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MONEY LAUNDERING IN TANZANIA: LEGAL AND PRACTICAL CHALLENGES

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Tanzania

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ABSTRACT

Money does not smell but the moral smell of money is concerned. At present, anti-money laundering measures have made it increasingly difficult the use of crime money that it may not infiltrate and corrupt the financial institutions. The threat of crime money has stimulated the establishment of laws and enforcement measures; however money launderers find still too many loop holes as a result the FATF secretariat issues annual report describing new methods of circumventing the anti-money laundering methods. Countries worldwide have agreed to cooperate in combating the money laundering though the magnitude of the risk brought by money crime depends to the attitude of the policy maker towards perpetuators and the kind of crime involved. Tanzanian policy and laws on anti-money laundering poses great challenges. The automatic denial of bail for money laundering charge, the unguided reporting requirement for professional is detrimental to professional ethics on privacy, confidentiality and loyalty, while the vagueness of the definition of money laundering justifies the prosecutor's discretion on either charging the accused under the Penal Code or under the Anti- Money Laundering Act render the offence unbailable thus, runs afoul of fundamental rights under international law as it cannot be challenged under judicial review. Besides, challenges on anonymity remains intractable rendering the Ant money laundering law regime a nugatory. It is high time to revisit the rationale for inclusion of or non inclusion of predicate offences to prevent being used arbitrarily irrespective of the fact that the FATF recommendations found it useful. Thus, this article analyses the legal and practical challenges in combating money laundering and suggests solutions for strengthening the existing legal regime.

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INTRODUCTION

[1] *'Pecunia non olet'* is a latin phrase meaning 'money does not stink'[2]. It is similar to an English phrase 'hold your nose and take the money'; is now an old adage. Time has changed as far as the moral smell of money is concerned.[3] Some sources of money smell both in the eyes of the law and in the opinion of the society. After criminalization of money laundering in 1985 in the Us, other countries followed the suit to raise barriers against the potential influx of dirty money.[4] At present, money laundering has become rampart in the world. Crime money is bad as it remains in the hand of the villains who earned it. It perpetrates crime by facilitating criminal activity that generates it to continue. The smuggled funds sponsors drug dealers, terrorists, arms dealers and other criminals to operate and expand their criminal empires.[5] This threatens not only public health but also the economic, social and political stability. Besides, funds obtained from criminal activity increase currency circulation which ultimately distorts banks and financial soundness. Countries worldwide have agreed to cooperate in combating the crime though the magnitude of the risk brought by money crime depends to the attitude of the policy maker towards perpetuators and the kind of crime involved. Thus, each country has its own priorities and different enforcement methods which are likely to be detrimental to or favour the accused.

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[1] Duyne P.C.V. et al, (2001), *Financial Investigation of Crime, A tool of the integral law enforcement approach*, Koninklijke Vermande, p. 115.

[2] The Financial Action Task Force on Money Laundering (FATF) established in 1989

[3] Duyne P.C.V. et al, (2001), op cit, fn No.1 p. 115.

[4] ibid

[5] United Republic of Tanzania Strategy for Ant-Money Laundering and Combating Terrorist Financing, July 2010-June 2013.

Tanzania automatic denial of bail for money laundering charge runs afoul of fundamental rights under international law. Thus this study calls for legal framework which comply with the countries obligation under regional and international law to alleviate the challenges in addressing money laundering in the country.

HISTORICAL BACKGROUND OF THE STUDY OF MONEY LAUNDERING: Financial manoeuvre exists since taxation itself. Chinese merchants in 2000 BCE concealed their wealth from the government and reinvested the smuggled funds to remote province and abroad to evade tax as the government abhorred commercial trading.[6] Concern about incapacitation of criminals exist since antiquate. States in ancient Europe and the US imposed forfeiture in cases of treason or rebellion to powerful nobles who challenged the authority of the crown or church.[7] The rationale for forfeiture was similar to the modern approach to incapacitate the criminal baron and his relatives from perpetuation his rebellion by impoverishing him and his family if not beheaded.[8] The history of organised crime in US has been well known by both politicians and law enforcer before the World War II. [9]The best documented example of money laundering concerns the famous Mafia boss, Al Capone who was charged with tax evasion in the late 1920's.[10] During the time of prohibition, He set up Laundromats in Chicago to disguise the source of his ill gotten wealth arising from sale of alcohol by integrating the same into legal financial system to make it legitimate.

Irrespective of incapacitating Al Capone into jail, his family continued enjoying financial wealth in his luxurious mansion. Additionally the exploits of the successful criminal companions Meryer Lanky and Bugsy Siegel prevailed. Siegel through the conduct of gambling and movie industry became the secret owner of the Califonia Metals Company which ultimately during the Second World War supplied salvage metals. In June, 1947 he was slain by fusillade of bullets, did not enjoy the wealth obtained from the Las Vegas casino enterprise which he had started in 1946. While Lanky the financial wizard of the American organised crime was skilful in laundering money from his fellow gangsters in Cuba, the Bahama and Haiti until when he was charged for tax evasion in 1970. He escaped to Israel where he unsuccessful claimed for citizenship as a Jew. He was later cleared of all his charges in Miami and died of cancer wealthy and peaceful. Regardless of these cases, detectives have been attaching much weight in searching for financial aspects of crime, albeit not so systematic. This has been evident in cases of murder where there is no motive for love nor vengeance, monetary motive has been the centre for investigation.[11] During the second half of the last century, the American 'Robber Barons' revealed an intertwined crime money and legitimate industry in form of charity funds and famous universities with the name of prominent and respectable families.[12] Approaching the crime of money laundering from a moral perspective would implicate the morals of both financial institutes and politics. Various agencies in US treat different criminal targets as being generators of crime money. Most of them waged war against drugs, such as the Drug Enforcement Agency (DEA)[13] and the Harrison Narcotic Act[14] and The Hague treaty[15]unsuccessfully fought the market by criminal justice tools which yielded short term results and overcrowded prisons.[16] Parallel to drug war there was fight against La Cosa Nostra or 'American Mafia' which culminated to enactment of harsh legislations such as the RICO Statute[17] which stipulated for forfeiture provisions authorizing the government to freeze the defendants assets before trial, the other was the Comprehensive Drug Abuse Prevention and Control Act[18]which allows seizure and forfeiture of all profit, assets, objects and real properties which facilitated drug offences. For example if one grows cannabis plants around his house, he is liable to forfeit the whole property including his house. In Europe financial investigation was as a matter of fact nonexistent. There existed lenience and indifferent approach of many agencies of law enforcement to wage war against money crime as there was a tendency of denial of money crime as anything than a 'few rotten apples in the barrel' problem.[19] In 1980 the Netherland established a commission to fight abuse of the social security and fiscal system. The United Kingdom established the Roskill Committee in 1983.[20] This gradual tendency existed in Germany too though fraud had been recognised early compared to other UK and the Netherland as Germany was the first country to set up fraud statistics.[21]

