prosecuted by the EFCC for stealing from the service and money laundering. The defendant got into a plea agreement with the AG to return some cash and assets, without the knowledge of the EFCC prosecutors. The judge held as follows:

> "There is a need for government to speak with one voice and not in different tunes that appear to be discordant, AG is the chief law officer of the Federation and the Constitution in Section 174 has already accorded wide powers of discretionary nature, of a very wide character in matters of criminal prosecution to him."
>
> "In my view, such discretions include the entry into a non-prosecution or a deferred prosecution agreement with criminal suspects, and which agreements shall be binding on all prosecutorial agencies including the 3rd and 4th defendants (EFCC and its Chairman)."[208]

This is an example of abuse of prosecutorial powers, using asset recovery as a shield to undermine the AML regime and the EFCC. If there is no accountability with regards to asset recovery and a clear parameter on how asset recovery should influence prosecutorial discretion particularly plea bargain, then the AML regime can never be effective with

[208] FRN v Abdullahi Inde Dikko[2019], FHC/ABJ/CR/21/2019.

regards to PEP. The implications of the decision in this case along with similar cases is critically discussed in the prosecutorial discretion chapter.[209]

2.10 The Influence of Law in the Development of Nigeria

It is hard to conceptualize the concept of development. However, for there to be development, the must be laws. The enhancement of living conditions must clearly be an essential- if not the essential-object of the entire economic exercise and that enhancement is an integral part of the concept of development.[210] Societies are governed by laws and these laws are enacted to create an environment for peaceful cohabitation amongst members of the society. It is also important that these laws put in place are enforced irrespective of the status if persons in that society.[211] For there to be development in any society, the rule of law must be institutionalized. Hence, there is a strong link between law and development. [212] Given the importance of law to successful development the potential mischief of political corruption can be perceived. Corruption by PEP undermine law, and thereby trust and economic and social and political development. In this thesis we examine this problem through the concept of the rule of law.[213] For a society to be developed, law can serve as an instrument. It can be argued theta these developments economy, infrastructure, education, GDP can be anchored on law reforms. It is important to note that there are some divergent views on how law can promote development.[214]

According to the UN office on drugs and crime, "Out of all Nigerian citizens who had at least one contact with a public official in the 12 months prior to the 2019 survey, 30.2 per cent paid a bribe to, or were asked to pay a bribe by, a public official. This means that, although still relatively high, the prevalence of bribery in Nigeria has undergone a moderate, yet statistically significant, decrease since 2016, when it stood at 32.3 per cent."[215]

This is explained further in the chapter on Prosecutorial Discretion.

Amartya Sen, 'The Concept of Development'[1988]1 Handbook of Developmental Economics 11

Ayua I, 'Law and Development in Africa'[1986]3 International Journal on World Peace 72

[212] Yong-shik Lee 'General Theory of Law and Development' [2017]50 Cornell International Law Journal 418

Christine Lagarde (ed), *Against Corruption: A book of essays* (The Stationary Office 2016)

Keneth Dam, *The Law-Growth Nexus: Rule of Law and Economic Development* (Brooking Institute Press, 2006)

Corruption in Nigeria: Patterns and Trends Second Survey on Corruption as Experienced by the Population In collaboration With The United Nations Office on Drugs and Crime and UK Aid, December 2019

One of the schools of thought argues that, there is a need for the role of state to encourage development. This school of thought argues that the state enacts laws that creates an enabling environment for development. Significant state intervention on economy, national industries and heavy regulation of multinational corporations can be employed in driving development.[216] in developmental state, law can be used as an instrument for state intervention in driving economic development.[217]

Law is needed to create the formal structure of macroeconomic control. Legislation can translate policy goals into action by challenging economic behavior in accordance with national plans. law is needed to create the framework for an efficient governmental bureaucracy and the governance of public sector corporations. Legal rules are needed to manage complex exchange controls and import regulations.[218] This school of thought could be called "law in the developmental state".

If law is an instrument for development, then it can be argued that the laws that regulate the AML regime in Nigeria, particularly as it relates with corruption by PEP, can serve as a catalyst for development in many sectors of the Nigerian economy. If the laws that regulate the AML regime are adequately enforced, irrespective of the class of the offender, then it can be argued that the rule of law has been entrenched deep into administration of justice. Hence, we can argue further that there is a strong link between the rule of law, the regulation of the AML regime in Nigeria and the development of the Nigerian state. The development of key sectors in the Nigerian state can be possible if when and if stakeholders of the AML regime, meticulously carry out their duties by ensuring that those who have stolen funds for meant for the development of the nation are brought to justice.

In a nation where the rule of law is adhered to irrespective of the class or status of persons, there is higher public confidence on the economy and foreign direct investments [FDI] than nations where the rule of law is not enriched. Nations with advanced regulatory framework on industrialization, banking & finance, real estate development, education, oil and gas,

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[216]Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton University Press, 1995)

Mariana prado, 'What is Law and Development'[2010]11 Revista Argentina de Teoria Juridica 9

Jane Murngi, 'Book Review: The New Law and Economic Development: A Critical Appraisal, by David M. Trubek and Alvaro Santos'[2008]46 Osgoode Hall Law Journal 686

are more likely to attract investments in these sectors than nations with no regulatory framework or an ineffective framework.[219]

Hence it can be argued that, if the AML regime and the discretionary technique applied by prosecutors in Nigeria is more effective, there would be higher chance of securing a conviction against those who have abused their office. When this happens, PEP would not hastily steal public funds. Funds appropriated for the development of the respective sectors which the PEP oversees could be utilized judiciously. This is a clear indication of the of effect good laws and the application of these laws can have on the development of the Nigerian state.

Furthermore, it is the duty of lawyers and stakeholders in the AML regime in Nigeria to act in a manner that can enhance the development of the nation. The actions and decisions they make as prosecutors can either encourage the development of the nation or hinder her growth. Lawyers as ministers in the temple of justice ought to ensure that rule of law is always upheld irrespective of the class and status of the offender.[220] If this is done, investors from the international community might have more confidence in investing in Nigeria. Hence, it can be argued that there is a link between the role of stakeholders in the AML regime and the economic development of Nigeria.

A lawyer lives for the direction of his people and the advancement of the cause of his country" – Christopher Alexander Sapara Williams (1855–1915), first indigenous Nigerian lawyer.[221] From the above quote. If we should go by the words of Sapara Williams, it means that there is an ethical obligation on the part of lawyers in ensuring that in their application and interpretation of laws, it should lead to development of their nation.

Hence, the application and interpretation of laws if properly done can lead to development of nations. Stakeholders in the AML regime particularly prosecutors should ensure that these laws for example MLPA 2011, EFCC ACT 2004, ICPC ACT 2000, Constitution of the Federal Republic of Nigeria, Criminal Codes and the ACJA 2015 are properly interpreted and

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Maman Lawan, 'Law and Development: A need For Activism'[2011]55 Journal of African Law 63.

Anyaehie Michael, 'Rule of Law: Panacea for National Development in Nigeria' [2009]3 Nigerian Journal of Humanities and Social Sciences.

Oyeniyi Ajiboye 'Realizing the Right to Development in Nigeria: an Examination of Legal Barriers and Challenges'[2015]6 Journal of Sustainable Development Law and Policy 17

enforced particularly when dealing with the issues of corruption by PEP. If this is done, funds meant for the development of various sectors of the nation can be properly utilized for the general good of the citizens.

2.11 The Internal Mechanism Regulating the AML Legislation in Nigeria

The AML regime in Nigeria is centered around the following legislation: Independent Corrupt Practices Commission [ICPC] Act 2000, the Economic and Financial Crimes Commission Act 2004, the Nigeria financial intelligence Unit 2018 [NFIU] Money Laundering Prohibition Act 2011 [MLPA], Criminal Code Act 2004 and most importantly the constitution of the Federal Republic of Nigeria. These legislations were enacted to prohibit and prosecute money laundering offences with a mandate to focus on PEP and other money laundering related offences.

Currently, the AML regime in Nigeria is centred on the Money Laundering Prohibition Act 2011 [MLPA]. The MLPA 2011 is the parent legislation regulating money-laundering offences in Nigeria. The MLPA 2011 repealed and replaced the MLPA 2004. The replacement of the 2004 Act was as a result of clear lapses relating to the typology of the AML offences in Nigeria. Money laundering being a criminal offence in nature, is supported by the entire criminal justice system of Nigeria, despite having the specific legislation regulating and prohibiting money laundering.

The criminal justice system of Nigeria is regulated by the Administration of Criminal Justice Act 2015. [ACJA] [222] The aim of the legislation is to create an enabling framework for the prosecution of criminal cases in Nigeria. It is important to note that since money laundering is a criminal offence, there could be a potential overlap of the ACJA with regards to the administration of money laundering cases in Nigeria. The ACJA focuses on administrative issues such as bail conditions, and a general guide for the conduct of criminal cases in Nigeria. ACJA does not deal with the substantive and regulatory issues of money laundering. The MLPA 2011 being the parent legislation of money laundering in Nigeria

222 Administration of Criminal Justice Act 2015, S1 (1).

deals with all regulatory issues of money laundering and remains the primary source of AML laws in Nigeria.[223]

The growing pressure by the international community led Nigeria to revamp her AML regime. The fall of the Abacha regime had exposed the weakness of the AML regime in Nigeria before the international community as a problem of typology. There was a need for the Nigerian state to show to the international community that it was serious about prohibiting money laundering activities, focusing on the typology of PEP within the country. The 2003 FATF Recommendations 1 stated that countries should have an AML regime with a view of including a wider range of offences. This was necessary because, nations like Nigeria prior to the 2003 FATF Recommendations, had an AML regime focused on drugs and narcotics only. This was an effect of the integration of the recommendations of the Vienna Convention 1988.

Prior to the enactment of the MLPA 2011, the MLPA 2004 was the parent legislation regulating AML in Nigeria. This MLPA 2004 was a positive development in the anti-money laundering regime. However, it had its deficiencies. It was a positive development because it was the first major step the government was taking to curb money laundering offences post Abacha regime.

The problem of the MLPA 2004 was the absence of a comprehensive definition of money laundering. The result of the deficiency of this non-comprehensive approach, made it difficult for the successful prosecution of money laundering offences by PEP. From the definition of the MLPA 2004, the typology which the act expressly regulated was on the proceeds of crime from drugs and narcotics. This express definition did not make the act any different from the NDLEA 1989. The absence of a holistic definition of money laundering made the MLPA 2004 ineffective with regards to the typology (PEP) of money laundering cases, which is predominant in Nigeria.[224]

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223 Eric Esoimeme 'The Nigerian Money Laundering (Prevention and Prohibition) Bill, 2016: A critical appraisal' [2017])20 Journal of Money Laundering Control 81.

224 Nlerum Okagbue, 'Official corruption and the dynamics of money laundering in Nigeria' [2007] 14 Journal of Financial Crime 50.

S 13 MLPA 2004 defined money laundering as :

> "Any person who— Money Laundering (a) converts or transfers resources or properties derived directly or indirectly offences form illicit traffic in narcotic drugs and psychotropic substances or any other crimes or illegal act, with the aim of either concealing or disguising the illicit origin of the resources or property or aiding any person involved in the illicit traffic in narcotic drug or psychotropic substances or any other crime or illegal act to evade the illegal consequences of his action, or
>
> collaborates in concealing or disguising the genuine nature, origin, location disposition movement or ownership of the resources property or right thereto derived directly or indirectly from illicit traffic in narcotic drugs or psychotropic substances or any other crime or illegal act commits an offence under this section and is liable on conviction to a term of not less than 2 years or more than 3 years".[225]

The definition of money laundering in the MLPA 2004 does not expressly caption the typology that is predominant in Nigeria. The above definition appears to be ambiguous and could not have effectively regulated the AML regime in Nigeria. The phrase "any other crime" is ambiguous and lacks clarity. Although, some may argue that the Act had a clear interpretation of money laundering, however the same legislation was specific with the proceeds of crime of a particular typology (drugs). The phrase "any other crime" could be interpreted to mean anything else relating to drugs.[226] It could also mean any other criminal offence not relating to drugs and narcotics, which could include PEPS, human trafficking, regulation of financial institutions etc. There is a wide and ambiguous range of what the definition of money laundering could be and what it could not be with the above definition.

There is also a possibility that legislators who enacted the legislation may not have had the clear intention of tackling political corruption, abuse of office and money laundering activities by PEPS, or were ignorant of the implication of having such an ambiguous

225 Money Laundering Prohibition Act 2004, S13 (1)

Ibid

definition of money laundering in a parent legislation for the country. This possibility might be because the legislators fall within the typology of money laundering offenders which has been predominant in Nigeria and still is.

It takes moral and ethical principles to enact good laws which may not be favorable to the person or persons who have enacted them. The application of virtue ethics, in the conduct of legislative duties by legislators could assist in enacting laws that could stand the test of time. Virtue looks at the motive necessitating the action rather than rules that govern the conduct of an individual or persons. Virtue is what distinguishes right from wrong, good from bad, and these distinguishing elements should be the motive behind the actions of participants and stakeholders in the AML regime of Nigeria. The intent and attitude that motivate your actions is the underlining element with this principle.[227]

Whether or not legislators were ignorant of the implication of the definition of money laundering in the MLPA 2004, or it was a deliberate act to undermine the efficacy of the AML regime, neither of both possibilities are acceptable.

The litmus test on the effectiveness of the MLPA 2004 in tackling the typology of money laundering offences by PEPS, was in the case of *James Onanefe Ibori v. Federal Republic of Nigeria.* The decision in the case is a clear indication that the Act had lapses in the definition of money laundering with regards to the typology of PEP. The courts held that the definition of money laundering in the MLPA 2004 was only applicable to money laundering offences relating to drugs and narcotics and not misappropriation and stealing. The defendant was discharged and acquitted.[228]

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227 J Rachels, *The Elements of Moral Philosophy* (revd. ed, McGraw-Hill Humanities ,2006)

228 James Onanefe Ibori v. Federal Republic of Nigeria,(2008) LPELR-CA/K/81C/2008:

The defendant who was a former governor of Delta State, an oil producing state in the Niger Delta region of Nigeria was a charged for money laundering under the money laundering prohibition act of 2004 . The defendant's lawyers argued that the provisions of S13 of the act was ambiguous and its emphasis was on proceeds of crime from drugs and narcotics and not proceeds of crime from embezzlement of public funds and abuse of office.

The *James Ibori's* case is open to a debate on some issues. One of these issues the case is opened to could be, whether or not there is an interpretation of a further definition of money laundering. If the definition according to S13 of the MLPA 2004 means proceeds of crime from drugs and narcotics, why is there an additional phrase in the last sentence "any other crime and illegal act?" There is a possibility that the definition of money laundering in the MLPA 2004 as applied in the *Iboris* case, could have been interpreted differently. The phrase "any other crime and illegal act" could have been interpreted to mean proceeds of crime from human trafficking, insider dealings in financial institutions, abuse of office, misappropriation of public funds by PEPS and not "any other crime and illegal act" with relation to drugs and narcotics. If the definition of money laundering was interpreted that way, the Judgement in the *Iboris* case would have been different. The application of the Ejusdem Generis Rule in the definition of money laundering in the *Iboris* case was clearly misapplied. The phrase "illicit traffic of narcotics drugs and psychotropic substances or any other crimes or illegal act" was interpreted as a list of two items, and the specific nature of the first item determined the nature and extent of the second item.

A second issue that can be raised from the *James Iboris* judgement is the issue of enforcement of statute and discretion of judges. The primary reason for the existence of laws is to regulate human conduct and give justice. The primary duty of a judge is not just to adhere to the principles of law and laid down statutes, but also dispense justice. That is the rationale behind the discretion members of the judiciary, particularly judges have and this discretion should be used judiciously and justifiably.

The interpretation of "any other crime and illegal act" in the definition of money laundering in the MLPA 2004 was solely at the discretion of the judge in the *Iboris* case. If the dispensation of justice is the reason why nations uphold the rule of law, then the test of a judge's loyalty to the rule of law, is at a time where there is a conflict between laid down rules and equity, natural justice and good conscience. The thing to do in the interpretation

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Defendants lawyers further argued that since money laundering offences are not stand-alone offences, and there is no "parent" offence the defendant had committed under the act, the charge should be deemed defective. The trial judge ruled in the defendant's favour and he was discharged and acquitted.

of money laundering in the *Ibori's* case, was to convict the defendant based on the phrase "any other crime and illegal act", and anchor the judgment based on the phrase instead of using that same phrase as an excuse to discharge and acquit the defendant.

The judgment in the *James Ibori* case was a setback for the AML regime, particularly as it relates to the typology of money laundering offences, [PEP] predominant in Nigeria.

It is important to note that an important legal instrument even though it's not expressly created to regulate money laundering is the constitution. One of the challenges the AML regime faces is the impossibility of prosecuting certain categories of PEP while they are in office. This means that they can only be prosecuted after serving their term of office. S 308 of the Nigerian constitution clearly makes provision for this. It states;

> "Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office; (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued: Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.
>
> The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
>
> This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section

to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office."[229]

The danger of this provision is that it gives these categories of PEP the opportunity to obstruct investigation since they have the instruments of power.

A scenario where a governor or a deputy governor cannot be prosecuted for sealing public money until he leaves office is dangerous. These people wield some influence in the society and can mount pressure on the AML regulatory authorities to stop investigation. More so, evidence might not be as fresh if the person has spent about 8 years in office as stipulated by the constitution. It makes it more difficult to successfully prosecute.

Out of the 36 states of the federation, the EFCC is currently prosecuting 16 former governors, out of which only 2 former governors have been convicted form money laundering and abuse of office since the inception of the EFCC.[230] S308 of the 1999 constitution clearly poses a problem with the prosecution of PEP for money laundering related offences and corruption.

Furthermore, the Criminal Code Act makes provision for corrupt offences and the prosecution of these offences. S 98 of the Criminal Code Act states:

"Any public official (as defined in section 98D) who-

corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or [1966 No. 84.] (b) corruptly agrees or attempts to receive or obtain any property or benefit of any kind for

himself or any other person, on account of- (i) anything already done or omitted, or any favour or disfavour already shown to any person, by himself in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a government department, public body or other organisation or institution in which he is serving as a public official; or

Constitution of the Federal Republic of Nigeria, 1999, S.308.
See appendix on high profile cases prosecuted by the EFCC.

anything to be afterwards done or omitted, or any favour; or disfavour to be afterwards shown to any person, by himself in the discharge of his official duties or in relation to any such matter as aforesaid, is guilty of the felony of official corruption and is liable to imprisonment for seven years.

If in any proceedings for an offence under this section of this Code it is proved that any property or benefit of any kind, or any promise thereof, was received by a public official, or by some other person at the instance of a public official, from a person-

holding, or seeking to obtain, a contract, license or permit from a government department, public body or other organization or institution in which that public official is serving as such; or

concerned, or likely to be concerned, in any proceeding or business transacted, pending or likely to be transacted before or by that public official or a government department, public body or other organization or institution in which that public official is serving as such, or by or from any person acting on behalf of or related to such a person, the property, benefit or promise shall, unless the contrary is proved, be deemed to have been received corruptly on account of such a past or future act, omission, favour or disfavor as is mentioned in subsection (1) (i) or (ii) of this section."

If the criminal code makes provision for corrupt practices by public office holders, one wonders why the Ibori case was hinged on the MLPA 2004. Flexibility of charges is an important technique which prosecutors must apply if a conviction needs to be secured.[231]

2.12 Integration of Fuller's Morality of Law into the Money Laundering Prohibition Act 2004

The rationale behind the enactment of the Money Laundering Prohibition Act 2004 was to create a regulatory framework for a wider stream of money laundering offences. This was

[231] See discussion of flexibility of charges in Chapter 4.

one of the FATF recommendations in 2003.[232] The concern was to have an AML regime that could focus on the typology of money laundering offences that is predominant in Nigeria. The Financial Action Task Force made very wide recommendation which was not applicable to Nigerian concerns. The wide recommendation by the FATF in 2003 appears to be an exception to the advantage, of Fullers principles of generality.[233] Fuller argues that for the integration and the acceptance of law, it must be general. This is because laws must be applicable to everyone in a society, irrespective of class and status, for the benefit of the rule of law.

However, it appears that the rationale behind Fuller's generality of law is to integrate this principle with the application of laws and enforcement, and not the formation of laws.[234] At the point of enacting a law, it should be less general and more specific. The specific nature of a law is what adds credence to it and gives it a framework to be enforceable. Laws cannot be easily enforced if they are too wide. The generality of FATF recommendation, which Nigeria "followed" was too wide and unspecific, which failed to give recommendations that where related to the typology of money laundering offences in Nigeria [PEP].

The typology of money laundering offences in the Nigerian state which is political corruption and abuse of office by PEP, necessitated the enactment of the MLPA 2004. The intention behind the enactment of the MLPA 2004 was clearly eroded with the definition of the offence of money laundering. The lack of clarity of the definition of money laundering in the MLPA 2004 was the major deficiency of the legislation.

The very essence for the administration of justice in a nation's judicial system is the rule of law. For the rule law to be enshrined in a system, there must be a systemic process which includes the clarity of the law. In *The Morality of Law*, Fuller asserts that for a society to be forward looking, there needs to be system or rules in place. Clarity of law ideally should be

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232 Financial Action Task Force 'The Forty Recommendation's'> http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf> assessed 13 January 2018.

Fuller, (n2) 47.

Fuller, (n2) 47.

one of the systems in place in any nation's justice system. It is important that laws are as clear as possible.[235] The ambiguity of law can make the application of law complex and uncertain. Provisions of a law should be clearly spelt out and easy to understand.[236] This was clearly lacking in the MLPA 2004. This could make the interpretation of these laws more straight forward and easy to understand. A complex law is no law. It is no law because it would be subjected to different interpretations and application.

When and if laws are clear, citizens can take legal requirements and prohibition into consideration when deliberating on how to act over issues.[237] This is essential for the very elements that bind a state or a society, which is law and order and the rule of law. S13 (1) MLPA 2004 could have been drafted with greater clarity and precision as to what the definition of money laundering is. It is also important that legislators while carrying out their primary responsibility, which is to make laws, the intention and reason for the legislation should be as clear as possible. This would limit the possibility of interpretations, which could be subjected to various personal reasons, believes, values, interest that are not in line with the rule of law. If all these were put into consideration, the judgment in the *Ibori* case may have turned out to be different. The *Ibori* case was a clear indication that Nigeria followed the FATF recommendations in the enactment of the MLPA 2004, without adjusting to Nigerian concerns and typology.

Fuller also examines the congruence between what written laws declare and how officials enforce those statutes.[238] The rule of law is pivotal to the development of any society.[239] The application of the rule of law also deals with how officials enforce laid down rules. These officials include judges and prosecutors. It is important that justice is seen to be done. The Nigerian judiciary failed to interpret the Act in light with its purpose. It is the duty of the judiciary to interpret laws in accordance to equity and justice, at least by the provisions of the constitution. The rationale behind the enactment of laws should be

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Fuller,(n 2) 47.

Mark Elliot and Robert Thomas, *Public Law* (Oxford University Press, 2014) 69.

Coleen Murphey, 'Lon Fuller and the Moral Value of the Rule of Law'[2005]24 Law and Philosophy 123.

Fuller,(n2) 47.

Michelle O'kelly, 'The Rule of Law and Advocacy in Civil Society' [2006]9 Irish Quarterly Review 390.

upheld, despite the mistakes in drafting the law. The enforceability of the law is of more importance than enactment of the law. If officials fail to enforce the law in light with the rationale behind the enactment, then there is no rule of law. The essence of the application of the rule of law is to do what is justifiably, even when circumstances surrounding the case, or the law are not favourable.[240]

It is important to note that what was in contention was whether or not the MLPA 2004 made provisions for the proceeds from stealing and misappropriation of public funds. Even though the MLPA 2004 did not make express provision for proceeds of crime from abuse of office and stealing, the prosecutors could have prosecuted the defendant on other laws that prohibited stealing, conversion and abuse of office and not necessarily money laundering. If prosecutors had prosecuted *Ibori* on stealing and conversion rather than money laundering charges, the prosecution might have been successful.

The problem of corruption could hinder the existence of the rule of law in any society. Officials must be willing to enforce the law and do justice. When the rule of law is realised the expectation of congruence will do justice. This would also encourage members of the society to obey the law. The attitude of the judges and the prosecutors in the AML regime in Nigeria would determine the level of success it would achieve.

The MLPA 2004 failed to regulate the anti-money laundering regime in Nigeria with precision and efficacy. The legislative drafting of the definition of money laundering, the difficulty with the enforcement of the laws and need to charge offenders for other money laundering offences not relating to drugs and narcotics were clear indications of the need to repeal and replace the MLPA 2004.

2.13 Application of the Money Laundering Prohibition Act 2011, in the Anti-money Laundering Regime in Nigeria

The changes in the AML regime in Nigeria has been more substantive than procedural as evidenced by the repeal of the MLPA 2004. The MLPA 2011, which is the current legislation that oversees the AML regime in Nigeria intends to address the concerns, which were not properly addressed in the MLPA 2004. These concerns fall within the typology of money

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Ibid.

laundering offences that are prevalent in Nigeria, an effective AML framework that can tackle this prevalent typology of PEP.[241]

The reason for the enactment of the MLPA 2011 was to establish a comprehensive framework of the money laundering regime and expand the scope of money laundering offences. These are some of the issues the MLPA 2004 failed to address.[242] The issue the MLPA 2011 hopes to address could be the ambiguity in the definition of the offence of money laundering and other related offences in the MLPA 2004. The ambiguity in the definition of the MLPA 2004 (repealed) made it difficult for the prosecution of money laundering related offences by PEP and other non-drugs and narcotics money laundering related offences.[243]

With the lack of clarity in the definition of money laundering in the MLPA 2004, the repealed act was unable to address the money laundering offences peculiar to the Nigerian State, which centres on PEP. It is important to note that the AML regime in Nigeria is peculiar and the sustainability of an AML framework must be in line with the peculiarity of the money laundering offences most common in the jurisdiction. The peculiarity in the regime is that money laundering and related offences are more linked with corruption, abuse of office, misappropriation of funds and stealing than the proceeds from drugs and narcotics. This has always been the reality of the practice of money laundering in Nigeria.

An AML legislation that neglects the regulation of money laundering by PEP and other money laundering related offences in Nigeria would most likely not be in line with the realities of Nigeria. There was a need for stringent legislation that could prohibit any kind of money laundering offence including offences by PEP. The legislation does not need to be too specific neither does it need to be very ambiguous. However, a holistic approach in the definition of money laundering in the MLPA 2011, introduces all money laundering offences that could be envisaged is the rationale behind the enactment of the MLPA 2011.

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241 MT Ladan, 'International Legal and Administrative Regimes for combating money laundering and Terrorist Financing' [2012]6 Nigerian Institutive of Advanced Legal Studies Journal 168.

Ibid.

Ibid.

The MLPA 2004 failed to address the issue of money laundering by PEPS and other non-drug related money laundering offences due to its lack of clarity in its definition. However, the MLPA 2011 gives a more detailed definition of money laundering. S.15 of the MLPA 2011 defines money laundering as follows:

> "15. (1) Any person who- (a) converts or transfers resources or properties derived directly from- (i) illicit traffic in narcotic drugs and psychotropic substances, or
>
> participation in an organized criminal group and racketeering, terrorism, terrorist financing, trafficking in human beings and migrants smuggling, tax evasion, sexual exploitation, illicit arms trafficking in stolen and other goods, bribery and corruption, counterfeiting currency, counterfeiting and piracy of products, environmental crimes, murder, grievous bodily injury, kidnapping, illegal restraints and hostage taking, robbery or theft, smuggling, extortion, forgery, piracy, insider trading and market manipulation and any other criminal act specified in this Act or any other legislation in Nigeria relating to money laundering, illegal bunkering, illegal mining, with the aim of either concealing or disguising the illicit origin of the resources or property or aiding any person involved to evade the illegal consequences of his action;
>
> collaborates in concealing or disguising the genuine nature, origin, location, disposition, movement or ownership of the resources, property or right thereto derived directly or indirectly from the acts specified in paragraph (a) of this subsection commits an offence under this section and is liable on conviction to imprisonment for a term not less than 5years but not more than 10 years."[244]

It is important to note that in most Nigerian cases, there are three typologies of money laundering offences that are linked with PEPS. These are; bribery and corruption, tax

244 Money Laundering Prohibition Act 2011, S15.

evasion and insider trading and market manipulation. These three offences are captured in the MLPA 2011. If we agree that most money laundering offences in Nigeria revolve around corruption by PEP, then the nations AML regime should have more focus on PEP than the proceeds from the sale of drugs and narcotics.[245]

The problems of political corruption and abuse of office can be addressed if Nigeria has an effective AML regime that takes into consideration the problem of this typology. The perception by the international community is that Nigeria is one of the most corrupt countries in the world. According to Transparency International, Nigeria ranked as the 148th least corrupt country in the world in 2017 as against 136th in 2016.[246] This perception in the global scene is due to the large scale political corruption by PEP and the negative effect it has had on the citizens of the country. For the AML regime in Nigeria to be effective, the regulations and legislation that governs the regime has to be drafted according to the peculiarities of the regime.

Furthermore, the punishment for money laundering and related offences under the repealed Act was perceived not to be strong enough. S 14 MLPA 2004 made provisions for penalties attached to offences of money laundering.[247] The punishment under the repealed act was a minimum of 2 and a maximum of 3 years imprisonment. This was another issue that the MLPA 2011 addressed. S15 MLPA 2011 stipulates a maximum punishment of 10 years imprisonment and a minimum of 5 years respectively.[248] The need to review the punishment attached to money laundering offences is essential to serve as deterrence on potential money laundering offenders. This is because if the punishment is severe, the gains from corruption would not be attractive.

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245 Tayo Oke, "Money Laundering Regulation and the African Pep: Case of Tougher Remedy Options[2016]19 Journal of Money Laundering Control 33.

246 Surveys, 'Transparency international corruption index' (*Transparency international*, January 12017)<https://www.transparency.org/news/feature/corruption_perceptions_index_2016> accessed 22 January 2018 .

247 Money Laundering Prohibition Act 2004, S14.

248 Ibid, S15 .

The MLPA 2011 has strengthened the AML regime in Nigeria particularly regulating and prohibiting money laundering offences by PEP. The broad approach in the definition of money laundering in the MLPA 2011 has assisted in addressing the issue of regulating money-laundering offences by PEP. The inclusion of bribery, corruption, tax evasion in the definition of money laundering in S15 of the MLPA 2011 strengthened the AML regime and gave the MLPA some form of force in the fight against money laundering in Nigeria.

2.14 The role of Designated Non-Financial Institution in the Money Laundering Prohibition Act 2011

Another issue which the MLPA 2011 introduced in the AML regime in Nigeria is the regularisation of the activities of financial institutions and "designated non-financial institution" [DNFI]. The role DNFI's play, could be instrumental to the success and collapse of a nations AML regime, hence the need for the regulation of the activities of DNFI. The regulation of DNFI entails that professionals who have been classed in this category must report any suspicious transaction to regulatory authorities. These professionals who are also known as gatekeepers, are to ensure that the laws that regulate the AML regime are adhered to This is a positive development. Lawyers are supposed to be gatekeepers in the AML regime. Who are gatekeepers? Professionals such as lawyers, notaries, accountants, investment advisors, trust and company service providers who assist in transactions involving the movement of money, and are given a particular role in identifying, preventing and reporting money laundering.

However, how many of these professionals classed as DNFI can withstand the pressure that could emanate from PEP? The regulatory bodies of these professionals must be totally insulated from the political establishment, for them to be able to withstand pressure from PEP and report to AML regulatory bodies on suspicion of fraudulent transactions. S 3 MLPA and S 5 MLPA clearly make provisions for the role DNFI must play in the course of dealings with their clients. This is because Nigeria had to be in line with international best practice and FATF guidelines with regards to DNFI.[249] The FATF refers to lawyers, accountants and

249 Forty Reccommendations" Financial Action Task Force [2012] > http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> accessed 3rd November 2017 .

other sensitive professionals who would ordinarily have financial dealing with clients and hold entities in trust for them. The MLPA 2011 has attempted to regulate the activities of DFNI particularly with regards to customer due diligence and financial reporting.

One of the challenges the AML regime faces is the effective regulation of DNFI. This is because there is a conflict between the S3 and 5 of the MLPA 2011 and the ethical considerations of these respective professionals, particularly law firms that have been classified as DNFI. This conflict is based on the contradiction of regulation between the substantive AML framework and Rules of Professional Conduct that regulate the ethics and conduct of lawyers within the jurisdiction. This has made the provision for reporting on suspicion of money laundering as stated in the MLPA 2011 practically unenforceable.

Several issues could be raised when considering the issues of suspicion and reporting. The first issue is, who is responsible for reporting? The provisions of S3 and 5 MLPA 2011 states that the DNFI should report to regulatory authorities on suspicion. It could mean that if the DNFI is a member of a profession where confidentiality is a major factor and adhered to stringently, then there could be some level of contradiction.

The second issue is that suspicion is a subjective issue. At what point should suspicion be raised? In situations where the client is a high net worth individual or a PEP, who regularly deals in high volume transactions, the DNFI may not be inclined to suspect that money is being laundered. Furthermore, the overwhelming influence of high net worth individuals and PEP would also reduce the frequency of suspicion and reporting. A banker may not be in a haste to report a PEP to the Economic and Financial Crimes Commission [EFCC] for fear of victimisation. Ethics of these respective professions must be brought into consideration, for an effective application of the MLPA 2011.

One of the issues which the MLPA 2011 has envisaged is the issue of smurfing. Smurfing can be defined as a process of breaking down funds to smaller amounts to avoid reaching the limit for the reporting threshold. The MLPA 2011 reduced the threshold for reporting from $5,000 to $1,000. It is the duty of a DNFI to identify and report on suspicion of

smurfing. However, it may be difficult to identify when smurfing is done due to the small amounts of money laundered at a time.[250]

In a situation where smurfing is done, the DNFI or a banker may not be aware that the funds are from the proceeds of crime. This is because, the monies have been broken down to lesser amounts which could fall below the minimum threshold. This is possible because, money laundering has become a systemic act. Human trafficking rings, drug cartels and terrorist financiers understand that moving money in substantial amounts could attract attention. These gangs prefer to move money in the smallest practicable units.[251] This may take longer time in transferring the proceeds of crime. The same technique could also be adopted by PEP. Often PEP prefer to work with fronts to hide the proceeds of corruption and misappropriation of public funds. These fronts are usually established professionals in business, law and other key sectors in the country. Hence, the issue of beneficial interest could come into play when dealing with DNFI and PEP.

