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Anti-Money Laundering Framework in Nigeria: An Umbrella with Wide Leakage[1]

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Abstract
Nigeria has consistently been in the international illicit financial transactions global monitoring watch list. The country is reputed for massive public corruption and mismanagement. In tackling the menace of corruption and money laundering activities, several laws and regulatory framework has be enacted by the Nigerian Government particularly in the wake of the democratic rule in 1999 – 2003. However, despite the unbroken chains of laws and the enactment of formidable codes of conduct and international best practices, corruption and money laundering activities remain prevalent in the country. The International Illicit Financial Regulators, therefore, continue to advocate for more stringent laws in combating Money Laundering activities by the Politically Exposed Persons and the Nigerian elites. The paper contends that the challenge militating against the efforts to combat money laundering in the country is not lack of appropriate legislation but ineffective and inefficient political institutions. The paper therefore advocates for the strengthening of political institutions by removing constitutional impediments in the current legal regime. The paper equally advocates for the introduction of Unexplained Wealth Order in Nigeria as it is currently practiced in the UK.
Key Words: Money Laundering, Corruption, Nigeria, Political Exposed Persons, Anti-Money Laundering, FAFT, United Kingdom, Unexplained Wealth Order.

1.0 Introduction

The Money Laundering Capital of Africa

The perennial nature of money laundering ("ML") in developing countries is inextricably intertwined with corruption and illicit trading often aided by the politically exposed persons ("PEPs"). The situations in most African countries best illustrate the axiom that 'dirty money is best passed through clean hands' (Graham 2012). ML may be simplified as movement of proceeds of corruption or illicit transactions from the source through devised scheme(s) aimed at disguising the source of the funds, and with the intention of returning the profits of crime(s) to the source as legitimate earnings from regular commercial transactions (Ezewudo 2012). The situation is very grim in Africa and extremely pathetic in the Nigerian context. A research at the Global Financial Integrity ("GFI") in 2010 concluded that Nigeria is the 'the Money Laundering Capital of Africa' (Dev Kar et al 2012).

Not surprising, Nigeria is held out as a fantastically corrupt country (BBC News 2016), perhaps due, among other facts, to wanton movement of funds across the globe by Nigerian PEPs and not unconnected with the inability of successive government/administrations to genuinely tackle corruption or evidence positive utilisation of oil exploration proceeds over the years (Aribisala 2013). Despite a range of Anti-Money Laundering ("AML") regulations, Corruption/ML unfortunately remains an albatross to Nigeria.

This paper argues that the seemingly irreversible failure of AML regulations in Nigeria is caused by weak political institutions but not a dearth of legislations/regulations much emphasized by Financial Action Task Force ("FATF") and other western institutions. To this effect, three key institutional factors militating against effective AML regulations are highlighted in the paper and recommendations on the development of strong AML institutions in Nigeria are proffered in the conclusion segment. While it is conceded that political will is germane to effective AML operations in developing countries, momentary political will, without more, is not sufficient to combat ML. Strong political institutions must therefore be developed concomitantly with AML regulations (Karl 2013).

[1]This paper is built on the research conducted my the author in "Money Laundering, Offshore Banking and Assets Recovery" module in the course of the author's LLM programme at the University of Buckingham.
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2.0 Money Laundering Analysed

ML consists of three stages beginning with introduction of illicit funds into financial system (placement), a disguise of the funds as regular financial flow (layering) then a reversion of the funds to the initiator as legitimate earnings (integration) (Agu et al 2016). ML therefore is simply legitimizing of proceeds of crimes. The Nigerian PEPs often disguise proceedings of corruption through a web of transactions just to alienate the funds from the source. Strive Masiyiwa (2011), in his account of embezzlement and laundering of the proceeds of the sale of Akwa Ibom and Delta States' equities in Econet Wireless Nigeria by the former Governors of both States, Victor Obong Atta and James Ibori, and facilitated by Bhadresh Gohil, a UK Solicitor, noted how a "Special Purpose Vehicle" – a shell company - was used for the receipt of the purchase price of the equities rather than direct payment of the funds into the states' accounts. It eventuates that Econet and the offshore SPV were mere conduits of ML for the Nigerian PEPs.