The increase in drug problem which raised public health concerns, led the Council of Europe to recommend measures against money laundering in 1980 to prevent funnelling crime generated money into legitimate economy and corrupt it. The council of Europe recommendations sparked development of international legal framework on money laundering such as the United Nations Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance in November, 1988[22], The Statement of Principles of the Bank for International Settlements 1988,[23] The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of the Council of Europe, the Financial Action Task Force on Money Laundering (FATF) established in 1989 and the Guideline against Money Laundering issued by the Europe Commission in 1991 which is binding and require member states to adopt the mandatory minimum provision in their domestic legislation as a result all EU member states have criminalized money laundering and set up disclosure system of suspicious or unusual transactions. Prior 1983 Tanzania had no orientation with organized crimes until when the country experienced a serious economic crisis in 1980's.[24] The pattern of Organized crimes took a new shape with the enactment of the Economic and Organized Crimes Control Act in 1984.[25]The legislation was tailored against international economic saboteurs. In 2006 Tanzania enacted the Anti-Money Laundering Act, Cap 423 and subsequently established the FIU in July 2007 along with promulgating and issuance of the Anti-Money Laundering Regulations, 2007. The country like other African states has ratified numerous International and Regional Protocols on combating money laundering. Some Regional protocols include; Protocol on Combating Illicit Drug trafficking in East African Region 2001, SADC Protocol on Combating Illicit Drug Trafficking 1996 was acceded in 2003, the SADC Protocol on Corruption 2001 was ratified in 2003. Tanzania was the founding member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in 1999. Withal to the government emended numerous laws relating to Money laundering or

[6] https://evercompliant.com/brief-history-money-laundering/Accessed on 03rd August, 2021 at 12:19 hrs
[7] Duyne P.C.V. et al, (2001, *op cit*, fn nNo.1, p. 1
[8] *Ibid.*
[9] *ibid.*
[10] *ibid*
[11] *op cit*, fn No. 9
[12] Abadinsky, H. (1991) *Organised Crime*, Chocago: Nelson-Hall.
[13] Drug Enforcement Agency (DEA) established in 1973 deals with control of cultivation, production, smuggling, and distribution of illicit drugs.
[14] The Harrison Narcotic Act of 1914
[15] The Hague treaty of 1914.
[16] Rasmussen, D.W. and Benson. B, (1994), *The Economic anatomy of a Drug War: Criminal Justice in the commons*, Lanham: Rowman & Littlefield; see also Duyne P.C.V. et al, (2001) p.3.
[17] The Racketeer Influenced and Corrupt Organizations Act (RICO) 1970.
[18] Comprehensive Drug Abuse Prevention and Control Act of 1970.
[19] Lock Cit, Duyne P.C.V. et al, (2001), p. 13.
[20] Roskill Committee of 1983. Dealt with criminal proceedings in fraud cases in England and Wales which was later supplemented by establishment of Serious Fraud Office.
[21] The Germany Bundestag of 1976 was enacted to combat Economic Crime against deceit, loan sharking and bankruptcy fraud which subsequently culminated the penalization of unfair competition in 1979.
[22] United Nations Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance in November, 1988, which came into force in 11.11.1990
[23] The Statement of Principles of the Bank for International Settlements of December, 1988
[24] Maria Mduda, (2013), Assessment of Money Laundering Prevalence in Commercial Banks of Tanzania: A Case Study of Ten Commercial Banks Operating in Tanzania- A Research Dissertation; Mwema s.A, Current Situation and Countermeasures against Money Laundering: Tanzania experience, Resource Material Series 58, p.428
[25] The Economic and Organized Crimes Control Act, No.13 of 1984

predicate offences in 2007 to combat money laundering; even so it still lag behind regional and international obligation on ant money laundering prevention.

CONCEPTUAL AND THEORETICAL FRAMEWORK

Definitions of Concepts

Money Laundering: The concept of Money Laundering in Tanzania is a new phenomena which has not been sufficiently tested by court irrespective of having the Anti-Money Laundering Act[26] since 2006. The Act itself define Money Laundering in a general term and has brought with it numerous offences which otherwise were bailable[27]. The definition is in consonant with the FATF's *Forty Recommendations* (2012-2018) No. 3 which among others mandate state parties to criminalize money laundering to the widest range of predicate offences.[28] Section 3[29]provides that

"Money Laundering" means engagement of a person or persons, directly or indirectly in conversion, transfer, concealment, disguising, use or acquisition of money or property known to be of illicit origin and in which such engagement intends to avoid the legal consequences of such action,and includes offences referred in Section 12" (emphasis is mine)

Moreover section 12[30] stipulates that a person who;

(a) engages, directly or indirectly, in a transaction that involves property that is proceeds of a predicate offence while he knows or ought to know or ought to have known that the property is the proceeds of a predicate offence;

(b) converts, transfers, transports or transmits property while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence, for the purposes of concealing, disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence to evade the legal consequences of his actions;

(c) conceals, disguises or impedes the establishment of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence;

(d) acquires, possesses, uses or administers property, while he knows or ought to know or ought to have known at the time of receipt that such property is the proceeds of a predicate offence; or (e) participates in, associates with, conspires to commit, attempts to commit, aids and abets or facilitates and counsels the commission of any of the acts described in paragraphs (a) to (d) of this section, commits offence of money laundering.

The term engagement is necessary to establish the offence of Money Laundering where a person(s) engage in conversion, transfer, concealment, disguising, use or acquisition of money or property known to be of illicit origin; though the act does not define the term engagement which is essential to establish the existence of '*actus reus'*. Glanville Williams[31] Observes, *"When we use the technical term actus reus we include all the external circumstances and consequences specified in the rule of law as constituting the forbidden situation. Reus must be taken as indicating the situation specified in the actus reus as on that, given any necessary mental element, is forbidden by law.*

In other words , actus reus means the whole definition of the crime with the exception of the mental element and it even includes a mental element in so far as that is contained in the definition of an act. This meaning of actus reus follows inevitably from the proposition that all constituents of a crime are either actus reus or mens rea"[32]

The Actus reus of Money Laundering involves numerous activities which include conversion or transfer' of the proceeds of crime, acquisition, possession, conceal or disguise the original source of illicit property,[33]and the aiding, abetting, facilitation and counseling the commission of the offence.[34] Generally activities constituting *actus reus* include predicate offences such as the criminal activities which generates the proceeds of crime such as fraud and related offences such as murder, grievous bodily harm, pyramid and other similar scheme, piracy of goods on one hand[35] and the laundering activity which disguise the original source of illicit property on the other hand. Though, prosecution of money laundering offence does not depend on ones conviction or proof of predicate offences.[36]