The role of lawyers as gatekeepers and the enforcement of financial reporting on their clients may be difficult to attain in Nigeria. The confidentiality rules affecting legal practitioners in Nigeria are stringent. These rules are perceived to be sacrosanct, and there is a perception that there is a conflict between the AML regime and the practice of law in Nigeria. Lawyers have opposed the application of S3 and 5 of the MLPA to them, given the peculiarity of the rules that govern legal practice in Nigeria. Some lawyers who are supposed to be gatekeepers could use that to deliberately perpetuate money laundering. As key players in the industry, they could act as fronts for PEP and would not draw attention to themselves, hence a perfect channel for money laundering.[252]

There is usually a reversionary interest being held by the PEP or whoever the funds are being fronted for. There could be a gradual reversionary interest or beneficial ownership until the political office holder's tenure elapses in office. The Act envisaged the possibility

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Money Laundering Prohibition Act 2011,S5.

Sarah N. Welling ' Smurfs, Money Laundering and the Federal Criminal Law: The Crime of Structuring Transactions' [1989] 41 University of Kentucky Law Faculty Scholarly Articles 290.

Ibid.

of using professionals including lawyers as fronts, hence the provisions in S 3 and 5 MLPA 2011 clearly regulate the activities of DNFI including scrutinising the customer or client.

There is also an unfortunate possibility that legal practitioners could aid their clients with laundering the proceeds of crime. There is a possibility for lawyers to abuse the unique nature of their jobs during their service to a client. This is part of the unethical practice in the legal profession that could undermine the AML regime in Nigeria. The MLPA 2011 envisaged a possibility of legal practitioners abusing their unique role, therefore S25 of the act clearly includes lawyers in the definition of DNFI. S 25 states:

> "DESIGNATED NON-FINANCIAL INSTITUTIONS" means dealers in jewellery cars and luxury goods, chartered accountants, audit firms, clearing and settlement companies, hotels, tax consultants, legal practitioners, casinos, supermarkets and such other businesses as the federal ministry of commerce may from time to time designate".[253]

The existence of rules in a society is important especially for the development of the society. These rules must be applicable to all the members of the society. This is important for nation building and a strong justice system, where the rule of law isn't negotiable or one-sided. In Fuller's *The Morality of Law*, he asserts that there must be set rules which members of a society should follow.[254] The set rules should be applicable to everybody without any exception, for justice, equity and the rule of law to prevail in the society. The essence of the rule of law is not just the existence of rules, but the application of existing rules without discrimination or exceptions for certain class of persons in the society. It is dangerous for set rules to be applicable to class of persons while certain persons are excluded from the enforcement of the set rules. Hence, the need for lawyers to be classified as DNFI.

According to S25 of the MLPA 2011, lawyers have been classified as DFNI however, the rules and regulations that govern DFNI are not applicable to legal practitioners within the jurisdiction. Reporting on suspicion of illegal sources of funds by a DNFI is the primary

253 Money Laundering Prohibition Act 2011, S25.

254 Fuller L, *Morality of Law* (revd.edn, 1969) .

reason for the inclusion of certain categories of persons as DNFI (including lawyers). It clearly means that legal practitioners within the Nigeria Jurisdiction ought to report to the appropriate authorities on suspicion of illegal sources of funds.

This is not the case in Nigeria as this position has been challenged in court. In *Nigerian Bar Association v FGN & CBN, it* was held that lawyers could not contravene the provisions in the Rules of Professional Conduct 2007 [RPC] and the Legal Practitioners ACT 1975 by disregarding duty of confidentiality between a client and a lawyer. A quotation from the judgement goes as follows:[255]

> "By the various provisions of the Legal Practitioners Act, the Rules of Professional Conduct for Legal Practitioners 2007 and the Rules of Discipline for Legal Practitioners.
>
> There are in existence even before the enactment of the Money Laundering (Prohibition) Act 2011, Regulatory bodies known to law such as the Chief Justice of Nigeria, the Bar Council, Appeal Committee of the Body of Benchers and the Legal Practitioners Disciplinary Committee which bodies exercise wide range of supervision duties on legal practice and legal practitioners in Nigeria.
>
> These bodies mentioned in (b) above are juristic bodies known to law unlike SCUML, a department of Federal Ministry of Commerce both of which are not juristic persons by virtue of the Court of Appeal decision in Agboola & others Vs Saibu & others (1991) 2NWLR PT (175) – 566
>
> The supervisory and regulatory powers or duties of the bodies mentioned in (b) above were in existence before the enactment of the Money Laundering (Prohibition) Act 2011 and as such the Legislature ought to have had them in contemplation when it did not repeal those

255 Ndidi Ahiauzu, "Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA V. FGN & CBN" Journal of Money Laundering Control,(2016) Vol.19.

powers and duties in the Money Laundering (Prohibition) Act, a later legislation in point of time.

The supervisory measures granted the bodies that superintendent over legal practice and legal practitioners in Nigeria are very comprehensive under the existing laws and there is nothing new in the Money Laundering (Prohibition) Act to add.

By virtue of section 192 of the Evidence Act 2011, communications between legal practitioners and clients are privileged and cannot be disclosed to a third party; therefore, legal practitioners cannot be made to disclose cash transactions between them and their clients to SCUML.

Legal practitioners are not part of the "mischief" the Money Laundering (Prohibition) Act 2011 seeks to address and as such the law cannot be targeted at them.

Section 192 of the Evidence Act contains enough safeguard to cover cases where communications are in furtherance of a criminal offence. Such communications are not privileged, and they are exempted by the law, legal practitioners have no privileges in such cases.

Section 192 of the Evidence Act are provisions specifically made to address legal practice in Nigeria, therefore, the provisions of the Evidence Act should be preferred and read as overriding the provisions of the Money Laundering (Prohibition) Act 2011.

The primary subjects and interests of the Money Laundering Act and the Evidence Act are different.

Practice of law "can hardly qualify as one of the kindred trades such as car dealership, estate agency, dealers in jewelleries, precious stones, supermarket, casinos etc., as to readily come under focus and be merged with such businesses that are to be brought under the SCUML's protocol."

None of the Trades mentioned in section 25 of the Money Laundering Act 2011 has provisions similar to section 192 of the Evidence Act in terms of privileged communications they have with their customers."

m) Legal practitioners deal with clients and not customers."

In this judgment, it shows the distinction in the AML regime from other common law jurisdictions where lawyers as DNFI are required to report suspicious transactions of their clients. The regulation of lawyers within the Nigerian jurisdiction cannot be overshadowed by recommendations and regulations in the AML regime. With this judgment, it means the classification of lawyers as DFNI and the enforceability of S3 and S5 of the MLPA may not be a reality. The sustainability of an effective AML regime lies in the hands of professionals who are supposed to be gatekeepers. If there is an exclusion of a class of professionals (lawyers) from reporting suspicious transactions by virtue of their ethical regulations, then it makes a mockery of the entire rationale of a "gatekeeper" and DNFI.

With the current system in place which exempts lawyers, (despite been classified as DNFI) from reporting transactions, clearly means that the application of S 3 & 5 of MLPA 2011 is one sided. If this provision regulates the activities of all categories of persons regarded as DNFI but lawyers, it could frustrate and undermine the AML regime in Nigeria. This could also negate the FATF 40 recommendations, as the "gatekeeper" initiative would fail. Hence, Fuller's rule on generality with the application of laws.

This could be the reason why Fuller asserts that, for the rule of law to be enshrined in any society and for an effective justice system, the applicability of set rules must be seen to be applicable to everyone in the society.[256] In this context the "society" referred to is class of persons called DNFI. This major issue has undermined the provisions of the MLPA and the AML regime in Nigeria.

Furthermore, the internalisation of international recommendations without recourse to local laws could jeopardise the principles of reciprocity in the rule of law. Fidelity is a fundamental element in Fullers rule of law. There must be some element of fidelity for the enhancement of the rule of law in any society. The guideline on money laundering offences

Fuller,(n2)47.

in Nigeria and the Prosecution of these offences is an adoption of FATF regulation. The FATF, which is responsible for the recommendation of anti-money laundering laws internationally, mounted pressure on Nigeria to transplant the recommendation her anti-money laundering regime.[257] This may be one of the reason anti-money laundering regime in Nigeria is not as effective as it should be. The provisions n S3 &5 of the MLPA 2011 clearly shows that Nigeria was in a hurry to classify legal practitioners as Designated Non-Financial Institutions [DNFI] without recourse to the reflection upon the possible integration with local laws and regulation that guide the conduct of these professionals.

When there is no consultation with stakeholders and relevant authorities before transplanting, there is every possibility there would not be fidelity on the part of those who are supposed to be enforcers of the law. Lawyers within the Nigerian jurisdiction do not see a reason why the provisions in S 5 MLPA 2011 should be adhered to. There is no willingness to reciprocate the enforcement of financial reporting by lawyers as it is done in other jurisdictions. There is a disparity between local criminal jurisprudence and the FATF guideline. There must be a meeting point or understanding or fidelity as Fuller puts it between the anti-money laundering regime in Nigeria and FATF. If issues of transplanting are not well managed, there may not be a willingness on the part of the law enforcement in Nigeria to implement FATF recommendations. It is important that there is fidelity and understanding between both parties agreeing to establish a framework on the anti- money-laundering regime.

2.15 Conclusion

Despite Nigeria's effort in fighting corruption and creating an AML regime which integrates PEP, the problems persist. Could it be that this typology of money laundering persists as a result of the deontological nature of the AML regime?

When laws are put in place to regulate the conduct of persons or class of persons in a society, this could be termed as creating a deontological approach in tackling a problem.

257 ' Giaba Mutual Evaluation Report' > http://www.giaba.org/reports/mutual-evaluation/Nigeria.html > Assessed on 30th of December 2016.

[258]The fact that regulations are in place to govern the conduct of a class of persons, means that the problems or potential problems in that society have been identified and codified by way of enactments. The creation of a statute to address an issue is a deontological approach by way of identifying what the problem is and if possible, criminalising what the behaviour.

It is important to note that mere criminalising a behaviour, creating a legislation to tackle a problem does not guarantee solutions to the problem without virtue. The "virtue system"

entails the enforcement of the legislation that have been identified in the money laundering legislation that has been created to prohibit a crime.[259]

The MLPA 2011 and the AML regime will be more effective if attention is paid to the successful prosecution of money laundering offences, particularly with this typology which is more common in Nigeria. If the procedure is effective and there are successful convictions of money laundering offences by PEPS, it would give credence to the substantive issues which have been laid down in the MLAP 2011.

Furthermore, the application of prosecutorial discretion and the rule of law in the AML regime in Nigeria falls within the scope of deontological issues which would provide support to a "virtuous system" as laid down in the AML framework.[260] The deontological approach cannot make an AML regime effective. Despite the comprehensive provision which captures the typology of PEP in the MLPA 2011, the AML regime in its totality, has not been as effective as it should be. Focus should be on how money laundering cases are handled, rather than the legislation itself. When convictions of offenders are secured, the citizens would be convinced that an effective AML regime is in place, and not a piece of legislation no matter how comprehensive it is.

The next chapter discusses the role of legal ethics in prosecutorial discretion in the AML regime of Nigeria.

See discussion on deontology ethics in chapter 3.

Fuller(n2)82.

See chapter 3 for discussion on virtue ethics.

Chapter 3

3.0 HISTORY AND CONCEPT OF ETHICS

Ethics are grounded in the notion of responsibility as free moral agents where individuals and organisations should be held accountable for their actions. Taking responsibility for actions or omissions as individuals or organisations with an expected consequence of their actions, can be viewed as ethics[261]

Ethics can also be viewed as a prescribed standard or pattern of right and wrong of what humans ought to do either in omission or in commission. This pattern is to serve as a guide in the daily activities of human behaviour. There is a clear distinction between legality and ethics. Asking whether an action is legal and whether it is ethical are two different questions.[262]

An action may be ethical or unethical but not a legal requirement. This distinction has evolved over time in the application of ethics to the daily lives of humans and our society in general. An example is the unethical behaviour of lying. One may argue that lying is bad, and not an ideal behaviour of any "good" person. However, if there is no contractual obligation to say the truth, is lying an illegality? Not all unethical behaviour is an illegal act and not all legal actions are ethical. If I lie to my father about certain domestic issues, we could argue that I do not owe my father a contractual obligation to tell him the truth always.[263] However, it is morally wrong or unethical for me to lie to my father whether or not I have a formal contract with him. It can be argued that the same principles apply to professional ethics.

Professional ethics are norms, culture or best practices that have been put together as rules in order to serve as a guide for behavioural pattern and conduct, for members of a selected

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261 Gururaja Chari, *Advocacy and Professional Ethics: In Retrospect and Prospect* (Allahabad : Wadhwa & Co 2000) 374.

Jonathan Herring , *Legal Ethics*(Oxford University Press 2014) 5.

David Luban, Legal ethics and human dignity(Cambridge University Press 2007)21.

profession. Since the focus is on legal ethics, emphasis would be on evaluating ethical conduct of lawyers and the role society plays in forming legal ethics.

Norms form a major part of ethical consideration. These norms are ideals and values by a group or class of persons, which at times could reflect on the society. Durkekeim argues that complex societies could accommodate a range of different normative systems parallel to that of the wider society.[264] This is because some societies may have several classes of persons with diverse cultural orientation and background, which could influence their daily lives. These norms would metamorphose into ethical guides for members of the society. It is even possible for each group or class of persons who are members of a complex society, to have norms and cultures that are distinctive from other groups in the same society. These norms, culture and values can be viewed as ethics.[265]

Bayle s explored four possibilities in the relationship between social norms and professional norms.[266] Bayle argues that professional norms are the same as ordinary norms of behaviour, the second is that they specify how professionals must relate with ordinary norms, the third is that they consider the role of professionals in applying ordinary norms and the fourth is that they are completely independent from ordinary norms. Professional ethics should not be formed without recourse to the norms and values of that society. As these norms and values change, so should professional ethics change. This is because professional norms emanate from norms of behaviour.

The norms form the regulatory framework that professionals irrespective of their profession abide by. Some of these norms could have a deontological approach while some could be virtue based.[267] Whichever ethical approach is applied in the legal profession, it should not be void of conscience and morality.[268]

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264 Emile Durkheim, *Professional Ethics and Civic Morals* (1957)11.

Ibid.

Bayles MD, *Professional Ethics* (Wadsworth Publishing Company 1989)14.

See 3.8. It discusses the conflict between deontological and virtue ethics.

Ibid.

For this purpose, Fullers work would be used as a reference point to evaluate various forms of ethics and ascertain which is best applicable for lawyers, and indeed regulators of the AML regime in Nigeria.

Fuller's account of the two moralities of duty and aspiration, clearly indicates that man has a role to play for the greater good of the society without recourse to laying down rules, laws or regulation. Fuller's Morality of aspiration is founded upon the needs and desire of an individual, which would ultimately serve in man's interest and in the best interest of the society.[269] Humans can bring out the finest traits in themselves without the aid or recourse to laid down legislation or rules. An Act of Parliament or a Rule of Professional Conduct, should not be the only basis for humans to aspire in behaving correctly. The natural traits in humans which makes us distinguish between good and bad, should be the guide of human behaviour. Humans could aspire to do good and make the society more orderly and "perfect". If there is anything like a perfect society. Hence, the fact that it is not a criminal or civil offence to lie to a spouse does not necessarily make it a good thing to lie. There are certain responsibilities we must take to consciously create a good and just society. Every component that forms a society has a moral duty to play. The moral obligation in a society does not necessarily have to be rule based or tagged with a title "professional conduct" or "code of conduct". In a family, it is expected that father owes a moral duty to provide for his child, particularly when he can afford it. There may not be any criminalisation or even a breach of a civil duty if a father is unable to provide for his child particularly if he cannot afford it. However, a father owes a moral duty to provide for his child. This moral duty could be a guide in differentiating what is "good" from what is legal or illegal.

It could be argued that ethics are rules and these rules help in forming and molding human behaviour, which in turn could have a resulting effect in the society.[270] This could be one-cut approach to ethics and this is a deontological view of ethics. This approach could have

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269 Fuller.L Morality of Law (Yale University Press, revd. Edn 1964).

Tengku Mohd T, 'Ethics of Information Communication Technology' [2003]4 Regional Journal on Ethics 243

certain disadvantages as it institutionally based. This does not emanate from within and achieving justice may not necessarily be the goal of a deontological approach to ethics.

Ethics could be described as rules that govern the conduct of a class, group of persons or a private individual. If we agree that ethics governs the conduct of a class of persons, then it could be right to argued that, ethics in the legal profession can be referred to the action of members of the Bar and how they conduct themselves in the course of their duties.

The members of the Bar also have a social role and responsibility to uphold the rule of law and act with integrity, with or without any codified rules that regulate the conduct of lawyers. Due to the role lawyers play in the society, it is expected that they owe members of the public a duty to protect the society by upholding to the rule of law. If Fuller argues that morality of duty should be attached to social values and responsibility, and not necessarily rules, then we may be right to argue that the rules of professional conduct for lawyers should not be the only yardstick of measuring an unethical conduct. The ability to differentiate between right and wrong and understand that lawyers owe the society in general a duty to uphold to the rule of law, is of more priority than whatever the rules of professional conduct dictate.[271]

3.1 Consequentialism:

The pivotal issue with this ethical theory centres on consequences that surrounds an action. The action could be considered right if the consequences of the action is good.[272] Consequentialism deals with the total consequences of an action. It deals with the result of an action. Consequentialists argue that what is most important should be the consequences of one's action rather than the focus on the dictates of the rules. Consequentialists appear to focus on the results or products of their actions rather than what the process followed in taking these actions.

Consequentialism seems to be controversial. Proponents of this theory believe that the very essence of morality is to make life easier for humans and create as much freedom as

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See 3.8: conflict between deontological and virtue ethics.

ibid, Herring 9

possible. There are considered two types of consequentialism. Rule consequentialism and act consequentialism.

For rule consequentialism, an action is considered morally right, so long as it does not violate the general set of rules that is acceptable in a society.[273] For this type of consequentialism, an action is not right or wrong because of its own consequences, rather because it does violate or does not violate a good set of rules that guide human behaviour in a particular community. The pivotal issue on consequentialism is that proponents of this theory must consider what is termed as "the most good". This could be problematic, as most people do not control the most good in every given situation. The term "the most good" in this regard appears to be subjective and critically arguable.

Who determines what the most good is? For example, an 8-year-old boy's father is shot and killed by his best friend, in the presence of the boy. The prosecution takes the boy as a witness to give evidence of the murder of his father. For certain reasons, the evidence given by the 8-year-old boy is inadmissible and the defendant is discharged and acquitted for murder. The boy as an 8-year-old witnessed the poor handling of the prosecution of his father best friend and bore a grudge. He plans a revenge. Upon attaining the age of 18 he joins a gang with the sole aim of killing his father's friend, who killed his father. He eventually carries out the assassination and kills his father's best friend.

From the above scenario, "the most good" can be subjective or objective. Subjectively, we could argue that the rationale behind the assassination of the boys father's friend is to do justice, since the courts have refused to do justice due to ineffective prosecution. Why should a killer be free? Why a should a killer not be murdered in cold blood? These are purely subjective arguments, which could be interpreted as the consequences of a person's action being the most good. Objectively, we could argue that two wrong actions cannot/ should not be interpreted as "the most good". Why kill a murderer when you have committed the same crime just as he has? Has the killer of the murderer produced the best outcome by the consequences of his actions?

273 ibid,10

The Oxford dictionary defines subjective as "based on or influenced by personal feelings, tastes, or opinions." Hence, going by this definition, if persons take actions because of the most good, then it means the "most good" is subject to the personal feeling and opinions of the person, which might not be beneficial to the larger society. These are some of the problems with consequentialism.

In consequentialism, the omission or indifference of a person from carrying out an action is as good or as bad as the person who has carried out an action. The consequences of one's actions by way of either omission or commission is a determinant, and not just by commission. Failure of a person to act when he should have acted could affect the "most good" outcome.[274] The consequences of inaction of a police officer to arrest a traffic offender, who drove recklessly, could cause more harm to the society. The potential danger of the person killing commuters as a result of the police officer's inaction, is a consequence and has not served the "most good", which is to enforce laws to prevent accidents.

In the practice of law, the dangers of this theory are that if practitioners apply consequentialism and rationalise their actions under the cover of "most good", they could engage in acts of illegality to achieve that "most good". For instance, the role of lawyers in the AML regime in most jurisdictions is to report suspicious transactions of their clients to AML authorities. In many jurisdictions, including Nigeria, the AML laws require lawyers to report suspicious transactions. [275] A lawyer could choose not to report suspicious transactions of a client. The lawyer could argue that it is the "most good" for him not to break the client confidentiality principle by exposing his client. The lawyer has not carried out an action but has refused to act. The consequences of his inaction to an objective mind could be that, his inaction could undermine the AML regime. As far as the lawyer is concerned, he has chosen not to act, and his inaction is to necessitate "the most good"

274 Carmen Tanner, Douglas Medin, ' Influence of Deontological versus Consequentialist Orientations on Act Choices and Framing Effects: When Principles are More Important than Consequences'[2007]6 European Journal of Social Psychology 493.

275 Money Laundering Prohibition Act 2011, S5.

which is to protect his client's interest, which is also a rationale behind act consequentialism.

In the application of consequentialism, it is important to note the following: The consequences of an action do not always justify the means. The "most good" can be subjective therefore, we must be rationally weighing our actions when attempting to carry out the "most good".

3.2 Deontology

The deontological approach seems to be quite different from consequentialism. Proponents of this principle believe there should be adherence to moral rules/duties, no matter the consequences of the action that is taken. Immanuel Kant the 18th century philosopher is the leading proponent of this approach.

In Hannah Arendt's Eichmann in Jerusalem, an analysis is given on the strict adherence to rules by Adolf Eichmann. Eichmann claimed to have followed strict instructions as his adherence to laws was as a result of his personal conviction to Kantian principles.[276] Here, Eichmann followed the law and did so blindly without recourse to common sense and moral inclination. Eichmann believed "superior orders" were orders that were to be obeyed even if these orders were considered bad or had an element of criminality and banditry. Eichmann believed that state laws must be obeyed irrespective of your personal conviction. He did so as he clearly mis-interpreted Kantians categorical imperative.[277] Eichmann claimed to be a fervent believer in Kant's principles hence. Hence, whatever Kant's role played in the decisions Eichmann made, there is no slightest doubt that Eichmann followed the precepts of Kant: a law was law, there could be no exceptions.[278] The strict adherence to rules is the focal point of deontology ethics which is centred on Kantian principles.

Kant is of the view that all humans are entitled to respect and dignity and for humans to be accorded with respect and dignity, humans must be ready to abide by rules or duties.

Hannah Arendt, *Eichmann in Jerusalem A report on the Banality of Evil* (Penguin Books, revd edn 2006)136

ibid

Ibid.

These rules should determine behavioural pattern of humans and would dictate the universal rational duties to one another.[279]

Proponents of this theory believe that the results we get from our actions, which could be interpreted as consequences of our actions, should be because we have kept a duty. This duty is to follow laid down rules and procedure no matter the circumstances at hand. Kant is of the view that to be morally good, you must be motivated by a duty. It could possibly imply that if there is no duty then there is no reason to be morally good. It is important to note that an action is not "morally good" because it is backed up by a duty. It is morally good because it is good in itself. The danger of this theory is that, it gives a systematic pattern on how human behaviour should be checked. Humans are not robots, therefore if a rule or a law is enacted, there must be circumstances where that rule or law should not be applicable.[280]

More so, the intuition of humanity had been existing before rules/laws came to regulate the behaviour of man. This intuition has served and still serves as a moral compass to distinguish between right and wrong/ good and bad. A person's action should not be considered as good only because the action is line with what the rules dictate. What is good is good and what is bad is bad. A "moral action" should not be motivated by a duty or a rule.[281] A person should not be inclined to do what is right because the rules/law clearly states that it can be done. What if there is no rule/law that supports a "moral/good" action? Would deontologist then argue that a person should not carry out a "good" act because there is no law to back that action?

The contrast between deontology and consequentialism can be seen through Kant's example. Kant argues that if an axed man/killer asked him where his brother was hiding, he would surely tell killer the truth, as he believes telling the truth in the circumstance is the right thing to do. However, consequentialist would argue that the right thing to do in

279 David Misselbrook, 'Duty, Kant, and Deontology' [2013]63 British Journal of General Practice 211

Ibid.

Ibid.

that circumstance is to save his brother irrespective of whether or not you have to lie to do that. Kant might have tried to make a point, which is that rules are sacred and must be obeyed irrespective of the situation you find yourself. However, I think Kant took it too far. Law was made for man and not otherwise. The essence of law is to regulate the conduct of mankind and to make life easier for mankind. If man becomes a slave to law/rules, then it defeats the rationale behind having the laws in the first instance.[282]

It would be most unfair to humanity if the rigidity of rules to determines the consequences of our actions. Critics of this theory would ask whether rules or principles must be adhered to. Consequentialist have argued that situations may occur where these rules may not be adhered to because of the importance of the "better good". Critics believe there must not be any strict adherence to rules and there should be room for some flexibility.[283]

However, there must be rules. If they are no rules and humanity is left to act based on their intuition to determine what should be morally good, it could be dangerous. This could bring several subjective ideas and opinion as to what is "morally good". Then people would kill, rape and commit all sorts of atrocities and justify it as morally good, since they are been guided by their intuition. There should be a meeting point between deontological philosophy and proponents of "morally good" (virtue) for a legal system to be more effective. If there is an amalgamation of deontology and virtue ethics in society, lawmakers who draft laws would consider societal values, norms and what is "right" before drafting these laws. When this is done, we could argue that "morality" has been included in the laws that regulate the actions of members of a society. Only then, deontologist can argue that adherence to rules no matter the consequences of the action must be obeyed.

The deontological approach seems to be more applicable in the legal profession in Nigeria. The legal profession in Nigeria is centred on the Rules of Professional Conduct 2007 and the Legal Practitioners Act 1975. The conduct of legal practitioners in Nigeria seems to be more focused on rules. Therefore, like deontologist, lawyers place more weight on rules and duties. Legal practitioners have duties to their clients and duties to the court. The duty

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Immanuel Kant *The Critique of Pure Reason* (CreateSpace Independent Publishing,2016).

A. Ayers, ' The lawyers Perspective: The Gap Between Individual Decisions and Collective Consequences in Legal Ethics'(2011) 36 Journal of the Legal Profession 77.

a lawyer owes a client, or the court is to speak the truth always and represent his client within the ambits of the law. It is immaterial whether it is stated as a duty or a rule for lawyers to always speak the truth to the court, because it is "morally good" in itself to speak the truth without the backing of a "duty" or a "rule".

3.3 Virtue Ethics:

Virtue ethics can be traced back to Socrates and Aristotle. Virtue ethics emphasises on what is the morally correct thing to do. It does assess the consequences of your action however, through the motive and the rationale behind the action itself.[284] This theory is unlike deontology which focuses on the adherence to rules no matter the consequences of one's action, virtue focuses on the motive behind the action of a person.

What is virtue? Virtue are positive traits, which direct the attitude and behavioural pattern of man. Virtue focuses on the attitude motivating an action. Unlike deontology, which is anchored on rules virtue attempts to give humans more free will. Proponents of this ethical ideology believe that, humans should be granted the opportunity to make their decisions based on what is morally right, rather than what the rule/law states. That freewill or discretion is anchored on the assumption that the human nature is inclined to do what is considered morally right.[285] Therefore, the general motive behind the action of humans is to do what is morally right. It could be further argued that, virtue looks at the intent and not the rule. If the intent of an action is right, even when it opposes what the law/rule states, then its virtuous.

Virtue looks at the moral nature of the action that has been taken and whether the action is good or bad. Virtue ethics in my opinion is more inclined to natural principles e.g. wrong and right, good and bad. There is no necessary adherence to rules or principles so long as the motive behind the action is right. Virtue ethics is centred on justice and fairness and not rules or codes. For instance, in certain jurisdictions particularly Nigeria, it has been

284 ibid, Herring 10.

285 Moss Jessica, 'Virtue Makes the Goal Right: Virtue and Phronesis in Aristotle's Ethics'(2011)56 Journal For Ancient Philosophy 204-261.

argued the administration of justice system is centred on technicalities of law (procedural) rather than justice.[286]

Some legal practitioners appear in court with the intention of using the law to technically obstruct justice. It is a possibility that lawyers within the jurisdiction are encouraged to use legal technicalities to deprive litigants of justice because the system allows and promotes legal technicalities rather than justice.[287]

Hence, both judges' and lawyers forget that the court is not only court of law but also a court of justice. A litigant is in court for justice to be served and not for the law to be upheld (yet the law must be upheld). If an action of a litigant is right or wrong, justice should be served on its merit and not on technicalities of law. The Nigerian justice system appears to be more inclined to the deontological approach, which is a direct opposite of what proponents of virtue argue for.[288]

In the legal profession, rules of professional conduct are meant to be followed and strictly obeyed. Lawyers could argue that once rules are complied with, it is immaterial whether their action is morally wrong or right. We could argue that once rules have been complied with, we can sacrifice equity justice and fairness. This is a scenario, which proponents of virtue ethics have continuously criticised. A lawyer's adherence to rules, irrespective of whether or not it is the right thing to do is principally challenged by proponents of virtue ethics. This is quite understandable, as it can be argued that legality is not morality.[289] An action is legal when there are laws that permit such action or there are no existing laws that prohibit an action. Whether or not an action is legal, is there an element of justice in

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286 Rand J, Dana C, *Moral Vision and Professional Decisions : the Changing Values of Women and men Lawyers*(1989)13.

287 Ibrahim Abdullahi, 'Ethics, Rules of Professional Conduct and Discipline of Lawyers in Nigeria: An Overview' [2017]4 International Journal of Public Administration and Management Research 4.

Ibid.

Ibid.

the action? Is the motive behind the action "right"? These are questions that create conflict between proponents of virtue and deontological ethics in the legal profession.

A lawyer's duty is beyond knowing the law. A lawyer's priority is to advocate for justice and do what is considered right and equitable in accordance to the Rules of Professional Conduct.[290] However, what happens when sections of the rules of professional conduct which a lawyer should adhere to, does not seem to promote what is "right"? Is a lawyer meant to ignore the provisions of the Rules of Professional Conduct (deontology) and follow his conscience (virtue) or obey the strict rules? This could pose a problem for the integration of virtue ethics in the conduct of lawyers in Nigeria. The "discretion" to determine what is right or wrong, which is associated with virtue can be abused by some lawyers.[291] It is arguable that right or wrong is subjective. Therefore, everyone could have a different interpretation of what is right. A person could flagrantly disobey a law or carry out an action which a law clearly prohibits, under the guise of it been the "right" thing to do. This could cause a breakdown of law and order, if we totally disregard rules and focus on motive or intent. However, the motive/intention cannot be overlooked.

Aristotle states that, it is the inner qualities of a person that makes the action made by a person right.[292] If applicable to the legal profession, it is the inner qualities of lawyers that matter and not the outcome of the result. The inner qualities of lawyers form their character; their character could determine how they apply the Rules of Professional Conduct. This is because a lawyer could intentionally do what is considered morally wrong but not break any of the rules. Hence the importance of motive and intent in ethics which virtue advocates.[293]

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290 Adrian Evans, *Assessing Lawyers' Ethics : a Practitioners' Guide(Cambridge University Press, 2011)19.*

Ibid.

Andrew Boon, Jeniffer Levin: *Ethics and Conduct for Lawyers in England and Wales* (Bloomsbury,2008)21.

293 Ibid.

In legal practice, it is important for lawyers to be honest. Honesty is a virtue, which should be expected of lawyers. Honesty has plays a role in the ethical consideration of lawyers. Honesty and trust are major factors in the legal profession and no number of rules or code of conduct can guarantee honesty from a lawyer. A lawyer must be virtuous. A virtuous lawyer would not convert a client's money to personal use.

A virtuous lawyer would not reveal a client's secret, knowing fully well that such information was given to him in trust. Virtue ethics are moral principles that emanate from within an individual. The conscience should be the guide rather than codes or rules.[294]

The importance of personal morality in ethics cannot be overemphasised. The moral values of person form the character. If the character of a person is questionable, then certainly the person cannot be virtuous. It is very possible for there to be a conflict between the strict application of rules and morality. One would argue that, where there is a conflict between the Rules of Professional Conduct and morality, morality should overtake the rules. This may be purely academic and difficult to integrate in reality due to the subjectivity of morality. However, morality is important in the context of virtue.[295] A scenario where a lawyer, who has a wealthy client, opens a trust account for the client with huge sums of money and the same lawyer has a poor client who is barely struggling to put a roof over his head and feed his family. The bank is about to foreclose on the poor client's home to evict him and his family. The lawyer could decide to withdraw from the rich client's trust account and help settle the debt of the poor client (without the knowledge of the client) and returns the money as soon as the poor client pays back, but he does not. Instead, he gives the client money from his personal savings to solve his housing problems, violating the rules of conduct in the jurisdiction he practices, which prohibits personal relationships with clients. The lawyer might have disobeyed certain provisions of the Rules of Professional Conduct but has helped to save a family from homelessness. Virtue looks at the intent and not the rules.

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294 Lawrence Solum, 'Virtue as the end of law: an Aretaic theory of legislation'[2018]9 Jurisprudence International Journal of Legal and Political Thought 9.

295 Reid Mortensen, *Reaffirming Legal Ethics : Taking Stock and New* Idea(Routledge Publishing,2009)17.

Critics of virtue ethics have argued that, in each situation there is no clear guide on what to do, leaving maximum discretion in the hands of the person carrying out the action. This could lead to ambiguity, unlike deontology which focuses on what the rule states and the adherence to the rule. Despite the problems of ambiguity and subjectivity, it is one of the most practicable and acceptable theories.[296]

Conflict of ethical principle is another factor that influences the integration of virtue ethics. There is an increasing number of conflicts of ethical principles these days particularly by lawyers who work for companies and state.[297] Career driven lawyers who work for companies or organisations might be caught between implementing company policies and doing what is considered "right". This is because some organisations may have goals or a mode of operation, which may not be morally acceptable. Lawyers who work for such establishments may run into problems with the establishment, if they do not implement company policies because it contradicts their ethical principles.[298] Conflict of interest between broader public interest and the interest of a client is a primary issue. Lawyers often make this mistake by prioritising the interest of the client above the interest of the public. This should not be. The lawyer owes the public or the society a duty first, before the client. Hence there should be a priority of interest. In this case the broader public interest should be priority. Proponents of virtue would argue that where core duties conflict, public interest must take precedence.[299]

Lawyers play a significant role in the society. The significant role played by lawyers reflect on the justice system. If lawyers are ministers in the temple of justice, then it is important for lawyers to conduct themselves with virtue with the aim of delivering justice for the common good of the society.

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296 William Simon, *The Practice of Justice: A Theory of Lawyers Ethics*(1998)34.

297 Sampford C, 'What's a Lawyer Doing in a Nice Place like This?'[1998]1 Legal Ethics 37.

Ibid.

