

COUNTERING THE ECONOMIC CRIPPLER; ANALYSIS ON PREVENTION OF MONEY LAUNDERING LAW IN SRI LANKA

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ABSTRACT

As per the Financial Action Task Force (FATF), money laundering is the 'processing of criminal proceeds to disguise their illegal origin to legitimize the ill-gotten gains of crime'. Money Laundering is a transnational crime and due to that fact, ascertaining the perpetrators is an arduous task. Consequently, convicting the perpetrators is hindered due to drawbacks in implementation of laws, scantiness in laws and ambiguities in the law. Money laundering is adverse to the economy as it promotes illegal trade such as drug smuggling and illegal firearms, it creates rapid economic growth but in the long run, the economy is distressed. Furthermore, the liberty and sovereignty of financial institutions are endangered and lead to tax evasion impinging government revenue. The research has attempted to identify money laundering as detrimental to the economy and the need for effective implementation of laws to counter money laundering. The objectives of the research are, to identify the impact of money laundering on the economy, to assess the legal framework relating to money laundering, to discuss the lacunae in the law relating to money laundering and to provide recommendations to rectify the lacunae relating to money laundering. The research seeks to answer the questions on what is the impact of money laundering on the economy, what the legal framework is relating to money laundering, what are the lacunae in the law relating to money laundering and what are the recommendations to rectify the lacunae relating to money laundering. The research is a doctrinal research

which is also qualitative in nature. Research has given prominence to statutes and judicial precedents to arrive at results. Research has also been aided by secondary sources such as scholarly publications. In addition, research has shed light on the international legal context to enrich the research. In the end, research has proved that money laundering as detrimental to the economy and the need for effective implementation of laws to combat money laundering.

Key Words: Economy, Lacunae in law, Money Laundering

I. Introduction

As per Financial Intelligence Unit, ‘Sri Lanka Prevention of Money Laundering Act (PMLA) was enacted on 6th March 2006. It sets out the laws necessary to combat money laundering such as freezing, property tracking and forfeiture of assets related to money laundering. The PMLA was further amended in 2011’. The objective of money laundering is to generate revenue in a short time in large quantities. Here the source of money is illegal. The objective behind the laundering of money is to conceal the illegal origin of the cash. Money laundering happens in various ways such as illegal firearms, narcotics, bribery, human smuggling, extortion, theft, credit card fraud, insider trading and more.

There are three stages of money laundering. The first stage of money laundering is known as ‘placement’, at this stage launderer places money into the financial system such as by way of bank deposit. The large cash amounts are broken into smaller amounts making it less suspicious. Consequently, the stage of ‘layering’ comes into action. At this stage, the launderer transmits the cash into different channels. The complexity in the channels makes it hard to notice the guilty act. At this stage, the launderer transmits the funds through different banks from different accounts and the transactions can be extraterritorial in nature. The third stage is the ‘integration’ stage; at this stage, money is integrated into legitimate financial institutions. In this context, money is whitewashed and laundered money is used to purchase assets or invest in profitable markets.

There are various laws to combat and minimize money laundering. They are,

- Conventions on the Suppression of Terrorist Financing Act No 25 of 2005
- o Conventions on the Suppression of Terrorist Financing (Amendment) Act No 41 of 2011.

Conventions on the Suppression of Terrorist Financing
(Amendment) Act No 03 of 2013

- Prevention of Money Laundering Act No 05 of 2006 o Prevention of Money Laundering (Amendment) Act No 40 of 2011
- Financial Transactions Reporting Act No. 06 of 2006 (FTRA)

Money laundering affects society, economy and political stability. Briefly, it is crystalline that money laundering is hazardous to society as a whole. In the context of the economy, money laundering creates misery in numerous ways such as insider trading, insider dealing, front companies, tax evasion, economic instability, vulnerable private sector companies, banking irregularities and social costs. Therefore, it is imperative to have stringent laws and effective implementation mechanisms to counter the threat of money laundering.

2. Methodology

The research is a doctrinal research where existing sources are utilized and analyzed critically. Research has used both primary as well as secondary sources. Special attention has been awarded to the primary sources, Prevention of Money Laundering Act No 05 of 2006 and Prevention of Money Laundering (Amendment) Act No 40 of 2011. Research is aided by Financial Action Task Force (FATF) reports and reports by the Financial Intelligence Unit (FIU) of Central bank Sri Lanka. Research is mainly of qualitative nature.

According to Denzin and Lincoln (1994, p. 2) ‘qualitative, which is of multimethod in focus, involving an interpretive, naturalistic approach to its subject matter.’ Research is also aided by few other laws and case laws of other jurisdictions.

3. Discussion

i. Impact of money laundering on the economy

Money Laundering has a direct impact on the economy of a country. Money Laundering happens by way of predicate offences. According to FIU ‘The criminal activity which generated the proceeds are called a predicate offence or underlying crime in money laundering and when such funds are laundered offence of money laundering will occur’. These are crimes including illegal drugs, illegal weapons, bribery and credit card fraud. ‘According to the vulnerability tracker of Illicit Financial Flows (IFFs) of the Tax Justice Network, Sri Lanka ranks mid-high at the financial secrecy index, being number 39 out of 133 countries globally, and with a score of 72 on financial secrecy haven’.