Laundry stages or processes: Placement means depositing dirty money into financial institutions. Section 3 of the Proceeds of Crime Act[37]elaborates the term placement to include opening, operating or closing an account held with a financial institution, the use of deposit box, telegraphic or electronic transfer by a financial institution, transmission of funds to foreign country e.t.c. This is the most sensitive stage as the depositor identity become visible and has to explain the source of his money and suspicious transaction may be reported to Financial Intelligence Unit (FIU).[38] At present, financial institutions and other reporting persons have to report any cash transaction above the threshold value. In order to circumvent the regulations smugglers result into number of transactions below the threshold through various means including opening numerous accounts; where straw men are used either to deposit the money or to become registered nominal owner of the company in which name the accounts are held.[39] It involves some social organization usually desperate accomplices, the method known as 'smurfing', named after the small cartoon-figures. Layering means disguising the origin of dirty money through series of transactions and bookkeeping tricks. It involve splitting the original amount in 'layers', transferring them abroad and re-transferring them to break the money trail or rather render it untraceable.[40] This may be achieved through cash conversion into monetary instruments such as banker's draft and money orders, re-selling material assets bought with cash and e-funding. Since transactions with large amount of money attract law enforcement attention thus, layering renders difficult to prove whether the money originates from criminal activity. Integration means justification of the origin of money by getting the laundered money into the mainstream economy by pretending some business activities, property dealing, foreign speculative profit or foreign loan from abroad whose real owner is untraceable. At this juncture, some professionals like lawyers have been used by smugglers to create shell companies for disguising the ill-gotten wealth.[41]

[26] The Anti-Money Laundering Act, Cap 423 [R.E 2019]
[27] There are 28 listed predicate offences the list may be expanded at the Minister of Finance's will.
[28] The United Nations Convention against Transactional Organized Crime (UNCTOC)
[29] Cap 423 [R.E 2019], *op cit*, fn No. 28
[30] ibid
[31] Glanville W. (1961) Criminal Law: The General , Part. 2nd edn, Stevens and Sons, at p.18
[32] Glanville W. (*Supra*) as cited in P.S.A. Pillai's ,Criminal Law,13TH Ed; Dr. K.I.Vibhute (Lexis Nexis India, 2017), p.31.
[33] Arnone, M and L Borlini (2010) "International anti-money laundering programs: Empirical assessment and issues in criminal law" 13(3) JMLC 226-271 at p. 251.
[34] Art. 6 of the UN Palermo Convention, also Section 3 of the Anti- Money Laundering Act, Cap 423 [R.E 2019]
[35] Secion 3 of Cao 423 as amended by Act No.1 of 2012.
[36] Ethics and Anti Corruption Commission (Interested Party) ; Assets Recovery Agency v. Pamela Aboo [2018] eKLR
[37] The Proceeds of Crime Act, Cap 256 [R.E 2019]
[38] Section 17 of Cap 423 [R.E 2019]
[39] Op cit, Duyne P.C.V. et al, (2001),p. 123.
[40] ibid
[41] Terry, L.S. and Robles, J.C.L. (2018), "The relevance of FATF's recommendations and fourth round of mutual evaluations to the legal profession", Fordham International Law Journal, Vol. 42 No. 2

Precipitation: means making crime money available for use in the upper world. The money is simply dissipated and precipitated directly in the upper world economy. The precipitation of surplus after personal use can be invested in real assets or production factories to produce legitimate goods. The laundering process does not necessarily follow the laundry process step by step. Layering may start at the placement phase and subsequently numerous accounts may be opened immediately after dirty money has been deposited in the corresponding accounts. It is extremely difficult to justify an income of a corporation which is not based on real business without tempering with paperwork which implies fraud. With this regard a flow of invoices sometimes involving other firm has to be created and some crime entrepreneurs are excited to see their phoney income cleared, paying taxes due.[42]However, financial investigators must be aware that the rest of the story is not reflected in paper work but it can be traced through other physical enterprise.

Predicate Offence: Predicate Offences are crimes connected to or related to money laundering. According to section 3 of the Act,[43] there are 28 listed predicate offences and the list may be expanded at the Minister of Finance's will.

These include;

- any dealing which amounts to illicit drug trafficking under the law for the time being relating to narcotic drugs and psychotropic substances;
- terrorism, including terrorist financing;
- illicit arms trafficking;
- participating in an organized criminal group and racketeering;
- trafficking in persons and smuggling immigrants;
- sexual exploitation, including sexual exploitation of children;
- illicit trafficking in stolen or other goods;
- all corruption and related offences stipulated under the Prevention and Combating of Corruption Act;[44]
- counterfeiting of currency or goods;
- armed robbery;
- theft; kidnapping, illegal restraint and hostage taking;
- smuggling;
- extortion;
- forgery;
- piracy;
- hijacking;
- offences under the Cyber Crimes Act[45];
- insider dealing and market manipulation;
- illicit trafficking or dealing in human organs and tissues;
- poaching;
- tax evasion;
- illegal fishing;
- illegal mining;
- fraud and other related offences;
- murder;
- grievous bodily harm;
- pyramid and other similar schemes;
- piracy of goods;
- environmental crimes; or
- any other offences as the Minister may, by notice published in the *Gazette*, declare, whether committed within or outside the boundaries of the United Republic."

There is a tendency for the Director of Public Prosecution to charge the accused who commit ordinary crimes like forgery or tax evasion under the Anti Money Laundering Act instead of charging under the penal code or under the Income Tax Act intending to render such offence unbailable.[46] Consequently many people have ended up in detention for years for offences which would rather be bailable but bail application has been rendered impossible as the prosecutor has entered a money laundering offence under the Ant- Money Laundering Act.[47]One cannot challenge the charge on ground that it can be drafted as ordinary crime in other statutes rather than the AMLA since no decision had been abrogated as it was in Shamte and Others v. Director of Public Prosecution[48]

Organized Crime: According to Article 2 (a) of the Palermo Convention[49]Organized crime has been treated as a 'serious crime,' the article defines organized criminal group as a structured group of three or more persons that exist over a period of time, the members of which act in concert aiming at the commission of serious crimes in order to obtain a direct or indirect financial or other material benefit.[50] The convention further suggests that the conduct which constitutes an offence is punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.[51] In Tanzania the Organized crime has been define under section 2 of the EOCCA[52] to mean "any offence or non-criminal culpable conduct which is committed in combination or from whose nature, a presumption may be raised that its commission is evidence of the existence of a criminal racket in respect of acts connected with, related to or capable of producing the offence in question". The act further defines a criminal racket as "any combination of persons or enterprises engaging, or having the purpose of engaging, whether once, occasionally or on a continuing basis, in conduct which amounts to an offence under this Act.[53]" the motive behind the organized criminals thrust or motivation is to gain advantage from proceeds of crime. While the article 2(e) of the Palermo Convention defined proceeds of crime to mean "any property derived from or obtained, directly or indirectly, through the commission of an offence." Thus ant-money laundering regime fight organized crime along with money laundering crime since organized criminals launder the ill-gotten wealth and turn them to assets that it may appear clean and legal. In the context of organize crime, money laundering emerges prominently since criminals commit crimes of this magnitude to access illicitly and acquire money.