P De Jersey, 'Public Interest and Public Policy: Unruly Horses alike?'[2006]6 Legal Ethics 23.

3.4 Ethics of Lawyers in Nigeria

As it is in most jurisdictions, the practice of law is regulated in Nigeria. The rationale behind the regulation of legal practice in Nigeria is to prescribe guidelines and code of conduct for lawyers, which could be interpreted as ethics. The history of legal practice in Nigeria could be dated back to the colonial era. At that time, there was no clear regulation or rule that guided the conduct of lawyers in and out of court. Prior to 1888, the absence of a definite regulatory guide made lawyers in the jurisdiction to act within their discretion.[300] The problem that arose as a result of their discretion was that, lawyers could not be held to account for their conduct. They could not be held to account because there were no rules that permitted or prohibited what lawyers could or couldn't do.

The Nigerian Bar Association (NBA) was founded in 1888. At the time of it being founded, it had only three members. This was because there were very few persons had the opportunity of travelling to the United Kingdom to study law.[301] Prior to that, and decades after the formation of the NBA, there was no guideline or rule that regulated the conduct of lawyers in Nigeria. At that time, the courts asserted control on the conduct of lawyers, in and out of the court room. Over time, the regulation of the conduct of lawyers was developed by the courts before the formation of regulatory authorities.[302]

The formation of regulatory authorities brought some formal developmental framework to the legal profession. This has created a formal consciousness for lawyers on their behavioural pattern in the line of work. Without any regulatory authority, there could have been a possibility that lawyers would abuse their office and functions, particularly with the fiduciary relationship that is between a lawyer and a client. [303] The courts also assist

300 A. Beredugo, *Nigerian Legal System* (Macmilliam Publishing, 2009)215.

Ibid.

Cab Rank Rule: What is Good For> https://notabarrister.wordpress.com/2013/01/29/the-cab-rank-rule-what-is-it-good-for-absolutely-nothing/ assessed on 8th July 2017.

Rotman Leonard, 'Understanding Fiduciary Duties and Relationship Fiduciarity'[2017]62 McGill Law Journal 975.

regulatory bodies to enforce certain behavioural patterns on lawyers within their jurisdiction.

Generally, the courts have a duty to supervise the conduct of lawyers and punish lawyers for misconduct. In the case of *Myers v Ellman*[304], Lord Wright observed, "the underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of such nature as to tend to defeat justice in the very cause in which he is engaged professionally."

The courts have a duty to monitor and supervise the conduct of lawyers beyond the rules of professional conduct. If lawyers are regarded as priest in the temple of justice, then we could argue that the temple has a right to monitor the conduct of priests that appear before it, to avoid desecration. The courts have the powers to punish erring lawyers to serve as a lesson for others to learn.

In Nigeria, the General Council of the Bar, which derives its powers from the Legal Practitioners Act[LPA] 1975, regulates the conduct of lawyers. S1(1) of the LPA 1975 states the functions of the General Council of the Bar, which sits once a year to review complaints about lawyers and review the guidelines for the code of conduct of lawyers.

S 1 (1) of the LPA states:

> "There shall be a body to be known as the General Council of the Bar (hereinafter in this Act referred to as "the Bar Council") which shall be charged with the general management of the affairs of the Nigerian Bar Association (subject to any limitations for the time being provided by the constitution of the association) and with any functions conferred on the council by this Act or that constitution."[305]

To further strengthen the regulation of lawyers in Nigeria, the Rules of Professional Conduct 2007 [RPC] was formed by the Bar Council. The RPC was enacted to give in detail ethical consideration of lawyers in Nigeria. Lawyers are meant to abide by the

304 [1940] A.C. 282 at 319.

305 Legal Practitioners Act 1975 S1 (1)

Recommendations of the RPC, which clearly states the functions of a lawyer particularly concerning the attorney-client relationship. The RPC 2007 and the LPA 1975 have an important role in the regulation of the practice of law and the ethics of lawyers in Nigeria.

In Nigeria, the practice of law is unitary. Legal practitioners are qualified to practice as solicitors and barristers. The Nigerian legal system inherited the British legal system, which makes both similar. Nigeria is a common law jurisdiction and most of her laws have their origin in the United Kingdom. Hence, the style of practice with regards to procedural law is similar with the UK. However, in the UK the role of a legal practitioner is separated. One is either a solicitor or a barrister.[306] Some legal scholars have argued that the current system which Nigeria practices, where the job of a lawyer is unitary, could create an enabling environment for misconduct while discharging their duties as lawyers.[307] It has been argued that the job of a lawyer should be divided between a barrister and a solicitor. Proponents of this argument believe that it would reduce the ambiguity of the role of a lawyer and make their duties more specific and this could reduce misconduct.[308]

This may not be very true. The professional role a person plays does not determine the content of the character of a person. Traits are inherently personal. It does not also make the person virtuous or honourable. These character traits are inherent personal qualities, and lawyers who lack the element of morality will not do the right thing even if their roles are separated. The argument for the separation roles of legal practitioners is merely deontological, as this may not have any serious influence on the conduct of lawyers within the jurisdiction.[309] This is because there are limits to the extent to which rules or laws can influence the character of a person. If roles are separated, as it is in jurisdictions like the UK, would that guarantee the behavioural pattern of lawyers in Nigeria?

James Tunbridge: Origin of the Split Profession> http://www.thefoxfund.com/reports/court.pdf< Assessed on 8th June 2018

Ogwezzy Michael, 'The Legal Practitioners Act: A Code for Regulating the Conduct of Lawyers in Nigeria'(2013)3 Agora International Journal of Juridical Sciences 110

ibid

See note on household deontology

Aristotle argues that what is bad is bad and what is good is good and rules do not influence what is good because good is good in itself.[310] Then, it could be argued that whether or not there are rules that govern the practice of law, or whether or not the is a separation of the role of lawyers in the jurisdiction, it cannot determine the content of the character of lawyers. Such rules are only an element required for the regulation of the conduct of lawyers.

3.5 Fiduciary Duty of Lawyers in Nigeria

Fiduciary duty is a primary obligation a lawyer owes a client.[311] It is the duty of a lawyer to diligently represent the client and the interest of the client. However, a lawyer also owes the court a duty. Part of the duty of a lawyer to the court is to represent a client within the limits of the law, speak the truth to the court and should not mislead the court with the intention of obstructing the course of justice. While representing a client, there could be a possibility of lawyers engaging in unethical practices with the aim of satisfying their clients.[312]

In some circumstances, lawyers within the Nigerian jurisdiction have intentionally attempted to obstruct the course of justice, by either filing frivolous applications in court to delay trial or engaging in outright corruption by attempting to bribe court officials to file their cases in courts, where "friendly" judges are presiding over.[313] This is a dangerous trend by lawyers who are supposed to be seen to uphold justice and the rule of law. Obstruction of justice by either prosecution lawyers or defence lawyers has been a major

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310 Bahadır Küçükuysal, Erhan Beyhan 'Virtue Ethics in Aristotle's Nicomachean Ethics' [2011]8 International Journal of Human Sciences 46.

311 Katerina Lewinbuk, 'Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty' [2008]40 Arizona State Law Journal 135.

Ibid.

Oladimeji Ramon 'Efcc V Joe Nwobike :Court jails Nwobike SAN, for attempt to pervert justice' Punch Newspaper (May 1 2018)> http://punchng.com/court-jails-nwobike-san-for-attempt-to-pervert-justice/> assessed 30 may 2018.

factor that has undermined the AML regime in Nigeria.[314] It can be argued that the unsuccessful prosecution of PEP and high net worth individuals in Nigeria, has been combination of both incompetence and corruption (where competent) on the part of prosecution and defence lawyers. Despite the strict rules of professional conduct in Nigeria, this reliance upon rules and assumption of a deontological response form lawyers has not addressed the primary issues of character of a lawyer.

The ability of the actors to resist temptation from their clients and remain ethical during their duty is crucial. This may not be a systemic thing but rather a personal and moral issue. It may not be systemic because there is a limit to how systems can control human behavior. A good person is someone who lives virtuously and is not controlled by rules or regulations.[315]

If we argue that there must be a systemic mechanism in place to ensure that lawyers behave right and are resistant to temptation in the line of their duty, then the system must be perfect to monitor the lawyers step all the way. This is practically impossible as there is no perfect system. A lawyer must act in good faith.

This was emphasized in the case of *Dryburgh v Scott's Media Tax.*

The court described the duty as, "act in good faith in the interests of (the principal), to act for a proper purpose, and not to allow… personal interests to conflict with those of (the principal)'. The concept is based on notions of trust, confidence and good faith. All very well in a utopian society, but for those operating in the hard knocks world of modern commerce, perhaps less familiar. Parties generally operate in accordance with what the contract says, whether good, bad or indifferent for the other party – indeed, wresting the best financial result is likely to be critical. Attempts to introduce a general duty of good faith into contracts have proved unpopular because of the level of uncertainty it brings. In Dryburgh, the Court said: 'A fundamental position applies to all fiduciary relationships, a

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Ibid.

J. Rachels, *The Elemetns of Moral Philosophy* (McGraw-Hill Education, revd edn 2012).

fiduciary must not place himself in a position where his interests and his duties may possibly conflict".[316]

Furthermore, in the case of *Bristol and West Building Society v Mothew,* the courts stated that:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. 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 duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."[317]

An essential element that guides lawyers is the duty to the client. A lawyer must handle a client's business with utmost care and skill.

> "It is the duty of a lawyer to devote his attention, energy and expertise to the service of his client and subject to any rule of law, to act in manner consistent with the best interest of the client." [318]

A lawyer must handle a client's business in the most professional manner. The manner must be within the ambits of the rule of law and the rules of professional conduct. His expertise could mean sound counsel on issues and proper representation in court when and if the need arises. This must be done in accordance to the rule of law. For instance, a dubious client may pressurise his lawyer to engage in unethical practices and the lawyer

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Dryburgh v Scott's Media Tax [2011] CSOH 147.

Bristol and West Building Society v Mothew [1996] EWCA Civ 533

Rules of Professional Conduct 2007, 14 (1).

unwittingly may want to satisfy the client by breaching certain laws or provision. This is stated in rule 15(2):

> " (2) In his representation of his client, a lawyer shall-
>
> keep strictly within the law notwithstanding any contrary instruction by his client, and if the client insists on a breach of the law, the lawyer shall withdraw his service;
>
> use his best endeavours to restrain and prevent his client from committing misconduct or breach of the law with particular reference to judicial officers, witnesses and litigants and if the client persists in his action or conduct, the lawyer shall terminate their relations."[319]

A lawyer should not consciously break the law during his service to his client. Even if the lawyer has not broken any law, or the rules are unclear on whether or not an action is prohibited, the conscience should serve as a compass in guiding the action of a lawyer. This

is the primary advantage virtue would have over deontology. Rule 15(1) of the RPC 2007 appears to create a gap for "bad" lawyers to capitalise on.

Rule 15 RPC states:

> "(1) In his representation of a client, a lawyer may refuse to aid or participate in conduct that he believes to be unlawful even though there is some support for an argument that the conduct is legal."[320]

The word "may" is used in the provision of Rule 15 RPC 2007. This could be very dangerous because it could be deliberately misinterpreted. A lawyer who does not want to do what is right and be virtuous could consciously, intentionally and pretentiously, claim ignorance of the ideal interpretation of the provision. A lawyer could go further to argue that the word

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Ibid.

Ibid.

"may" gives an option with regards to believing or accepting that what a client is doing or is about to do is unlawful.

For avoidance of such mischief, laws must be clear. Clarity of laws is very essential for the integration of the rule of law in a nation's justice system. Fuller argues that for a law to be valid, it must be clear.[321] Fuller further argues that the fidelity of law is an essential ingredient for the rule of law. Lawyers should strive to uphold the fidelity of law. The application of this law is as important as the enactment. Lawyers must not deliberately attempt to misinterpret the law or mislead a judge to please a client. Legal practitioners more than anyone else need to be part of the collective effort to uphold the rule of law. For the legal profession to develop it depends on the usefulness of law to clients and the integrity of the law. For the viability of the system, lawyers must support the profession and ensure that the fidelity of the law is upheld. Despite the clarity of rules or law, there is a limitation on how much it can influence that character of lawyers. If lawyers act with virtue, the AML regime would be more efficient. Defence lawyers would not go out of their way in committing crimes or obstructing the course of justice in order to satisfy a client.

If it is proven that, a lawyer has engaged in an unethical practice, the Legal Practitioners Disciplinary Committee [LPDC] has the responsibility of disciplining lawyers. This body derives its powers from s10 of the LPA 1975[322]. Members of the legal practitioner's disciplinary committee are; the Attorney General of the Federation, Attorney Generals of States, and 12 Legal Practitioners who have distinguished themselves in practice and have proven to be of good character and conduct. They are selected from different areas of practice and academia with a minimum of 10 years of post-call experience. It is important to note that matters before the LPDC can be appealed. The appeal goes straight to the Supreme Court.

321 Ibid, Fuller.

322 Legal Practitioners Act 1975, S10.

3.6 Ethical Consideration of Prosecutors in Nigeria in the AML Regime

In criminal prosecution, it is the duty of the prosecution to weigh the evidence before going to court. Prosecutorial discretion is essential when weighing the evidence at the point of investigation. Prosecutors must be thorough to avoid an abuse of court process.[323] Prosecutorial discretion can play a role in guiding a prosecutor. This would ensure that ethics in the profession are regulated particularly with criminal prosecution in Nigeria. An intelligent prosecutor, having weighed the evidence and gone through the facts of the case, should be able to envisage or forecast where the court may head.[324]

Prosecutors must consider ethical implications before filing charges. Part of which is to evaluate the available evidence of the offence and apply discretion on whether or not to prosecute. If a prosecutor applies prosecutorial discretion by amending charges against the accused/defendant, in accordance with the available evidence, there may be a less probability of an abuse of court process. The independence of a prosecutor must not be abused by overcharging or attempting to secure a conviction by any possible means. In most cases, a prosecutor primarily is a lawyer.[325] Despite the fiduciary duty of a lawyer which is to satisfy the client (the state in the case of a prosecutor), a lawyer owes a duty to the court to diligently carry on his case. The prosecutor also owes a duty to uphold the rule of law and not abuse his esteemed office. Overcharging or an attempt to get a conviction by any means can be interpreted as persecution. A prosecutor should prosecute and not persecute defendants by filing unsubstantiated charges before the courts.[326] It is in line with virtue ethics that a prosecutor does not abuse the discretion attached to the office, by punishing perceived enemies of the state or for personal reasons. It is ideal for the

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323 'Prosecution Independence and Accountability ,Principles, Challenges and Recommendations' Commonwealth Law Bulletin (31st Jan 2017).

324 Wilfrid Rumble, 'Jerome Frank and His Critics: Certainty and Fantasy in the Judicial Process' [1961]10 Journal of Public Law .

Ibid.

Ibid.

prosecutor to charge defendants in accordance with the evidence that is available. Any action short of that could be unethical and not in good faith.

The common law approach was for the prosecutor to present evidence before the court and determine whether the evidence is sufficient for a conviction. The judgment of Rand JF the Supreme Court of Canada held in*, Boucher v The Queen*[327] *:*

> "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

From the judgement in the above case, it is important to note that, an abuse of court process does occur when lawyers file frivolous applications before the court. This is clearly a procedural issue however; some discretion needs to be applied on the part of the prosecutors when filing criminal processes in court. A lawyer could fall short of ethics when prosecutorial discretion is not applied before going to court. This unethical practice of filing frivolous charges has affected the AML regime in Nigeria.[328]

The improper application of prosecutorial discretion in the AML regime in Nigeria could also be responsible for the high number of money laundering cases in our courts by PEP with very few convictions. The AML regulatory agencies that are empowered to prosecute on behalf of the Attorney General, are always in a hurry to prosecute without applying

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327 [1954] 110 CCC 263 at 270.

328 Ojienda.O, *Professional Ethics : a Kenyan Perspective*(Law Africa Publishing, 2011)13.

prosecutorial discretion. This could make charges too cumbersome, ultimately difficult to diligently prosecute and secure a conviction.

The AML regime in Nigeria has suffered some setbacks due to the high handedness of prosecutors. When frivolous charges are attached to money laundering charges, it undermines the rationale behind the prosecution of the defendant. The public might think there is a political persecution on the defendant, which could in return undermine the AML regime in the court of public opinion. For the success of the AML regime in Nigeria, the public has to be convinced with the way and manner AML regulatory bodies prosecute money laundering cases.[329] If prosecutors abuse their office by overcharging or are seen to appear to get a conviction by any means, the support the AML regime would need from the public will not be there. This, can undermine the AML regime in Nigeria.

Prosecutors could exercise great responsibility to the society. Prosecutors play a key role in the administration of the criminal justice system, whether as individual prosecutors or prosecution agencies. A prosecutor is supposed to act with fairness and detachment. Professionalism should be displayed in the way he carries out his duties. Prosecutors must be conscious of the fact that the accused is a member of the society and he owes the larger society a duty of care. Prosecutors must not be desperate to secure a conviction by any possible means. Fairness cannot be overemphasised as a duty of a prosecutor.

The Australian High Court in *Whitehorn v The Queen* [330] Deane J stated:

> "Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."

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329 David Luban, 'Natural Law as Professional Ethics: A Reading of Fuller'[2000]18 Sociology & Philosophy Journal 176.

330 [1983] 152 CLR 657 at 663–4,

Exercising fairness could be one of the core advantages of prosecutorial discretion. For example, a first offender for a misdemeanour ordinarily should not be charged to court, particularly if it might not be in the interest of the public to do so. More so, since the person if a first offender, and has shown remorse, the prosecutor should be able to decide if it is essential for the person go be tried by a court. A prosecutor should be able to exercise that discretion on a minor issue like this and allow the person go. A fundamental principle of the rule of law is fairness. Fairness to the accused with respect to the evidence at hand could influence prosecutorial discretion.

Public interest is a major factor considered by prosecutors on suspicion of a criminal offence. The prosecutor must consider if it is in the interest of the public for an offender to be prosecuted. This is because the prosecutor's primary responsibility should be to the public and not the agencies responsible for prosecution.

Could it be that the criminal justice system in Nigeria focuses on securing a conviction as against public interest? Prosecutors should not be in a hurry to take all manner of cases to the courts without considering available evidence and applying prosecutorial discretion. The National Bureau of Statistics has stated that prosecutors are responsible for the high number of inmates in Nigerian prisons awaiting trial.[331] Some of these offences are offences that could be misdemeanour; if prosecutorial discretion is applied there would not be backlog of persons awaiting trial. It is very shocking and embarrassing to note that about 70% of inmates in Nigerian prisons are awaiting trial.[332] This is quite unfortunate. There is a clear disparity between the application of prosecutorial discretion for PEP and other citizens. It seems there are different standards with the application of prosecutorial discretion in Nigeria. One standard is used for the poor or ordinary citizen who is hurriedly locked up in prison without trial, while another standard is used to prosecute the PEP for

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331 Yomi Kazeem, 'Up to Three-Quarters of Nigeria's Prison Population is Serving Time Without Being Sentenced' Quartz Africa(January 24 2017)<.https://qz.com/892498/up-to-three-quarters-of-nigerias-prison-population-is-serving-time-without-being-sentenced/ > assessed 16th may 2018

332 Ibrahim Musa,'70% of Nigerian prison's inmates are awaiting trial' Daily Trust (July 17,2017) >https://www.dailytrust.com.ng/news/general/70-of-nigerian-prison-s-inmates-are-awaiting-trial--reports/190845.html> assessed 16th of may 2018.

stealing and money laundering charges. Again, it goes against Fullers principles of generality.

The improper application of prosecutorial discretion in the AML regime in Nigeria could also be responsible for the high number of money laundering cases in our courts by PEP's with very few convictions.[333] The anti AML agencies that are empowered to prosecute on behalf of the Attorney General have not lived up to expectation. If ethics were considered before proffering a charge, there might not have been too many delays in trial.

Overcharging also makes the process of trial too cumbersome and ultimately might not secure a conviction. The resulting effect is on the members of the public whose resources have been looted by PEP. It is important that prosecutorial discretion be enforced as a part of ethical guide for prosecution in the Nigerian criminal justice system and the AML regime in particular.

3.7 The role of Confidentiality in Ethics

A fundamental ethical duty imposed on lawyers is the duty of confidentiality. The obligation not to disclose details of transactions or information about a client is a priority rule amongst legal practitioners all over the world. This is a fundamental rule that lawyers in most jurisdictions are obliged to follow. Most other professions adopt this rule however, it is more pronounced with lawyers.[334]

This ethical duty of confidentiality has been a part of the legal heritage since the practice of law. A combination of public perception and the discipline has been part of the traditional heritage, that is associated with the practice of law and lawyers in general.[335] The perception that lawyers do not speak except when authorised to speak, the belief that

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See appendix.

Paul Rothstein, 'Ethics and Evidence: VII Lawyering Skills and the Limits of Confidentiality: "Anything You Say May Be Used Against You": A Proposed Seminar on the Lawyers Duty to Warn Confidentiality Limits in Todays Post-Enron World' [2017] 76 Fordham Law Review.

335 Ibid.

lawyers are conservative with words, forms a major part of public confidence that is bestowed upon lawyers. This duty has been a part of legal practice and it has been a sacrosanct duty until recent times.[336] The history of client confidentiality suggest that lawyers must obey the law, rules and regulation that govern the society except when the law treads on client confidentiality. This had been the old common law practice where lawyers would go to any extent in protecting the information given to them by their client, no matter what offence has been committed.

There are two effects of compliance with AML laws and regulations. The first is that compliance would have beneficial effect that justifies eroding confidentiality, even though confidentiality itself has its own beneficial effect. The second issue is that compliance can prevent a possible misuse of confidentiality.

As the society evolved the practice of law also evolved. The changes and the demand from the society naturally influences the decision we make as humans. This influence is not restricted to individuals but also professional bodies, which includes the legal profession. The societal demand, which most affects confidentiality, are compliance regulation. These regulations could generate a conflict between compliance and confidentiality.[337] The rationale behind the confidentiality between an attorney and a client, is to provide an enabling atmosphere and an assurance of privacy. This “assurance” is currently being eroded with enforcement of compliance law s[AML] on legal practitioners. However, it could be argued that these compliance laws are necessary to act as a check on legal practitioners who may intend to abuse the duty of confidentiality and perpetuate criminality. Hence, the need to enforce certain compliance laws on legal practitioners.[338] This is debatable. Confidentiality plays a crucial role in a nation’s justice system. This is because for there to be access to justice, a litigant must pass through a legal practitioner

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336 Clare cowling, ' Legal Records at Risk: Does the Legal Profession Care about Preserving its Heritage? And What Could be done to Rescue Private Sector Legal Records?' [2016] 16 Legal information management 177-183.

337 Fred Zachariah, 'Harmonizing Privilege and Confidentiality' [1999] 41 Texas Law Review 69-70.

338 Rebecca Aviel, 'The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism' [2012] 86 Tulane Law Review 1210.

who in turn would pass through the legal system. For litigants to be encouraged to access justice through the legal system, they must be confident that they would get adequate representation by any legal practitioner of their choice.[339] A litigant may not be encouraged to access justice through the legal system, if he feels details of his communication with the person who supposedly is to represent him, has divulged information to either anybody else or his adversary.[340] It is important to note that in some cases, the "adversary" could be the government, who is investigating a person on suspicion of money laundering or any other offence and the lawyer who is supposed to be representing him gives him out on the altar of compliance. These are some of the issues between the compliance with AML regulations and confidentiality.

The importance of duty of confidentiality between an attorney and client is a fundamental part of legal ethics. It could be argued that ethics in the legal profession are compliance laws on their own. The rule of professional conduct, which governs legal practitioners in respective jurisdictions is a compliance regulation on its own. Lawyers are bound to comply with their code of conduct, which is the primary compliance law that is applicable to legal practitioners. Whether or not there are conflicting compliance laws between (money laundering, real estate, insolvency, financial regulation, oil and gas and other areas of legal practice) and the duty of confidentiality, one of these compliance laws must prevail. This begs the question, when there is a conflict between compliance laws set by legislation or policy document and confidentiality which is stated in the code of conduct of lawyers (another compliance law) which should prevail? At what point should a lawyer draw the boundary between confidentiality and complying with other regulations? The courts have stated the importance of confidentiality between lawyer and client in several cases.

In the case of *Edwardian Group Ltd and another v Singh and ors,* it was stated that Legal advice covers what should prudently and sensibly be done in a relevant legal context. It is

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Ibid.

Katherine Kruse, 'The Jurisprudential Turn in Legal Ethics'[2011]53 Arizona Law Review 508.

not confined to telling the client the law. The context must, however, reasonably require the lawyer's legal skills and confidentiality to be deployed in the service to the client.[341]

In the case of *Property Alliance Ltd v Royal Bank of Scotland plc,* it was stated that factual information communicated by a lawyer to his client to enable the client to take a fully informed decision as to what to do and what further advice to obtain, was considered privileged. It was also stated however, that this protection would not extend to factual material prepared by a third party that is simply sent by a lawyer to his or her client.[342]

Furthermore, In the case of *Prince Jefiri Bolkiah v KPMG,* Lord Millett stated that:

> "it is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest interest to the administration of justice, the importance that a solicitor or other person in possession of privilege and confidential information should not act in a way that may appear to put the information at risk of coming into the hands of someone with an adverse interest".[343]

Lord Millett must have envisaged that there could be a time when confidentiality between attorney and client would be eroded.[344] It appears we live in such times. However, before we criticise the proponents of lawyers complying with regulations which would enable them to report suspicious transactions of their clients, we should examine the society and the times we live in. Law is not static. The evolution of law comes with the evolution of the society. As norms and practices of the society changes, so should law change.[345] This is important in order to accommodate the current realities every society faces.

Edwardian Group Ltd and another v Singh and ors [2017] EWHC 2805

Property Alliance Ltd v Royal Bank of Scotland plc [2016] EWHC 3342

[1999] 1 All ER 517.

Ibid.

Benson Bruce, *The Evolution of Law* (Klauwaer Academy Publishers, 2004).17

The evolution of criminal jurisprudence is done in accordance with the changes in the society. These changes could also include the historical rules and values that have guided the legal profession such as the duty of confidentiality.

For a criminal justice system to be developed, there must have been a need to place less emphasis on the confidentiality rule in other to achieve a greater good for the society. This "greater good" can be interpreted to mean having a society where justice is implemented, with less regard to rules or norms of certain professions. It could be further argued that, in order for justice to be implemented, these professionals should obey certain compliance laws, which may be conflicting with professional norms or rules. This could be the rationale behind the classification of legal practitioners as Designated Non-Financial Institutions [DNFI] and mandating these professionals to report suspicious transactions of their clients. It could be further argued that for an effective AML regime and if the goal is justice (successful prosecution of PEP), it does not matter whose ethics or norms are broken. This should not be the case. There should be a balance between the implementation of compliance rules and Code of Conduct of legal practitioners, of which client confidentiality forms major part.

3.8 The Conflict Between Virtue and Deontological Ethics: An Examination of the role of Confidentiality in the Anti-money Laundering Regime in Nigeria, with a Focus on Lawyers as Designated Non-Financial Institutions

As society evolved, typology of money laundering also evolved. The way money laundering offences have been carried out in some cases, shows that certain professionals who are supposed to be gatekeepers can be placed in a position of compromise and aid money laundering activities. Over the years, the values of the legal profession have been eroded by elements within the profession, who sacrificed their virtue over client satisfaction or personal gains. This has led to the prosecution of lawyers on money laundering offences.[346]

346 Bell R.E, 'Prosecution of Lawyers for Money laundering Offences' [2003] 6 Journal for Anti-Money Laundering Control 19.

Some lawyers have taken advantage of the principles of confidentiality, which in some jurisdictions like Nigeria and Canada is sacrosanct.

The AML regime in Nigeria, which is anchored on the Money Laundering Prohibition Act [MLPA] 2011, makes clear provisions for professionals to report suspicious transactions of their clients. These professionals have been classified as a Designated Non- Financial Institutions [DNFI.] This is seen in S 3, 5 and 25 of the MLPA 2011. S 25 expressly includes lawyers in the classification Designated Non-Financial Institutions.

S 3 of the MLPA 2011 states:

> (1) A Financial Institution and a Designated Non-Financial Institution shall
>
> verify its customer's identity and update all relevant information on the customer
>
> before opening an account for, issuing a passbook to, entering into fiduciary transaction with, renting a safe deposit box to or establishing any other business relationship with the customer, and (ii) during the course of the relationship with the customer;
>
> scrutinize all on-going transactions undertaken throughout the duration of the relationship in order to ensure that the customer's transaction is consistent with the business and risk profile.
>
> An individual shall be required to provide proof of his
>
> identity, by presenting to the Financial Institution or Designated Non-Financial Institution a valid original copy of an official document bearing his names and photograph or any other identification documents as the relevant regulators may from time to time approve;
>
> address, by presenting to the Financial Institution or Designated Non-Financial Institution the originals of receipts issued within the previous 3

months by public utilities or any other documents as the relevant regulatory authorities may from time to time approve;

A body corporate shall be required to provide proof of its identity by presenting its certificate of incorporation and other valid official documents attesting to the existence of the body corporate.

The Manager, employee or assignee delegated by a body corporate to open an account shall be required to produce not only the documents specified in subsection (2) of this section, but also proof of the power of attorney granted to him in that behalf.

A casual customer shall comply with the provisions of subsection (2) of this section for any number or manner of transactions including wire transfer involving a sum exceeding US$1,000 or its equivalent if the total amount is known at the commencement of the transaction or as soon as it is known to exceed the sum of US$1,000 or its equivalent.

Where a Financial Institution or Designated Non-Financial Institution suspects or has reasonable grounds to suspect that the amount involved in a transaction is the proceeds of a crime or an illegal act it shall require identification of the customer notwithstanding that the amount involved in the transaction is less than US$1,000 or its equivalent.

If it appears that a customers may not be acting on his own account, the Financial Institution or Designated Non-Financial Institution shall seek from the customer by all reasonable means, information as to the true identity of the principal and where the customer is a body corporate, the Financial Institution or Designated Non-Financial Institution shall

take reasonable measures to understand the ownership and control structure of the customer; and

determine the natural persons who truly own or control the customer.

Where the customer is a Public Officer, the Financial Institution or Designated Non-Financial Institution shall in addition to the requirements of subsection (1) and (2) of this Section –

Put in place, appropriate risk management systems; and

(b) Obtain senior management approval before establishing and during any business relationship with the Public Officer."[347]

The inclusion of lawyers as DNFI'S in the AML regime of Nigeria, implies that lawyers ought to report suspicious transactions. Emphasis on ought to. However, the implication of S 3, 5 and 25 of the MLPA appears that the character of legal practitioners within the Nigerian jurisdiction is put to question. It is expected that as a legal practitioner, you have passed a certain test in character. The expectation generally is that a lawyer is worthy to be trusted in the soundness of mind and in the content of character. The content of character of a lawyer includes honesty and morality. These two contents are/have been essential qualities of legal practitioners for decades. If we agree that honesty and morality are essential qualities of lawyers, then we could argue further that virtue ethics plays an essential role in the conduct of lawyers. We could argue further that, if lawyers are virtuous and the profession is noble, is there a need to subject lawyers to compliance regulations in the AML regime? If our argument is that there is a need for lawyers to report financial transactions of their clients, is the government and society beginning to suspect lawyers? Is the society of the opinion that lawyers are no longer as noble as they claim to be?

Subjecting lawyers to report suspicious transactions by virtue of compliance laws as seen in S 3, 5 and 25 of the MLPA 2011, appears to be a deontological approach for the role of lawyers in the AML regime. The rationale behind following laid down rules and regulations, no matter the motive and consequences of one's action is Immanuel Kant's believe. Kant is of the opinion that actions should be motivated by a duty.[348] These duties could be interpreted to be rules. The household deontological approach to ethics can be interpreted

347 Money Laundering Prohibition Act 2011, S 3.

348 Robert Pippin, 'Kant's Theory of Value: On Allen Wood's Kant's Ethical Thought' [2010]43 An Interdisciplinary Journal of Philosophy 241.

to mean that, whether or not a lawyer's motive for carrying out an action is morally good, the lawyer must follow laid down rules and procedure. However, it is important to note that the definition of suspicion is highly subjective. Suspicion may differ according to the individual, as a mere unease cannot be justifiable suspicion.

In the case of *R v Da Silva,* the court had to consider the meaning of the word suspect. The case arose under the Criminal Justice Act 1988 [UK] and the Proceeds of Crimes Act [POCA]. It was clearly stated that a feeling of unease is not enough to convict someone for been a beneficiary of the proceeds of crime. It stated that a mere possibility Is more of wishful thinking.[349]

If we go by the Da Silva's case, it means that lawyers cannot be reporting transactions of a client on mere suspicion of money laundering. If a lawyer must report a client at all, the facts must be clear and undisputed to the lawyer. Hence, suspicion is subjective.

Also, in *R v Saik,* the court held that mere suspicion is not enough to claim that a person is benefiting from the proceeds of crime. The facts must be very clear and convincing.[350]

The rules on deontology, appears to oppose virtue, as virtue ethics would look at the motive behind the lawyer's action and moral value attached to it. If a lawyer refuses to report the transactions of his clients by virtue of S3 and S5 of the MLPA 2011, he could justify his actions by the immorality of breach of trust. A client is expected to trust his lawyer and a lawyer is expected not to divulge any information given to him in the course of him representing that client. This is the basic principle which confidentiality represents.

A lawyer who is not disclosing the details of transactions of a client may be going against the rules that classifies him as a DNFI and mandates financial reporting. It is important that laid down rules particularly compliance laws are obeyed. This would help to check the possibility of lawyers abusing or taking advantage of their office to aid money laundering. The rationale behind the deontological approach, on the ethics of certain professionals

R v Da Silva[2007] Crim LR 77.

R v Saik [2006] UKHL 18

Richmond Douglas, 'Lawyers Professional Responsibilities and Liabilities in Negotiations' [2009]22 The Georgetown Journal of Legal Ethics 249.

including lawyers is understandable. However, there should be a meeting point between the rule based ethics and morality. The amalgamation of virtue and deontological ethics could be more effective when considering the role of lawyers in the AML regime.[352]

The conflict between deontology and virtue ethics as to "what is morally good" should be backed up by rules, and what is "morally good" is good on its own, because "good is good". This can be applied to the role of lawyer and ethics in the AML regime in Nigeria. The application of deontological and virtue ethics at the same time could be more effective than having only a deontological approach in the ethics of lawyers. The essence of virtue is to give a guide as to what morality is and what is should be. The essence of rules is to guide the conduct of man, and people of a society. Conflict could arise when laws are enacted without taking into consideration the basic moral principles of those who the laws were made for.

