

AFRICAN JOURNAL OF INTERNATIONAL ECONOMIC LAW

Volume 2 | Fall 2021

S | SHERIA
PUBLISHING
HOUSE

 Afronomics**LAW**

AFRICAN JOURNAL OF INTERNATIONAL ECONOMIC LAW

Volume 2 | Fall 2021



Published by Sheria Publishing House, Nairobi
P.O. Box 56095 – 00200
Nairobi , Kenya.

Design & Layout by Almond Print Ltd.

CO-EDITORS IN CHIEF

James T. Gathii

Loyola University Chicago

Olabisi D. Akinkugbe

Dalhousie University

EDITORIAL BOARD

Clair Gammage

University of Bristol

Regis Simo

Queen's University Belfast

Caroline Ncube

University of Cape Town

Tsotang Tsietsi

University of Lesotho

Ibironke Odumosu-Ayanu

University of Saskatchewan

Amaka Vanni

University of Leeds

ADVISORY BOARD

Antony Anghie

*National University of Singapore
and University of Utah*

Sergio Puig

University of Arizona

Joy Kategekwa

United Nations Development Programme Africa

Jan Yves Remy

*Shridath Ramphal Centre for International
Trade Law, Policy and Services, Barbados*

Melaku Desta

De Montfort University

Franziska Sucker

University of Witwatersrand

Hajer Gueldich

Université de Carthage-Tunis

Markus Wagner

University of Wollongong

Danny Bradlow

University of Pretoria

TABLE OF CONTENTS

CONTENTS

Introduction to the African Journal of International Economic Law Volume 2	7
<i>Olabisi D. Akinkugbe & James Thuo Gathii</i>	

LEAD ARTICLES

Advancing the Use of Digital Technology by Africa's Female Farmers: Shortcomings in Data Protection Regulations	11
<i>Uchenna Felicia Ugwu</i>	

Reforming the International Monetary Fund's Debt Sustainability Assessments towards Achieving the UN's Sustainable Development Goals (SDGs): A Crucial Post-Pandemic Recovery Agenda	32
<i>Karina Patricio Ferreira Lima</i>	

Mapping Inclusive Law and Regulations: A Comparative Agenda for Trade and Development	48
<i>Katrin Kuhlmann</i>	

Informality as a Sticky Sector in the Post-Pandemic Era of the Fourth Industrial Revolution	88
<i>Christopher Changwe Nshimbi</i>	

Effective Taxation in Africa: Confronting Systemic Vulnerability through Inclusive Global Tax Governance	100
<i>Okanga Okanga & Lyla Latif</i>	

AFRICAN PRACTICE IN INTERNATIONAL ECONOMIC LAW

African Practice in International Economic Law: 2020–2021	122
<i>Tsotang Tsietsi & Akinyi J. Eurallayah</i>	

CASE NOTE

Panel Report in Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia (DSS78)	142
<i>Oluyori Ehimony and Maryanne Kamau</i>	

BOOK REVIEWS

Law and Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe, by Tinashe Kondo, Cape Town, University of the Western Cape Press, 2021, 282 pp., R275 (hardcover) ISBN 9781990995026	157
<i>Talkmore Chidede</i>	

Combating Money Laundering in Africa: Dealing with the Problem of PEPs, Edward Elgar, by John Hatchard, 2020, pages 277. £100. ISBN 9781789905298	161
<i>Nkechikwu Valerie Azinge-Egbiri</i>	

Book Review:
**Combating Money Laundering in Africa:
Dealing with the Problem of PEPs,
Edward Elgar,**

by John Hatchard, 2020, pages 277. £100. ISBN 9781789905298

Reviewed by Nkechikwu Valerie Azinge-Egbiri

This extensively researched and coherently written piece of scholarship ought to be widely consulted by scholars and practitioners seeking to combat money laundering (ML) in Africa. The book may not have addressed theoretical issues that emphasize its core arguments. However, its analyses of politically exposed persons (PEPs) and the extent to which national constitutions may aid or forestall money laundering tactics contribute to the understanding of how African countries (ACs) can strategize to combat ML via PEPs.

Existing policy and academic literature recognise PEPs as government officials or royal families, including their close associates or family members. Such recognition is largely due to historical and recent case studies that demonstrate their involvement in high-level ML cases. Hatchard exemplifies this with the *Cashgate Case* where, between 2009–2014, government ministers and senior public officials in Malawi manipulated the government’s payment control system and laundered proceeds amounting to over \$365 million. *Cashgate* demonstrates the extent to which PEPs can abuse their office to loot funds from state coffers. Similarly, investigation shows that South Africa’s former President Jacob Zuma had worked with close associates – the Gupta Family – to launder and divert state funds. Zuma’s case, amongst many others, shows that close associates are not exempted from the PEPs classification.