Legal Framework on Money Laundering

International Legal Framework

The United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substance in November, 1988.[54] Tanzania ratifies the convention in 1996. It is generally regarded as the first international instrument showing international effort against Money Laundering. It was primarily intended to combat illegal drug trade and its enforcement. Though it does not explicitly refer to money laundering it defines the concept and call for international efforts to criminalize the same under its Articles 1, 3 and 4. The Financial Action Task Force on Money Laundering (FATF) 40 Recommendations on Anti-Money Laundering Standards.[55] The FATF Recommendations sets minimum standards for action for states to adopt in accordance to their own constitutional framework and establishes measures to guide criminal justice and regulatory system and some further guideline on financial institutions, professionals and other businesses.

[42] Ibid. P.127
[43] Cap 423 [R.E 2019], *op cit*, fn No. 28
[44] The Prevention and Combating of Corruption Act, Cap 329
[45] The Cyber Crimes Act, Cap 443
[46] Dickson Paulo Sanga v. The Attorney General, High Court of Tanzania (HC), Miscellaneous Civil Cause No. 29 of 2019 (Unreported)
[47] Cap 423 [R.E 2019], *op cit*, fn No. 28
[48] Shamte and Others v. Director of Public Prosecution(2018).
[49] The International Convention against Transnational Organized Crimes (The Palermo Convention) of 2003, it came into force on 29th September, 2003.
[50] Article 2(a) *ibid*
[51] Article 2(b) *ibid*
[52] The Economic and Organized Crime Control Act, Cap 200
[53] Section 2, *ibid*
[54] United Nations Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance in November, 1988, which came into force in 11.11.1990
[55] The Financial Action Task Force on Money Laundering (FATF) established in 1989.

The International Convention against Transnational Organized Crimes[56] (The Palermo Convention) of 2003. The Palermo Convention adopted the FATF Recommendations on Anti-Money Laundering and calls for stated to ratify laws which criminalize money laundering and promote international cooperation in the fight against transnational crimes including money laundering.[57]The convention further emphasizes on the principle of non interference that state should respect the principle of sovereign equality, territorial integrity and non intervention into domestic affairs of other states in implementation of the convention. Other International Conventions though not direct but provide some guide on combating against Money Laundering Tanzania ratified include; Single Convention on Narcotic Drugs (1961)-Acceded in 1993, UN Convention on Psychotropic Substances (1971) - Acceded in December 2000, International Convention Against the Taking of Hostages (1979) – Acceded on 22nd January 2003, International Convention for the Suppression of Terrorist Bombing (1997) – Acceded on 22nd January 2003, International Convention for Suppression of Financing of Terrorism (1999) – Acceded on 22nd January 2003 and the UN Convention against Corruption (2003) – signed on 9th December 2003, Ratified on 25th May 2005.

Regional Legal Framework: Tanzania ratified Some Regional protocols to include; Protocol on Combating Illicit Drug trafficking in East African Region 2001, SADC Protocol on Combating Illicit Drug Trafficking 1996 was acceded in 2003, the SADC Protocol on Corruption 2001 was ratified in 2003. Additionally, Tanzania was the founding member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in 1999.

Domestic Legal Framework: There are numerous domestic laws which provide for both substantive and procedural matters on Money Laundering. These include any law which deals with any of the listed predicate offences;

The Anti-Money Laundering Act, Cap 423 [R.E 2019]
The Proceeds of Crime Act, Cap 256, [R.E 2019]
The Prevention of Terrorism Act,
The Economic and Organized Crime Control Act, Cap 200
The Extradition Act, Cap 368 [R.E 2019]
The Evidence Act, Cap 6 [R.E 2019]
The Criminal Procedure Act, Cap 20 [R.E 2019]
The Mutual Assistance in Criminal Matters Act, Cap 254
The Gaming Act, Cap 41 [R.E 2019]
The Banking and Financial Institutions Act, Cap 342
The Prevention and Combating of Corruption Act, Cap 329 [R.E 2019]
The Drug Control and Enforcement Act, Cap 95 [R.E 2019]
The Ant Money Laundering (Amendment) Act, 2012
The Prevention of Terrorism (General) Regulation, 2014
The Ant-Money Laundering Regulation, 2012
The Ant Money Laundering (Amendment) Regulations, 2019
The Ant Money Laundering (Electronic Funds Transfer and Cash Transaction Reporting) Regulation, 2019. The Ant Money Laundering (Cross Boarder Declaration of Currency and Bearer Negotiable Instruments) Regulations, 2016

LEGAL AND PRACTICAL CHALLENGES OF MONEY LAUNDERING IN TANZANIA: Without prejudice to the new comprehensive anti money laundering regime challenges on Money Laundering are intractable as the scourge persist, nay, rather than the laws to cub the criminal activity. Smugglers devise new and sophisticated methods and means to thwarting global measures targeted at combating the problem. The following are legal and practical challenged intending to shed light as to why money laundering in Tanzania remains an albatross;

The automatic denial of bail for money laundering charge: Bail is an agreement between the accused, his sureties and the court that the accused will pay a sum of money fixed by the court should he fail to appear to attend his trial on a certain date. Bail is a constitutional right which secures a temporary release of an accused person, thus shielding him from being incarcerated prior to his guilt being established by the court. The principle underlying bail is the presumption of innocence enshrined in Article 13(6)(b) of the Constitution.[58] The court may at any stage of the proceeding admit to bail a person who appears before it, charged with an offence subject to bail restrictions under section 148(4) and (5) of the CPA.[59] Section 148(5) of the CPA[60] stipulate for unbailable offences. Some of these offences fall under the list of predicate offences under the Ant-Money Laundering Act,[61]while the majority of these offences are bailable, the parasitic offence that is money laundering offence is unbailable consequently renders the offence unbailable. Thus, runs afoul of fundamental rights under international law[62]as it cannot be challenged under judicial review.[63]

The vagueness of the definition of money laundering: Money Laundering has been defined under Section 3 of the Act[64] to mean engagement of a person or persons, directly or indirectly in conversion, transfer, concealment, disguising, use or acquisition of money or property known to be of illicit origin and in which such engagement intends to avoid the legal consequences of such action, and includes offences referred in Section 12."[65] There is confusion as to whether the Act create a single, two or five offences. The position that section 3 and 12 create distinct offences is doubtful as it is hard for the prosecutor to establish the *mens rea* of each offence as independent from each other especially where elements of Money laundering are not derived from section 3 but under each paragraph of section 12 of the same Act as stated in case of Public Prosecution v. Harry Msamire Kitilya and Others.[66] That section 12 creates five distinct money laundering offences from paragraph (a-e), though paragraph 'e' does not explicitly stipulate for the mental element of the crime. Paragraph (e) stipulates; *"…participates in, associates with, conspires to commit, attempts to commit, aids and abets or facilitates and counsels the commission of any of the acts described in paragraphs (a) to (d) of this section, commits offence of money laundering."* The paragraph does not clearly provide for the mental element of crime as it describes the *actus reus* only where else paragraphs a-d provide for both physical and mental element of a crime. However, one may infer both *actus reus* and *mens rea* in 'aiding' and 'abetting.'