If confidentiality is a seen as a moral principle in the practice of law, which could be interpreted as "virtue", the compliance rules as stated in S3, S5 AND 25 of the MLPA 2011 can be interpreted as a deontological approach in the AML regime. This is because these compliance laws are rules to guide the conduct of DNFI, which "must" be obeyed. Whatever ethical approach is adopted, an effective AML regime that would not undermine ethics of the legal profession should be the aim. Legal practitioners within Nigeria are of the opinion that the compliance laws in the AML regime, is an affront on the legal profession and undermines the virtues that lawyers are known for. The duty of confidentiality, which is embedded in the legal system, has its roots in Legal Practitioners Act [LPA]1975, the Rules of Professional Conduct 2007 [[RPC] and the Evidence Act 2011. However, this contradicts provisions in S3 and 5 of the MLPA 2011.

S21 (2) of the LPA states as follows:

> "A bank shall not, in connection with any transaction in respect of an account of a legal practitioner kept for clients' moneys, with that or with any other bank (other than an account kept by him as trustee for a

The failure to resolve this issue on a principled basis was recounted above in Chapter 2, where the courts imposed an absolute priority of confidentiality.

> specified beneficiary) incur any liability, or be under any obligation to make any inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to the account."[353]

This provision in the above section appears to be clear and free from ambiguity. The provision implies that lawyers are not under any obligation, to a bank to disclose transactions that pass through their client accounts. From the interpretation of the section, it also means that lawyers do not owe their banks an explanation as to the source of funds, so long as it is credited through their client accounts. This could be one of the reasons why lawyers do not feel obliged to report disclose "suspicious" transactions to the EFCC. It is important to note that the LPA is the parent legislation that governs the legal profession in its entirety in Nigeria.

The confidentiality principle is reinforced in Rule 19 of the Rules of Professional Conduct 2007 [RPC]. It states as follows:

> "19 (1) Except as provided under sub-rule (3) of this rule, all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged.
>
> Except as provided in sub-rule (3) of this rule, a lawyer shall not knowingly –
>
> Reveal a confidence or secret of his client;
>
> Use a confidence or secret of his client to the disadvantage of the client; or

353 Legal Practitioners Act 1975, S21.

(c) Use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure."[354]

R 19 of the RPC 2007 appears to be drafted with the intent to preserve to the virtues of the legal profession, which deals with keeping clients secret safe at all times. This is understandably so, as it can be argued that the patronage of the justice system, is dependent on the confidence of the litigant in lawyers who represent them.

If there is no confidence of litigants or defendants in the lawyers of a particular justice system or jurisdiction, there may be a breakdown of law and order. Defendants and litigants may resort to self-help if they are not sure of effective representation by their lawyers, or their "secrets" are been made public. Why would a defendant, litigant, or client want to brief a lawyer when he/she is aware that information given to the lawyer would end up in the hands of the "opponents" or potential prosecutor [government/ regulatory authorities]? A client having confidence in a lawyer, knowing that details of his transactions will not be revealed to anybody including regulatory authorities is a virtue, which is based on trust.

If for regulatory purpose of AML, the virtue of trust (confidentiality) is eroded, it could pose a real threat to the criminal justice system. If there is no meeting point between compliance rules in the AML regime and ethical practices among lawyers within the Nigerian Jurisdiction, neither the AML regime, the justice system nor the legal profession will be as effective as it should be.

S192 of the Evidence ACT states as follows:

"Professional communication between lawyer and client

(1) No legal practitioner shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to

354 Rules of Professional Conduct 2007, S19.

disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure –

Any such communication made in furtherance of any illegal purpose;

Any fact observed by any legal practitioner in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of such legal practitioner was or was not directed to such fact by or on behalf of his client.

The obligation stated in this section continues after the employment has ceased."[355]

The above provision is one of the reasons why lawyers in Nigeria have refused to obey compliance laws as stated in S3, and 5 of the MLPA 2011. Although, S 192 of the EA 2011 prohibits lawyers from disclosing details and transactions of their clients. It can be argued further that the provisions in S 192 of the EA is a deontological approach to the conduct and ethics of lawyers. The provisions of the EA 2011 also strengthen the argument of contradiction of legislation, which should assist the AML regime in Nigeria. The EA 2011 is not a primary legislation regulating the AML regime. However, prosecutors cannot successfully prosecute anyone most especially lawyers for aiding money laundering without recourse to the EA 2011. This contradiction between the EA and the MLPA makes the job of a prosecutor much more difficult than it should have been. The application of this section of the EA could frustrate the AML regime from effectively regulating and prosecuting the core typology prevalent in Nigeria.

If we argue that deontological ethics are centred on rules which must be obeyed, then we can also argue that confidentiality principles does not have its foundation in virtue ethics.

355 Evidence Act of Nigeria 2011, S192.

If lawyers believe that the reason why they should not disclose suspicious transactions of their clients to AML regulatory bodies, is based on the fundamental rule which is considered "sacrosanct", then maybe confidentiality is another deontological approach.

The dangerous implication of this is that some legal practitioners may not support the AML regime for their own selfish interest. Some bad elements within the legal profession can take advantage of the confidentiality provision as a standing rule and aid their clients in money laundering. Some lawyers may fall into the temptation of aiding PEP and high net worth individuals to launder funds that have been stolen. Lawyers who lack virtue could capitalise on the rules, which mandates confidentiality, and continually aid some PEP to impoverish the Nigerian state. PEP that commit money laundering offences may most likely engage the services of high-profile law firms. These firms would have accounts domiciled abroad and as gatekeepers, could fall into the temptation of assisting their clients in laundering funds outside the country.

When there is an absence of virtue in a lawyer, it could be implied that the lawyer does not have a conscience. A conscience serves as a moral compass differentiating good from bad. This "conscience" or "morality" or "virtue" is very essential when following laid down rules and regulations. Hence the importance of an amalgamation between virtue and household deontology ethics when considering the role of lawyers in the AML regime.

In certain jurisdictions like the British Colombia in Canada, lawyers are not obliged to report suspicious transactions of their clients. Lawyers are exempted from reporting requirements in their AML regime. [356]

In the case of the *Law Society of B.C v A.G Canada*, it was held that any financial reporting by lawyers amounts to an "unprecedented intrusion into the solicitor-client relationship"[357] The Canadian position of confidentiality seems to be similar with that of Nigeria.

Nigerian Bar Association v FGN & CBN, it was held that lawyers are not bound to obey S3 and 5 of the MLPA 2011 and contravene the provisions in the Evidence Act, Rules of

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356 Stephen Schneider, ' Testing the Limits of Solicitor- Client Privilege: Lawyers, Money Laundering and Suspicious Transaction Reporting'[2006] 9 Journal for Anti-Money Laundering Control 21.

357 The Law Society of B.C v A.G Canada: Bcsc 1593.>www.courts.gov.bc.ca/jdb-txt/SC/01/152001BCSC1593.htm>assessed > assessed 3rd may 2017.

Professional conduct and the Legal Practitioners act. The reason the judge gave is that stringent regulatory measure are attached to the practice of law in Nigeria, and the admittance of lawyers into the bar in Nigeria is based on character and conduct.[358] The interpretation of this judgement could mean that subjecting lawyers to report suspicious transactions of their clients based on the provisions in S3 and S5 of the MLPA 2011, might undermine the nobility of the profession and put the virtue of lawyers to test and possible ridicule. This judgement has caused a setback in integrating the role lawyers in the AML regime of Nigeria.

If we agree that an effective AML regime is the ultimate goal, and we agree that lawyers are stakeholders in the AML regime, at what point should lawyers report transactions to regulatory bodies? At what point can lawyers be prosecuted for not disclosing suspicious transaction of their clients? Or at what point should the balance between the two values be made?

These questions are pertinent to establish the role of lawyers in the AML regime in Nigeria. The conflict between the AML regime and the rules of confidentiality can be resolved if there is a confluence. This confluence would determine the extent to which the RPC 2007, LPA 1975 and the EA 2011 can be applied, as against the provisions in S3 of the MLPA 2011. If regulatory authorities and prosecutors can establish "intent", it is possible for lawyers to be successfully prosecuted on money laundering charges. Intent plays a pivotal role in addressing the confluence. This is because, if confidentiality is sacrosanct in the Nigerian justice system (as it is presently), would a lawyer knowingly aid and albeit his client in committing money laundering and hide under the defence of confidentiality? If a lawyer is aware that a client is about to commit money laundering, and proceeds to transact on behalf of the client, that should be enough intent. If "intent" connotes a present or future

358 Ndidi Ahiauzu, "Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA V. FGN CBN" Journal of Money Laundering Control, [2016]19.

See an explanation of the case in Chapter 2 above.

action, which can be argued that a lawyer owes a duty to prevent a client from carrying out money laundering offences by reporting the intended transaction.

That duty to report should be mainly discretionary upon suspicion, that a client is about to engage in money laundering. It could be further argued that duty to report, "intended suspicious transactions" is a virtue. The lawyer may be reporting to prevent "bad things" from happening to the society, despite the strict professional rules attached to the profession. It is important to note that S192 of the EA is silent with regards to lawyers reporting future crimes of their clients. In this scenario common sense and virtue dictates that a lawyer should report "futuristic" suspicious activities.

It could be further argued that the limitation to this is if a client has already committed an offence of money laundering, without the knowledge of the lawyer or before the client had briefed the lawyer. A scenario where the proceeds of crime has already been laundered before accepting brief of a client, the lawyer should be bound by confidentiality rules. At this point it would be unreasonable for a lawyer to report the offence of his client, even if it has just been discovered. Whether or not it is against the virtues or principles of the lawyer to be affiliated with or represent a money launderer, is immaterial at this point.

However, there should a limit with regards to the application of confidentiality between lawyer and client. This limit can be applicable with future crimes or an intended crime. An intended crime means a crime that has not been committed at the time of briefing a lawyer but has been committed after briefing a lawyer, and the lawyer is aware that the client has committed a crime. At this point, a lawyer cannot fail to report such transaction because it has been brought to his attention that his client has committed the crime of money laundering. Hence, the application of the strict rule of confidentiality cannot be applicable at this point. A lawyer must act virtuously by reporting future money laundering offences carried out by his client. That in itself is virtue.

There must be a limit and a meeting point (amalgamation/confluence) in the application of virtue and deontological ethics when examining the role of lawyers in the AML regime of Nigeria. A rigid approach on what lawyers should or should not do may not be the best for the AML regime. If there is no confluence of these ethical principles, the AML regime in Nigeria would be ineffective and the citizens of Nigeria may continue to have her public funds stolen.

3.9 An Evaluation of Fuller's Morality of Law and the Duty of Confidentiality in the Anti-Money Laundering Regime in Nigeria.

Fuller's principles in *Morality of Law* deals with the fundamental elements and characteristics of valid laws. The effectiveness of a legal system is dependent on the rule of law and the applicability of principles that centre on the rule of law. For purpose of this evaluation, focus is on contradiction of laws.

Fuller asserts that laws should not be contradictory.[359] This is because a law cannot prohibit what another law requires. The contradiction of laws could be detrimental to Nigeria's AML regime. The client confidentiality principle has made the Nigerian AML regime not as effective as it should be. This may be a contributing factor to the unsuccessful prosecution of PEP for money laundering offences, as the gathering of evidence may be more difficult. In some jurisdictions like the UK and the USA, the client-attorney confidentiality has been eroded to accommodate their AML regime. In Nigeria, the confidentiality rule appears to have more acceptance from lawyers than the provisions in the MLPA 2011. The contradiction between S3 of the MLPA 2011 and S192 of the EA 2011, S 19 RPC 2007 and S 21 LPA 1975 appears to be a problem facing the AML regime in Nigeria. This contradiction of laws has undermined the role of lawyers as DNFI in the AML regime. The rationale behind the inclusion of lawyers as DNFI is to aid investigation and possible prosecution of offenders in the AML regime.[360]

The motive behind S3 of the MLPA 2011 is defeated if lawyers who are supposed to be gatekeepers, refuse to disclose suspicious transactions of their clients to regulatory authorities because of confidentiality laws. Some elements within the profession could back their argument, that they are requisite laws which prohibit them from disclosing the details of their transactions. At this point, whether or not the motive behind the lawyers of

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Ibid,Fuller 46-49.

Normah Omar, Zulaikha 'Amirah Johari , 'A Review of the Role of Designated Non-Financial Institutions Business and Professionals as Preventive Measures in Preventing Money Laundering' [2016] 72 International Scientific Researches Journal.

non-disclosure is “bad”, there are contradictory laws that mandates the lawyer to disclose and otherwise.

Fuller asserts once there is contradiction of laws, citizens would have to become selective on what law to obey and what law to disobey. The contradiction of laws in the AML regime in Nigeria, could incline lawyers to obey laws they want to obey and disobey laws they want to disobey. The problem this poses would be an allegiance to laws based on convenience or discretion. If it is not convenient for a lawyer to obey a law, then the law is disobeyed. Lawyers would most likely continue to prioritise their discretion towards client confidentiality rather than disclose details of transactions of their clients. If lawyers intentionally refuse to assist the AML regime in Nigeria, the prosecution of money laundering offenders would not be as effective as it should be.[361]

Fuller also asserts that for an effective justice system, the rule of law must prevail. However, the rule of law can only prevail if there are laws that prohibit a particular crime, while these laws must not permit what another prohibits. It is the duty of legislators to make laws. We may argue that lawyers should not be given all the blame after all; lawyers did not enact the laws.

The legislators [PEP] who included the provision for disclosure in the MLPA 2011, should have been aware that there is an existing law, which prohibits lawyers from disclosure. Legislators should have amended or expunged relevant sections in the RPC 2007, LPA 1975 and the EA 2011, which mandates lawyers not to disclose before the enactment of the MLPA 2011. If the legislators who are also PEP, intend to address this issue of contradiction concerning disclosure, why haven’t they amended S19 RPC 2007, S192 EA 2011 and S 21 LPA 1975? On the other hand, are legislators no longer empowered to make laws? Alternatively, could this be a complicity on the part of PEP to frustrate the AML regime in Nigeria? Whatever the reason may be, this is an avoidable contradiction of law, which has to be addressed and solved for an effective AML regime in Nigeria.

361 ‘A Lawyer’s Guide to Detecting and Preventing Money Laundering’[2014] A collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe 6

The current judicial resolution of the contradiction of laws as explained above in Chapter 2 is not ideal. It did resolve the contradiction, holding that laws governing legal responsibility to be overriding. This solution was effective but had the effect of undermining the AML regime to a large extent. A superior resolution of conflict has been sketched above in this Chapter.

3.10 Conclusion

Lawyers have an important role to play when dealing with prosecutorial discretion and money laundering. In most cases, the defence and the prosecution are lawyers. Both parties are governed by a code of conduct or ethics. The duty of confidentiality between an attorney and client in the AML regime in Nigeria has been criticized by AML regulators. Lawyers as DNFI cannot be compelled to disclose financial transactions to the EFCC and other regulatory bodies. This is because the Legal Practitioners Act 1975, the Evidence Act 2011 and the Rules of Professional Conduct 2007 has created an enabling environment for lawyers not to disclose. This is the current position in Nigerian.

Lawyers must not abuse the provisions of S192 of the Evidence Act of Nigeria and S 12& 13 off the Legal Practitioners Act 1975. Lawyers must be ready to assist and cooperate with AML regulatory bodies for the successful prosecution of money laundering, particularly PEP. Lawyers who are involved in money laundering should be prosecuted by the Legal Practitioners Disciplinary Committee [LPDC].

The LPDC should put in more effort in identifying lawyers who have violated their ethics and aided their clients in money laundering by prosecuting them. Client accounts and non-disclosure of financial transactions by lawyers should be reviewed by the Nigerian Bar Association and the General Council of the Bar with a view to an amendment on S 192 of the Evidence Act 2011 and S13 & 21 of the LPA 1975. It is in the best interest of Nigeria and the AML regime for these laws to be reviewed.

For an effective AML regime, lawyers should be able to report suspicious transactions of their clients to AML regulatory bodies. This would assist in the successful prosecution of money laundering cases in Nigeria.

Finally, the deontological approach of the ethics of lawyers in Nigeria should be reviewed. The system where rules are given and if these rules are not broken, then action taken by the lawyer is deemed right. This approach appears not to be as effective as anticipated. There should be an amalgamation between deontology and virtue ethics. Lawyers should be ready to willingly assist the AML regime in Nigeria because it is the right thing to do. The typology of money laundering offences in Nigeria, which is corruption and abuse of office by PEP, has caused enough damage to the development of the country. Lawyers should see themselves as a part of the country and owe a duty to the public to participate in the fixing of the country by fighting corruption and assisting the AML regime. This duty should be born out of the will to do what is right whether the Rules of Professional conduct permits them to do so.

Prosecutors must also prosecute diligently and with regard to public interest. Prosecutors must understand that they are rendering a service to the nation by diligently prosecuting PEP who have stolen the nation's wealth and have impoverished the people. Prosecutors in applying prosecutorial discretion must do so in accordance to the rule of law.

Chapter 4

PROSECUTORIAL DISCRETION IN THE ANTI-MONEY LAUNDERING REGIME IN NIGERIA

4.1 The Role of and Independence of a Prosecutor

The prosecutor plays significant role in the administration of justice in the criminal justice system of a nation. The prosecutor's role is crucial to the efficacy of the criminal justice system more importantly; the independence of the prosecutor is essential to the appropriate application of prosecutorial discretion.

This is because in exercising the role of a prosecutor, it is essential that the independence of the prosecutor is not in doubt hence, it undermines the integration of the rule of law in the application of discretionary powers of the prosecutor.

Who is a prosecutor? A prosecutor is a person who institutes or conducts legal proceedings in court against persons who have committed criminal offences. Essentially, the function of a prosecutor is to proffer a charge against a defendant and prosecute the charge.[362]

More recently, investigation has been accepted to be part of the role of a prosecutor in the administration of criminal justice. It is common these days to have prosecutors carry out investigative functions on cases they are prosecuting. Ideally, prosecutors ought to be lawyers with a special training on how to prosecute criminal cases, with the aim of seeing that justice is served against the defendant.[363] This special training includes the application of prosecutorial discretion while dealing with criminal cases. Hence, a prosecutor should not be just a lawyer, but a lawyer with the emotional intelligence and skill in selecting the most applicable charge from a crime scenario. This emotional intelligence and skill in the selection of a charge from a crime scenario can be described as prosecutorial discretion.

What is prosecutorial discretion? There are several definitions of prosecutorial discretion. In the case of *Krieger v. Law Society of Alberta,* the supreme court of Canada defined prosecutorial discretion as follows:

Blacks Law Dictionary,(9th Edn)

Bruna Azevedo de Castro, 'The Role of the Prosecutor in Criminal Investigations in the Light of Constitutional Principles Related[2012]2 Revista do Direito Público 3

"Prosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences. The Attorney-General is the chief law officer of the Crown and a member of the Cabinet. He heads a ministry of the government that exercises the authority over the administration of justice and the constitution and the maintenance and organization of the courts that is conferred upon the provincial government by the constitution".[364]

The Black's Law dictionary defines prosecutorial discretion as the " Discretionary powers exercised by the government's prosecution service such as whether to prosecute charge recommended by police, to stay an ongoing proceeding, plea bargaining, or the taking over of a private prosecution".[365] In simple terms, prosecutorial discretion can be defined as the powers vested on a particular individual or office with a choice on whether or not to prosecute criminal offences.

These discretionary powers that are vested on an individual in the criminal justice system, is for the administration of justice. If the purpose of prosecutorial discretion is to administer justice then, the application of this discretionary power must be done with fairness, impartiality, integrity and in accordance to the rule of law.[366] To maintain the integrity of prosecutors and to ensure that prosecutors apply this discretionary powers in accordance to the rule of law, nations must ensure that prosecutors can carry out their duties without undue influence, harassment, intimidation or any form of interference from the State or representatives of the state.[367] Hence, the independence of the prosecutor is sacrosanct for prosecutors to carry out their functions in accordance to the rule of law, and the appropriate application of prosecutorial discretion.[368]

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364 Krieger v. Law Society of Alberta, [2002] 3 SCR 372, 2002 SCC 65.

365 Blacks Law,(8th edn 2014) .

Yvon Dandurand, 'The Role of Prosecutors in Promoting and Strengthening the Rule of Law' [2007]47 Crime Law Soc Change 248.

Ibid.

Ibid.

Also, prosecutors should be held accountable in carrying out their functions. The accountability of a prosecutor is as important as the independence of the prosecutor. There must be guidelines or checks and balances depending on the jurisdiction, to check the actions of prosecutors in the course of their duties. This is because, "over independence" of the prosecutor can be dangerous for the administration of justice.[369] There should be systems that can regulate the conduct of prosecutors to ensure that despite the independence of a prosecutor, the prosecutor is acting with fairness, equity and in accordance to the rule of law.[370]

Principles regarding fairness of a prosecutor have been enforced a long time ago. In

the *United States of America in Berger v United States*, the court said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[371]

The importance of fairness in carrying out the functions of a prosecutor cannot be over emphasised, even as the supreme court said this in the above case, the Universal application of Human Rights insists on the principles of equality before the law,

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Jeffrey Bellin, 'The Power of Prosecutors'[2018]94 New York University Law Review 173.

Ibid

295 U.S. 78 (1935)

presumption of innocence, right to fair hearing and an impartial prosecutorial system.[372] Furthermore the UN Havana guidelines attempt to ensure prosecutorial independence, fairness and meets with the requirements of international standards. In articles:

> States shall ensure that prosecutors are able to perform their professional functions
>
> without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability ……
>
> (10) The office of prosecutors shall be strictly separated from judicial functions…….
>
> (13) In the performance of their duties, prosecutors shall:
>
> (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual, or any other kind of discrimination …….. (b) … act with objectivity …

Also, the International Association of Prosecutors, [IAP] the only global association for prosecutors and prosecution agencies, established in 1995 have also given standards which prosecutors must meet.[373] The IAP standards provide:

> (2.1) The use of prosecutorial discretion, when permitted in a particular jurisdiction,
>
> should be exercised independently and be free from political interference.
>
> (2.2) If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:
>
> transparent;
>
> consistent with lawful authority.
>
> subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.
>
> (2.3) Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

Prosecution Independence and Accountability: Principles, Challenges and Recommendations[2017] Commonwealth Law Bulletin> http://dx.doi.org/10.1080/03050718.2017.1282212 . Assessed 5 April 2017.

Ibid.

The IAP standards enforces the concept of independence of a prosecutor, however in enforcing this concept emphasis on fairness is laid. The independence of the prosecutor would not only immune the prosecutor from undue interference from the agents of the state, particularly when prosecuting high profile persons, but also immune the criminal justice system from undue interference. For justice to be served on defendants in criminal trials, the prosecution must be independent. This might also be one of the challenges of the AML regime in Nigeria. Since prosecutorial Independence is subject to the discretion of the AG, prosecutorial agencies cannot prosecute without the consent of the AG, knowing also that the AG possesses powers to discontinue trial without the consent of the prosecutors.[374] This poses a problem in the administration of criminal justice, undermines the principles of the rule of law and can erode public confidence in the justice system. This is because justice must not be done but be seen to done.

Hence, for justice to be seen to be done, prosecutorial accountability is another issue that must be considered. The executive and the legislative branch of governments in nations must be able to hold their prosecutors to account. Prosecutors must be seen to be carrying out their duties within the limits of the law, therefore securing convictions by any means shouldn't be the focus of a prosecutor. A prosecutor should be more interested in ensuring that he carries out his duties with respect to public interest and justice, certainly not with the motive of securing a conviction at all cost.[375] Hence, there must be a mechanism to check the activities of prosecutors in ensuring that they are acting within the limits of the law.

The special rapporteur between on the independence of Judges and lawyers stated:

> "The fair, independent and impartial administration of justice also requires prosecutors to be held to account should they not fulfil their functions in accordance with their professional duties. In this vein, the

See Chapter 4.5. An analysis of the powers of the AG is given.

Ibid

> Special Rapporteur emphasizes that autonomy should not exist to the detriment of accountability."[376]

This further emphasis the need to hold prosecutors accountable alongside with enforcing their independence. Hence, to make prosecutors accountable, members of the public owe a collective responsibility, the media, courts, professional associations and of course the judiciary in ensuring that prosecutors act in accordance to the rule of law, where fairness and equality before the law will not be in doubt.

4.2 Constitutional Role of the Attorney General in Prosecutorial Discretion

Having discussed the AML regime of Nigeria in chapter 2, it is important to give a critical analysis of the role of the AG and the application of prosecutorial discretion in the criminal justice system, which gives birth to the AML regime of Nigeria.

In the Nigeria's criminal justice system, the AG is vested with an enormous responsibility and discretionary powers. The AG has Tripartite roles. First, the occupant of the office of AG doubles as the minister for justice. This dual function of the AG is vested in S 150 of the 1999 constitution of the Federal Republic of Nigeria. It states as follows:

> " (1) There shall be an Attorney-General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation.
>
> A person shall not be qualified to hold or perform the functions of the office of the Attorney-General of the Federation unless he is qualified to practise as a legal practitioner in Nigeria and has been so qualified for not less than ten years."[377]

The responsibility of the Ministry of Justice is to oversee the general administration of the justice system, for the easy dispensation of justice. This ministerial responsibility is carried out by the minister/AG and any person the minister delegates the responsibility to. The second responsibility of the office of the AG is to provide legal representation on disputes

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Report of the Special Rapporteur on the Independence of Judges and Lawyers' [2012] A/HRC/20/19, para

Constitution of the Federal Republic of Nigeria, 1999, S150.

that concern the government and proffer legal advice where necessary.[378] The third responsibility, which is essential to this research is the prosecutorial responsibility attached to the office of the AG. The office of the AG is responsible for the commencement of criminal proceedings in court, irrespective of the nature of the crime.

It is important that a distinction is made between the office of the AG and the incumbent of the office. As stated in s.150, of the Nigerian Constitution 1999, the office of the AG is the only ministerial role which is created by the constitution. The office of the AG does not only institute proceeding on behalf of the government but also represents the government when criminal and civil claims are brought against the state. The office of the AG plays a constitutional role, which therefore derives its powers from constitution. The distinction between the office of the AG and the occupant of the office has been substantiated in the case of, *Attorney General of the Federation v All NigeriaPeople's Party.*[379]

In this case an appeal to the supreme court of Nigeria was filed after the dissolution of the executive council by the President. The AG being a member of the executive council, was affected by the dissolution. A preliminary objection was raised on the grounds that there was no valid appeal, since there was no occupant of the office of the AG at that time. The supreme court overruled the preliminary objection and defined the office of the attorney general as a corporate person who can sue and be sued. The supreme court stated that:

> "An office created by the Constitution though occupied at any given time by a natural person as a constitutional office, is a corporation sole, and having regard to the functions conferred on it by the Constitution, it can be safely said to be a public authority. As a public authority and a corporation, it is a legal person that can sue and be sued. Thus, the office of the Attorney General of the Federation is different and distinct from the person occupying it. And so, while the office continues in perpetuity unless abrogated by the Constitution, the holder of the office

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378 Chinedum Umeche 'An Appraisal of the Powers of the Attorney General of the Federation with Respect to Criminal Proceedings Under the Nigerian Constitution'[2008] 34 Commonwealth Law Bulletin 43-51.

379 Attorney General of the Federation v All Nigeria People's Party and 2 Ors (2003) 18 NWLR (PT 851) 207.

could leave the office at the expiration of his tenure or upon his removal as the case may be".

If we follow the judgment of the Supreme Court, with regards to the distinction between the office of the AG and the occupant of the office, it can be argued that the prosecutorial powers vested on the AG is as a result of the office and not the occupant. There have been several AG's since Nigeria's independence and there will be more. The provisions of S174 of the constitution of Nigeria 1999, vests powers on the occupant of the office. If we go by the interpretation in the *All Nigeria Peoples party* case, it means that when an occupant vacates the office, all powers and liabilities that accrue with the office remains in the office. It also means that once the occupant of the office vacates the office, the person can no longer institute proceedings in court or constitute legal representation on behalf of the government.[380]

The office of the AG is central to the criminal justice system in Nigeria, the implication of the central role the AG plays demands for delegated responsibility. It may be almost impossible for the AG to personally carry out all the functions of the office, without any form of delegated duties roles. Hence, the directorate of public prosecution [DPP], is directly responsible for the prosecution of criminal trial in court.[381] This office is headed by a director who acts on the instruction of the AG. The directorate of public prosecution assist's the AG in carrying out a key constitutional requirement which is to prosecute criminal offences.

One of the delegated functions of the DPP, is the application of prosecutorial discretion in the criminal justice system. For practical purposes, the AG cannot personally institute criminal proceedings in court against a defendant. By virtue of the enormous responsibilities attached to the office, there is a high tendency that the primary ingredient of prosecutorial responsibility, which is the discretion, would be delegated. The delegation

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Ibid.

Osita Mba 'Judicial Review of the Prosecutorial Powers of the Attorney General in England and Wales and Nigeria: an Imperative of the Rule of Law'[2010]2 Oxford University Comparative Law Forum.

of prosecutorial duties falls within the powers of the AG. These are some practical realities of the prosecutorial system in Nigeria.

S 174 of the 1999 constitution makes provision for the powers of the AG. It states:

> "(1) The Attorney-General of the Federation shall have power -
>
> to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly;
>
> to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
>
> to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
>
> The powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department.
>
> In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process."[382]

From the above quotation, it is evident that the office of the AG is central to the prosecutorial system and also plays a constitutional role in the administration of the criminal justice system in Nigeria. If the powers of the AG emanate from the constitution and it settled law that the constitution of any democratic society is supreme, it can be argued that when there is a conflict between other laws and the constitution, the constitution prevails.[383]

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382 Constitution of the Federal Republic of Nigeria, 1999, S174.

Remigiiis Nwabueze, The History and Sources of Conflict of Laws in Nigeria with Comparison with Canada[2000]6 University of Manitoba Law Journal 113.

This argument is important because some government agencies that have prosecutorial powers have attempted to prosecute criminal charges, without the authorisation of the AG. The argument of the administrators of these agencies is that, it is within the enabling legislation of these agencies to prosecute offences which these agencies were created to regulate.[384]

For example, the AML regime in Nigeria is primarily regulated by two agencies established by statute. The Economic and Financial Crimes Commission Act 2004 [EFCC] and the Independent Corrupt Practices and other Related Offences Act 2000 [ICPC]. These two AML regulatory agencies can investigate and prosecute money laundering offences. If we agree, that money laundering offences are criminal in nature, then we can further argue that despite the enabling laws which empowers the EFCC and the ICPC to prosecute money laundering related offences, the consent of the AG is needed to prosecute. Since the AG is the primary custodian of prosecutorial discretion in the criminal justice system in Nigeria.[385]

If we agree with the previous argument, then certain critical questions should be asked. Is there a need to integrate prosecutorial powers in the establishment act of government agencies, when the application of prosecutorial discretion by government agencies is limited and its subject to the approval of the office of the AG? Are the prosecutorial powers by government agencies not contradicting the provisions of S174 of the constitution of Nigeria? If there is a conflict between the constitution of the country and any other legislation/law which should prevail?

Despite the constitutional and central role the AG plays with regards to prosecutorial discretion, the bureaucracy and the extent of responsibility reposed on the AG may make it unrealistic for the AG to personally be involved In all prosecutions. The reason why government agencies are empowered to prosecute is for the easy administration of the business of government and an easier administration of the criminal justice system. This

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384 Elijah Okon ,'The Rule of Law in Nigeria: Myth or Reality?'[2011]4 Journal of Politics and Law 212.

Constitution of the Federal Republic of Nigeria 1999, S172.

could be the reason why the enabling laws that govern these agencies, permits them to prosecute.

It can be argued further that, government agencies with enabling laws to prosecute, do not in any way undermine the prosecutorial powers of the AG as the sole administrator of prosecutorial discretion. This is because when there is a conflict of laws, the superior law should prevail.[386]

The apex law which governs the administration of a nation is the constitution. If there is conflict between any provision of the constitution and other laws enacted by the parliament of a nation, the ideal is that the constitutional provision prevails over any other legislation. It should not be any different in the Nigerian state. S1 of the constitution of the federal republic of Nigeria states:

> "1. (1) This Constitution is supreme, and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
>
> The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
>
> If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."[387]

From the provisions of S1, and S1(3) of the Nigerian constitution 1999, it could be interpreted to mean that if there is a conflict of laws within the nation, the provision of the constitution is supreme. For example, S13(2) of the EFCC Act empowers the commission to

386 Schilling Theodor 'The Jurisprudence of Constitutional Conflict: Some Supplementations to Mattias Kumm'[2006]12 European Law Journal 174

387 Constitution of the Federal Republic of Nigeria, 1999,S1

prosecute all money laundering offences in accordance with any of the AML legislations in Nigeria. S13(2) of the EFCC ACT 2004 states:

> "(2) The Legal and Prosecution Unit shall be charged with responsibility for –
>
> Prosecuting offenders under this Act; (b) Supporting the general and assets investigation unit by providing the unit with legal advice and assistance whenever it is required;
>
> Conducting such proceedings as may be necessary towards the recovery of any assets or property forfeited under this Act; (d) Performing such other legal duties as the Commission may refer to it from time to time"[388]

It can be further interpreted that, if there is a conflict between S174 of the constitution which empowers the AG to institute criminal proceedings and S13 (2) of the EFCC ACT 2004 which empowers the AML commission to prosecute money laundering offences, S 174 of the constitution should prevail. This is because the constitution which the AG derives powers from, is the supreme law in the nation.

Furthermore, another important legislation with specific responsibility for the administration of justice in Nigeria is the Administration of Criminal Justice Act 2015[ACJA]. The powers of the AG with regards to criminal prosecution is stated in S 104 and S105 of the ACJA. It states:

> "104.The Attorney-General of the Federation may proffer information in any court in respect of an offence created by an Act of the National Assembly.
>
> The Attorney General of the Federation may authorize any other person to exercise any or all the powers conferred on him under this section.

388 Economic and Financial Crimes Act, 2004, S13(2)

Information by the Attorney General.

105.(1) The Attorney General of the Federation may issue legal advice or such other directive to the Police or any other law enforcement agency in respect of an offence created by an Act of the National Assembly.

Where any proceeding is pending in respect of the offence for which legal advice or other direction referred to in subsection (1) of this section is given, a copy of the legal advice or direction shall be forwarded by the Attorney General of the Federation or Director of Public Prosecutions to the court before whom the proceeding is pending.

The Attorney-General of the Federation may request from the Police or any other agency for the case file in any matter in respect of an offence created by an Act of the National Assembly and the Police or other agency shall immediately send the case file as requested"[389]

The provisions in S104 and 105 of the ACJA 2015, reinforces the provision of S174 of the constitution of Nigeria, which empowers the AG as the "sole administrator" of prosecutorial discretion in the criminal justice system in Nigeria.