A recurring theme across existing literature is the recognition that historically, PEPs have been uniquely placed to launder government’s funds with limited recourse to the law. However, there has been limited focus on PEPs in relation to Africa but for Inge Amudsen’s recent edited book, *Political Corruption in Africa: Extraction and Power Preservation*, which considers laundering exploits of PEPs in several ACs. Regardless, a lacuna still exists regarding an in-depth analysis to addressing the issue contextually and the role of national constitutions in combatting ML in ACs. Essentially, Hatchard addresses the lacuna by developing a framework that justifies the ability of ACs to curtail ML via PEPs through a persuasive alignment with the “three-pronged approach”. According to Hatchard this requires a multi-layered AML strategy that is implemented domestically, transnationally and at the corporate level. I will come to the “three-pronged approach” later in this review.

The book is distinctive as it arguably chronicles Hatchard's research expertise, personal experience and professional role, in various capacities, including with the Commonwealth. It combines practical and academic perspectives in establishing a solution to a complex problem. The book commences by recognizing that PEPs orchestrate their laundering antics through the co-optation of gatekeepers, such as financial institutions, professionals and multinationals (MNCs), amongst others. Hatchard typifies his assertion with the mass laundering of billions of Ugandan shillings aided by Cairo Bank Ltd through the opening of fictitious bank accounts and forged cash withdrawal slips by 'ghost pensioners'. Similarly, Hatchard posits that MNCs operating in Africa not only pay bribes to PEPs to obtain or retain their businesses but are also complicit in facilitating the laundering of corruption proceeds. These examples illustrate how PEPs are well positioned to destroy the ethical fabric of society by undermining gatekeepers' responsibilities. Such co-optation coupled with constitutional frameworks across many ACs, which grant PEPs control over key AML institutions, immunity from prosecution and possible presidential pardon, inadvertently limit the extent to which PEPs can be held accountable for laundering.

In seeking a pan-African-driven solution to PEPs engagement in laundering, Hatchard starts by examining the international AML instruments and their adaptability to ACs. In particular, he examines the Financial Action Task Force (FATF), a prominent AML policy making body. He correctly points out that the FATF which has global and regional reach plays a key role in evaluating the compliance of countries to its standards. Furthermore, Hatchard recognises that the FATF has enforcement powers to sanction erring states that fall short on compliance. Emphasising the 'teeth' and 'power' of the FATF, Hatchard advances a strong argument that:

"On the face of it, [the FATF recommendations] are non-mandatory requirement and provides an option for FATF members as to whether or not to implement the particular strategy or action.... However, hidden in the general glossary to the 2012 recommendation is the statement that 'should has the same meaning as must'. In other words, 'recommendation' is the FATF's speak for' requirements' (pp. 57-58)"

Indeed, this statement availed Hatchard the opportunity to examine deeper, from the global south perspective, the nuances of unreflective transplantation and the evolution of the FATF's African regional bodies (RBs). Superficially, the African RBs appear to have been established to meet homegrown problems. However, critical examination reveals that the RBs simply perpetuate western ideals in ACs. Arguably, RBs represent a hegemonic imposition of a western agenda that sets ACs up to fail, as the 'FATF's teeth' do not necessarily consider the socio-economic challenges of ACs. Hatchard's unwillingness to address these critical challenges does not however undermine the strength of the book. Instead, by taking a practical approach, Hatchard simply brings into limelight the possible implications of the FATF's mandatory requirements on ACs.

Definitely, one of Hatchard's pivotal argument is that despite the existence of global frameworks aimed at correcting the anomaly of PEPs' involvement in laundering, domesticating uniform laws across all ACs is impossible. Hence, he suggests that 'functional equivalence' amongst national systems ought to be the norm. According to Hatchard, this means that '*states must, to the extent possible...develop and harmonise their policies and domestic legislation to combat money laundering according to their particular circumstance and constitutional framework*'. Against this backdrop, Hatchard recommends that ACs adopt a multitrack approach at the national level, which ensures that the constitution and its respective bodies are not undermined by PEPs. In addition, he recommends that AC AML laws, compliance and international obligations are closely aligned. Hatchard's suggestion stems from his proposed 'three-pronged approach' which advocates for domestic, transnational and corporate level strides to checkmate PEPs. An examination of this approach reveals its multipurposed strategy. On one hand, his suggested approach warrants ACs to have sturdy yet persuasive national AML laws and institutions alongside a robust AML investigation, prosecution and asset recovery framework. On the other hand, it includes far reaching attempts at curtailing bribe paying private companies that facilitate the continued cycle of laundering. These seemingly divergent approaches collide to hinder the supply or demand for bribery, corruption and money laundering.