Since Money laundering flourishes from predicate offences, if properly listed it allows authorities to be vigilant on offences of serious nature which are economically disruptive. This creates an early warning system that effectively lessens the investigation burden. However, the inclusion of traditional offences such as corruption, fraud and grievous body harm under serious offence creates some lope hole on prosecution of money laundering offences. There is confusion as to whether the prosecution need to first prove the criminal activity along with the existence of ill-gotten wealth before proof of the offence of money laundering. This is evident in the case of *DPP vs. Elladius Cornellio Tesha*[67] where the money laundering is predicated with the unproved predicate offence. However, the court held that where money laundering is charged upon un proved

[56] The International Convention against Transnational Organized Crimes (The Palermo Convention) of 2003, it came into force on 29th September, 2003.
[57] Ibid, Articles 6 and 7.
[58] The Constitution of the United Republic of Tanzania of 1977 as amended.
[59] The Criminal Procedure Act, Cap 20 {R.E 2019]
[60] ibid
[61] Cap 423 [R.E 2019], *op cit*, fn No. 28
[62] The AG vs. J. Mtobesya, CA (Dar) Civil Appeal No. 65 of 2016 (unreported); Daudi Pete vs. R. (1995) TLR 22
[63] Shamte and Others v. Director of Public Prosecution(2018).
[64] The Anti-Money Laundering Act, Cap 423 [R.E 2019]
[65] Mniwasa, E.E. (2015), "Money laundering control in Tanzania: the convergence of economics, politics and law", in Mjema, G.D. and Kaganda, G.E. (Eds), Socio-Economic Dynamics in Tanzania: Lessons and Experiences, Vol. 1, Dar es Salaam University Press, Dar es Salaam.
[66] ibid
[67] The DPP v. Elladius Cornellio Tesha HC (DAR) Criminal Appeal No. 135 of 2013 per Arufani J. dated 27th May 2016 (Unreported)

predicate offence the particulars of the money laundering offence must provide adequate information on proceeds of the predicate offence. In this regard, the burden of proof is raised to the higher standard on the part of the prosecution. Although the prosecutor can infer culpability of an accused by proof of *mens rea* based on intention, recklessness or negligence, this may not be practicable where the court rely on 'irresistible inference' as source of legal proof, consequently the inference level on burden of proof may highten on the prosecution.

In other jurisdiction, lying of a charge of Money Laundering does require or depend on proof of a predicate offence as in Asset **Recovery Case.**[68]In this case the respondent had failed to explain the source of her funds and had never made any withdrawals. The court effectively dispensed with the need to prove predicate offences before laying a charge of money laundering. Thus, the vagueness of the definition of money laundering justifies the prosecutor's discretion on either charging the accused under the Penal Code or under the Anti-Money Laundering Act.

Reporting requirement for professional: The law mandates the Financial Intelligent Unit (FIU) to receive suspicious transaction reports from reporting persons.[69] A Reporting person is either a natural or legal person who has duty to report to the FIU with regard to suspicious transaction.[70] A reporting person is supposed to report any suspicious transaction to the Financial Intelligence Unit within 24 hours.[71]Further, reporting professionals are required to establish internal money laundering control and take client due diligence by verifying information in relation to a client in order to mitigate a particular risk posed by the client or a particular transaction by fulfilling the following obligations;[72]

- To satisfy himself as to the true identity of any applicant seeking to enter into a business relationship with him.
- In relation to politically exposed persons; obtain senior management approval and satisfy the source of income
- Establish and maintain customer records,
- Report suspicious transactions,
- Establish and maintain internal reporting procedures, and
- Ensure that no person shall open or operate an account with a bank, financial institution or any other reporting person in a false, disguised or anonymous name."

Moreover, regulation 5 (1) of the Anti Money Laundering (Electronic Fund Transfer and Cash Transaction Reporting Regulation[73]stipulates that; (a) Currency transaction involving Tanzania Shillings or any foreign currency equivalent to ten thousand United States Dollars or more in the course of a single transaction. (b) An electronic Fund Transfer involving Tanzanian Shillings or any foreign currency equivalent to one thousand United States Dollars or more in the course of a single transaction. Report on currency transaction and electronic funds transfer shall be submitted to the financial Intelligent Unit electronically or otherwise as per Regulation 6[74]within five days of the transaction. The format for reporting currency transactions is provided in the first schedule to the regulation while the format for reporting electronic funds transfer is provided under the second schedule of the same regulation. The duty to disclose overrides any other duty to customer or secrecy obligation per section 21(1) of the Act.[75]Besides, reporting persons enjoys immunity against criminal and civil litigation on breach of confidentiality.[76] It is evident that the service of legal professionals has been enjoyed by politicians, wealthy individuals and corporate entities in facilitating money laundering by creation shell companies for hiding the ill-gotten wealth and assist in tax avoidance.[77] Failure to report suspicious transactions per the law attracts punishment.[78]the Act further prohibit Tipping off which refers to warning or alerting a client involved in a transaction of a possibility or actual report being made to the FIU during establishment of their relationship or in the course of the transaction or relationship; [79]this may interfere with investigation. The defence to this offence is only to prove that the accused person did not know or did not have reasonable ground to suspect that disclosure in question was likely to prejudice any investigation of money laundering as stated in *Mohamed Iqbad Meer Case*[80] where Mr. Meer was charged for acting dishonest and was himself viewed as a conspirator since the funds in question passed through his firm's client account.

Therefore, the duty to report by legal practitioner is contrary to the doctrine of confidentiality required for Advocate-Client relationship which require non disclosure or use it for unauthorised purposes.[81] Further, authorities have arbitrarily used the Ant money laundering laws to victimise some legal practitioners at the same time abdicate its duties of preventing ML and delegate it to legal practitioners.[82] The unguided reporting requirement for professional is detrimental to professional ethics on privacy, confidentiality and loyalty. Other Jurisdiction have held that such interferes with solicitor-client is unjustifiable as it violates solicitor-client privilege per the case of *Attorney General of Canada v. The Federation of Law Societies of Canada*[83]that "the expectation of privacy in solicitor-client privileged communication is invariably high regardless of the context..."This calls for self regulation in combating money laundering by legal practitioner since the legal practitioners are now vulnerable to the charge of money laundering by virtue of their profession.[84]In Tanzania the Tanganyika Law Society has no guideline to advocates on how to handle money laundering issues as it is in other jurisdiction like 'risk red flag' in Kenya and 'blue card warning' in UK.