There are problems associated with the sole discretionary powers allocated to the AG by the constitution and the ACJA. These sole discretionary powers can be likened to the problems of monopoly that most economist frown upon. One of the problems associated with monopolistic powers in a nation's economy, is the inability for the consumers to have access to an efficient alternative.[390]

The same monopolistic tendencies appear be applicable to the criminal justice of Nigeria. The sole administration of prosecutorial discretion in the criminal justice system of Nigeria by the AG, appears to be a dangerous but legal reality. This is because the discretionary powers government agencies possess to prosecute, is limited by virtue of S174 of the

389 Administration of Criminal Justice Act, 2015, S104&105.

390 Adas Cenk 'How Serious is the Problem of Monopoly'[2012]62 Istanbul Üniversitesi Iktisat Fakültesi Mecmuasi35.

constitution. This could be interpreted to mean that the alternative means of prosecution which are government agencies with prosecutorial powers cannot be as effective as they ought to be. This is primarily because the discretion to prosecute criminal offences could be subjected to the approval of the AG, if the AG so wishes. The AG's oversight and ultimate power to determine issues could be dangerous to the development of the criminal justice system and branches under the criminal justice system.

This system could be best described as a "monopolistic prosecutorial system", where the AG controls and dictates the narrative of the prosecutorial system in Nigeria. This could be dangerous for an effective criminal justice system. Such control creates an opportunity for abuse of powers by the AG in the application of prosecutorial discretion, which negates the principles of rule of law.[391] The powers to determine whom to prosecute should not be subjected to the approval of the occupant of an office, where government agencies have been given independent prosecutorial powers.[392]

4.3 Powers of the AG to Discontinue Criminal Proceedings, "Nolle Prosqui" as a Discretionary Technique of Prosecution

The powers of the AG is not limited only to commencement of Criminal cases, the AG also possesses powers to discontinue cases that are being tried by courts of competent jurisdiction. This process traditionally known as "nolle prosequi" which means a notice of discontinuance, can be issued by the AG to stop all criminal proceedings against the defendant. The AG possesses powers to issue a notice of discontinuance to the prosecutors and a written notice to the court, informing the courts of the intention to withdraw all criminal charges against an accused.

This notice of discontinuance can be issued to the courts even before judgement is delivered, irrespective of the nature of the offence that is been tried by the courts.[393] This discretionary powers to discontinue criminal cases is a constitutional provision as seen in S

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391 Benjamin Igwenyi 'Jurisprudential Appraisal of Nolle Proseque in Nigeria' [2016]4 Global Journal of Politics and Law Research 12.

Ibid.

Oguche Samuel 'An Appraisal of the Roles of the EFCC and ICPC in Combating Corruption and Financial Crimes in Nigeria'[2010]9 University of Jos Law Journal 73.

174 (1)(b)and (c) of the constitution of the federal republic of Nigeria 1999.[394] From the provisions in S174(b)and(c),we could interpret that, the powers to discontinue criminal proceeding against an accused is not only limited to charges instituted by the AG, but also charges instituted by any delegated authority with prosecutorial powers. Delegated authorities with prosecutorial powers mean, all agencies of government with prosecutorial functions including the EFCC. This can be interpreted to mean that, the AG can discontinue cases instituted by AML regulatory agencies in court.[395] This could be a challenge for an effective AML regime in Nigeria. The EFCC, ICPC and other stakeholders of the AML regime in Nigeria cannot operate independently without interference from an "external force" outside these organisations, in this case the AG.

Apart from the provisions in S174 of the constitution of Nigeria, which gives the AG powers to discontinue criminal proceedings, the primary legislation responsible for the administration of the criminal justice system, ACJA 2015, also gives powers to the AG to discontinue criminal proceedings. S 107 and 108 of the ACJA 2015, states:

> "(1) In any criminal proceeding for an offence created by an Act of the National Assembly, and at any stage of the proceeding before judgment, the Attorney-General of the Federation may discontinue the proceedings either by stating in court or informing the court in writing that the Attorney-General of the Federation intends that the proceeding shall not continue and based on the notice the suspect shall immediately be discharged in respect of the charge or information for which the discontinuance is entered.

394 Constitution of the Federal Republic of Nigeria, 1999 S174(1)(b) and (c):

to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and

to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

395 Iyola Babatunde 'The economic and financial crimes commission and its role in curbing corruption in Nigeria: Evaluating the success story so far'[2016]2 International Journal of Law 17.

Where the suspect:(a) has been committed to prison, he shall be released; or

(b) is on bail, the recognizance shall be discharged.

Where the suspect is not:(a) before the court when the discontinuance is entered, the registrar or other proper officer of the court shall immediately cause notice in writing of the entry of the discontinuance to be given to the officer in charge of the prison or other place in which the suspect may be detained and the notice shall be sufficient authority to discharge the suspect or) in custody the court shall immediately cause notice in writing to be given to the suspect and his sureties and shall in either case cause a similar notice in writing to be given to any witness bound over to prosecute.

Where discontinuance is entered in accordance with the provisions of this section, the discharge of a suspect shall not operate as a bar to any subsequent proceeding against him on account of the same facts.

108.(1) In any trial or proceeding before a court, a prosecutor may, or on the instruction of the Attorney-General of the Federation, in case of offence against an Act of the National Assembly, may, at any stage before judgment is pronounced, withdraw the charge against any defendant either generally or in respect of one or more of the offences with which the defendant is charged"[396]

From the provisions in S107 and S108 of the ACJA 2015, the application of notice of discontinuance by the AG, is discretionary and is not subject to approval or ratification from any authority or regulatory body. Despite it being constitutional for the AG to discontinue criminal proceedings, as stated in S174 of the constitution and S107&108 of the ACJA, this position has been put to question before the courts and it has been upheld by the supreme court. In the case of *State v Ilori,* the supreme court in the lead judgement held:

396 Administration of Criminal Justice Act,2015, S107&108.

“For the reasons which given therein, I would dismiss the appeal. I would, however, like to stress the following points which I consider pertinent. The Attorney-General of a State in Nigeria has many powers and duties with regard to criminal proceedings in respect of any offence created by or under any law of the House of Assembly of the State. These powers are clearly spelt out in section 191 of the 1979 Constitution. He may, for example, stop any prosecution under a State Law by entering a *nolle prosequi.* He need not give any reasons for his decision. All he needed to do when deciding to discontinue any such criminal proceedings at any stage of the proceedings is to "have regard to the public interest, the interest of justice, and the need to prevent abuse of legal process." A number of factors, known to the Attorney-General, must, of necessity, come to his mind when he decides whether to prosecute or not. It may not be in the public interest to disclose any of these.

To my knowledge, and presumably for these reasons, the courts have never sought to interfere with the exercise of that power. That is how it should be, bearing in mind that the Attorney-General is the principal law officer of the State coupled with the fact that he should not be subjected to any pressure either by the Executive or by the Courts in the exercise of this enormous power.

Incidentally, the Attorney-General of the Federation has the same powers and duties under section 160 of the same Constitution with regard to criminal proceedings in respect of any offence created by or under any Act of the National Assembly. It must, of course, be understood that any Attorney-General, be he the Attorney-General of the Federation or of a State, is answerable for his actions not only to his appointor, but also to the National or State Assembly as the case may be. He is, of course, also subject to the comments, favorable or otherwise, of the members of the legal profession and to the glaring scrutiny of public opinion. It may not be out of place to record, in this context, the public's

> general aversion to mixing politics with the enforcement of the criminal law. The supreme importance of maintaining the independence of the Attorney-General when discharging his responsibility, inherent in his office, for the proper administration of the criminal law must, therefore, be emphasized. For all these reasons, it cannot be too strongly stressed that this preeminent position of the Attorney-General with respect to criminal proceedings in our Constitution carries with it grave and onerous responsibility which should not be discharged with levity. Because of this, it is of paramount importance that when an Attorney-General is being appointed, the appointor should, at all times, bear in mind the integrity, ability, experience, and maturity required of the person holding this high and important office. He should be a person who, in the discharge of his duties, will always have regard to the public interest, the interest of justice, and to the need to prevent any abuse of legal process."[397]

From judgement in *Ilori's case*, the supreme court has clarified the application of a notice of discontinuance in the criminal justice system as, a technique at the discretion of the AG, which is not subject to approval from any person or authority before it is applied, nor any substantive review by the court after its application.[398] The danger of this "monopoly" in determining what case to withdraw and what not to withdraw is that, there could be a potential abuse of powers by the AG. Hence there is a constitutional provision in S174(3) which provides that, the application of a notice of discontinuance by the AG must be in the public's interest.

In the case of *FRN v Danjuma Goje*, the defendant was being prosecuted by the EFCC for misappropriation of public funds, to the tune of 6 Billion Naira [$ 40,000,000] and money laundering, while he was governor of Gombe state. The EFCC commenced his prosecution in 2011 however, on the 9th of June 2019. The EFCC was prosecuting the former governor

397 State v. S. O. Ilori & 2 Ors (1983) 2 SCLR 155.

398 Ibid.

on a 21count charge. The EFCC commenced his prosecution in 2011 however, on the 9th of June 2019, the AG used his discretionary powers by entering a notice of discontinuance before the courts. This was done without the knowledge of the EFCC, as the EFCC insisted the case must continue. The courts held that the AG's decision is supreme, and that despite the EFCC having discretionary powers to prosecute, the AG is the chief prosecutor of the country and his discretionary decision cannot be questioned.[399] It is important to note that this case was not reported in any law report, yet it is the most recent landmark decision with regards to the application of notice of discontinuance on money laundering cases. However, part of the application for the notice of discontinuance by the representative of the AGF goes as follows:

"My Lord, we have an application having taken over the case and reviewed the 21 count charges. As it is, the Federal Ministry of Justice wishes to withdraw all charges against the accused persons

"This action is in line with the power vested on the AGF by virtue of section 128 of the Administration of Criminal Justice Act 2015 particularly sub section 1 of that section (128).

It's in accordance with the power vested on the AGF by the constitution that we wish to withdraw the charges before your Lordship. This is our humble application and urge your Lordship to grant our application".

The counsel to the defendant, Niyi Akintola [SAN] stated:

"*My Lord, we are not opposing the application but we are urging your Lordship to evoke the provision of section 2(a)(b) of the Administration of Criminal Justice Act 2015 and acquit them of the charges. The same section gives your Lordship the discretionary power to make an order for the accused persons to be discharged and acquitted. My Lord have the power under Section III.As we urge your Lordship to consider our humble application, we wish thank you for your patience with us since 2011 when we started this journey on the case. We also wish to commend the AGF for wise decision in bringing this case to an end".*[400]

Punch Newspaper "AGF took over Goje's case — Prosecutor" < https://punchng.com/agf-took-over-gojes-case-prosecutor/ > assessed August 20 2019.

ibid

Justice Quadiri, in his ruling, said pursuant to Section 174(1) particularly sub-section (b) and coupled with Section 108 (2) of 2015, "*the application by the AGF to withdraw the charges is hereby granted."*

The Goje's case is an example of the AG's miss-use prosecutorial powers and undermining the AML regime in Nigeria. A public official who is been prosecuted for allegedly stealing funds that could have been used for the development his state, is been protected by an AG who chooses to invoke his powers whenever he so wishes, might not be acting in the interest of the public.[401] Why did the AG discontinue the trial after 8 years of prosecution by the EFCC? Did the AG act in the interest of the public before taking the decision to discontinue proceedings? These are questions that might be left unanswered and the citizens might never get an explanation for.

If the decision of the AG is subject to judicial review, it would make it impossible for an AG to abuse his discretionary powers in the application of a notice of discontinuance. Goje's case, which was been prosecuted for 8 years, is suddenly withdrawn by the AG raises some suspicion. However, it is sad that this suspicion cannot be put to questions as decisions taken by the AG cannot be subject to judicial review nor can be questioned. It means that the application of the phrase "interest of justice" as seen in S 174 (3) is highly subjective. Hence, it could be that the AG acted in the interest of justice by withdrawing the Goje's case. This is disappointing.

Despite that S174 of the constitution of the Federal Republic of Nigeria makes the AG the sole custodian of prosecutorial powers, S174(3) tries to limit the mode of application of these powers. However, the attempt to limit these powers appears to be vague as the interpretation of the "interest of Justice" is determined by the same AG. An AG who is interested in discontinuing the prosecution of a PEP for personal reasons can possibly defend his actions by claiming it was done in the interest of justice. After all, S 174 also states that the AG has the powers to take over or discontinue the prosecution of a case instituted by any person or authority at any stage before judgement is given. This means that the AG can takeover or discontinue a trial up until the day before judgement is given,

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Ibid

and defend the action using the phrase, “interest of justice”. Hence the limitation in S174(3) is not legally enforceable and sound.

Again, there appeared to be a contradiction between S174(1), (2) and S174(3) of the constitution. This is because it is almost impossible to insist that the AG acts in the interest of justice as stated in S 174(3), when the S174(1)(2) gives him powers to act with less accountability or checks and balance. The fact that the same section of the constitution gives powers of the AG to discontinue a case at any time of prosecution, before judgement, risks an abuse of the legal process. This can make the AG not to act in the interest of Justice. Hence a part of a law prohibits what another permits. This in itself is the same problem which Fuller identifies in his *inner morality of law*.[402] The implicit contradiction of both sub sections has created an opportunity for a power intoxicated AG to abuse court process and not act in the interest of the public if he so choses.

More so, there ought to be clear guidelines or rules as to when and how the AG can takeover or discontinue criminal proceedings on a case. These discretionary powers to discontinue criminal proceeding should be guided by set rules. These rules would set certain standards a case or trial must meet, before the AG can utilize the part of his powers which allows for a discontinuance and the takeover of a case. This must be done to avoid a situation where those who ought to be custodians of the principles of the rule of law become the ones who violate the rule of law.

Hence, there must be a working mechanism in the constitution which checks the powers of the AG in other to avoid an abuse of legal process, the justice system and the AML regime in Nigeria.

However, the application of S 174(3) of the constitution appears not to be practicable within the scheme of the Nigerian criminal justice system. This is because the AG’s powers with regards to the application of this prosecutorial technique, appears not to be subject to approval or ratification from any other authority. Hence, who determines public interest? It seems that the determination of what constitutes public interest with regards to the application of a notice of discontinuance is subjective, more so subjective only to the

402 Ibid, Fuller 63.

AG. It means the AG could chose to act on "public interest" and withdraw the prosecution of a criminal case of a friend, or someone who is influential and powerful in the society. The withdrawal of a criminal case of a PEP, could be anchored on public interest, since the AG does not need to explain or justify to anyone the circumstances surrounding the "public interest" driven decision that has been taken. This could be dangerous.

Taking a further look at this prosecutorial technique, certain questions can be asked. What guides the decision of the AG in the application of a notice of discontinuance on criminal cases? Is the application of a notice of discontinuance by the AG in accordance to the rule of law despite the AG's discretionary powers?

We could argue that the AG is the chief law enforcement officer of the country.[403] If this is the case, the AG owes it as a duty to maintain the rule of law in the society. To attain a progressive society, the application of the rule of law through law and order in the daily activities of members of the society is paramount. This "application" could be interpreted as an enforcement of law and order.[404] In the application of law and order, it must be done in accordance to the rule of law, which emphasises on equity and good conscience. The application of this prosecutorial technique must be done in accordance to the rule of law. A Notice of Discontinuance by the AG should not be used as a technique to stop prosecution of PEP or persons who are privileged in the society. This discretionary powers by the AG should be applied with caution and equity, in other to achieve a just society and an effective criminal justice system.

It could be argued further that, there should be a significant ethical consideration in the application of a Notice of Discontinuance on criminal cases by the AG, if the AG's primary duty is to maintain law and order in the society. The integrity of the occupant of the office of the AG should not be in doubt or else, it could send a wrong message to members of the society that the occupant of the office might be compromised. Hence the important of virtue ethics. If Aristotle argues that virtue looks at the moral nature an action that has been taken and whether or not the action taken is good or bad, then we could argue that

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Blacks Law,(8th edn 2014).

Clemet Julian 'Great Society, Law and Order'[2018]44 Journal of Urban History 541.

the moral nature of the case should be a guiding factor in the application of a Notice of Discontinuance on criminal cases.

Proponents of virtue ethics argue that, what is good is good and what is bad is bad. It means that for the greater good of a society, there must always be a moral consciousness to do the right thing. Deontologist would argue that in the application of a notice of discontinuance in a criminal case, the laws are clear and should be respected whether or not it passes a moral test. Proponents of deontology could argue further that, if we allow the conscience/ virtue to determine whether or not to apply laid down rules and regulations, then it could bring a state of lawlessness. Lawlessness in the sense that members of a society might not see a need to follow rules and regulations but do what is "good" in accordance to their conscience, which is also dangerous as it is subjective.[405]

The amalgamation of virtue ethics and deontology might seem to be a workable path in the application of a Notice of Discontinuance in the criminal justice system of Nigeria. Since the AG has exclusive discretion in applying this prosecutorial technique by virtue of S174 of the constitution and S108 of the ACJA 2015, which can be interpreted as a deontological approach, the moral consciousness of doing what is "good" must be applied. This moral consciousness by the AG which can be interpreted as public interest in this regard, is virtue on its own. Hence, the importance of an amalgamation of virtue and deontological ethics in the application of a nolle prosequi [notice of discontinuance]. When and if this amalgamation is done in the application of this prosecutorial technique, the principle of public interest and good faith will be the focal point of any AG.

4.7 Plea Bargain as a Prosecutorial Discretionary Technique in the Criminal Justice System of Nigeria

Plea bargain has been a prosecutorial technique in several jurisdictions particularly in the UK and the USA. However, the concept of plea bargain as a prosecutorial technique in the criminal justice system of Nigeria has been alien until as recent as 2011. Prior to the integration of plea bargain in Nigeria's criminal justice system, the criminal justice system was centred on punitive measures. Punitive measures in the sense that, the prosecutorial

[405] See note in chapter 3. An intricate detail of deontological ethics is explained in the chapter.

system appeared to be more interested in securing a conviction at any expense without considering the weight of the evidence in connection with the charge.[406]

Taxpayers money was spent on prosecuting bogus charges that could ideally have been "negotiated" between the prosecution and the defendant. A considerable amount of time is also spent in the attempt to adduce evidence on each charge, which on its own slows down the administration of justice.[407] This is also because, there are a limited number of judges in the entire justice system. These judges hear both criminal and civil cases that are filed to them and if more time is spent unnecessarily in the hearing of a case, which could be as a result of cumbersome charges and poor use of prosecutorial discretion, the entirety of the justice system Is delayed.[408] Hence, these among others could be reason for the integration of plea bargain in the criminal justice system in Nigeria.

For a critical analysis, it is important we understand the meaning and concept of plea bargain. What is plea bargain? According to the Black's law dictionary, plea bargain can be defined as "the negotiation of an agreement between the prosecution and the defence whereby the defendant pleads guilty to a lesser offense or to one or some of multiple offenses usually in exchange for more lenient sentencing recommendations, a specific sentence, or dismissal of other charges".[409]

The concept of plea bargain can be classified into two. Charge bargain and sentencing bargain. The idea of charge bargain is when the defendant negotiates with the prosecution to plead guilty on a lesser crime. when this happens, the prosecutor expunges the more serious crimes and charges the defendant on the lesser crime. While the concept of sentencing bargain is where the defendant pleads guilty or enters a non-contest plea

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406 Olu Awolowo ' Nigeria: Plea Bargaining – A Mockery of Criminal Justice Administration?'[2017]65Journal of Law, Policy and Globalization 67.

Ibid.

Ben Ezeamalu 'Why Nigeria's Criminal Justice System is Slow – Judge'(Premium Times 19 January<https://www.premiumtimesng.com/news/more-news/256056-nigerias-criminal-justice-system-slow-judge.html >assessed26 October 2018

Black's Law Dictionary(9th edn 2009).

because all sides i.e. the prosecution and defence have agreed on what sentence to recommend to the judge.

It is important to note that the criminal justice system of Nigeria accommodates any form of "negotiated sentencing". The scope of prosecutorial discretion in Nigeria's criminal justice system permits the integration of negotiated sentencing to plea bargain. However, it is at the discretion of a judge to determine what sentence to give, with regards to the extant laws of the country.[410]

The concept of plea bargain as a prosecutorial technique ideally is to make the job easier for the prosecution. It could be argued that the ultimate beneficiary the integration of plea bargain in the prosecutorial system is the prosecutor and not the defendant. However, the defendant also enjoys certain benefits by agreeing to a plea bargain. The primary benefit the defendant enjoys is the opportunity to be charged on a lesser offence on the condition that the defendant pleads guilty to the lesser charge. This implies that the defendant upon conviction could be sentenced to a much lesser punishment than he would have got, if he hadn't entered a plea bargain. It also saves the defendant the psychological torture of the prosecutorial process and a lengthy trial with the thought's conviction. On the other hand, the time and money spent by the prosecution and indeed taxpayers is significantly reduced when a defendant enters a plea bargain. The time that would have been spent in the prosecutorial process and the admissibility of evidence on the charge against the defendant, is saved once a defendant agrees to the terms of a plea bargain agreement. [411] Hence, the primary beneficiaries of the concept of plea bargain is the defence, due to the high probability of getting a lighter sentence and the prosecution for the time saved and the avoidance of the risk of failing to prove guilt during trial. [412] The application of

410 Akintunde Adebayo 'A Review of Plea Bargain Concept in the Anti- Corruption War in Nigeria'[2018]5 Brawijaya Law Journal 37.

Nadia Cantemir 'The Plea Bargain Negotiation Between the Prosecutor and the Defendant'[2013]20

Lex et Scientia Journal 15.

412 Redlich A, *'The Validity of Pleading Guilty': Advances in Psychology and Law [Springer Publishing,*2016].

prosecutorial discretion in the AML regime of Nigeria is limited to charge bargain, as sentencing bargain is an uncommon practice within the jurisdiction.

4.8 The Application of Plea Bargain as a Prosecutorial Technique in the Administration of Justice in Nigeria.

Some legal scholars have named this prosecutorial technique as "negotiated justice". The negotiation between the defendant and the prosecutor could have a positive impact on a nations criminal justice system, particularly with regards to speedy dispensation of justice.[413] However, it could be argued that the concept of plea bargain or "negotiated justice" as some would call it could have a negative impact on the criminal justice system if wrongly applied. It could also be argued that the term "negotiated justice", appears to give a derogatory meaning to the rationale and concept of plea bargain itself.[414] This is because when we refer to the concept of plea bargain as "negotiated justice", it cheapens the entire criminal justice system and brings a connotation of a market place where goods and services are negotiated for. Nevertheless, plea bargain plays a critical role in many nations criminal justice systems.[415]

The application of plea bargain as a discretionary technique in most cases could be on the advice of the prosecutor. Normally, the prosecutor advises the defendant to plead guilty for a smaller offence in exchange for a lighter punishment. However, there appears to be a conflict of interest in this advisory role of the prosecutor. There could be a conflict of interest between the prosecutors' interest and defendants interest hence, one wonders the quality of advice the prosecutor would give the defendant. It would certainly not be impartial. The defence also has a duty to advise clients properly on what charges to plead to and evaluate if there could be any collateral consequence as a result of accepting a plea bargain. This is because sometimes, the client may not be aware of the entire legal implication of accepting a plea bargain and may get into more serious problems than envisaged, due to the lack of proper advice from the defence lawyer.

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413 Thea Johnson 'Measuring the Creative Plea Bargain'[2017]92 Indiana Law Journal 909.

Ibid.

Ibid.

Collateral consequences could arise if a defendant enters a plea bargain without proper advice or proper legal representation. It is ideal that a complete analysis of the terms in the plea bargain agreement should be looked into by the lawyers representing the defendant, to ascertain whether or not there could be other consequences that might not be related to the charge, if the defendant pleads guilty.[416]

The successful integration of plea bargain in a nations criminal justice system is dependent on the effectiveness of the stakeholders. The stakeholders include the prosecution, defence and the Judge. However, the most influential stakeholder with regards to plea bargain and prosecutorial discretion is the prosecution. This is because the prosecution uses a "carrot and stick" approach when negotiating for a plea bargain. The prosecution applies subtle threats on the defendant, by magnifying the potential punishment upon conviction which scares the defendant into agreeing to a plea bargain.[417]

It cannot be overemphasised that the idea and rationale behind plea bargain should not be to scare the defendant into submission nor to create an avenue for "negotiated justice", but to assist in the quick dispensation of justice. In so doing, before a defendant pleads guilty on a charge the defence lawyers must thoroughly evaluate the implication of the defendants pleading guilty on the charge. This is because the stakeholders of a plea bargain agreement is like a tripod i.e (prosecution, defence and the judge), of which each of these stakeholders play a unique role.[418]

The defence should vet and be assured before accepting proposed terms brought by the most influential of the tripod, which in this case is the prosecution. This is because the prosecution at times may not also fully understand the real implication of a defendant pleading guilty to a charge, even if the prosecution may have the intention to assist. It is

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416 Kevin O'Keefe ' Two Wrongs Make a Wrong: A Challenge to Plea Bargaining and Collateral Consequence Statutes through Their Integration'[2010]100 Journal of Criminal Law & Criminology246 .

417 Oren Gazal-Ayal 'A Global Perspective on Sentencing Reforms'[2013]76 Law and Contemporary Reforms Journal 138.

418 Ibid.

basically the duty of the defence to scrutinise the terms on a charge bargain to avoid any form of collateral consequence upon conviction.[419]

In Nigeria, prior to 2015 the current regulatory framework that governs the application of plea bargain in the criminal justice system was limited to Lagos state. There were no laws that regulated the use and application of plea bargain as a discretionary technique for prosecution in the federation as a whole. This had a negative impact in the administration of justice and the AML regime in particular. The application of charge bargain as a plea bargain technique in the criminal justice system of Nigeria, appeared to be "too discretionary" and still is. There were no guidelines or rules that regulated the extent to which the prosecution can apply discretion in the charging of a defendant, which gave the opportunity for unnecessary favours, corruption and undue pressure by the prosecution with regards to federal offences. It is important to also note that money laundering related offences are federal offences and the application of state laws for a federal offence does not suffice. However, it is worthy of note that proactive state governments within Nigeria have integrated plea bargain as a law, for easy administration of justice. S.76 of the administration of criminal justice law 2011, Laws of Lagos state, clearly makes provision for plea bargain.

S.76 of the Administration of Criminal Justice Law 2011, Laws of Lagos State, States:

> "1) the prosecutor and a defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of:
>
> A plea of guilty by the defendant to the offence charged or a lesser offence of which he may be convicted on the charge, and
>
> An appropriate sentence to be imposed by the Court if the defendant is convicted of the offence to which he intends to plead guilty.
>
> The prosecutor may only enter into an agreement contemplated in Subsection (1) of this Section:

John Baldwin and Michael McConville, 'Negotiated Justice: Pressures on Defendants to Plead Guilty' [1979]8 Journal of Social Policy 273.

After consultation with the Police Officer responsible for the investigation of the case and if reasonably feasible, the victim, and

With due regard to the nature of and circumstances relating to the offence, the defendant and the interest of the community.

The prosecutor, if reasonably feasible shall afford the complainant or his representative the opportunity to make representations to the prosecutor regarding:

The contents of the agreement; and

The inclusion in the agreement of a compensation or restitution order.

An agreement between the parties contemplated in subsection (1) shall be reduced to writing and shall:

State that, before conclusion of the agreement, the defendant has been informed (i) that he has a right to remain silent; (ii) of the consequences of not remaining silent; (iii) that he is not obliged to make any confession or admission that could be used in evidence against him.

State fully the terms of the agreement and any admissions made and,

Be signed by the prosecutor, the defendant, the legal practitioner and the interpreter as the case may be.

The Presiding Judge, or Magistrate before whom criminal proceedings are pending shall not participate in the discussions contemplated in subsection (1). Provided that he may be approached by Counsel regarding the contents of the discussions and he may inform them in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

Where a plea agreement is reached by the prosecution and defence, the prosecutor shall inform the court that the parties have reached an

agreement and the Presiding Judge or Magistrate shall then inquire from the defendant to confirm the correctness of the agreement.

The Presiding Judge or Magistrate shall ascertain whether the defendant admits the allegations in the charge to which he has pleaded guilty and whether he entered into the agreement voluntarily and without undue influence and May:

if satisfied that the defendant is guilty of the offence to which he has pleaded guilty, convict the defendant on his plea of guilty to that offence, or;

if he is for any reason of the opinion that the defendant cannot be convicted of the offence in respect of which the agreement was reached and to which the defendant has pleaded guilty or that the agreement is in conflict with the defendant's rights referred to in subsection (4) of this Section, he shall record a plea of not guilty in respect of such charge and order that the trial proceed.

Where a defendant has been convicted in terms of subsection (7) (a), the Presiding Judge or Magistrate shall consider the sentence agreed upon in the agreement and if he is:

Satisfied that such sentence is an appropriate sentence impose the sentence; or

Of the view that he would have imposed a lesser sentence than the sentence agreed upon in the agreement impose the lesser sentence; or

Of the view that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he shall inform the defendant of such heavier sentence he considers to be appropriate.

Where the defendant has been informed of the heavier sentence as contemplated in subsection.

8) Above, the defendant may: a) Abide by his plea of guilty as agreed upon in the agreement and agree that, subject to the defendant's right to lead evidence and to present argument relevant to sentencing, the Presiding Judge, or Magistrate proceed with the sentencing; or

Withdraw from his plea agreement, in which event the trial shall proceed de novo before another Presiding Judge, or Magistrate, as the case maybe.

Where a trial proceeds as contemplated under subsection (9) (a) or de novo before another Presiding Judge, or Magistrate as contemplated in subsection (9) (b):

No reference shall be made to the agreement;

No admissions contained therein or statements relating thereto shall be admissible against the defendant; and

The prosecutor and the defendant may not enter into a similar plea and sentence agreement."[420]

From the provision above, the integration of plea bargain in the administration criminal justice in law Lagos state was a step in the right direction. It was a step in the right direction because, prior to the enactment of the Criminal Justice Laws of Lagos state in 2011, the concept of plea bargain could not have been integrated even if it had been advocated for prior to 2011. The successful integration of plea bargain in Lagos state gave the federal government the will to integrate it in the ACJA 2015. The quick dispensation of justice in Lagos, with the most population within Nigeria encouraged the federal government to integrate the concept of plea bargain across all states of the federation.

. For federal offences, S 270 of the Administration of Criminal Justice Act 2015 [ACJA] ought to regulate the application of plea bargain in the criminal justice system. However, S 270 of the ACJA only states the guidelines on how a prosecutor should negotiate for a plea bargain with a defendant. It could be argued that the application of plea bargain is still largely

420 Administration of Criminal Justice Law, Laws of Lagos State, 2011 S76 .

unregulated, as the guidelines on the terms and conditions a prosecutor must fulfil with regards to applying discretion when negotiating a plea bargain, appears to be vague. Core issues that affect branches of the criminal justice system like the AML regime has not been properly dealt with in the ACJA. For example, negotiating the recovery of assets from PEP prosecuted for money laundering offences has to be considered and captured in such a way that the principles of plea bargain is not abused. The limitation on minimum sentencing with regards to plea bargain and asset recovery must be incorporated.

S 270 of the ACJA 2015 states:

> "(1) Notwithstanding anything in this Act or in any other law, the Prosecutor may:
>
> receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf; or (b) offer a plea bargain to a defendant charged with an offence.
>
> The prosecution may enter into plea bargaining with the defendant, with the consent of the victim or his representative during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence, provided that all of the following conditions are present:
>
> the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt;(b) where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative; or (c) where the defendant, in a case of conspiracy, has fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders.
>
> Where the prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of justice, the public interest, public policy and the need to prevent abuse of legal process, he may offer or accept the plea bargain.

The prosecutor and the defendant or his legal practitioner may, before the plea to the charge, enter into an agreement in respect of:Plea bargain guidelines.

the term of the plea bargain which may include the sentence recommended within the appropriate range of punishment stipulated for the offence or a plea of guilty by the defendant to the offence charged or a lesser offence of which he may be convicted on the charge; and (b) an appropriate sentence to be imposed by the court where the defendant is convicted of the offence to which he intends to plead guilty.

The prosecutor may only enter into an agreement contemplated in subsection (3) of this section:

after consultation with the police responsible for the investigation of the case and the victim or his representative; and (b) with due regard to the nature of and circumstances relating to the offence, the defendant and public interest;

Provided that in determining whether it is in the public interest to enter into a plea bargain, the prosecution shall weigh all relevant factors, including:

(i) the defendant's willingness to cooperate in the investigation or prosecution of others,

the defendant's history with respect to criminal activity,

the defendant's remorse or contrition and his willingness to assume responsibility for his conduct,

the desirability of prompt and certain disposition of the case,

the likelihood of obtaining a conviction at trial and the probable effect on witnesses,

the probable sentence or other consequences if the defendant is convicted,

the need to avoid delay in the disposition of other pending cases,

the expense of trial and appeal, and

the defendant's willingness to make restitution or pay compensation to the victim where appropriate.

The prosecution shall afford the victim or his representative the opportunity to make

representations to the prosecutor regarding:(a) the content of the agreement; and (b) the inclusion in the agreement of a compensation or restitution order.

……

Where a plea agreement is reached by the prosecution and the defence, the prosecutor shall inform the court that the parties have reached an agreement and the presiding judge or magistrate shall then inquire from the defendant to confirm the terms of the agreement.

The presiding judge or magistrate shall ascertain whether the defendant admits the allegation in the charge to which he has pleaded guilty and whether he entered into the agreement voluntarily and without undue influence and may where:

he is satisfied that the defendant is guilty of the offence to which he has pleaded guilty, convict the defendant on his plea of guilty to that offence, and shall award the compensation to the victim in accordance with the term of the agreement which shall be delivered by the court in accordance

……

Notwithstanding the provisions of the Sheriffs and Civil Process Act, the prosecutor shall take reasonable steps to ensure that any money, asset or property agreed to be forfeited or returned by the offender

under a plea bargain are transferred to or vested in the victim, his representative or other person lawfully entitled to it.

Any person who, wilfully and without just cause, obstructs or impedes the vesting or transfer of any money, asset or property under this Act, commits an offence and is liable on conviction to imprisonment for 7 years without an option of fine."

From the provisions in section 270, it can be argued that there is no limitation to the application and integration of plea bargain in the justice system. The provisions in S270 of the ACJA 2015, appears to only legitimise the application of plea bargain but fails to regulate the discretion applicable to prosecutors. There should be certain requirements that should fulfilled by a defendant before the integration of a plea bargain agreement. The discretionary powers bestowed on the prosecutor shouldn't be limitless. [421]

These requirements should include the type of offence, who is the offender and circumstances surrounding the offence, before a plea bargain agreement could be considered by the prosecutor, else it would be abused. S270 of the ACJA fails to give the conditions that should serve as a guide for the prosecutors in applying their discretion. The section appears to be focused on rules which serves as a procedural application for plea bargain.[422] This implies that if the procedure for the application of a plea bargain is met, the intention of the prosecutor does not matter. This could be a dangerous endorsement for the miss-application of prosecutorial discretion and plea bargain in specific. It could create an opportunity for the abuse of prosecutorial discretion, where prosecutors could engage in favouritism and undue influence in determining what charge to prosecute a defendant with.[423]

It can be argued that the application of plea bargain in the criminal justice system of Nigeria has been introduced in a deontological fashion. The deontological approach focuses on

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421 Nigeria: Harvesting Plea Bargains [2011]47 Africa Research Bulletin: Economic, Financial and Technical Series 18941.