It is equally significant to emphasize that ML usually involves diverse actors. Strives' account reveals that Nigerian PEPs employed financial institutions and professionals across the globe in the ML schemes (Musiyiwa 2011). This fact is further evidenced in the report of the US Senate Subcommittee's Investigation of bribery of Senior Nigerian Government Officials by Siemens AG particularly the case of Atiku Abubakar, a Former Vice President of Nigeria. The report identifies professionals, firms of experts and financial institutions as actors in Abubakar's ML schemes (Oluwadayisi et al 2016). It was concluded that Abubakar and his wife, Ms. Douglas, opened more than 30 bank accounts using offshore corporations to 'bring suspect funds into the United States', estimated at US$40 million between 2000 and 2008 (United State Senate Permanent Subcommittee on Investigation 2010).

It is not in doubt that ML by African PEPs are sustained by foreign collaborators to the detriment of Africans who are at the receiving ends of deepened corruption and flourishing illicit trade given that foreign institutions ensure continuous flow of profits from crimes committed in the developing countries. The proceeds are eventually used at home to undermine fledging political institutions while such funds are available for investment in the developed countries (Oluwadayisi et al 2016). It is opined that the most formidable AML regulations stand little chance of success in the ensuing vicious circle.

3.0 The Augaen Stable

The research at GFI concluded that Nigeria, as at 2010, had lost $165 billion to the developed countries as a direct consequence of ML. The country was consequently ranked one of the largest exporters of illicit funds globally (Aribisala 2013). Olusegun Obasanjo, a Former President of Nigeria, put the ML and corruption figure cumulatively, as at 2012, as $400 billion (Obasanjo 2017). Both conclusions are reflected in the international corruption perception indexes in which Nigeria was ranked the second most corrupt country in the world between 1999 and 2004 (Oluwadayisi et al 2016), and presently occupies 144 out of 146 in the 2015/2016 Transparency International Corruption Perception Index (Obasanjo 2017). FATF in this glooming period recommended that financial institutions should avoid or treat transactions from Nigerian sources with stringent due diligence (Bello 2014).

The Nigerian Government was accordingly compelled to enact effective anti-corruption/AML regulations (Abiola 2014). The country became a critical partner in international anti-corruption/AML campaign by not only acceding to international AML instruments, international treaties, regulations and best practices were domesticated across all sectors. Nigeria eventually joined the Egmont Group of Financial Intelligent Units with the establishment of Nigeria Financial Intelligence Unit in 2007 in compliance with FATF recommendation 29 and Article 19 of UNCAC (NFIU 2017).

3.0 Combating the Malaise

Seven notable pieces of legislations/regulations were enacted in response to international AML recommendations. The National Drug Law Enforcement Agency (NDLEA) Act 1989, Money Laundering (Amendment) Act 2004 (Now Money Laundering (Prohibition) Act 2011 "MLPA"). The Economic and Financial Commission (Establishment) Act 2002 (see Economic and Financial Crimes Commission (Establishment) Act 2002, which established the EFCC in 2003 with power to investigate and prosecute financial crimes/ML related activities (Economic And Financial Crimes Commission (Establishment) Act 2002, Laws of the Federation of Nigeria, ss 5, 6, 7). There is also the Independent Corrupt Practices and other Related Offences Commission Act 2000 for combating of corruption in public services. The Security Exchange Commission Rules

and Banking and other Financial Institution Acts 2004 ("BOFIA") equally contain AML provisions for the monitoring of financial institutions and the capital market respectively. And there is the Central Bank of Nigeria (Anti-money Laundering and Combating the Financing of Terrorism in Banks and other Financial Institutions in Nigeria) Regulations 2013. These legislations/laws extensively cover FATF recommendations on Customer Due Diligence, Suspicious Transaction Reporting, and Financial Intelligence Gathering and Surveillance on ML/TF as well as the prescription of other international institutions or instruments (Abola 2014; Ezewudo 2012). It was based on these AML laws/regulations that FAFT retreated from recommending further countermeasures against Nigeria and a possible placement on NCCT list at the period (Banker's Academy 2015). Unfortunately, Nigeria is presently identified as one of the jurisdictions posing higher risks of Money Laundering and Terrorist Financing ("TF") as at March, 2016.