Elements of the crime of money laundering: The general rule of criminal responsibility requires that a person cannot be guilty of a criminal act unless in so acting he does so with a guilty state of mind. *Actus non facit reum, nisi mens sit rea*" meaning the act itself does not constitute guilt unless done with a guilty mind.[85] *Mens rear* means a guilt state of mind when committing the act or when omitting the act. It has been held that elements of Money Laundering (ML) are not derived from the provision (i.e section 3 of the Cap 423) that define the offence but from each paragraph of section 12 of the same Act.[86] The courts contention in rejecting the usefulness of the definition in understanding the offence defeats the purpose of the

[68] Asset Recovery Agency v.Pamela Aboo; Ethics and Anti Corruption Commission (Interested Party) [2018]eKLR

[69] Section 4 of Cap 423 [R.E 2019], *op cit*, fn No. 28

[70] Sections 3, 15, 17-20 of Cap 423; See also Reg. 5(1) of the Anti Money Laundering (Electronic Fund Transfer and Cash Transaction Reporting Regulation No. 420 of 2019.

[71] Section 17 of Cap 423 [R.E 2019], *op cit*, fn No. 28

[72] Sections 18 and 15 of Cap 423 [R.E 2019], *op cit*, fn No. 28

[73] The Anti Money Laundering (Electronic Fund Transfer and Cash Transaction Reporting Regulation No. 420 of 2019.

[74] The Anti Money Laundering (Electronic Fund Transfer and Cash Transaction Reporting Regulation , No. 420 of 2019.

[75] Section 21(1) of Cap 423 [R.E 2019]

[76] Section 22, *ibid*

[77] Terry, L.S. and Robles, J.C.L. (2018), "The relevance of FATF's recommendations and fourth round of mutual evaluations to the legal profession", Fordham International Law Journal, Vol. 42 No. 2

[78] Section 17(4) of Cap 423 [R.E 2019]

[79] Section 20(1)and (3) , *ibid*

[80] Attorney General of Zambia V. Meer Care &Desai (a Firm) and Others [2008]EWCA Civ 1007 (31st July 2008)

[81] Gichuki, N. E. (2020); The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya; Journal of Money Laundering Control. Also available at https://www.emerald.com/insight/content/doi/10.1108/JMLC-05-2020-0055/full/html.

[82] Mniwasa E,(2021), Tackling Money Laundering in Tanzania: are Legal Practitioners Crime enablers or ineffectual and reluctant gatekeepers?, Journal of Money Laundering Control, Vol24 No. 2, p.311

[83] The Attorney General of Canada V. The federation of the Law Societies of Canada [2015] 1 R.C.S

[84] Mniwasa, E.E. (2021), "Tackling money laundering in Tanzania: are private legal practitioners crime enablers or ineffectual and reluctant gatekeepers?", *Journal of Money Laundering Control*, Vol. 24 No. 2, pp. 291-324. https://doi.org/10.1108/JMLC-03-2020-0028

[85] Chipeta B.D, (2009)A Handbook For Public Prosecutors, 3rd Ed. Mkuki na Nyota Publishers DSM, p. 87

[86] Director of Public Prosecution v. Harry Msamire Kitilya and Others, Criminal Appeal No.105 of 2016

definition. With regard to *mens rea* and *actus reus* of ML in the charge sheet is that the particulars of the offence must adequately disclose the criminal conduct that generates the proceeds of crime and the laundering conduct.[87]

Section 3 of the Act[88] conforms to Art. 6 of the Palermo Convention[89] which suggest three elements of *actus reus*, that is the objective element of money laundering offence.[90] These are

- *Conversion or transfer'* of the proceeds of crime, and conduct to '*conceal or disguise'* the true source and nature of the illicit property
- *The acquisition, possession* or use' of the illicit property
- *aiding, abetting, facilitation and counseling* the commission of the offence.

For example, the Palermo Convention explicitly stipulate that "money laundering is a 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 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 disguising its true nature, source, location, disposition, involvement or ownership of, or rights with respect to property knowing that such property is the proceeds of crime." Thus the offence of organized crime also covers people who assist and facilitate the serious offence committed by an organized criminal group, even though they may not participate directly in all of its crime.[91] The objective element require the prosecution to first prove the criminal activities that generates the proceeds of crime and then prove the activities related to laundering of the proceeds of crimes. The burden is extremely heavy on the prosecution side. The *mens rea* of money laundering (the subjective element) means that the accused knew, should have known, and ought to have known that the source of money or property is from criminal activity.[92] The *mens rea* of the offence of money laundering has two elements; (i) intent to conceal or convert property or proceeds crime (ii) knowledge or belief that the property or proceeds were derived from an enterprise crime offence or a designated substance offence.[93] The term conceal and convert are two distinct terms; to convert does not suggest intent to conceal rather has a broader meaning as to change or transform, while to conceal means to hide.

In Tanzania mens rea of money laundering offence is founded under section 3 alongside section 12 (a-d) of the Act.[94] The court in the case of *Public Prosecution v. Harry Msamire Kitilya and Others*[95] stated that section 12 creates five distinct money laundering offences from paragraph (a-e), though paragraph 'e' does not explicitly stipulate for the mental element of the crime rather the *actus reus*. However, one may infer both *actus reus* and *mens rea* in aiding and abetting. Words under section 3 of the Ant-Money Laundering Act that is '*known to be of illicit origin' and 'intends to avoid'* gives primacy to the intentionality of the conduct and the knowledge of the source of property as it emanates from criminal activity or from one's involvement in illegal conduct.[96] This create uncertainty as to whether the act creates a single, two or four or five offences.

However, proof of actual knowledge in money laundering offence includes inferences in which the mental element may either be objective or subjective while the broader concept of *mens rea* include 'belief,' 'suspicion,' or 'reasonable suspicion'(mostly in common law countries) or recklessness, gross negligence or negligence(in civil law countries). Additionally, there is confusion as to whether the prosecution need to first prove the criminal activity along with the existence of ill-gotten wealth before proof of the offence of money laundering. In *R v. Raymond Adolf Louis and four Others* [97] the following elements were held to be essential to prove the offence of Money Laundering; "(i) engaging directly or indirectly in the transaction that involves property that is a proceed of predicate offence, (ii) presupposes that a predicate offence has been committed, (iii) knowing or ought to have known that that the property is the proceed of predicate offence. Where else, courts have held that the element of an offence of money laundering must be stipulated within the section of the statute which creates the said offence.[98] In **Director of Public Prosecution v. Elladius Cornelio Tesha & Others** [99] money laundering has been predicated with the unproved predicate offence.