Ibid.

Ibid.

the laid down rules and procedure without recourse to the intent/motive and moral values. However, there are problems associated with a deontological system with the application of discretion in plea bargain, particularly with money laundering offences. This is because if there is a regulatory framework on the application of a principle of law without its limitations, it can create a gap for "over discretion", which could undermine the very rationale behind plea bargain itself. What do I mean by "over discretion"?

The fact that there is a principle of law[plea bargain] which is accepted and applicable in the criminal justice system of a nation, without extant laws that regulate how discretion is applied to this principle, could give room for an abuse of powers. An abuse of powers or office by the custodians of prosecutorial discretion, (the AG and other prosecutorial agencies empowered by law) may not be easily curtailed with regards to the application of plea bargain. Custodians of prosecutorial discretion may choose to prosecute a defendant for a much lesser offence that may be considered unreasonable on the altar of a plea bargain agreement. The presence of laid down rules, without emphasis on what factors prosecutors should be considered in the application of this technique, could give room for unnecessary compromise and corruption by the prosecutors, particularly if the defendant is a PEP.[424]

It means that a prosecutor, having met the procedural requirement for entering a plea bargain could reach an agreement with a defendant who has no justification for entering a plea bargain, particularly if the evidence is overwhelming. The defendant would plead guilty to a lesser offence and may be given a light sentence. This can undermine the criminal justice system, as some corrupt prosecutors can reach an agreement with a defendant and prosecute them with a light charge, on the excuse of a plea bargain.[425]

It can be also argued that some of the dangers this deontological approach on the regulation of plea bargain, is the absence of the concept of Justice. Some philosophers have

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424 Olayiwola Oluwaseyi Adebayo 'The Concept of Plea Bargain as a Veritable Tool for Justice or Corruption 'available online at >http://www.legalnaija.com/2016/09/the-conceptof-plea-bargain-as.html> accessed 27 December 2018.

425 Peter Echewija 'Plea Bargaining and the Administration of Criminal Justice in Nigeria: A Moral Critique'[2017]3 Journal of Ethics, Religion & Philosophy 38.

argued that justice are moral ideals which we must live by. Immanuel Kant conceives Justice as "living honourably, injuring no one, and to give every person his due".[426] In *The Republic* Plato upheld that "justice involves giving a man his due. For him, justice is truth telling and paying of one's debts"[427] Plato is of the view that a man's reward should be according to his deeds. The concept of plea bargain if not properly administered could create some form of injustice where defendants would be sentenced not according to their deeds but according to the laid down rules and procedure. The negative effect of this procedural approach[deontology] is that, it could sacrifice equity and justice on the altar of rules and regulation.

The deontological approach with the regulation of plea bargain in the criminal justice system of Nigeria has had its effect on money laundering cases. Prosecutors apply this discretionary technique, for the easy administration of justice and a faster trial process on money laundering cases.[428] However, prosecutors must be careful with the application of plea bargain and focus on motive, but not rules.

Persons who have committed very serious offences against the state and the citizens may be given an opportunity to escape justice, if the application of plea bargain as a prosecutorial technique is abused. Hence, there is a need to have limitations on the application of plea bargain.

4.9 The Integration of Plea Bargain and Notice of Discontinuance as Prosecutorial Discretion Techniques, in the AML regime of Nigeria: A Focus on Politically Exposed Persons

The regulation of AML in Nigeria has been dependent on regulatory agencies. These agencies assist the government in making policies that could regulate money laundering and other related offences in Nigeria.[429] Policy direction and prosecutorial powers are

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Alyssa Bernstein, 'Kant on Rights and Coercion in International Law: Implications for Humanitarian Military Intervention'[2008]16 Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics 59

By Plato, G. M. A. Grube: *Republic (Hacket Publishing Company 1992).*

See appendix. It is important to note that some of these cases commenced in 2004. Are still on trial..

Ibrahim Abubakar 'Overview of key sections of Nigeria's money laundering (Prohibition) Act, 2011'[2018]4 International Journal of Law 50.

carried out by AML regulatory agencies like the EFCC and ICPC. These agencies by the enabling Act have the powers to prosecute offenders on money laundering and related offences, particularly with the typology of money laundering offence that is prevalent in Nigeria.[430] As discussed earlier, the typology of money laundering offence prevalent in Nigeria is focused on PEP.

The AML regime in Nigeria makes provision for several typology of money laundering offences, however more emphasis is placed on money laundering offences by PEP due to the prevalent money laundering issues surrounding these category of persons.[431] The primary AML regulatory agency, the EFCC has the discretionary powers to prosecute money laundering and other related offences. The discretionary powers of the commission to prosecute, is subject to the provisions in S6 of the EFCC act. S6(a), (b) and (c) of the EFCC act states:

> " The Commission shall be responsible for·-
>
> the enforcement and the due administration of the provisions of this Act;
>
> the investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud. Fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam, etc;

430 Mohammed Yusuf 'Corporate Criminal Liability in Money Laundering and Terrorism Financing Prosecution in Nigeria, United Kingdom and United States: A Comparative Review'[2017]6 International Journal of Humanities and Social Science Invention 2319.

431 Ike Onyiliogwu 'Money Laundering by Politically Exposed Persons in Nigeria: Consequences and Combative Measures' (2018) >https://digitalcommons.lasalle.edu/ecf_capstones/29/> assessed December 2018.

the co-ordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other person or authority ;"[432]

From the provisions in S 6 of the EFCC act is clear that the commission does not only possess regulatory powers but also enforcement and prosecutorial powers. It's interesting to note that from the above provision, the EFCC is not primarily aimed at prosecuting PEPS for corruption. It ought to have been clearly included in the enabling Act. These prosecutorial powers are not only limited to the EFCC . ICPC also possesses powers to prosecute money laundering offences, particularly with regards to the typology of money laundering offence that is prevalent in Nigeria. However, the EFCC happens to be a more effective AML regulatory and prosecutorial agency.[433] This might be as a result lack of political will to empower the ICPC with funding and necessary, manpower to investigate and prosecute money laundering offences by PEP. This has rendered the ICPC as mere regulatory body in existence and not AML regulatory body with the will and drive to prosecute, which ideally by its enabling Act should have its focus on PEP.[434] Hence, the EFCC has since taken over its functions by all practical means. S 5 & 6 of the ICPC act, makes provision for the prosecutorial powers the commission possesses.

S5 & 6 of the ICPC act states:

"1) Subject to the provision of this Act, an officer of the Commission when investigating or prosecuting a case of corruption shall have all the powers and immunities of the police officer under the police Act and any other laws conferring power on the police, or empowering and protecting law enforcement agents.

If, in the course of any investigations or proceedings in court in respect of the commission of an offence under this Act by any person

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432 Economic and Financial Crimes Act, 2004, S6.

433 Nlerum Okogbule 'Regulation of money laundering in Africa: the Nigerian and Zambian approaches'[2007]10 Journal of Money Laundering Control 452.

Ibid.

there is disclosed an offence under any other written law, not being an offence under this Act, irrespective of whether the offence was committed by the same person or any other person, the officer of the Commission responsible for the investigation or proceedings, as the case may be, shall notify the director of public prosecutions or any other officer charged with responsibility for the prosecution of criminal cases, who may issue such directions as shall meet the justice of the case.

General Duties of the Commission to receive investigate the complaint and prosecute offenders. Etc 6.it shall be the duty of the Commission- (a) Where reasonable grounds exist for suspecting that any person has conspire to commit or has attempted to commit or has committed an offence under this Act or any other law prohibiting Corruption, to receive and investigate any report of the conspiracy to commit, attempt to commit or the Commission of such offence and, in appropriate cases, to prosecute the offenders;

To examine the practices, system and procedures of public bodies and where, in the opinion of the Commission, such practices, systems or procedures aid or facilitate fraud or corruption, to direct and supervise a review of the case

To instruct, advise and assist any officer, agency or parastatals on ways by which fraud or corruption may be eliminated or minimized by such officer, agency or parastatal;"[435]

The provisions in S 5&6 of the above act, clearly empowers the commission to prosecute offences related to corruption. It is important to note as discussed earlier, that the prosecutorial powers of these regulatory agencies i.e the EFCC and the ICPC are subject to the discretionary powers of the AG, as seen in S174 of the constitution of Nigeria.

As a fact, ICPC was established in 2000, four years before the establishment of the EFCC, yet the EFCC happens to be the only pro-active AML regulatory body with records of

435 Independent Corrupt Practices and Other Related Offences Act, 2000, S5&6.

ongoing prosecution and convictions of PEP.[436] However, how effective is the EFCC with regards to the prosecution of PEP? If we agree that the typology of money laundering offence that is prevalent in Nigeria is centred on corruption, then the prosecutorial technique applied by the AML agencies should be evidenced by considering how effective the fight against corruption is.[437]

There has been a tendency of PEP in developing nations particularly in Nigeria, to abuse the office and powers bestowed on them by the people. This negative trend in the Nigerian political environment is that PEPS either elected or appointed, have not been discouraged by the prosecutorial system and the criminal justice system from stealing public funds and abuse of public office. There is a connection between the efficacy of the prosecutorial system in the AML regime and corruption. This connection can be attributed to the fact that, if there is an ineffective AML regime with regards to the prosecution of PEP, then PEP would not be discouraged from stealing public funds and laundering the proceeds.[438]

If the typology of money laundering offences in Nigeria which is most prevalent is on political corruption and abuse of office by PEP, then we could argue that the AML regime in Nigeria is not as effective as it should be. Maybe, the regime would be more effective if its prosecutorial approach is more effective and serves as a deterrent to political office holders. The prosecutorial approach by AML regulatory agencies is not bringing the desired results, which should ideally serve as punitive and preventive measures against money laundering. [439]

See appendix.

Anna Markovska, Nya Adams 'Political corruption and money laundering: lessons from Nigeria'[2015]18 Journal of Money Laundering Control 172.

438 Transparency International 'Nigeria: Evidence of corruption and the influence of social norms'[2014] >https://www.transparency.org/files/content/corruptionqas/Nigeria_overview_of_corruption_and_influence_of_social_norms_2014.pdf >assessed January 25, 2019 .

See appendix

4.10 A Critique of the Integration of Prosecutorial Techniques on Money Laundering Cases in Nigeria.

Several cases that have been prosecuted by these regulatory agencies, can be criticised from the point of view of ineffective prosecutorial technique.[440] Some of these cases have been decided by courts of competent jurisdiction.

In the case of *Federal Republic of Nigeria V Cecilia Ibru* the defendant was prosecuted for money laundering and granting of a credit facility above her credit limit of $20 million as chief executive of Oceanic Bank. Upon a plea bargain arrangement, the defendant forfeited assets and cash worth $1.2 billion. The court sentenced the defendant to 6 months imprisonment, and she was allowed to spend the 6 months sentence in a hospital due to a health challenge, as this was part of the plea bargain.[441]

The judgement by the court in the *Cecilia Ibrus* case, was criticised from a legal and a moral point of view. It is important to point out that at the time of this judgement, the integration of plea bargain in the trial of federal offences like money laundering, was technically illegal. This is because the law which, makes provision for the application of plea bargain in prosecution federal offences is the ACJA 2015.[442] If the defendant in the above case was convicted and sentenced based on a plea bargain agreement with the EFCC in the year 2010, it the begs the question. What law did the EFCC rely on to negotiate a plea bargain in the Cecelia's case? If the ACJA which makes provision for plea bargain for federal offences was enacted in the year 2015, then it can be argued that the EFCC acted outside the scope of the criminal justice system at that time, in getting into that agreement with the defendant.

There could have been other reasons best known to the EFCC in applying the discretionary technique of plea bargain in the *Cecelia Ibrus* case. However, whatever these reasons could have been, it was alien to the laws of the country at that time. As plea bargain was fully

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Law Digest 'Tackling unresolved high-profile corruption cases' Punch Newspaper, November 2017 > https://punchng.com/tackling-unresolved-high-profile-corruption-cases/ > assessed January 25 2019.

441 Federal Republic of Nigeria v Mrs Cecilia Ibru [Unreported] Charge No. FHC/L/297C/2009.

442 Administration of Criminal Justice Act, 2015, S270.

integrated into the justice system of the Nigeria in 2015, which therefore makes that agreement and judgement illegitimate. This argument maybe best seen as academic, however it an opinion.

Furthermore, from the Cecelia's case, there is a tendency for AML regulatory agencies to abuse these discretionary techniques, particularly plea bargain. The rationale behind the integration of plea bargain in the justice system in Nigeria is to provide a faster route to getting justice and not a technical route in availing criminals of justice.[443] This on its own is immoral. Even if there is a law which permits the application of plea bargain in Nigeria, the way and manner which prosecutors apply this discretionary technique is worrisome. It is been perceived by the public as a selective prosecutorial technique, used in availing the rich and powerful from conviction and justice.

It is understandable that, part the rationale behind the application of plea bargain particularly when dealing with PEP is to recover a significant amount of money or asset. However, the recovery of asset should not erode the basic principles of the criminal justice system, which is to dispense justice. More so, if recovery of asset is the primary motive of AML regulatory agencies in applying a plea bargain, then it means a wrong message is been passed. The message is simple, "steal as much as you can, if you get prosecuted, you enter a plea bargain and get a light sentence". This is a dangerous trend for the AML regime in Nigeria, if the entire motive behind the application of this prosecutorial technique is to recover stolen asset. There must be a balance in the application of this technique.

The application of plea bargain as a prosecutorial technique should not be used for the PEP or the influential in the society but also the average criminal who has committed other typology of money laundering offences. Even with the application of plea bargain across all classes of money laundering offenders, the prosecutors must act reasonably and justifiably when concluding on the plea bargain agreement. If this is not so, it could make mockery of the criminal justice system of the nation, thereby encouraging PEP to steal more and negotiate more. Hence, the scholars who have argued against plea bargain as "negotiated

443 Adekunbi Imosemi ' Plea Bargaining in Nigeria: an Aftermath of the Administration of Criminal Justice Act 2015' [2017]5 International Journal of Business & Law Research 97.

justice" may be right after all. Prosecutors must apply caution and ethics particularly virtue, in the application of plea bargain on money laundering offences.

In the case of *FRN V Lucky Igbenedion*, the defendant was the governor of Edo state, Nigeria. A 147-count charged was proferred against him, which included money laundering, and stealing of public funds. The defendant upon reaching a plea bargain agreement pleaded guilty to some counts on the charge sheet, including stealing the sum of $26 million {4 billion naira}. The accused was convicted and sentenced to a fine of $23,000 {N3.5 million Naria}. There was no recovery of asset, there was no money recovered.[444]

The prosecution of *lucky Igbenedion* and the subsequent sentence upon conviction was an affront to the criminal justice system of Nigeria. From a critical point of view, the EFCC which prosecuted this case appears to have abused the concept of plea bargain as a discretionary technique. It can be argued that the plea bargain reached by the prosecution and the defendant is an affront on equity natural justice and good conscience, which are fundamental elements in the application of the rule of law.

The integration of prosecutorial techniques particularly plea bargain in the AML regime, should be justice driven rather than technicality driven. What this means is that if less attention is given to technicalities of law, rules and regulation, statutes and ordinances, as against justice, then the entire prosecutorial system would be centred on "rules" as against justice. This could portend danger to the criminal justice system of the nation. Hence, the importance of the integration of ethics in the application of prosecutorial discretion on money laundering cases. The ethical consideration of prosecutors is pivotal to the success of the AML regime.

The *Igbinedion* case, suggest that the prosecutors followed a deontological approach in the plea bargain agreement reached with the defendant. The prosecutors appeared to either innocently misconstrue the rationale behind plea bargain by reaching an agreement where the defendant pays a fine, or acted out of mischief or compromise, with the intent of undermining the entire AML regime and hiding under the cover of the plea bargain rule. This is very dangerous for the entire justice system and the nation at large. Hence the

444 F.R.N v. Igbinedion [2014] All FWLR Pt. 734, 101 .

importance of the integration of virtue ethics in the AML regime cannot be over emphasised. The character of prosecutors, who are supposed to be custodians and protectors of the AML regime in Nigeria, should not be in doubt. If virtue emphasises on doing what is morally right for the greater good of the society, then prosecutors should not hide under the pretentious cover of rules that could enable them to do what is morally wrong.[445]

Prosecutors hiding under the cover of rules is one of the problems of the deontological approach in ethics and conduct of lawyers in Nigeria.[446] This is because if the rules make provision for the prosecutor to apply discretion when administering plea bargain, without any form of review with regards to how the bargain was done, it might be dangerous. It is dangerous because, rules are rules and rules must be obeyed whether or not the rules are bad. This deontological approach gives a perfect opportunity for rogue prosecutors to insist that they followed the rules in administering this discretionary technique. Hence, the lawyers who assist in regulating and prosecuting for the AML regime, might have directly or indirectly contributed to the underdevelopment of the country by not diligently prosecuting PEP for corruption and money laundering. If we agree that a major problem that affects Nigeria's growth is corruption by PEP and money laundering, then regulatory agencies empowered to prosecute money laundering offenders should do everything possible to punish these offenders. Prosecutors should not use their discretionary powers as a leverage to fail certain ethical standards expected from them by the society. This is very important particularly in the interest of justice.[447] The society wants justice to be served on those who have stolen public funds and laundered their common resources. The society does not want fines served on those who have stolen their commonwealth as punishment. The *Igbenedion's* case can be best defined as the wrong application of prosecutorial discretion.

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445 Schaeffer Matthew 'Virtue Ethics and the Justification of Punishment' [2010]6 International Journal of Punishment and Sentencing 39.

See chapter 3.2 on deontology ethics.

Rodman Kenneth 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court'[2009] 22 Leiden journal of international law 104.

4.11 The Role of Flexibility of Charges in the Application of Prosecutorial Discretion in the AML Regime.

It is important to note that, it is at the discretion of the prosecutor to choose what law to prosecute under. It can be argued that, the integration of prosecutorial discretion in the AML regime also includes the choice of legislation which the prosecutor would anchor the charge on. This is because in some instances, it may be difficult to prove money laundering charges, due to the technicalities involved in this peculiar crime.[448]

However, the prosecutor might be able to successfully prosecute on other offences linked with money laundering, but not money laundering as an offence. This is because it can be argued, as it has been argued in several cases including the case of *FRN V Ibori*, that money laundering cannot be a stand-alone offence.[449] If we follow this line argument then, we could assert that there is a parent offence that should be attached to a money laundering charge. After all, if we agree that money laundering is the proceeds of crime, then the crime itself (parent offence) creates an opportunity for the money laundering offence to take place.[450]

For example, in a recent judgement delivered on the 29th of august 2019 in the case of *FRN V Waripamo Owei-Dudafa* the defendant who was an aide to a former President of Nigeria, Goodluck Jonathan was prosecuted on a 22 count charge on money laundering. The Judge held that, the case of the EFCC was built on suspicion of crime and suspicion, no matter how strong, could not be used to secure a conviction.

448 Esoimeme Ehi 'The money laundering risks and vulnerabilities associated with MMM Nigeria' [2018]21 Journal of Money Laundering Control 115.

449 FRN V James Ibori (2014) LPELR-232CA.

450 Ibid.

He further held, that the EFCC did not conclude an investigation before rushing to court, thereby leaving loopholes. He dismissed the entire 22 counts against Dudafa, discharged and acquitted him.[451]

From the judgement in the *Dudafa* case, it is obvious that prosecutors were ignorant of the fact that money laundering is a technical offence, which makes securing a conviction on mere suspicion of money laundering without compelling evidence difficult. Prosecutors in this case had failed to apply the discretion of flexibility of charges, if it seemed too technical to prove money laundering charges in court. The prosecutors might have been successful, if the prosecutors focused their charges around corruption and abuse of office, rather than money laundering. Maybe the EFCC prosecutors would have succeeded in admitting evidence that would have been more compelling to secure a conviction.

If we apply this argument to the AML regime in Nigeria in relation with the typology of money laundering offences which is mostly abuse of office and stealing of public funds, then prosecutors do not necessarily have to anchor their charge based on the provisions of MLPA 2011. The AML regulatory agencies could prosecute money laundering offences alongside other offences (parent offence).

The discretionary powers of prosecutors in the AML regime should not be limited to the MLPA 2011, other laws which regulate the criminal justice system should be applied. This is because the rationale behind the establishment of an AML regime in Nigeria, is to create preventive measures and punitive measures in relation to the typology of money laundering offences [PEP], and not a mere existence of an AML regime. Hence, prosecutors should pay more attention to other laws regulating the criminal justice system, and reduce the fixated approach that a PEP must be prosecuted for money laundering.

For an effective AML regime, prosecutors must apply prosecutorial discretion in such a flexible manner, to accommodate the parent offence committed by the PEP with recourse

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451 Oladimeji Ramon, The Punch 'N1.6bn fraud: Court frees Jonathan's ex-aide, banker'<https://punchng.com/n1-6bn-fraud-court-frees-jonathans-ex-aide-banker/ > assessed August 29th 2019 .

(I was also a member on the defence team in the the Dudafa case.)

to the potential problems of overcharging.[452] This way, it would be more difficult for the defendant to escape justice. The focus on only money laundering charges by AML regulatory agencies and prosecutors could have contributed to the ineffective prosecution of money laundering cases by PEP.

In the case of *FRN V. Jolly Tevoru Nyame* the defendant was the governor of Taraba state in Nigeria. The EFCC began his prosecution for money laundering charges in the year 2007. In 2014, the EFCC through the leave of court, amended the charges to a forty count charge against the defendant for criminal breach of trust, which is punishable under S315 of the Penal Code Act, Laws of the Federation of Nigeria 1990.[453] The defendant was sentenced to 14 years imprisonment.

An excerpt of judgement held as follows:

> "There were Clear Breaches of Trust under these Counts. The Defendant had the Duty to notify or engage the Correct Offices or Officers, and in summoning Mr. Nev, the Permanent Secretary of Government House instead of the Secretary to the State Government, the First breach was committed. There was also a Clear Breach of Trust by the way Funds were utilized and disposed off. There was no Accountability of the Monies Expended and there were no Retirement of the Funds or Audit Queries issued. Misappropriation under the Offence of Criminal Breach of Trust does not equate to Conversion to one's Use. The lack of Adequate Documentation, the fact of the Impracticability and the Non-accountability injects a Dishonest element to this Breach of Trust. The Element of Disposal is one of the Modes under Criminal Breach of Trust, and any Disposal of Government Funds contrary to the Financial Rules and Regulations of the State constitutes Criminal Breach of Trust. The Defendant is the Chief Custodian and Executor of all Government Funds,

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452 Gifford Donald 'Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion'[1983]37 University of Illinois Law Review 41.

453 Penal Code Act, Laws of the Federation of Nigeria 1990, S 315.

> and he is to Direct the Expenditure in Compliance with the Laws under which he governs. At the Time he approved the Memos in ExhibitsO1, O2 and O3, he ought to have known that these Huge Expenses for a One Day Visit, with a One Day Notice was absurd and extreme to say the least. From the above Analysis, the Court is satisfied that as regards the Offences in Counts 10, 12 and 14, the Prosecution has satisfied the Court that the defendant committed Criminal Breach of Trust beyond reasonable Doubt."[454]

The successful prosecution of Jolly Nyame and subsequent conviction was regarded as a major success in the AML regime and the fight against corruption.[455] From the case, it can be argued that, for the successful prosecution of PEP, emphasis should be placed on the parent offence while the money laundering offence should be secondary. Criminal breach of trust is a parent offence that is common with most money laundering offences by PEP.

If we agree that a PEP is the custodian of public trust, then if a PEP misappropriates public funds or steals from public treasury, it is breach of public trust. Hence it was a tactical integration of prosecutorial discretion on the part of the EFCC by amending the charge, with the inclusion of criminal breach of trust.

It is important to note that in the *Jolly Nyame's* case, the defendant was not convicted for money laundering charges. Which implies that if the EFCC had focused the charge on only money laundering, Jolly Nyame would have been added to the list of the many unsuccessful prosecution of money laundering cases by PEP.[456] Hence the importance of flexibility of charges and an inclusion of "parent" offences when prosecuting PEP for money laundering, cannot be over emphasised.

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454 FRN v Jolly Nyame, CHARGE NO: FCT/HC/CR/82/07.

455 Vanguard News 'N1.126bn fraud: Court sentences Joshua Dariye to 14 years imprisonment' https://www.vanguardngr.com/2018/06/n1-126bn-fraud-court-sentences-ex-gov-dariye-14-years-imprisonment/ >assesed 3rd march 2019.

See appendix.

Furthermore, in the case of *FRN V Joshua Dariye*, the defendant was the governor of Plateau state Nigeria. He was prosecuted with money laundering charges by the EFCC which began in 2007. The defendant was been prosecuted for laundering the sum of 1.6 billion Naira [N1,600,000,000], [$10,600,000] equivalent. In 2016, nine years after the prosecution proffered charges on money laundering, the charges were amended to criminal breach of trust, which is punishable under S 315 of the Penal Code Act. The defendant was found guilty and sentenced to 14 years imprisonment in June 2018, for criminal breach of trust.

An excerpt from the judgement is as follows:

> " As regards the Sum of N53, 600, 643.056, as seen from the Statement of Account, the Statement of account speaks for itself, as it showed that the Defendant made several disbursements after this Sum of Money was lodged into his Account, which he dishonestly converted to his own Use to carry out banking transaction to other beneficiaries other than the Plateau State Government.
>
> Further reasoning is as held under Criminal Breach of Trust and the Court finds that these Funds in both Counts 9 and 11 belonged to the Plateau State Government and were converted by the defendant to his own use, without any reasonable explanation and the manner of lodging these Sums showed a dishonest intent to misappropriate the Funds.
>
> Without further ado, the Court finds these Counts as proven beyond a reasonable doubt and accordingly, finds the Defendant Guilty as Charged for the Offences of Criminal Misappropriation under Count 9 and Count 11."
>
> "I cannot imagine such Brazen Act of Systematic Looting and Stealing, as what occurred in this Case, is it the transfer of nearly half a Billion from the Ecological Funds Account meant for his State? Or is it the Transfer of Funds from the Account of the Plateau State Government into his Personal Ventures Account? The Facts of this Case and the Ensuing Events left a Litany of Woes and a Devastating Trail of Victims, who even

though they were Adults capable of making Rational Choices, ended up being scarred. How do we count the Physical, Moral and Sociological Costs of the People involved In this Tragedy of Corruption? There was Dr. Kingsley Nkrumah, the Permanent Secretary under the Ecological Office of the Presidency, who lost his Job and Reputation, was charged to Court and upon the grant of his Bail, left the Country. Then there was Mr. Awe Odessa, the Banker at the All States Trust Bank, who lost his Job, was jailed and had his Reputation soiled. His bank suffered no less fate when it had its Certificate of Incorporation revoked after being fined. There was also Mrs Joyce Oyebanjo in London who was jailed for Three and Half Years for Money

Laundering Offences. The most shocking aspect is that regarding the People of Plateau State, who suffered Financial Losses, and at some period in time, as seen from the Accounts of Ebenezer Retnan Ventures and Plateau State Government Account before the Court, the

Defendant, through this Venture was richer than Plateau State. More importantly, his Family would no doubt have suffered as a Result of the Long drawn out Trauma of the Trial.

It is unfortunate, but there is no Compromise to Corruption. By whatever Shade of Colour, Tribe, religion and Status, Corruption will forever be Corruption. This Statement is akin to the Law of Gravity, whatever is thrown up, invariably will come down, and sometimes hard. It is rather unfortunate. Having found the Defendant Guilty as Charged in regard to these Counts of the Offences under Criminal Breach of Trust, the Court hereby Sentences the Defendant, Chief Joshua Chibi Dariye to Terms of Imprisonment in Each of these Offence, as follows: -

As regards the Offence of CRIMINAL BREACH OF TRUST, the Defendant is to serve in: -

COUNT 1-Fourteen (14) Years Term of Imprisonment with No Option of Fine"[457]

The judgement in the *Dariyes* case, came as a positive shock to the AML regime and the criminal justice system at large. This is because the *Dariye* and *Nyame's* judgements were delivered by the same judge in a time frame of two weeks, in the year 2018. The AML regime in Nigeria has suffered setbacks with the prosecution of PEP, due to the misapplication of prosecutorial discretion, due to the "fixated" application of the MLPA 2011. There is a clear similarity between the case of Joshua Dariye and Jolly Nyame. It can be argued that the successful prosecution of Dariye and Nyame can be attributed to the flexibility of the prosecutor, by not relying solely on money laundering charges to convict the defendant. The technicality of proving money laundering charges could have been responsible for the slow pace of prosecution, since the prosecution commenced trial in 2007. It can be further argued that when prosecuting PEP for money laundering offences, it may be easier to prove the parent offence than the money laundering offence itself. Hence, the reason why the EFCC could establish a case of criminal breach of trust against the defendants in the Dariye and Nyame's cases respectively.

The flexibility of charges is a discretionary power attached to prosecutors in the AML regime as seen in the *Dariye* and *Nyame's* case, which many prosecutors may not be conversant with. The fact that a PEP is prosecuted for money laundering related charges does not necessarily mean that emphasis should be placed on the enabling laws regulating money laundering. There appears to be a high probability that, if prosecutors place emphasis on the parent offence as the primary offence when prosecuting PEP for money laundering offences and allowing the money laundering offence to remain as a secondary offence, there would be a higher rate of conviction. Again, this shows the importance of flexibility of charges in the application of prosecutorial discretion.

Furthermore, in the *Dariye* and *Nyame's* cases, there was an obvious consideration of professional ethics. The prosecutors acted in the interest of the public in doing what was considered "good", by amending the charges and including breach of public trust as an

457 FRN v Chief Joshua Driye, CHARGE NO: FCT/HC/CR/81/07 .

additional charge. The prosecutors amended the charges because they might have felt that, relying on strict rules which regulate money laundering might not be in the best interest of nation and the public, with respect to these cases. The prosecutors merged the principles of deontological ethics and virtue ethics. They did so by "obeying" the rules and prosecuting on money laundering offences but acted in the greater good and interest of the society, by amending the charge to include breach of public trust. A charge which was included years after the prosecution of both defendants had begun.

What must have been going through the minds of the prosecutors between 2007 when the charge was proffered and 2017 when the charge was amended? Could it be because the prosecutors envisaged that they might not have been able to secure a conviction, if they had continued prosecution on that charge and felt that they owed the public a duty to bring the defendant to justice?

Whatever the reason could be, the prosecutors in these cases acted with virtue, in the interest of the greater good of the public and the AML regime. It may be interesting to also add, that it is the same prosecutor who prosecuted both Dariye's and Nyam'e cases, which has been the only significant conviction of a high-profile PEP since 2004.[458] We do not want to believe that there are only a few prosecutors in the AML regime, who are diligent and act with virtue. May be Other prosecutors in the AML regime of Nigeria, should take lessons from the prosecutor who successfully prosecuted these landmark cases.

4.12 The Integration of the Rule of Law in the Application of Prosecutorial Discretion in the AML regime in Nigeria.

The prosecution of the typology of money laundering offence [PEP], which is prevalent in Nigeria, has suffered some setback since Nigeria began her AML regime. As discussed earlier the prevalent typology of money laundering offence in Nigeria is centered on political corruption.[459] It's a fact that the Nigerian AML regime has recorded very few successes in the prosecution of PEP. AML regulatory and prosecutorial agencies have not been able record a high success rate with regards to PEP, compared to the success rate

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See Appendix/

See note… chapter on money laundering in Nigeria.

recorded with the regulation and prosecution of other typologies of money laundering.[460] It can be argued that a primary factor which is responsible for the ineffectiveness, is the absence of the core values of the rule of law in the regulation and the prosecution of money laundering offences by PEP.[461]

One of the core values of the rule of law is equality before the law. The fundamental principle which drives positive development in a nations justice system is the application of legal equity in the dispensation of justice.[462] This principle is essential if the AML regime in Nigeria must be successful. The integration of the rule of law in the AML regime in Nigeria, is not only to ensure that the AML regime is successful but to ensure that this principle is applied in enforcing AML regulations.

Theodore Roosevelt a former American President once said:

> "No man is above the law and no man is below it; nor do we ask any man's permission when we ask him to obey it. Obedience to the law is demanded as a right; not asked as a favour."[463]

If we agree that legal equity is fundamental in the application of the rule of law in Nigeria, then we can also agree that the same set rules that are applicable in the enforcement of other typology of money laundering, should be applicable in the enforcement of money laundering with regards to PEP. This is because the prosecution of other typology of money laundering offences appears to be more effective, as discretionary techniques are used correctly in the prosecution of narcotics related offences, human trafficking, arms trafficking, tax evasion etc.[464] The level of professionalism and zeal applied in prosecuting

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460 See appendix. A detailed chat on the success rate of the AML regime with regards to PEP is available.

461 'Pursuing Unexplained Wealth in Nigeria: It's Time to Take on the Enablers'(KYC360,MAY 2019)>

https://www.riskscreen.com/kyc360/article/pursuing-unexplained-wealth-in-nigeria-its-time-to-take-on-the-enablers/ > assessed 4 July 2019.

462 Whiting Susan, 'Authoritarian "Rule of Law" and Regime Legitimacy'[2017]50 Comparative Political Studies 1910.

Donald Davidson, '*The Wisdom of Theodore Roosevelt'*(Citadel Press 2018).

See note in AML Chapter.

other typology of money laundering offences appears to be higher. Hence, it can be argued that there is a higher ethical standard applicable by AML regulatory agencies and prosecutors, in the prosecution of other typology of money laundering offences. This is an affront on the basic principles of equity and the rule of law.

Applying Fuller's principles into the AML regime in Nigeria, there must be set rules and these set rules must be general.[465] The generality in the application of laws is an indication of the integration of the rule of law in that society. There are set rules that regulate the AML regime in Nigeria and the prosecution of money laundering offences. However, the problem is not associated with the existence of set rules but the applicability and generality of these set rules. The principal officials regulating the AML regime and those with discretionary powers to prosecute cannot apply a set of rules for a typology of offenders and not apply same for another typology of money laundering offenders.

It can be argued that the lopsided application of "set rules" with regards to prosecutorial discretion in the AML regime, could possibly be what Fuller had attempted to avoid. Fuller must have envisaged that there could be a time in the regulation of human activities and society, when there could be discrimination or favoritism in the application of these set rules. This is appearing to be the situation of the AML regime of Nigeria. This again is inked to adherence of the rule of law.