The early era coincided with the former President Olusegun Obasanjo Administration's ostensible patial political will for AML regime but without simultaneous development of independent political institutions. The EFCC, ICPC and NFIU, three of the most important institutions for combating corruption/ML as well as TF are directly placed under the control of the presidency in a country with little restraint on presidential proclivities or probity. If this political control vested in the President is considered with the constitutional immunity against prosecution under section 308 of the 1999 Constitution of the Federal Republic of Nigeria (as amended "CFRN"), the result would be that the President is practically above the AML laws. The Senates (members of the upper chamber of the Nigerian Legislature) equally assert some form of controls over the AML regulatory agencies by capitalising on their constitutional power of confirmation of appointments of the heads of regulatory institutions made by the President, and or budgetary approval/oversight duties to influence the independent decisions of the heads of the ML agencies. The aim of such surreptitious moves most time is to protect or frustrate investigations or cases of financial improprieties by the AML institutions against suspected members of the National Assembly. Furthermore, the Attorney General of the Federation exercises overall control on the operations of the AML agencies as the constitutional chief law officer of the country (see section 150 of CFRN).

4.0 The Monster Fighting Back?

The failure of the Obasanjo regime to build strong and independent political institutions for sustainable AML was exploited by the succeeding administrations to protect the PEPs from domestic and/or international AML proceedings. The situation exposes the incapability of weak political institutions to sustain AML regulations particularly where there is lack of political will.

The presidential control of the AML institutions leaves rooms for political interference in the statutory duties of the agencies. A case which best illustrate this assertion is the controversial removal of Nuhu Ribadu as the EFCC Chairman in order to frustrate investigations into alleged corrupt practices of some former governors during their term in office (Hatchard 2014). Similarly, the Nigeria Senate recently used their confirmation power to frustrate the appointment of Mr. Ibrahim Magu, the current Acting-Chairman of the EFCC, from becoming the substantive Chairman of the agency in accordance with the provisions of the EFCC Act. The refusal to confirm Magu by the Senate has been described as a political reprisal over commencement of investigations against some Senators on allegations of corruption (News24, 2017). Michael Aondoakaa's insidious use of his constitutional power as Attorney General of the Federation ("AGF") to suppress AML agencies and frustrate the fledging Mutual Legal Assistance ("MLA") between Nigeria and the United Kingdom ("UK") in order to shield James Ibori from prosecution for ML in the UK equally exemplifies abuses in the present system (Hatchard 2014). In the course of the two succeeding administrations after the Obasanjo regime, as the World Bank noted, government officials misappropriated and laundered about N65 billion of the initial $458 million repatriated to Nigeria by the Swiss government (Oludayisi et al 2016). This sleaze prompted the Swiss, UK and US Government to withdraw mutual legal and technical assistance in asset recovery and MLA given to Nigerian Government and institutions (Ezewudo 2012).

The effect of corruption/ML in the said era was not limited to export of funds critically needed by the economy; AML agencies were consequentially rendered ineffectual by exploiting the weak institutions (Okesola 2012) such that the EFCC regrettably lacks the requisite capacity to prosecute high profile cases despite the renewed political will by the present administration (Falana 2017).

5.0 Conclusion

Any way out of the Quagmire?

The foregoing arguments demonstrate that ML by PEPs in the developing countries is usually consolidated with the assistance of several actors across the globe including institutions in western countries notwithstanding the sophisticated AML regimes. It has equally been demonstrated that legal framework and political will are not enough for a sustainable AML regulations in Nigeria; strong political institutions are equally critical. The political institutions must also be developed concurrently with laws/regulations and complemented by political will.

Going forward, the constitutional impediment in section 308 of the CFRN must be removed. In addition, appointment of officers of AML agencies, like EFCC, should be made by the National Judicial Council (the highest judicial regulatory body in Nigeria) contrary to the present political appointments by the President and confirmation by the Senate. AML agencies should be out of the control of the office of political appointees like the AGF. In the same vein, the finance of the agencies should be sourced directly from the federation account and determined by Federal Revenue Mobilization Commission to guarantee a total independence of the agencies.

The above propositions, it is opined, would be the starting point in the development of strong AML institutions and eventually independent AML regime.

6.0 Another Way through Unexplained Wealth Order

The conventional criminal prosecutions and conviction based asset recovery have proved to be inadequate in tackling corruption and money laundering even in advanced systems with formidable institutions (Hatchard 2014). The challenges posed by evidential burden of proof, delay tactics by the corruption suspects and other myriad of legal technicalities have become clogs in the will of justice in several African Countries. It is worrisome that despite public evidence of sleaze and informal confession of criminal diversion of funds allocated for the procurement of ammunitions for the Nigerian Army by public officials, and other wanton corrupt practices under the Jonathan regime, no conviction had been secured by the Federal Government (Falana 2017). Public officers in Nigeria continue to acquire assets far above their legitimate income embolden by the deficiencies in the criminal justice system, AML and financial monitoring mechanisms.