Challenges on Predicate offences: Predicate offences are crimes connected to or related to money laundering as noted earlier on conceptual and theoretical framework. The Act, stipulates for a list of 28 offences which constitute the charge of money laundering. Kapama[100] observes that there is a notable rise of incidences of money laundering predicate offences in Tanzania. Undoubtedly, the significant contributions to the pool of ill gotten money derive from organized crime, tax evasion and fraud (that may appear in numerous forms such as trade fraud, bank and financial fraud, medical, insurance and other frauds), the illegal arms trade and public sector corruption is threatening.[101] Owing to this, a number of international instruments have expanded the definition of money laundering as stipulated under the Vienna Convention's to include these predicate offences or serious offences. For instance, the UN Convention against Transnational Organized Crime of 2000 (the Palermo Convention) requires all the state parties to apply the Vienna Convention's definition of money laundering to "…the widest range of predicate offences"[102] Besides, proper listing of predicate offences allows authorities to be vigilant on offences of serious nature. Economic offences pose a serious disruptive effect to the county's economy. Thus, the need to devise a comprehensive detection system should involve all stakeholders on anti money laundering such as banks, financial investigators, professionals, the public and others. This may increase the method of detection of criminal activities. Further, Money Laundering has been observed as a parasitic offence that rides on the existence of traditional offences categorized as serious offences known as 'predicate offences'. This has been stated in an English case of R v. GH[103]that the offence of Money Laundering refers to a 'Parasitic offence' for it creates two set of offences that leads to disruption of the model of culpability, that we have the predicate offence that generates proceeds of crime on one hand and the Money Laundering offence on the other hand that legitimized the proceeds of crime. However, there are instances when the principle offender who committed the predicate offence may never be present yet access to proceeds of crime would have been achieved as it was in Asset Recovery Case.[104]In this case the respondent had failed to

[87] Director of Public Prosecution v. Tesha, *op cit*
[88] Cap 423 [R.E 2019], *op cit*, fn No. 28
[89] The International Convention against Transnational Organized Crimes (The Palermo Convention) of 2003
[90] However, section 3 of Cap 423 is read together with section 12 of the same Act which adds five more offences whose objective element is clearly stated as per the case of Director of Public Prosecution v. Harry Msamire Kitilya and Others, Criminal Appeal No.105 of 2016
[91] A corporation can also be charged with organized crime and the liability can be criminal, civil or administrative per Article 10(2) of the Palermo Convention.
[92] Director of Public Prosecution v. Harry Msamire Kitilya and Others, Criminal Appeal No.105 of 2016; Felix Kiprono and Mohamed Iqbal Meer Case
[93] R v. Daoust (2004)180 C.C.C.(3d)449(S.C.C.)
[94] Cap 423 [R.E 2019], *op cit*, fn No. 28
[95] ibid
[96] Arnone, M and L Borlini (2010), p. 256.
[97] R v.Raymond Adolf Louis and four Others, Economic Crime Case No.1 of 2017 (Corruption and Economic Division, Dar es Salaam Registry[Unreported] p. 73.
[98] Director of Public Prosecution v. Harry Msamire Kitilya and Others, Criminal Appeal No.105 of 2016
[99] The DPP v. Elladius Cornellio Tesha HC (DAR) Criminal Appeal No. 135 of 2013 per Arufani J. dated 27th May 2016 (Unreported)
[100] Kapama, F. (2017), How Money Laundering Threatens Socio-Economic, Political Stability, The Daily News, Dar es Salaam.
[101] Myers J.M,(1998), International strategies to control money laundering, available at www.icclr.law.ubc.ca/Publications/Reports/myer_pad. pdf. Accessed on 20th August, 2021.
[102] Article 6 (2) (a) the UN Convention Against Transnational Organized Crime of 2000 (the Palermo Convention).
[103] R v. GH(2018)
[104] Asset Recovery Agency v.Pamela Aboo; Ethics and Anti Corruption

explain the source of her funds and had never made any withdrawals. The court effectively dispensed with the need to prove predicate offences before laying a charge of money laundering. There are three approaches used in identification of predicate offences. These include; (i) all crimes approach-a model that include all crimes (ii) the list approach-as the case of Tanzania where a model is limited by a list of offences (iii) the threshold approach-the model that identify serious crimes and put a threshold for predicate offences.[105] Tanzania is modeled with the UK pattern on identification of predicate offences by list approach. So far there is no justification as to why some offences such as corruption,[106] drug related offences and grievous body harm are seriously disruptive offence[107] to be listed as predicate offence under section 3 of the Ant Money Laundering Act.[108] Owing to this speculation there is a need to reconsider the rationale for inclusion or non inclusion of predicate offences in the list of money laundering. The interpretation notes with regards to the threshold approach and the FATF Recommendations No.3 have to guide in resolving this dilemma to avoid being arbitrarily used. Likewise Murray[109] suggests the use of irresistible inference as an alternative to predicate offence for this would provide a hostile environment to money smugglers though this may not be practicable without having international consensus. Matters may be worse when the DPP decides to forfeit the accused properties under the Proceeds of Crimes Act on basis of conviction for money laundering pending the acquittal on predicate offence. Tanzania need to embark on an objective risk analysis as proposed under FATF Recommendation since the list of predicate offence appears to be *ad hoc.*

Anonymous nature of the offence of Money Laundering and launderers: The process of hiding the source of ill-gotten wealth includes disguising the true perpetuator of crime who generated such proceeds of crime. Section 19(2) and (3) of the Act[110] prohibits opening or operating an account with a false, disguised or anonymous name. further, the Vienna Convention[111] define money laundering to mean the process of concealing or disguising the illicit origin of property or money derived from criminal activities. Though money does not smell it is evident that some sources of money do smell both in the eyes of the law and in the opinion of the society. [112] Since money laundering is part of organized crime offences it can be facilitated by dirty income derived from all organized crimes offences.[113] Owing to this fact, smugglers accumulate much wealth and devise sophisticated methods to disguise the origin or ownership of the proceeds of their criminal activities to make it legitimate. Over and above, the presence of predicate offences which include offences under the Cyber Crimes Act,[114] presents the anonymous nature of cyber crimes as the identity of the user of internet may be undisclosed to the owner or operator of internet. Moreover, owing the intricacies involved in its detection and investigation, mandatory identification of internet user has been introduced; the same has been ferociously opposed by Human rights activists for violating privacy. Thus, challenges on anonymity remains intractable rendering the Ant money laundering law regime a nugatory.

International nature of the crime: Money laundering has become transitional and de-territorised as smugglers takes advantage of the global market to trade illicit drugs, traffic in persons, fraud and other transnational crimes. From time immemorial smugglers have been looking for means to disguise the source of their fund emanating from criminal activities including some of the traditional offences such as fraud, drug trafficking and corruption.[115]Globalization has largely transformed Money laundering to international scale due to widespread use of electronic money transfer, increased international trade and liberalization of foreign market. This makes detection and investigation complex and length as money launderers use multiple jurisdiction. These require concerted efforts and sufficient resources to unravel sophisticated criminal network. Countries worldwide have agreed to cooperate in combating the crime though the magnitude of the risk brought by money crime depends to the attitude of the policy maker towards perpetuators and the kind of crime involved. The UN Security Council under chapter VII of the UN Charter passed and adopted Resolution 1373 on 28th September 2001, to criminalise action in furtherance of terrorism financing and call for corporation in criminal investigation and sharing information. In 2015 the UK SFO launched an investigation against Standard Bank, Pls which was subject to indictment for failure to prevent bribery contrary to section 7 of the UK Bribery Act of 2010. Through Deferred Prosecution Agreement (DPA) the Standard Bank was ordered to pay financial orders of USD 25.2 million and required to pay the Government of Tanzania 7 million USD for compensation plus and addition of UK pound 330,000 to SFO in relation to investigation and subsequent resolution of the DPA. Thus, Tanzania should sign, ratify and domesticate global and regional legal instrument in combating money laundering since there is dearth of jurisprudence on money laundering being a new phenomena which has not been sufficiently tested by court, consequently magistrates and judges have little guide and knowledge.