Furthermore, the issue of prosecutorial competency as seen in both Dariye and Nyame's might be another problem the AML regime in Nigeria faces. One can argue that the success recorded in these cases is an ethical issue revolving round prosecutorial competency. The prosecutor displayed a high level of competence in carrying out his responsibility by amending the charge, rather than prosecuting solely on money laundering. One might also argue that there is an element of virtue ethic displayed by the prosecutor in these cases.[466] This is because it is most unlikely that the former prosecutors prosecuting these cases were uninformed that to successfully prosecute PEP for money laundering, all charges do not need to be hinged on money laundering. Hence, it can be argued that if the former prosecutors knew that they can prosecute on breach of public trust, (which is obviously

465 Ibid, Fuller 46.

See chapter 3.3 on virtue ethcs

easier to prosecute from the outcome in the Dariye and Nyame's cases), then it means that the moral inclination on the part of the prosecutors to do what is right is absent. This also is an ethical issue.

If you apply a high level of ethical standards in prosecuting money laundering offenders who are considered to be ordinary citizens and persons who do not have access to the instruments of state power, then the same ethical standard should be applied to those who are powerful and influential in the society.

The integration of prosecutorial techniques in the AML regime of Nigeria is not enough to ensure an effective regime, these prosecutorial techniques must be applied with strict adherence to the rule of law. Hence, the provision in S 174(3) which attempts to limit the powers of the AG, does so with reference to fundamental principles of the rule of law, which is public interest.[467] The interest of the public must be put into consideration before AML regulatory and prosecuting agencies apply a plea bargain or a notice of discontinuance in the prosecution of PEP. This is because this typology of money laundering offence affects the elements of the nation the most, as it creates an enabling environment for corruption and underdevelopment as against other typology of money laundering offences.[468]

When monies appropriated for development of basic infrastructure and welfare of the citizens are stolen and laundered by persons elected or appointed into office, it affects virtually all categories of persons living in the society. Hence, prosecutors owe the public and members of the society a duty to ensure that PEP are diligently prosecuted without an abuse of court process or a deliberate misapplication of prosecutorial techniques, thereby undermining the rule of law. When AML regulatory and prosecutorial agencies act in the interest of the public, it will reflect on the number of PEP convicted for corruption and money laundering.[469] Their conviction would also serve as a deterrent to other PEP and

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467 Constitution 1999, S 174

468'Impact of Corruption on Nigeria's Economy'(PwC Nigeria, January 2019) > https://www.pwc.com/ng/en/press-room/impact-of-corruption-on-nigeria-s-economy.html > assessed July 5 2019

See Appendix

could give a better opportunity for accountability and transparency of spending of public funds.

Hence, we can argue further that, there is a relationship between the rule of law and successful prosecution of PEP and development. This is because if the fundamental principles of the rule of law are applied in the prosecution of PEP for money laundering offences, monies appropriated for the development of the society would be properly utilized and accounted for.[470] The implication is that those responsible for the regulation of the AML regime in Nigeria, can play a key role to ensure the fast growth and development of the society.

Prosecutors can accelerate development in the Nigerian society, if they adhere to strict ethical standards by doing what they consider morally right, in accordance to strict rules of professional conduct to act in the interest of justice. This means that in the process of prosecuting PEP, the ethical standard of the prosecutor can influence his adherence to the principles of the rule of law, which in turn could influence a lesser tendency of the misapplication of prosecutorial discretion, which could increase the conviction rate of PEP.

For example, we can argue that the absence of the element of the rule of law in the application of prosecutorial discretion with regards to PEP, is responsible for the high rate of unsuccessful prosecution for money laundering offences. The case of *FRN V Ibori*[471] is a clear example of the absence of the fundamental elements of law in flexibility of charges, in prosecuting PEP for money laundering. The application of this technique, as a discretionary technique, should be done with a focus on equity and justice, morality and truth, in accordance with the rules and regulations.

It is an affront to the rule of law for the judge to reach a conclusion on a mere definition of money laundering in accordance to the MLPA 2004, in the Ibori case. Some can also argue that it is not the responsibility of a Judge to proffer charges on a defendant but the duty of

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Ibid.

James Onanefe Ibor v. Federal Republic of Nigeria,(2008) LPELR-CA/K/81C/2008.

a prosecutor. Hence, we can further argue that, the prosecutors unwittingly or intentionally placed the Judge in a situation where he cannot function in accordance to the rule of law and moral standards, which made the judge stick to strict rules and regulations (MLPA 2004). It was the duty of the prosecutor to have acted with the intent of ensuring that justice is reached. Part of that duty is to ensure that "realistic" charges were proffered against the defendant other than money laundering, which could have guaranteed a conviction. A prosecutor acting with the intent to ensure the enforcement of the rule of law in the *Ibori case,* would have done so by proffering a charge that could most likely secure a conviction against a PEP who had stolen public funds.

This would have been possible if the prosecutor had proffered charges hinging on breach of public trust in the *Ibori case*. This is because, it would have been easier to prove breach of public trust rather than money laundering. This is also because, money laundering charges are usually technical to prove and the vagueness of the MLPA 2004 which created a gap in this typology of money laundering offence, would have been difficult to prove. The onus was on the prosecutor to have acted within the ambits of the rule of law, by considering public interest, in the prosecution of Ibori. If this interest was considered, the prosecutor would have proffered a "realistic" charge within the context of the AML regime at the time. As argued earlier, that realistic charge which the prosecutor should have proffered was breach of public trust.[472] It is expected that an experienced prosecutor such as the EFCC, should understand these fundamental rudiments of prosecution and as such might not have innocently made that mistake in prosecuting solely on money laundering offences. This argument is subjective.

Again, as argued earlier, there is a linkage between virtue ethics and the successful application of the rule of law in the AML regime. This link can be established because, robots do not act as prosecutors of PEP but humans. Virtue ethics critically examines the fundamental element which directs the human mind in taking decisions because they believe that is right or wrong.[473] This could be a guiding principle in decisions prosecutors

472 See note in Prosecutorial Discretion Chapter.

473 Louis Kosman, *Virtues of Thought : Essays on Plato and Aristotle* (Harvard University Press,2014).

should take in entrenching the rule of law and administering prosecutorial discretion in AML cases involving PEP.

A good prosecutor who intends to carry out his responsibility with the understanding of the damage corrupt PEP have caused in Nigeria, should be able to reach a balance between Virtue ethics and deontological ethics. This balance can be best described as an amalgamation of both ethical approaches to enforce the rule of law in the AML regime in Nigeria. It is not enough for a prosecutor to act in accordance with what the law states but must do so in accordance with ethical principles and public interest. If this was applied, maybe the *Ibori case* would not have generated a national embarrassment, acquitting a man who stole public funds by courts in Nigeria and conviction of the same person on similar charges in the UK. The fundamental difference here is the application of the rule of law in one AML regime and a deficit of it in another.

Finally, another fundamental flaw in the application of the rule of law was seen in the case of *FRN V Bode George*. In this case the defendant was prosecuted by the EFCC and convicted by the High court for money laundering. He was convicted for awarding the sum of $533,000,000 [United State Dollar], to his company as chief executive of the Nigerian Ports Authority. On appeal, the supreme court discharged and acquitted him stating that, contract inflation was not known to law. The supreme court held that if the parent offence was not known to law then, the high court should not have convicted him for money laundering.[474]

The Bode George case was an affront on the criminal justice system of Nigeria and the AML regime. This is because the Supreme Court should have considered public interest before discharging and acquitting the defendant. The judgment of the High court should have been upheld based on public interest and not technicalities of law. Hence, the need to integrate the rule of law in the AML regime and the Nigeria's criminal justice system.

Hence, the significant role the application of the rule of law plays in any advanced AML regime cannot be overstated. The rule of law is the pillar of any successful justice system

Federal Republic of Nigeria V. Chief Olabode George & Ors (2013) LCN/4072(SC).

and since the AML regime is under the criminal justice system, the AML regime cannot work in isolation without the rule of law.

4.13 A Brief Review of Literature on the Integration of Prosecutorial Discretion in the AML Regime in Nigeria.

This research takes into cognizance the analysis and contribution by other authors, contributing to the literature on prosecutorial discretion. The literature review is integrated throughout the thesis. It is important to note that there is little literature on prosecutorial discretion.[475] There is also little literature on prosecutorial discretion and the application of this technique on money laundering.[476]

Most international recommendations contributing to the existing knowledge on prosecutorial discretion and prosecutorial independence have not given a critical analysis on the integration of prosecutorial techniques in dealing with PEP and money laundering related offences. For example, the recommendations form the common wealth secretariat titled "Prosecution independence and accountability: principles, challenges and recommendations" places emphasis on prosecutorial independence and prosecutorial competency.[477] The recommendations here gives a guideline on how prosecutors should conduct themselves when carrying out their duties especially as it relates with fairness and accountability.[478] However, little or no discussion is done linking these prosecutorial standards e.g. the IAP standards and crimes like money laundering, especially the typology of PEP.

The little literature on prosecutorial discretion and the problem of PEPs is problematic for the rule of law generally and money laundering and corruption specifically in Nigeria. This

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See discussion on the role of prosecutors in 4.11 and discussion on a critique on the integration of prosecutorial techniques in 4.10.

The commonwealth recommendations focus on prosecutorial standards. Discussions on prosecutorial discretion with regards to money laundering by PEP is still novel. Furthermore, no discussion has been done integrating the powers of the AG on money laundering case by PEP. There have been discussions linking money laundering and corruption and the effect on Nigeria's development. However, none has been done integrating prosecutorial discretion and the powers of the AG with corruption related money laundering.

See discussion on the independence of a prosecutor in 4.11.

Ibid.

is a problem because there has been no analysis on the application of these prosecutorial powers in AML regimes especially as it relates with the Nigerian state. As discussed throughout the thesis, prosecutorial powers within the Nigerian state is central and revolves around the office of the AG.[479] This is problematic for the integration of the rule of law which existing literature ignores. It is problematic for the integration of the rule of law because there is a high chance of potential abuse of powers by the AG, as the sole custodian of discretionary powers.[480] It is important to also note that this potential problem affects the prosecution of PEP for money laundering cases, as the arbitrary application of these prosecutorial techniques by the AG can jeopardize the fight against the prevalent typology in Nigeria.

Furthermore, an analysis of the Nigerian Constitution and the ACJA 2015 shows that there is a gap with the integration of the rule of law and the prosecutorial powers of the AG. There is little literature discussing the powers of the AG and the side effects it could have on the AML regime. There is also little literature discussing the potential amendments of S174 as recommended in this thesis. Several literature discussing the powers of the AG and prosecutorial discretion have not linked the effect of such discretionary powers on the AML regime.

Furthermore, it is essential to note that, the application of S174(3) which attempts to limit the powers of the AG to act in the interest of the public has not been addressed in any literature.[481] For example, the application of a nolle prosequi by the AG in FRN V Danjuma Goje case is a clear case of abuse of powers by the AG, with regards to a PEP that has been prosecuted for money laundering.[482] Emphasis on the word attempt because, the provision has not been effective in regulating the powers of the AG. His acting in public interest without any guide on how the AG can act is highly subjective. For example, in jurisdictions like the UK, the Code of Conduct for Crown prosecutors clearly gives guidelines with regard to the consideration of public interest in the application of discretionary powers of the AG.

See discussion on the powers of the AG in 4.3.

Ibid.

There are several literature discussing the powers of the AG, however, there is no discussion analyzing the powers of S174(3), as it relates to public interest. See discussions on power of the AG in chapter 4.3.

See analysis on FRN V Danjuma Goje chapter 4.3.

This is seen from S 4.9 to 5.1 in the Code of Conduct for Crown Prosecutors.[483] Unlike the UK there is no clear guideline on the application of these discretionary powers in Nigeria.

"4.9. In every case where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest. 4.10. It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In some cases the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution. 4.11. When deciding the public interest, prosecutors should consider each of the questions set out below in paragraphs 4.14 a) to g) so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors, together with any public interest factors set out in relevant guidance or policy issued by the DPP, should enable prosecutors to form an overall assessment of the public interest. 4.12. The explanatory text below each question in paragraphs 4.14 a) to g) provides guidance to prosecutors when addressing each particular question and determining whether it identifies public interest factors for or against prosecution. The questions identified are not exhaustive, and not all the questions may be relevant in every case. The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case. 4.13. It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed. 9 4.14. Prosecutors should consider each of the following questions: a) How serious is the offence committed? • The more serious the offence, the more likely it is that a prosecution is required.

• When assessing the seriousness of an offence, prosecutors should include in their consideration the suspect's culpability and the harm caused, by asking themselves the questions at b) and c). b) What is the level of culpability of the suspect? • The greater the suspect's level of culpability, the more likely it is that a prosecution is required. • Culpability is likely to be determined by: i. the suspect's level of involvement; ii. the extent to which the offending was premeditated and/or planned; iii. the extent to which the suspect has benefitted from criminal conduct; iv. whether the suspect has previous criminal convictions and/or out-of-court disposals and any offending whilst on bail or whilst subject to a court order; v. whether the offending was or is likely to be continued, repeated or escalated; vi. the suspect's age and maturity (see paragraph d below). • A suspect is likely to have a much lower level of culpability if the suspect has been compelled, coerced or exploited, particularly if they are the victim of a crime that is linked to their offending. • Prosecutors should also have regard to whether the suspect is, or was at the time of the offence, affected by any significant mental or physical ill health or disability, as in some circumstances this may mean that it is less likely that a prosecution is required. However, prosecutors will also need to consider how serious the offence was, whether the suspect is likely to re-offend and the need to safeguard the public or those providing care to such persons. c) What are the circumstances of and the harm caused to the victim? • The circumstances of the victim are highly relevant. The more vulnerable the victim's situation, or the greater the perceived vulnerability of the victim, the more likely it is that a prosecution is required. • This includes where a position of trust or authority exists between the suspect and victim. • A prosecution is also more likely if the offence has been committed against a victim who was at the time a person serving the public. • It is more likely that prosecution is required if the offence was motivated by any form of prejudice against the victim's actual or presumed ethnic or 10 national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or if the suspect targeted or exploited the victim, or demonstrated hostility towards the victim, based on any of those characteristics. • Prosecutors also need to consider if a prosecution is likely to have an adverse effect on the victim's physical or mental

Hence, the AG acting in public interest is subjective. This also has created gap in literature with regards to the discussion on prosecutorial discretion and AML in Nigeria, which this thesis addresses. The integration of Fuller's work to analyze the role of the rule of law in the application of prosecutorial discretion in AML regimes is novel.[484]Furthermore, an analysis on other renowned authors e.g Tom Bingham, A,v Dicey and Aristotle is introduced at the beginning of the thesis. An analysis of A.v Dicey and Tom Bingham's principles on the rule of law proves that the rule of law is central to the AML regime. However, the Fullers principles re more linked to the issues surrounding prosecutorial discretion in the AML regime in Nigeria.[485] It is also important to note that there are several literature analyzing Fullers eight principles, however there is little literature integrating Fullers principles with AML and prosecutorial discretion. No literature makes a critique of Fullers eight principles while discussing issues of corruption and money laundering. This is part of the novel nature of this thesis. If the rule of law is crucial in analyzing issues of corruption related money laundering and the powers of the AG, then then a critique on the application of laws must be done. Hence, Fuller plays a crucial role in the literature of what law ought to be, and how law should be integrated into the society.[486]

Hence, there is a clear gap in the discussion on the role of the rule of law in the integration of prosecutor discretion with PEP, which this thesis addresses.

Furthermore, in analyzing issues of prosecutorial discretion and money laundering by PEP, the integration of legal ethics is done. This is important because for a successful AML regime in Nigeria, the principal actors who happen to be lawyers must act in accordance

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health, always bearing in mind the seriousness of the offence, the availability of special measures and the possibility of a prosecution without the participation of the victim. • Prosecutors should take into account the views expressed by the victim about the impact that the offence has had. In appropriate cases, this may also include the views of the victim's family. • However, the CPS does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest."

Fullers work on Morality of Law is used throughout the thesis. A critical analysis on the eight principles of law has been integrated to the AML regime in Nigeria. Fullers work contributes significantly to the existing literature on rule of law. It is important to note that an analysis on other authors on the rule of law was done. Hence, the literature review is liked directly to the thesis.

The integration of Fullers work is evidenced throughout the thesis.

ibid

with what is best for society. Hence, the integration of virtue and deontological ethics in this thesis. It is important to note that the there are several literatures on legal ethics, but no literature has been applied in the discussion of corruption by PEP and prosecutorial discretion. An analysis of Immanuel Kant's theory on deontological ethics is done and it is linked to issue of money laundering by PEP and the role lawyers could play in regulating AML.[487] A critical analysis is also done using several theories advocating for virtue ethics. Hence, literature discussing Aristotle's virtue ethics is discussed all through the thesis. [488]

4.14 Conclusion

The success of the AML regime in Nigeria is central to the development of Nigeria. The primary setback the AML regime in Nigeria suffers, is its inability to successfully prosecute and convict PEP who have stolen the commonwealth of the nation.

The application of prosecutorial discretion particularly plea bargain in the AML regime, has been wrongly applied in several cases. The rationale behind prosecution is to get justice. There cannot be any better rationale for prosecution than justice, hence the importance of the application of ethical conduct of prosecutors in the AML regime.

The integration of virtue ethics in the existing deontological framework of the AML regime, will create an enabling environment for the rule of law to thrive. In a society where the rule of law is sacrosanct, the chief prosecutor [AG] will not be in a haste to enter a nolle prosequi without considering the ethical implications, particularly if it goes against public interest.[489] The deontological framework of the AML regime appears to have given prosecutors more discretionary powers than they should have, after all, "the rules are clear", and the "rules must be obeyed". This should not be the case. Prosecutors must be guided by their conscience in determining how to apply prosecutorial powers.[490] This in itself is virtue. This could be one of the key problems the AML regime suffers.

Also, upholding the rule of law no matter how highly placed the defendant, is plays a pivotal role to the success of the AML regime. This was seen in the Jolly Nyame and Joshua Dariyes cases, which is regarded as a major success that the AML regime has not recorded in a long

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[487][487] See discussion on deontology ethics in chapter

[488] See discussion on thess amalgamation of virtue and deontological ethics in chapter 3.

[489] See cases as discussed above.

[490] See cases as discussed above.

time, particularly with regards to PEP. This further proves that the integration of Fuller's principle of generality in the application of prosecutorial discretion is central to the growth and success of the AML regime in Nigeria.

Having examined legal philosophers and their argument on the issues on rule of law, the assertions and arguments of thee scholars with emphasis on Fuller and Bingham have shown the significant value the rule of law impacts in a society.[491] The integration of these principles of law particularly with regards to Fuller's inner morality of law can be used as an efficacy test, to evaluate Nigeria's AML regime and its respect for fundamental rules of society and how these rules are applied.

It is obvious that for the positive advancement of the AML regime in Nigeria, the integration of key principles are essential particularly with regards to the typology of money laundering offences Nigeria faces. In addressing the problems of money laundering by PEP in Nigeria, the gaps in the administration of criminal justice and prosecutorial discretion has to be addressed. These gaps particularly with regards to the prosecution of PEP are caused by the concentration of powers by the constitution on an office or individual, the AG. As discussed earlier, the problem associated with too much concentration of powers in the office of the AG, creates a gap for the abuse of prosecutorial powers, discretionary techniques and the rule of law.[492]

This gap also creates an avenue for lopsided application of discretionary techniques either in favor of PEP or against other typology of money laundering offences. Situations where the arbitrary withdrawal of money laundering case by PEP, invoking the powers of S 174 of the constitution is clearly lopsided. S174 of the constitution was not enacted for the protection of the powerful and influential in the society.[493] It might be "good" if the application of these prosecutorial techniques including a notice of discontinuance, is applied on other typology of money laundering offences. Where these offenders are ordinary people in the society and their offences are mainly narcotics related, trafficking related, cyber fraud related money laundering offences, the rule of law and the AML regime appears to be effective. Hence, this is the importance of Fuller's integration of Generality,

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See Introduction Chapter.

See ilori case as discussed above.

Fullers principles on generality of laws. This has been discussed extensively across the thesis.

in the application of rules or the members of the society. The laws that regulate prosecutorial discretion should be applicable to all categories of persons in the society, no matter the class or status. Until when this happens, the citizens might not have confidence in the AML regime in Nigeria.

Finally, ethical consideration of lawyers particularly prosecutors play a pivotal role in the integration of the rule of law in the AML regime. As discussed earlier, there is a connection between legal ethics and the rule of law, particularly virtue ethics. If the rule of law is centered on justice, equity and fairness, so is virtue ethics. Virtue ethics revolves around intent/motive, wrong or right. Hence, prosecutors must balance the strict application of rules(deontology) with their intent or motive by doing what is right (virtue ethics).[494]

For the positive advancement of the AML regime in Nigeria, prosecutors must adhere to ethical principles which could serve as a guide in applying the rule of law when integrating prosecutorial discretion in the AML regime in Nigeria.

[494] See Chapter 3. A detailed analysis of deontological ethics and virtue ethics is given.

Chapter 5

CONCLUSION AND FINAL RECCOMMENDATIONS

Setting up an AML regime in a nation is one thing but having an enabling environment and institutional structure within the criminal justice system that regulates the AML regime and makes it effective, with a focus on the prevalent typology is another thing. The typology of political corruption by PEP has not been effectively prosecuted, yet this typology is the most prevalent and dangerous, not only to the Nigerian justice system but to the development and growth of the nation. The uniqueness of Nigeria's AML regime is in its typology of PEP, the same way the uniqueness of other nations AML regimes could be the typology of narcotics, human trafficking, arms trafficking, tax evasion, banking regulation etc.[495]

Having critically examined the AML regime in Nigeria and the problems with the application of prosecutorial discretion in the prosecution of PEP, there seems to be a link between the application of this discretion and the success or failure of the AML regime. If there is a failure, the primary factor responsible for this is the misapplication of prosecutorial discretion in the AML regime. This is because money laundering, which is a criminal offence, is within the purview of what should be administered by the criminal justice system of the country. Hence, for a more effective AML regime, vital elements which form a successful criminal justice system must be taken into consideration, of which prosecutorial discretion is an element.[496]

The primary problem of the AML regime in Nigeria with regards to the typology of PEP, is the gap between the laws that regulate the AML regime and the enforcement procedure, which includes the prosecution of PEP for money laundering offences.[497] From the findings

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Ike Onyiliogwu, ' Money Laundering by Politically Exposed Persons in Nigeria: Consequences and Combative Measure'[2018]29 Economic Crime Forensics Capstone 6.

It was the revelations from the Abacha regime as discussed in Chapter 2 that led the FATF to recognise the role of PEP as a typology of money laundering and the potential dangers it can cause in destabilising nations.

Ibid.

in this research, this gap is in the discretionary powers given to AML regulatory agencies and the application of this discretion in the prosecution of PEP for money laundering offences. If there is a misapplication of prosecutorial discretion with regards to PEP, which has been identified in a number of cases in this research, it can have a negative effect on the society.

In the Nigerian context, the inappropriate application or misapplication of prosecutorial discretion in cases involving PEP has been responsible for the underdevelopment and the slow rate of economic, human capital and infrastructural growth. From the findings, when prosecutors lose cases involving PEP, or the cases spend a decade in court without making any significant progress, there is a wrong signal passed to members of the political class. It signals that the regulation and enforcement of the AML regime is weak hence, there is no effective punitive measure in place for these high-level offenders.

This is also because, for a punitive measure to be in place, there has to be an effective prosecutorial system, which would bring offenders particularly PEP to face justice. When justice is not served on these PEP as a result of the misapplication of prosecutorial discretion by prosecutors, an opportunity for the continuous looting of the national treasury has been created.[498]

Hence, there is an important link between the application of prosecutorial discretion in the AML regime and development in Nigeria. The positive implication of the diligent application of prosecutorial discretion in the AML regime, is economic growth and confidence by the citizens and members of the international community in the justice system of Nigeria. For an effective application of prosecutorial discretion in the AML regime and for the successful prosecution of PEP, certain factors must be placed into consideration and implemented.

These factors include :

> An evaluation of the role and application of prosecutorial discretion with regards to the provisions of S174 of the constitution, dealing with the powers of the attorney

Okonjo Iweala, *Fighting Corruption is Dangerous* [MIT Press, 2018]17.

general as the sole authority with discretionary powers to prosecute and withdraw charges.

A re- examination of international policies and recommendations on the measurement of what a successful AML regime must achieve.

An integration of the rule of law into the AML regime of Nigeria irrespective of the status or class of the offender.

A critical evaluation on the role of stakeholders, prosecutors and lawyers in the AML regime.

There is a strong link between these factors. Each of these factors cannot be implemented on its own. For an effective AML regime, particularly a regime which's prevalent typology is PEP, the application of all these factors can propel the current regime to be a success. To achieve this success, this research has contributed originally to the body of knowledge.

5.1 Original Contribution to Knowledge:

In carrying out this research, I have been able to synthesise and put together ethical theory; rule of law theory and specifically Fuller, as a source for an evaluative stance. Substantive law of AML in Nigeria, an account of the institutional structure for the prosecution of crime under Nigerian law; legal ethics of both defence and prosecution lawyers in Nigeria). I have forged new insights and identified key problems. I have done this by not only bringing these aspects of this research together, but by integrating them into a coherent account of the AML in Nigeria and identified structural problems arising from two sources:

The process by which the intentional AML regime was formulated and adopted by Nigeria and a lack of an understanding at that time of how it should have been integrated into the Nigerian legal system.

The over centralisation of prosecutorial discretion in Nigeria on the AG, the lack of any judicial review of the discretion held by the AG, and a lack of appreciation of the centrality of prosecutorial discretion for an effective AML and indeed for the rule of law in Nigeria.

5.2 Unconditional Integration of the Rule of Law

The rule of law is central to the success of any nations criminal justice system. Since the AML regime is a branch of the criminal justice system, it is safe to assert that if prosecutors adhere to the rule of law in the application of discretionary techniques in prosecuting, the AML regime would be more effective. Prosecutors should not feel intimidated by PEP into compromising the central element of Justice, which is the rule of law. In Lord Acton's letter to Bishop Creighton he stated :

> "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it. That is the point at which the negation of Catholicism and the negation of Liberalism meet and keep high festival, and the end learns to justify the means. You would hang a man of no position, like Ravaillac; but if what one hears is true, then Elizabeth asked the gaoler to murder Mary, and William III ordered his Scots minister to extirpate a clan. Here are the greater names coupled with the greater crimes. You would spare these criminals, for some mysterious reason. I would hang them, higher than Haman, for reasons of quite obvious justice; still more, still higher, for the sake of historical science."[499]

The Wall Street Journal, (may18,2012) >https://www.wsj.com/articles/SB10001424052702304749904577386330173853236 > assessed 30th August 2019.

Lord Acton might have envisaged that there would come a time in the life of a society called Nigeria, where favouritism in the application of laws would exist. The views of Acton appear to be very alive in the criminal justice system and indeed the AML regime of Nigeria today.

The AG who is the chief law enforcement officer of the country owes a duty to nation to adhere to the rule of law hence, occupants of the office shouldn't be in haste to apply discretionary powers in favour of a particular class and status of money laundering offenders. Prosecutors must understand that these class of persons [PEP] perpetuate the typology which negatively affects the growth and stability of the nation.

In most developed nations, the institutions are pivotal in the administration of governance and not individuals. The institutional supremacy over individuals no matter how highly placed the individual is, further consolidates on Dicey's rule through law. This principle given by Dicey, appears to be one of the elements lacking in the criminal justice system of Nigeria. The integration of the principles of the rule of law in the criminal justice system of Nigeria could make the administration of justice more effective, particularly with regards to the prosecution of PEP for money laundering.[500]

The institutional supremacy in the regulation and prosecution of AML should be present. The transparency and non-selective prosecution of money laundering offenders would strengthen the institutions and the citizens of the state would have confidence in these institutions.[501] This in itself, could see to the application of the rule of law in the prosecution of money laundering cases in Nigeria.

For example, the rules and the application of the rules that govern the prosecution of money laundering offenders in Nigeria should be Uniform. The prosecution of PEP for money laundering offences should not be any different from the prosecution of other typology of money laundering offence. The treatment of those who have stolen government funds and have necessitated underdevelopment in Nigeria, should be as

500 Tosin Osasona 'Time to Reform Nigeria's Criminal Justice System'[2015]3Journal of Law and Criminal Justice 74 .

Ibid.

stringent as other money laundering offenders who do not have access to government patronage and the corridors of power.

The application of prosecutorial techniques like plea bargain should be applicable to other typologies of money laundering and not only PEP. The application of prosecutorial techniques in favour of certain class of persons by prosecutors is an affront to the concept of equality before the law, which could undermine the criminal justice system of Nigeria and indeed the AML regime. Government officials who have committed offences against the state should treated the same as commoners who have committed offences against the state. When this happens, members of the society would have confidence in the justice system and would understand that nobody is above the law.

For the integration of the rule of law in the justice system of a nation, the civil rights of individuals particularly persons under trial must be respected. There must be a presumption of innocence on a defendant during trial hence, the defendant cannot and should not be treated like a convict. This is a fundamental element in the application of the rule of law in criminal justice systems. The application of this rule must also not be one sided. It has to be applied from bottom to top, irrespective of your status in the society. The rule of law must be adhered to in the administration of criminal justice, particularly the AML regime in Nigeria. The rights and liberties of money laundering offenders irrespective of their status must be protected.

The adherence to the fundamental rights and liberties in prosecution of money laundering offenders in Nigeria appears to be present in a typology of money laundering offence, which is PEP. When prosecuting those who have enriched themselves through corruption and abuse of office, the prosecuting agencies appear to enforce the "the rule of law". These offenders are treated with respect and courtesy, bail is usually granted on self-recognition, yet this typology of offenders use all sorts of technicalities in the course of trial to delay the dispensation of justice.[502]

Again, reference is made to fullers principles on generality of law. The application of discretionary powers should not be lopsided to the rich and powerful. The rule of law must run from bottom to top of the society, not the opposite.

The same courtesy and respect of fundamental rights is never given to other typology of money laundering offenders. In most cases, AML regulatory agencies would arrest and not grant bail to these offenders. It can be argued that this discriminatory treatment is primarily because other typology of money laundering offences e.g. drugs and narcotics, human trafficking, arms trafficking etc, are most likely perpetuated by persons who have no high standing in the society.[503] These persons cannot take advantage of the system by mounting undue pressure on the instruments of power and prosecuting agencies hence, their civil rights and liberties are abused. This is wrong.

The application of the rule of should know no class and status, irrespective of whom an offender is the rights and liberties of the offender must be respected.

It important to note that the categories of persons whose rights and liberties are abused are ordinary citizens. This abuse of fundamental human rights never happens to PEP who have stolen government funds and have laundered the proceeds. A justice system where the ordinary offender's rights are abused while the big offender's rights are respected are signs of underdevelopment. Hence the linkage between the enforcement of fundamental human rights/liberties, the rule of law and development.[504]

PEP must understand that they represent the public and the public has entrusted their resources with them.

For example, the AG of Nigeria is a PEP and interestingly is the sole custodian of prosecutorial discretion in the country. The implication of an AG not acting in good faith particularly in the prosecution of fellow PEP is that it could undermine the AML regime. The AML regime which might not reach its full potential and might not be able to hold public officials accountable, if the AG refuses to exercise his powers in good faith in the prosecution of PEP. The AG should not deploy prosecutorial techniques that could frustrate the trial of PEP, by virtue of the powers conferred on the AG by the constitution (the people). Hence, the AG in person as a public official needs, to be held accountable for

ibid

Ibid, Bingham,63

actions taken while in office, particularly with the way the AG applies prosecutorial techniques in the AML regime in Nigeria.[505]

The Attorney General [AG] plays a central role in the administration of criminal justice system in Nigeria. This central role played by the AG is the supervision of and application of prosecutorial discretion. As discussed in the preceding chapter, the AG is the principal officer empowered by the constitution of Nigeria, to prosecute criminal cases on behalf of the government. This clear implication is that, the AG possesses prosecutorial powers by virtue of S 174 of the constitution of the Federal republic of Nigeria 1999, which confers powers on the AG.[506]

The AG doubles as the minister for Justice who heads the justice system, which includes procedural administration, civil servants working under the ministry for justice and the administration of courts.[507] The AG is the only cabinet member whose powers are clearly stated in the Nigerian Constitution. It can be argued that by virtue of how the constitution is drafted, the AG holds enormous powers, particularly with regards to the administration of the criminal justice system.[508]

The AG by virtue of the Constitution and the Administration of the Criminal Justice Act 2015, has the exclusive authority to administer prosecutorial discretion. As discussed in the preceding chapter, the application of prosecutorial discretion in the criminal justice system is the exclusive responsibility of the AG. AML regulatory agencies that have prosecutorial powers by virtue of their establishment Act including the EFCC and the ICPC, prosecute on behalf of the AG. The AG's discretionary powers not only includes whom to prosecute or the charge to prosecute with, but also the power to withdraw an ongoing case from further

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Nasir Muhammad Al, 'Bio politics, Thanatopolitics and the Right to Life'[2017]34 Theory, Culture & Society76

506 Constitution of the Federal Republic of Nigeria, 1999, S 174

507 Osita Mba, 'Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: an Imperative of the Rule of Law'[2010]2 Oxford University Law Forum 17

508 ibid

prosecution even a day before judgement is to be delivered.[509] The implication of these discretionary powers given to the AG by the constitution is that, the AG could also decide on the application of a prosecutorial technique irrespective of whether or not the prosecutorial technique is best applicable to the case at hand.

For example, the EFCC as an AML regulatory agency can decide to propose a plea bargain to a defendant in the process of prosecution, and the AG can reject the proposal and demand for prosecution on all the charges proffered against the defendant. This is primarily because AML regulatory agencies like the EFCC and the ICPC despite possessing prosecutorial powers, are prosecuting on behalf of the AG who derives powers from the constitution.[510]

The EFCC is established as an independent body with the sole responsibility of investigating and prosecuting money laundering related offences, which ideally should mean that the EFCC can prosecute without consulting or authorization from the office of the AG. Unfortunately, this is not the situation in Nigeria.[511] This is because the AG derives powers from the constitution, while the EFCC derives its powers from an Act of parliament. Hence, the AG has overriding powers over the AML regulatory agencies by virtue of S1 of the Constitution of the Federal Republic of Nigeria, 1999.[512] This cannot continue. The independence of AML prosecutorial agencies must be guaranteed by amending the constitution and making these AML regulatory agencies truly independent from the influence of the AG.

Hence, if an individual who happens to be a political appointee of the President [AG], possesses such powers to influence the process of prosecution and withdraw a case from prosecution without prior notice, This could can potential problems. The problems

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509 Isabella Okagbue, Private Prosecution in Nigeria: Recent Developments and Some Proposals'[1990]34 Journal of African Law 57

510 Oke Tayo, 'Financial Crime Prosecution, Legal Certainty and Exigency of Policy: Case of Nigeria's EFCC'[2014]21 Journal of Financial Crime 58

Ibid.