It is therefore appropriate that institutional framework and strict legislations be enacted for the introduction of full implementation of Unexplained Wealth Order ("UWO") as it is presently obtainable in the UK, Ireland and Australia (Bartel 2010; Reuts 2017). A practical illustration of the operation of UWO may be gleaned from the context of the UK Criminal Financial Act 2017, CAP 22, 2017 ("CFA") which amends the Proceeds of Crime Act 2002 to make provisions for appropriate legal procedures for the treatment and confiscation of terrorist property and properties or proceeds of corruption and other crimes. CFA or UWO procedure gives the Serious Fraud Office, HMRC and other agencies or authorities the power to require an individual to explain the means of acquisition of assets suspected to be above the person's legitimate income (s 362A [7]). The procedure is commenced by an application to the High Court for an Unexplained Wealth Order (UWO). The UWO Application would urge the court for an order compelling the respondent to explain his interest in the property described on the face of the application and the source or means by which the property was acquired (CFA 2017, s 362A[1] – [3]). The Court is empowered to make a confiscation order against the property should the respondent fail to respond or give satisfactory response to the application (CFA 2017, 362C).

The legal implication of the UWO procedures is that the burden of proving that the property was acquired through legitimate means is put on the respondent rather than the state. In the UK, UWO addresses loopholes in the laws which hitherto prevented the authorities from seizing property from overseas criminal suspect unless they have been convicted of a crime in their home country (Anita Clifford 2017). The scope of UWO as it is presently obtainable in the UK may be adopted in Nigeria in order to facilitate confiscation of properties acquired through the proceeds of corruption without a formal criminal proceeding against the suspect. UWO is critically important at this juncture as it has become pathetically difficult for AML and corruption fighting agencies to obtain criminal convictions even in obvious cases of criminal enrichment. UWO would therefore be a step in the right direction to ensure criminals do not benefit from the proceeds of their crimes as a result of technical requirements of the law in criminal based asset forfeiture proceedings.

It is clear that a fair application of UWO would strengthen institutional powers in tackling corruption and money laundering and would to a large extent prevent PEPs from benefitting from the proceeds of crimes. UWO may however, like most criminal framework and state machinery in Africa, be subjected to abuse and instrument of political vendetta. A misuse of UWO may lead to heavy reliance by the authority for an array of unproven criminal activity. As the Transparency International noted on UWO in the UK, 'The UK currently has in place several laws which give the authorities the power to fight money laundering in the UK under the Proceeds of Crime Act 2002. Unfortunately, there have been occasions when the authorities have misused these powers which have resulted in lengthy and costly litigation. We can only hope that the requirement of judicial scrutiny from the High Court will provide enough protection to ensure that UWO's are utilised correctly' (Transparency International 2017).

There are also some concerns that the provisions of the UWO dispense with presumption of innocence thereby run afoul of the rules of natural justice particularly the fair hearing provisions enshrined in the laws of most countries of the world. Section 36 of CFRN 1999, and article 6 of the European Convention on Human Rights, which is a codification of the rule in *Woolmington v DPP* [1935] AC 462, are apt examples in the context of these submissions. It has equally been argued that UWO may violate the fundamental right to acquire and own property (Dominic Thomas-James). It is submitted that so long as the alleged owner of the property is not criminally convicted in the process and he is given adequate hearing notice and opportunity to explain the means of acquisition of the property, the right to fair hearing has not been violated. It is equally submitted that the right to property is not absolute- the right is always subject to exceptions such as confiscation of property consequent to an order of a court of competent jurisdiction as provisions of sections 43 and 44 of CFRN 1999 clearly demonstrate.

It is doubtful if the legislature in most developing countries, where the law is mostly required, would enact similar laws for the use of UWO as set out in the UK CFA. African PEPs are known for exploiting the weak political and judicial institutions and their control over legislative and regulatory framework to undermine AML (Hatchard 2014). The clear path or strategy towards blocking of the leakage in the AML framework in Nigeria is institutional development but not enactment of further laws or regulations as often suggested by international actors.

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