Arguing on the workability of a national framework, Hatchard concentrates on the potential role of national constitutions as sturdy AML instruments. For Hatchard, a relationship exists between constitutional rights of PEPs and AML requirements placed on countries by the FATF. He recognises that the implementation of the FATF's standards at the national level may have unintended consequences, as it can infringe on the constitutional rights of PEPs such as right to privacy, right to consult a lawyer, etc. Hence, Hatchard advocates strongly for a balancing exercise to ensure that constitutional rights do not interfere with effective AML prosecutions and investigations. In particular, Hatchard advances the point that heightened national and international collaborative efforts between AML institutions and civil society organisations remain critical to the constitutional fight against ML. It is imperative to reiterate that Hatchard's core points here are novel, as whilst there is literature relating to PEPs in 'safe havens', there is limited documentation on the relationship between the national constitution and AML efforts in the African context. The richness of Hatchard's arguments is based on the premise that it is a library-based research supplemented by discussions with a wide range of practitioners in and from ACs.

A critical part of this book was Hatchard's considerations of transnational AML initiatives. He explores key thematic areas ranging from how ACs can amplify their beneficial ownership transparency, to the potential of an African Court of Justice and Human and Peoples Rights to facilitate increased prosecution rates. Though the prospects of the court seemed somewhat convincing, Hatchard finds it difficult to accept its workability and effectiveness due to various factors, including the dearth of international cooperation, procedural impediments and the immunity PEPs enjoy.

He states that *'Immunity strengthens the culture of impunity that is already entrenched in most African countries and protects a wide range of PEPs from being accountable for their crimes during their time in offence'*. Acknowledging these challenges, Hatchard does not care to delineate processes that can catalyse the workability of the court beyond the current obstacles. He does not also make a comparison to other regional courts to determine the remit of cases and viability. Instead, Hatchard redirects his focus to the role of the private sector in combatting laundering via PEPs and stresses their critical importance to a holistic AML fight.

Hatchard concludes the book optimistically, reiterating the importance of the "three-pronged approach" to addressing PEPs involvement in laundering. He restates that this approach which is guided by the FATF alongside other instruments is workable when supported by political will. He believes the approach would amplify the fight against PEPs now and in the future. Hatchard contends that whilst Africa's current situation seems daunting, the development of effective strategies remains critical in bringing hope for a better and more prosperous future for the victims of greedy political leaders. In summary, Hatchard, through this book, provides a critical analysis of the strategies required to combat ML through PEPs and recover proceeds of crime – a tool for stakeholders in the field. Hatchard's solution is peculiar to Africa as he discusses them within the context of the continent's economic and developmental problems alongside its sparse political will which continually hinders the adoption of appropriate strategies. Yet he remains resolute that ACs can still navigate the waters to checkmate PEPs. Hatchard's persuasive proposition represents an important step forward towards combatting financial crime through PEPs, who ironically should be custodians of financial integrity.

Hatchard's scholarship deserves a wide readership and consideration by academics and stakeholders in the AML space. The book heralds the dominance of an existing voice, intertwining AML strategies and constitutional law, complex areas of law which the author simplifies. As this review has shown, the book's arguments are compelling. However, the reality remains that certain theoretical underpinnings further highlight the obstacles ACs encounter in combatting ML. The book however alludes to the practical challenges ACs encounter in a manner that is not as radical without a theoretical underscoring of the challenges they face. Whilst not theoretically radical, Hatchard states that this book is a catalyst from *'the need for effective action'* across ACs and this book delivers on this promise. Furthermore, this book does not provide a comprehensive analysis of the constitutional framework and practices in each AC which Hatchard considers an unnecessary exercise. However, the book's selective cross-country focus on particular elements and case studies which the author considers critical to establishing a good governance regime paints a robust picture. Arguably, the pan-Africa approach does not undermine the strength or impact of the book. I can only warmly recommend this book to all interested.

Nkechikwu Valerie Azinge-Egbiri, PhD
Senior Lecturer, School of Law, University of Lincoln.