CONCLUSION AND RECOMMENDATION

Conclusion

Money Laundering being a serious offence in terms of Proceeds of Crimes Act is not bailable and it cannot be challenged under judicial review[116]as stated in the case of *James Burchard Rugemalira v. R*.[117] In this case the Court of Appeal refused to struck out the offence of Money Laundering and declare it bailable one on ground that such prayer was premature. Thus, runs afoul of fundamental rights under international law. The duty to report by legal practitioner is contrary to the doctrine of confidentiality required for Advocate-Client relationship which require non disclosure or use it for unauthorised purposes.[118] Such interferes is unjustifiable as it violates solicitor-client privilege per the case of *Attorney General of Canada v. The Federation of Law Societies of Canada*[119] Each paragraph of Section 12 creates a separate offence; thus there are five distinct money laundering offences which provide for act (*actus reus*) and a necessary mental element (*mens rea*) per the case of *Director of Public Prosecution v. Harry Msamire Kitilya and Others*,[120] There is confusion as to whether the prosecution need to first prove the criminal activity along with the existence of ill-gotten wealth before proof of the offence of money laundering. This is evident in the case

Commission (Interested Party) [2018]eKLR

[105] Recommendation No.1 of the FATF Recommendation (2012-2018) "Assessing risks and applying a Risk based approach" (RBA). Rec. No. 3 on the ML offence under its Interpretive Note (at p. 32) sub-items 3 suggest the threshold approach.

[106] *ibid*

[107] Legal Affinity Group – Chapter 2 pp. 20 -29 on the Risk based approach for Lawyers

[108] Cap 423 [R.E 2019], *op cit*, fn No. 28

[109] Murray, Kenneth (2011), Journal of Money Laundering Control, 14(1):7-15. Also found at www. Researchgate.net, Accessed on 18th August, 2021, at 12:13 hrs

[110] Cap 423 [R.E 2019], *op cit*, fn No. 28

[111] Adopted by the UN at its sixth plenary meeting on 19th December, 1988. Tanzania signed the Convention on 13th December, 2000.

[112] Duyne P.C.V. et al, (2001), *Financial Investigation of Crime, A tool of the integral law enforcement approach*, Koninklijke Vermande, p. 115.

[113] Mwema s.A, Current Situation and Countermeasures against Money Laundering: Tanzania experience, Resource Material Series 58, p.429

[114] The Cyber Crimes Act, Cap 443 and Section 3 of Cap 423 [R.E 2019]

[115] Madinger J. Money laundering: A Guide for Criminal Investigators 3rd Ed. (CRC Press, Francis and Taylor N. Y 2012) esp. ch.2 "The Historical context" pp.11 – 22. Examples of the Mafia and Political Campaigns Money laundering before 1986 when the US passed its AML Act

[116] Shamte and Others v. Director of Public Prosecution(2018).

[117] Jemes Burchard Rugemalira v. R, Criminal Appeal No. 391 of 2019 (27th June, 2019)

[118] Gichuki, N. E. (2020); The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya; Journal of Money Laundering Control. Also available at https://www.emerald.com/insight/content/doi/10.1108/JMLC-05-2020-0055/full/html.

[119] The Attorney General of Canada v. The federation of the Law Societies of Canada [2015] 1 R.C.S

[120] Director of Public Prosecution v. Harry Msamire Kitilya and Others, Criminal Appeal No.105 of 2016

of Director of Public Prosecution v. Elladius Cornelio Tesha & Others [121] where the money laundering is predicated with the unproved predicate offence. At this juncture, lying of a charge of Money Laundering does require or depend on proof of a predicate offence. This is not always the case as there are instances when the principle offender who committed the predicate offence may never be present yet access to proceeds of crime would have been achieved as it was in Asset Recovery Case.[122] There is a need to reconsider the rationale for inclusion or non inclusion of predicate offences in the list of money laundering. The use of irresistible inference as an alternative to predicate offence for this would provide a hostile environment to money smugglers though this may not be practicable without having international consensus. The unguided reporting requirement for professional is detrimental to professional ethics on privacy, confidentiality and loyalty. In Tanzania the Tanganyika Law Society has no guideline to advocates on how to handle money laundering issues as it is in other jurisdiction like 'risk red flag' in Kenya and 'blue card warning' in UK. Smugglers accumulate much wealth and devise sophisticated methods to disguise the origin or ownership of the proceeds of their criminal activities to make it legitimate. A casual glance at the predicate offences which include offences under the Cyber Crimes Act,[123] presents the anonymous nature of cyber crimes as the identity of the user of internet may be undisclosed to the owner or operator of internet. Moreover, owing the intricacies involved in detection and investigation of money laundering, mandatory identification of internet user has been introduced; the same has been ferociously opposed by Human rights activists for violating privacy. Thus, challenges on anonymity remains intractable rendering the Ant money laundering law regime a nugatory.

Recommendations

There should be regular training to judicial officers, law enforcers and legal practitioners on ant-money laundering and other standards-corporations as required under the Act.[124]Tanganyika law Society should conduct training on capacity building to legal practitioners that they may modernize their offices by equipping them with facilities that can prevent their system from being infiltrated by money launderers. Additionally, Money laundering charge must be particularized sufficiently clearly to allow the accused to prepare his defense as emphasized in Director of Public Prosecution v. Elladius Cornelio Tesha & Others;[125] and that the element of an offence of money laundering must be stipulated within the section of the statute which creates the said offence. This will resolve the confusion especially where money laundering is predicated with the unproved predicate offence. The interpretation notes with regards to the threshold approach and the FATF Recommendations No.3 have to guide in resolving this dilemma for inclusion or non inclusion of predicate offences in the list of money laundering to avoid being arbitrarily used. There should be established internal money laundering control, rules and procedures allowing duties and responsibilities towards compliance as require under the law.[126]Entities should set up departments, sections or units to facilitate reporting. There should be concerted efforts and international cooperation in combating money laundering. A country cannot successfully deal with the problem on its own without collective efforts.

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CONVENTION

International Convention Against the Taking of Hostages (1979) – Acceded on 22nd January 2003
International Convention for Suppression of Financing of Terrorism (1999) – Acceded on 22nd January 2003
International Convention for the Suppression of Terrorist Bombing (1997) – Acceded on 22nd January 2003
Single Convention on Narcotic Drugs (1961)-Acceded in 1993
The International Convention against Transnational Organized Crimes (The Palermo Convention) of 2003, it came into force on 29th September, 2003.
The UN Convention against Corruption (2003) – signed on 9th December 2003, Ratified on 25th May 2005
UN Convention on Psychotropic Substances (1971) - Acceded in December 2000
United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substance in November, 1988, which came into force in 11.11.1990

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