Constitution of the Federal Republic of Nigeria, 1999, S1

attached with this individual discretionary power has to do with the limitation of the application of prosecutorial discretion and the rule of law.

From the provision in S1 of the constitution, the AG can decide to undermine the powers of AML regulatory agencies and withdraw a case, or alter a plea bargain agreement, which could lead to a lack of transparency in the prosecution of money laundering offenders. The lack of transparency and the arbitrary application of the AG's powers, in selecting who to prosecute and what case to withdraw, is necessitated by the "supremacy of the constitution". Therefore, any AG who chooses not to adhere to the principles of the rule of law, or is ready to compromise certain ethical standards in favor of a PEP that is been prosecuted, could do so, using the provisions of the constitution as a defense. This enormous power unwittingly given to the AG has caused problems with the integration of the rule of law in the AML regime and the criminal justice system in general.[513]

Hence, the need for a constitutional amendment. The provisions of S174 needs to be amended, decentralizing the powers of the AG.

In the process of making laws particularly AML regulations in Nigeria, members of parliament should carry out due diligence, with the aim of ensuring that there are no possible existing laws that are contrary, or would undermine the laws that are been made to regulate the AML regime in Nigeria. From all indicators, the provisions of S174 of the constitution appears to be the greatest threat to the AML regime in Nigeria.[514] While the EFCC Act gives powers to the commission to regulate and prosecute money laundering activities, the constitution empowers a potentially corrupt AG to frustrate the activities of the EFCC and undermine the rule of law. A corrupt AG can take advantage of the provisions of S 174 basically because, there is a contradiction with regards to the powers of the EFCC and the powers of the constitution. The constitution is a law while the EFCC Act and other money laundering regulations are laws. However, since its settled law that the constitution is supreme over any law in the land, those with the responsibility of enacting laws that

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Ibid.

See chapter 4.12, it discusses the integration of the rule of law and the powers centred on S 174 of the constitution.

regulate the AML regime should have put the constitution into consideration with the intent of not enacting a law that is contradictory to an existing superior law.[515] This alone is enough to frustrate the AML regime in Nigeria and undermine the rule of law. Hence, in enacting laws that regulate the AML regime in Nigeria, law makers must avoid any form of contradiction with any existing law, whether superior or inferior. This is the reason why Fuller emphasizes on the non- contradiction as an element of a good law which could In turn integrate the rule of law in the society.[516] If Fuller's opinion is that a law does not allow what another law prohibits, then it can be argued that the provisions of S6 of the EFCC act contradicts the provision of S174 of the Constitution of the Federal Republic of Nigeria.

Another problem attached with this contradiction is that, AML regulatory agencies like the EFCC would not be able to exercise their full discretionary powers in prosecuting money laundering offences without undue interference from the office of the AG. The EFCC and other AM regulatory bodies like the ICPC and the NFIU may lack the political will to prosecute money laundering offenders particularly PEP. This is because the PEP in most instances might have "political friends" and political connections.[517] The PEP might enjoy government patronage and might have access to the AG. The implication of this contradictory law is that the EFCC in prosecuting a PEP, understands the peculiarity of this typology of money laundering offender, and also understands that such an offender might have access to the AG who in return could interfere with the proceedings, either at investigation or prosecution stages. [518]

If there were no legislation contradicting the powers of AML regulatory and prosecutorial agencies, there would be a lesser probability of an AG or any occupant of the office to misuse his powers by either discontinuing prosecution or altering plea bargain agreement.

Fuller,63

Ibid.

Oladayo Nathaniel, ' Political Corruption and Underdevelopment in Nigerian Fourth Republic'[2014]11 International Journal of Innovation and Scientific Research 153.

Ibid.

Which can be described as not only misuse of office, but obstruction of justice backed with legality and rules.

Hence, it can be argued further that there is a connection between the contradiction of laws regulating the AML regime in Nigeria and ethics, which in turn might be responsible for the unsuccessful prosecution of PEP. There is a connection because if there was no contradiction between the legislation that regulates AML in Nigeria and the provisions of the constitution which gives the AG sole discretionary powers to prosecute (as the constitution is supreme), then AML regulatory agencies would have been able to act independently as a prosecutors of money laundering offences.[519]

The ethical implication is that an AG could misuses the office by applying the provision of S174 of the constitution of the Federal republic of Nigeria 1999, with intent to obstruct the course of justice and ensure that a PEP doesn't face justice for stealing and misappropriating public funds. After all, the AG can argue that he's acting within the constraints of the law, as the law permits the AG to "legally" violate the principles of the rule of law. Hence, again there is a connection between ethics and the rule of law for an effective AML regime in Nigeria.

This is arguably so because the intentional misapplication of the provision of s174 of the constitution might be as a result of the deontological ethical approach in the criminal justice system in Nigeria, rather than virtue ethics.[520] The adherence to strict rules which regulate and govern the conduct of man is good. A society without rules and laws could give evolve into a state of anarchy and chaos. Life would be nasty brutish and short.[521]

This is the reason why nations are regulated by laws, to avoid a situation where there will be lawlessness.[522] However, while adhering strictly to rules we should do so with a moral

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519 Ibid, Tayo, 59.

As noted above, the deference of the Supreme Court makes the importance of the character of the AG more important, as he faces any political accountability.

Thomas Hobbes, *The Levathian (revd edn, Penguin Classics1981).*

Qun Gong, 'Virtue Ethics and Modern Society—A Response to the Thesis of the Modern Predicament of virtue Ethics'[2010]5 Frontiers of Philosophy in China Journal 258.

justification as to determine whether or not actions or inactions are morally right or wrong. The character of the individual carrying out an action can relate with the motive behind the action, which is virtue.[523] The application of discretionary powers with regards to the principles of right and wrong as prosecutors, is virtue. It can be further argued, for the integration of the rule of law in the AML regime and the justice system of Nigeria, there should be an amalgamation of application of virtue ethics and deontological ethics. This is because, prosecutors particularly the AG, would not hide under the provisions of S 174 of the constitution of the federal republic of Nigeria to undermine the rule of law. An AG whose motive is to obstruct the course of justice would use deontological ethics (adhering to strict rules) as a shield, protecting him from doing what is right, thereby claiming to be adhering to principles of the rule of law.[524]

It must be understood that the same obligation the AG owes the state when authorizing the prosecution of other typology of money laundering offenders, is the same obligation the AG owes when prosecuting persons who are influential and have been given a political mandate by the people, whom they are meant to govern.

What this means is that there must be a general attitude and perception that there is no preferential treatment in the prosecution of a "class" of money laundering offenders. The typology of money laundering offence is inconsequential when the character of the prosecutor is not in question. The AG would care less if he is prosecuting a governor, senator or any other PEP who has the political privilege or access to the corridors of powers, if doing what is right is all that matters. The AG would most likely ensure an efficient prosecution of the PEP the same way the prosecution of other typology of money laundering offenders e.g. drugs and narcotics, arms trafficking. Human trafficking, cyber fraud etc are effective.

Hence the importance of an integration of Fullers generality in the AML regime in Nigeria. Laws must be general.[525] The applicability of laws to everyone in a society no matter the

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Ibid.

See Chapter 3 on deontology ethics and adherence to strict rules.

Ibid Fuller,46.

class or status, would create an enabling environment for the rule of law to thrive. When members of a society understand that no matter their class or status, the long arm of the law would catch up with them when they break the law, then we can feel the complete integration of the rule of law in the society.[526] For this to happen, set rules that are applicable to persons who are considered as ordinary citizens, must be the same set rule that are applicable to persons PEP, particularly in the AML regime. If the AG gives an impression that some money laundering offenders are "superior" [PEP] to other money laundering offenders, then the AG is consciously creating an enabling environment of corruption, mismanagement of public funds and not holding public officials accountable.[527]

Again, relationship between ethics and the rule of law. The ideal situation for the effective integration of the rule law in prosecutorial discretion is that, there must be an amalgamation of strict rules[deontology] and moral values[virtue]. What this does is that the AG who is the final authority with discretionary powers, would be properly guided by the laws of the land and core values that promote the interest of equity natural justice and good conscience. The integration of both ethical ideologies could assist in having a more effective AML regime in Nigeria. It can be argued further that, S 174(3) of the constitution of the Federal Republic of Nigeria, had envisaged the need of an AG to possess the moral consciousness in the application of his prosecutorial powers.

From the provisions in S 174(3), it the interest of the public must be put into consideration before an AG should apply discretionary powers on the decision to prosecute.[528] Maybe it exists to guide the AG in the application of this discretion. This is because the constitution envisaged a situation whereby the occupant of the office of AG, would attempt to abuse the office. It can be argued that the interest of justice is the hallmark of the rule of law, hence all actions of the occupant of the office of the AG should revolve around the interest of justice.[529] The AG should not compromise the office by discontinuing the prosecution of PEP due to political alliance or undue pressure from his employer (the President). It is in

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Ibid Fuller,46

Ibid, O. Nathaniel,154.

Constitution of the Federal Republic of Nigeria, 1999, S 174(3).

Ibid.

the interest of justice that those who have unjustly enriched themselves at the expense of the development of the Nigerian state should be prosecuted, irrespective of their class or status in the society. The AG should not apply prosecutorial techniques with sole aim of obstructing the course of justice and undermining the AML regime. Again, the need to decentralize and amend the constitution.

Efforts must be made by stakeholders in the justice sector and the citizens to ensure that persons, irrespective of their status are diligently prosecuted, without fear or favour and without compromise of these discretionary technicalities.[530] This is a collective responsibility of citizens and regulators.

The rule of law is supreme, and its supremacy lies in the General application of laws and not lopsided application of laws to the advantage of a class of persons. Hence, Fuller's *Morality of Law* can be used as a model to guide regulators in the AML regime. If this is done, there would be a general procedure in the application of discretionary techniques irrespective of the defendant's class and typology of money laundering offence.

5.3 Amalgamation of Virtue Ethics and Deontological Ethics as a Guide for the Legal Profession and Stakeholders in the AML Regime.

There has to be a critical evaluation of core values and ethics of stakeholders, particularly prosecutors and defence lawyers. This is very important and central to the success of a nations AML regime. The core ethics and code of conduct of lawyers must be evaluated and possible reforms should be carried out. This is because most regulators and prosecutors in the AML regime in Nigeria, are legal practitioners. Legal practitioners are called to the bar not only by learning but also character. The character of a prospective lawyer who ends up been a prosecutor or a defence lawyer, severs as a guiding factor in the decisions that would be made. Hence, most law schools in Nigeria emphasise on ethics and conduct of lawyers.[531]

Bolaji Owasanoye, *Justice or Impunity? High Profile Cases Crawling or Gone to sleep*(HDI Press, 2014)

Alice Wooley, Bradley Wendel 'Legal Ethics and Moral Character'[2010] 6 Cornell University Law Journal 136.

However, one cannot enforce character on would be lawyers and practicing lawyers through promulgation of a code of conduct or rules alone, hence the RPC has not been as effective as it should be. As discussed in the ethics chapter, the deontological approach of legal ethics in Nigeria has not been as effective as it should be, particularly in the AML regime in Nigeria. This ineffectiveness is because of the "rules" based assessment of ethical conduct, which has enabled some bad elements in the legal profession to manipulate these rules to their advantage.[532] Adherence to the Rules of Professional Conduct 2007 and the Legal Practitioners Act 1975 is good. The existence of these rules and regulation gives a guide to lawyer's behaviour and conduct. However, what the proponents of strict adherence to rules in the legal professional fail to understand is that, "bad" decision or actions can be made under the guise of adhering to these rules. It is usually better when there is a moral motivation and inclination, alongside adhering to strict rules and regulation. The motive behind a lawyer's action should be for the greater good of the society rather than strict adherence to rules and regulation. Hence, the importance of the incorporation of virtue ethics in the regulation of lawyers within the Nigerian Jurisdiction.[533]

If there is an amalgamation of deontological ethics and Virtue ethics, problems arising from the conflict of interest between the AML regime, the Rules of Professional Conduct 2007 and the Legal Practitioners Act 1975 would not arise. As discussed in the ethics chapter, the primary conflict of interest between the AML regime and the Laws that regulate the conduct of lawyers is centred on confidentiality.[534] The laws that regulate the AML regime classify lawyers as DNFI, when regulators of the regime insist that lawyers must disclose. Lawyers have also insisted that the classification of DNFI does not apply to them and have refused to disclose suspicious financial transactions, on the basis that the laws which regulates the conduct of lawyers forbids them to disclose. This conflict would continue to frustrate the AML regime in Nigeria.[535]

See Chapter 3, on role of Designated non-financial institutions and confidentiality.

See chapter 3, on the amalgamation of virtue and deontological ethics.

See chapter three on the role of confidentiality in ethics. A detailed explanation is given.

Angelo Nicolaides & Stella Vettori 'The Duty of Lawyers: Virtue Ethics and Pursuing a Hopeless Legal Case'[2019]5 Athens Journal of Law 150.

In as much as lawyers have a duty to obey their rules lawyers also owe a moral duty to the society because if there is no society there would be no place for lawyers to practice law. The incorporation of virtue ethics in the regulation of the conduct of lawyers, would compel them to report suspicious transaction of their client, particularly if these clients are PEP. Knowing the enormous damage political corruption and money laundering has done to the Nigerian state, lawyers owe a moral obligation to assist the AML regime in achieving her goals by not withholding information that could assist the prosecutor AML regulators. There needs to be a change to the rules to permit disclosure.

Furthermore, it might be better for the AML regime and the criminal justice system, if the sections of the Rules of Professional Conduct and the Legal Practitioners Act which enforce strict adherence to confidentiality, should be amended or possibly expunged. The strict adherence to confidentiality should be subjected to the public interest and the rule of law. Confidentiality between lawyer and client is of less interest than the interest of the public. Lawyers must understand that is virtuous to disclose suspicious transactions to the regulatory authorities, which in turn would make the work of the prosecutor easier. It is virtuous because Nigeria would be a nation when political corruption reduces to the minimum, which can only be possible when and if lawyers obey the Rules and act with virtue.

Again, lawyer/client confidentiality is necessary for the rule of law. Hence, the has to be a harmonisation between confidentiality and suspicious reporting.

The integration of virtue ethics also applies to prosecutors in the AML regime. Prosecutors must be able to take firm decisions which could create an enabling environment for a fair trial. The integration of virtue ethics also applies to prosecutors in the AML regime. Prosecutors must be able to take firm decisions which could create an enabling environment for a fair and speedy trial of PEP. As discussed in the ethics chapter, compromised prosecutors can hide under the cover of adherence to strict rules including procedure of practice to intentionally miss-apply prosecutorial techniques.[536] This is a

[536] See chapter 3 on legal ethics.

problem, which the application of deontology ethics alone to legal practitioner's conduct cannot solve.

For prosecutors in the AML regime to understand that, it is in the greater good of the nation for the AML regime to be effective and political corruption is adequately addressed, there must be a moral conviction on the part of the prosecutors. This moral conviction alongside with laid down rules and principles, would serve as a guide in the application of a notice of discontinuance and plea bargain on money laundering cases by PEP. The potential abuse of powers by the AG and prosecutors would be a lesser probability, when they feel there is a moral obligation to do what is right and act in the interest of justice. The fact that some prosecutor choses to act in the interest of justice shows that there is a moral conviction, which the prosecutor believes in, and a moral obligation which the prosecutor feels should be owed to the public.

Hence, there should be background checks on persons who aspire to be members of the bar. These background checks should include the criminal history, financial history, emotional stability and general behaviour. Lawyers should not be admitted to the Bar solely on academic and intellectual requirements. The character and conduct of persons admitted would determine quality of the justice system. This is because a Judge who is an integral part of the justice system, is primarily a lawyer that has been called to the bar before been appointed on the Bench. The defence lawyer and prosecutor also play an integral role particularly the prosecutor, who has a discretionary role to play. Hence the importance of ethics.

Therefore, it is understandable that it might be difficult to enforce virtue ethics or to ensure that lawyers act in accordance with morality, this is because one cannot enforce people's character.[537] Character is formed over time. However, this problem in the legal profession can be managed by ensuring that that those who are called to the Bar are worthy of character. Only then, the deontological approach (Rules of Professional Conduct) should be introduced to lawyers who are already worthy of character(virtue).

[537] See chapter 3.3 on virtue ethics.

5.4 Decentralisation of the Powers of the AG/ a Review of S 174 of the Constitution of the Federal Republic of Nigeria, 1999 and the Independence of AML Prosecutorial Agencies

There must be a decentralisation of the powers of the AG. The provisions of S174 of the Constitution of the Federal Republic of Nigeria has to be amended. This is because power corrupt, and absolute power corrupt absolutely. The criminal justice system of a nation cannot be anchored on one individual. The negative implication of this is obvious, as seen in the Nigerian criminal justice system. The decision to prosecute criminal offences should be addressed at entry level by ensuring that that those who are called to the Bar are worthy of character. Only then, the deontological approach (Rules of Professional Conduct) should be introduced to lawyers who are already worthy of character(virtue). and shouldn't be subject to the discretion of the AG alone.[538] The decision to withdraw a criminal charge should not be subject to the sole discretion of the AG. As discussed in the prosecutorial discretion chapter, a primary problem of the criminal justice system and the AML regime is the misapplication of discretionary techniques. The misuse of the powers of the AG in the application plea bargains and notice of discontinuance in money laundering cases of PEP without recourse to the consent of AML regulatory agencies, is as a result of the centralisation of powers.[539] The powers of the AG with regards to the discretionary right to prosecute must be subject to judicial review. The discretionary right to prosecute in a nations criminal justice system cannot be left at the mercy of an individual without any checks and balance.

The political check on the AG is inadequate. Since the Ag is an appointee of the President, the President who heads the executive arm of government and members of the legislative arm of government should do more in checking the powers of the AG.

See chapter above on prosecutorial discretion. A detailed analysis is given as to why the AG shouldn't be the only person with sole discretionary powers.

Osita Mba, Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: an Imperative of the Rule of Law[2010] 2 Oxford University Comparative Law Forum

Decisions taken by the AG must be subject to review by the supreme court, particularly if the public considers the case sensitive one, or the AG has acted against the interest of the public.[540] S 174(3) of the constitution which makes provisions for an AG to act in the interest of the public, would be meaningless if there are no checks and balances that can be deployed by the judiciary to ascertain whether or not the AG acted in the interest of the public.[541] Hence, S 174 of the constitution must be amended to include a clause which would subject the AG decision to apply a "nolle prosequi" to judicial review by the Supreme Court. Nothing less than the Supreme court should review the decisions made by the AG when applying this discretionary technique, so that the AG would not be given an opportunity to challenge the review any further.

There also needs to be a decentralisation of the AML regulatory agencies in Nigeria. the AML regulatory agencies need to act independently from the office of the AG. AML regulatory agencies like the EFCC and the ICPC would need to amend their Act, creating a caveat stating that the actions of the agencies should not be subject to the powers and jurisdiction of the AG. If this happens, it could eliminate any form of undue interference and pressure from the AG, in dictating how these agencies should prosecute and who they should prosecute, particularly when prosecuting PEP. However, the problem could remain if a caveat which allows for the independence of the AML agencies without recourse to the AG is included in the amended Act of these agencies, while the constitution itself is not amended. This is because the constitution is supreme. Hence, the amendment of S174 of the constitution is key to the survival and efficiency of the AML regime and the prosecution of PEP in Nigeria. Also, the use of prosecutorial discretion by these agencies should be subject to possible judicial review.

5.5 A Review of the Test and Assessment of What a Successful AML Regime Should be.

In as much as success is a process, the real measurement for assessing success is the result. International organisations like the FATF and influential nations like the USA and the UK, have in the past been concerned about Nigeria's corruption and money laundering problem. Hence pressure from these countries and international organisations like the

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FATF made Nigeria to integrate the typology of corruption in her AML regime.[542] Since then it appears the international community and FATF have been satisfied with Nigeria and have given Nigeria a pass mark on her fight against corruption and money laundering. This is because it is public knowledge that Nigeria has an AML regime, and has been prosecuting high profile persons for money laundering.[543]

However, the international community needs to continuously mount pressure on Nigeria. This is because when you measure the numbers of convictions secured by the AML regime against the number of ongoing money laundering cases, the convictions are insignificant. As a fact, Nigeria's last high-profile conviction on a money laundering related offence was in 2018, prior to that it was in 2011 and 2007 respectively. The EFCC has been prosecuting over 40 high profile PEP since 2004, most of which are still ongoing.[544] A nation that spends almost two decades in prosecution persons who allegedly have stolen her commonwealth

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FATF/ GIABA Mutual Evaluation of Nigeria, > https://www.fatf-gafi.org/countries/n-r/nigeria/documents/mutualevaluationofnigeria.html > assessed 29 November 2019

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See appendix, A list of ongoing and decided cases by the EFCC. It is important to note here that most of these cases have not been decided. Some of these cases have been ongoing since 2004(the year EFCC was created). What is more worrisome is the fact that these high-profile cases remain in court while other typology of money laundering offences e.g drugs and narcotics, cyber fraud, trafficking etc are quickly dispensed with. Yet the most prevalent typology in Nigeria appears not to be getting its deserved attention. The table shows that out of about 40 high profile cases less than 5% have been dispensed with. It also important to note that high profile cases where the EFCC lost in court, are not included in the table. Only three of these case have judgement been delivered in favour of the Federal Government. Of course, the EFCC as the regulatory agency in charge of money laundering related offences prosecutes on behalf of the government. The table is an indication that the prosecuting agency has not met its obligation by ensuring that most of these cases are concluded and offenders are punished for stealing the commonwealth of the nation.

Organisations like the FATF should ask the right questions by using tables and data like this in assessing whether or not the AML regime in Nigeria has loved up to its expectation.

The table was downloaded from the official EFFCC website.

is certainly not making progress in her AML regime.[545] Hence, the assessment of the international community and the FATF with regards to Nigeria's progress with the typology of corruption is wrong.

It appears the wrong questions have continuously been asked hence, Nigeria is not under pressure to muster the political will to ensure that these high-profile offenders are successfully prosecuted. The wrong question is: How many PEP is Nigeria prosecuting for corruption and money laundering offences? Of course, with this question and by any standard Nigeria is performing and living up to expectation with regards to the prosecution of PEP for money laundering offences.

However, the right question should be: How many high-profile PEP has Nigeria successfully prosecuted since the inception of these AML regulatory agencies? If this is the question, then Nigeria's AML regime is seriously underperforming. Until the right questions are asked, the greatest concern of the AML regime in Nigeria, which is the typology of corruption by PEP would never be significantly solved.

High Profile Cases being Prosecuted by EFCC > https://efccnigeria.org/efcc/images/HIGH%20PROFILE%20CASES%20BEING%20PROSECUTED%20BY%20THE%20EFCC%20FOR%20%20%20%20%20%20AG.pdf< assessed 25th August 2019

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Appendix 1

Table 6.1 High Profile Politically Exposed Persons, Oil Subsidy, etc, Matters Being Prosecuted By EFCC

NO		PARTIES	CASE/CHARGE NO	BRIEF SUMMARY OF FACTS AND NATURE OF OFFENCE(S)	YEAR CASE WAS FILED IN COURT	COURT	STATUS
1		FRN V ALHAJI DANJUMA GOJE & 4ORS	FHC/GM/CR/33C/2011	The 1st accused was the Executive Governor of Gombe State. He is facing trial alongside	2011	Federal High Court, Gombe	Office of the AG has taken over the case. Case withdrawn

				others for corrupt practices and money laundering allegedly committed while he was the Governor			

2	FRN V JOLLY TEVORU NYAME.	FCT/HC/CR/82/2007	The accused who was the Executive Governor of Taraba State is standing trial on a 41-count charge of criminal misappropriation of public funds, embezzlement, and criminal breach of	2007.	High Court of FCT.	Judgment Delivered. Conviction Secured

			trust.			
3	FRN V JOSHUA DARIYE.	FCT/HC/CR/81/07	The accused who was the Executive Governor of Plateau State is standing trial on a 23- count charge of criminal misappropriation of public funds, embezzlement, and criminal breach of trust.	2007.	High Court the FCT.	ofJudgment Delivered. Conviction secured.
4	FRN V ORJI UZOR KALU & ORS.	FHC/ABJ/CR/56/07	The 1st accused who was the Executive Governor of Abia State is standing trial alongside others for	2007.	Federal High Court, Abuja	Judgement Delivered Conviction secured

			money laundering allegedly committed by him when he was the Governor of Abia State.			

						y appeal by the defence.
5	FRN V SAMINU TURAKI & ORS.	FHC/ABJ/CR/86/07	The 1 accused who was the Executive Governor of Jigawa was charged for corruption related money laundering allegedly committed by him while he was the Governor of the State.	2007.	Federal; High Court, Dutse.	Defendant has absconded . Bench warrant issued for his arrest.
6	FRN V. AUDU ABUBAKAR & ANOR	CR/115/2013	The 1st accused who was the Executive Governor of Kogi State was charged for corruption related money laundering allegedly committed by him while he was the Governor of the State.	2013	Federal High Court, Abuja	Trial was ongoing before the decease of the 1 defendant.
7	FRN V TIMIPRE SYLVA & 6 ORS	FHC/ABJ/CR /280/2015	The 1st accused who was the Executive Governor of Bayelsa State was charged for corruption related money laundering allegedly committed by him while he was the Governor of the State.	2015	Federal High Court, Abuja.	Case dismissed as an abuse of court's process. Measure have been taken to appeal against the decision
	FRN V ESAI DANGABAR & 7	FCT/CR/64/2012	The accused persons are facing breach of trust	2012	FCT High Court,	Trial

	Ors		and misappropriation of Police Pensions funds.		Abuja	ongoing
9	FRN V MURTALA NYAKO & ORS	FHC/ABJ/CR/293/2015	The 1st accused who was the Executive Governor of Adamawa State is facing trial alongside others is facing trial for corruption related money laundering	2015	Federal High Court, Abuja	Trial has commence din the case
10	FEDERAL REPUBLIC OF NIGERIA V SULE LAMIDO & ORS.	FHC/KN/CR/116/2015	The 1st accused who was the Executive Governor of Jigawa State is standing trial alongside others for corruption related money laundering	2015	Federal High Court, Abuja	Trial is ongoing

11	FRN V DR. SANI SHAIBU & 10ORS	TEIDIFHC/ABJ/CR/82/2013	The accused persons are standing for pension scam in the office of the Head of Service of the Federation ..	2013	Federal High Court, Abuja	Trial is ongoing
12	FRN V TEMISAN OMATSEYE (NIMASA)	FHC/L/482C/2010	The Accused is who was the Director General of NIMASA is facing for offences under the Public Procurement Act.	2011	Federal High Court, Lagos	Trial is ongoing

13	FRN V OTUNBA ALAO-AKALA	1/5EFCC/2011	The accused who was the Executive Governor of Oyo State is facing corruption and money laundering charges.	2011	High Court, Ibadan	Trial is yet to commence . Case is on interlocutor y appeal at the Supreme Court
14	FRN V OROSANYE	STEVEFHC/ABJ/CR297/2015	The accused is facing trial for corrupt practices during his tenure as the Head of Service of the Federation	2015	Federal High Court, Abuja	Trial is yet to commence
15	FRNV BABALOLA BORISHADE & ORS.	CR/09/08	The 1st accused person who was a Minister of Aviation and others are	2008	High Court of FCT, Abuja	Trial ongoing. 9 witnesses have testified for

			facing trial for conspiracy, forgery, uttering and gratification in relation to N6.5billion Safetower Project			the prosecution. Case delayed by an interlocutory appeal up to the Supreme Court on the admissibility of

						confessional statement.
16	FRN V RASHEED LADOJA	FHC/L/336C/08	The accused person who was the Executive Governor of OyO State is standing trial for corruption related money laundering allegedly committed while in office.	2008	Federal High Court, Lagos.	Case on interlocutory appeal up to the Supreme Court.

17	**FRNV** CHIMAROKEF NNAMANI & ORS	HC/L/09C/2007	The 1st accused person who was the Executive Governor of Anambra State is standing trial with others for corruption related money laundering allegedly committed while in office.	2007	Federal High Court, Lagos	Trial has been delayed by the alleged illness of the 1t defendant
18	**FRN** v **SANI** LULU ABDULLAH! & 3 ORS	ABJ/CR/147/2010	Accused persons are standing for alleged fraud in relation to the fund earmarked for the 2010 World Cup.	2010	Federal High Court, Abuja	Trial ongoing

19	FRN V BOLANLE BABALAKIN	ID/143C/2015	Money laundering	2015	High Court of Lagos State	Trial yet commence after the striking out of the initial charge.
20	FRN V GBENGA DANIEL	AB/EFCC/02/11	The accused person, the former Executive Governor of Ogun State is standing trial for corruption committed	2011	High Court of Ogun State	Trial ongoing

			allegedly committed while in office .			

	ENGR. SAMUEL IBI GEKPE & 5 ORS		on crimInaI oreacn of trust in the sum of N5billion in the purported award of rural electrification contracts.		OT rl, I .	
22	FRN V AL IYU AKWE DOMA & 2 ORS	FHC/LF/CR/34/2011	The 1st accused who was the Executive Governor of Nassarawa State is standing trial with others for corruption related money laundering.	2011	Federal High Court, Lagos.	Trial ongoing
23	FRN V ATTAHIRU BAFARAWA & ORS	SS/33C/2009	1st accused was the Executive Governor of Sokoto State. He		High Court, Sokoto.	Trial ongoing

			was charged alongside others including his companies for misappropriation and embezzlements of the funds of Sokoto State Government.			
24	CRN V ABDULLAHI ADAMU & ORS.	FHC/LF/CRS/2010	The 1st accused was the Executive Governor of Nassarawa State. He was charged alongside others for corrupt practices and	2010	Federal High Court, Lafia	Case on interlocutory appeal. Trial yet to commence.

			money laundering while being the Executive Governor of the State.			
25	FRN V MAMMAN TUKUR ORS.	&ID/120C/2012	Oil subsidy scam in the sum of N1.2bn	2012	High Court of Lagos, State	Trial has commenced
26	FRN VWALTER WAGBATOMA & ORS.	RID/115C/2012	Oil subsidy scam in the sum of	2012	High Court of Lagos State.	Trial has commenced
27	FRN V NASAMAN OIL SERVICES LTD &ORS	ID/116C/2012	Oil subsidy scam in the sum of more than N4bn	2012	High Court of Lagos State	Trial has commenced
28	FRN V ABDULLAH! ALAO & ORS.	ID/119C/12	Oil subsidy scam in the sum of N2.6bn	2012	High Court of Lagos State	Trial has commenced
29	FRN V OLUWASEUN OGUNBAMBO	ID/122C/12	Oil subsidy scam in the sum of N1bn	2012	High Court of Lagos State	Defendant jumped court bail.

30	FRN V ANOSYKE GROUP COMPANIES & ORS.	OFID/179C/12	Oil subsidy scam in the sum of N1,5bn	2012	High Court of Lagos State	Trial has commenced
31	FRN V DOWNSTREAM SOURCES LTD & ORS.	MID/180C/12	Oil subsidy scam in the sum of N880m	2012	High Court of Lagos State	Trial has commenced
32	FRN V ASB INVESTMENT CO.	TID/ 178C/12	Oil subsidy scam in the sum N1.2bn	2012	High Court of Lagos	Trial has commenced

	LTD & ORS				State	
33	FRN V MAJOPE INVESTMENT LTD & ORS	ID/181C/12	Oil subsidy scam in the sum of N1.1bn	2012	High Court of Lagos State	Trial has commenced
34	FRN V CHIDI ADABANY A & Others	FHC/ABJ/54/2012	Money Laundering involving the sum of about N2bn obtained from Shell Petroleum Dev. Company	2012	Federal High Court, Abuja	Trial has commenced
35	FRN V AYODELE FESTUS; OYEBAMIJI AKEEM; AYODEJI ALESHE ; AJIWE SUNDAY ADEGOKE; OLANIRU MUNIRU ADEOLA	FHC/IB/31C/2015	Stealing of naira currencies meant for pricketing or burning at the Central Bank of Nigeria.	2015	Federal High Court, Ibadan	Case on interlocutory appeal following an objection to the charge and ruling thereon.

36	FRN V ONI DAMOLA DOLAPO; AFOLABI ESTHER OLUNIKE; OLANIRAN MUNIRU ADEOLA	FHC/IB/32C/2015	Stealing of naira currencies meant for pricketing or burning at the Central Bank of Nigeria.	2015	Federal High Court, Ibadan	Case on interlocutory appeal following an objection to the charge and ruling thereon.
37	FRN V OLANIRAN MUNIRU ADEOLA	FHC/IB/33C/2015	Stealing of naira currencies meant for pricketing or burning at the Central Bank of Nigeria.	2015	Federal High Court, Ibadan	Case on interlocutory appeal following an objection to the charge and ruling thereon.

38	FRN V OLANIRAN **MUNIRU ADEOLA**	FHC/IB/34C/2015	Stealing of naira currencies meant for burning or destruction at the Central Bank of Nigeria.	2015	Federal High Court, Ibadan	Case on interlocutory appeal following an objection to the charge and ruling thereon.
39	FRN V ODDIAH **EMMANUEL; OLANIRAN MUNIRU** ADEOLA; SALAMI **IBRAHIM**	FHC/IB/35C/2015	Stealing of naira currencies meant for burning or destruction at the Central Bank of Nigeria.	2015	Federal High Court, Ibadan	Case on interlocutory appeal following an objection to the charge and ruling thereon.
40	**FRN V ILORI ADEKUNLE SUNDAY;AFOLABI**	FHC/IB/36C/2015	Stealing of naira currencies meant for burning or	2015	Federal High Court, Ibadan	Case on Interlocutory Appeal

	OLUFEMI JOHNSON ; PATIENCE OKORO EYE; FATAi **ADEDOKUN YUSUSF**		destruction at the Central Bank of Nigeria.			following an objection to the charge and ruling thereon.
41	FRN V OLANIRAN **MUNIRU**	FHC/37C/2015	Stealing of naira currencies meant for burning or destruction at the Central Bank of Nigeria.	2015	Federal High Court, Ibadan	Case on Interlocutory Appeal following an objection to the charge and ruling thereon.

42	FHC/ABJ/CR/86/2009	FRN V THOMAS ISEGHOHI & 2 OTHERS	Defendant are standing trial for money laundering with respect to the	2009	Federal High Court, Abuja	Trial is ongoing

			sale Transcorp shares			
43	FHC/ABJ/111/2009	**FRN** V DAYO OLAGUNJU & 10 Others	The Defendants are standing trial for money laundering and flagrant violation of the Public Procurement Act.	2009	Federal High Court, Abuja	Trial ongoing

Source EFCC website