According to Financial Accountability Transparency and Integrity Reports (FACTI 2021), Sri Lanka is a country with illicit financial flows (IFFs). It mentions several reasons behind money laundering activities. One such reason is aggressive tax planning. Due to aggressive tax planning launderers' takes advantage of the tax system and exploit it. As per FACTI 2021, 'double non-taxation is a fine example. Money launderers seldom pay taxes. They are capable of laundering money sophisticatedly without divulging the illegal origin. For illustration, in cases such as charity organizations and non-governmental organizations are free from tax. For that reason, money launderers tend to use it as a cover to immune themselves and conceal their dark reality. Therefore, ascertaining beneficial ownership is crucial; if not it is detrimental to the economy.

Government incurs social costs due to money laundering. Especially in cases such as illegal drugs, the social cost is high. Government expenditure is high on confiscation and raids. The menace does not stop from confiscation; the government also has to suffer a loss in order to rehabilitate drug-dependent persons and litigation fees. This is a burning issue in Sri Lanka where there are plenty of cases filed in the high court. Virtual currencies are also a threat to the economy, which is facilitated by money laundering. 'In Sri Lanka, although foreign currency exchange laws prohibit purchasing virtual assets with credit cards, cryptocurrency is unregulated and has seen an important rise'. Therefore, it is clear that money laundering is exclusively detrimental to the economy of the country. Hence, laws must be able to counter the threat.

ii. Legal framework relating to money laundering

Section 2 of the Prevention of Money Laundering Act No 05 of 2006(PMLA) revolves around the applicability of the act as well as on jurisdiction. The Act is wide in scope it is not only restricted to natural persons but it has also been extended to legal personality. Due to that reason, institutions are also accepted under the Act. Next, Act welcomes acts committed while being a resident of Sri Lanka as well as outside Sri Lanka. This showcase the extraterritorial nature of the crime. Unless other crimes money laundering is a cross border crime where perpetrators are widespread. For illustration, if a merchant obtains money from drugs and deposits the money derived in a bank his accomplice living in another country might withdraw from an international bank. As a result, the web of crime is not wholly in Sri Lanka and it is strenuous to prove who is guilty. The Act extends to institutions that are listed or incorporated outside Sri Lanka in addition to the institutions located in Sri Lanka. Furthermore, it applies to branches of financial institutions as well.

In the cases of acts of money laundering committed by a body of persons, 'Every director or other officers of that body shall be guilty of money laundering. There is a defence available that the act was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. The assets of any person found guilty of the offence of money laundering shall be liable to forfeiture in terms of the commission of the unlawful activity.'

Section 3 of the Act deals with the offence of Money Laundering. According to the Act, 'Any person, who engages directly or indirectly in any transaction about any property which is derived or realized directly or indirectly, from any unlawful activity or the proceeds of any unlawful activity; receives, possesses, conceals, disposes of, or brings into Sri Lanka, transfers out of Sri Lanka, or invests in Sri Lanka, any property which is derived or realized, directly or indirectly, from any unlawful activity or the proceeds of any unlawful activity, knowing or having reason to believe that such property is derived or realized, directly or indirectly from any unlawful activity or the proceeds of any unlawful activity, shall be guilty of the offence of Money laundering.'

This section is wide in scope it specifies ranges of acts such as 'receives, possesses, conceals, disposes of'. Moreover, Act indicates the intention by the wordings of 'knowing or having reason to believe. Therefore, Act penalizes both the guilty act (*Actus Reus*) and the guilty mind (*Mens Rea*)...However, the offence of 'conspiracy' is not recognized separately, which is a lacuna in the system. Comparatively United Kingdom's anti-money laundering scheme is wide. (Segarajasingham 2018) states that 'The PCA/UK defines money laundering as an act which constitutes an offence under sections 327-962 and includes attempt, conspiracy, aiding, abetting, counselling and procuring the commission of the offence which are called principal offences. In addition, there exist non-reporting offences and tipping-off offences under the Act'.

In the case of *R v Joseph Ashman & Others* (2016), 'Three of the four defendants (including the principle defendants' wife and sister) were convicted.' Proving the element of 'aiding, abetting'. A similar position is seen in Sri Lanka. In the case of *Wele Suda* '[a case was] filed against three accused including drug dealer Gampola Vidanage Samantha Kumara alias Wele Suda and his wife'. A similar position was adopted when 'The mother, of underworld criminal Janith Madusanka de Silva alias 'Podi Lassi', was arrested by the Western Province North Crime Division, on charges of handling money earned from drug trafficking.' This is crystalline from the words of 'knowing or having reasons to believe incorporated in Sri Lanka's Anti Money Laundering Act.

Another matter, which merits importance, is ‘front companies’ are widely seen in Sri Lanka, which makes identifying the perpetrator a hard task. It is important to ascertain the real owner and trust companies or companies receiving grants should not be given the liberty to launder money. One of the advantages which are in the Act is two separate cases can be instituted which means in addition to money laundering a case can be filed for the predicate offence. In the case of *Director of Public Prosecutions v Elladius Cornelio Tesha and others* [2016], it was held that ‘it is permissible to charge both money laundering and its predicate offending’.

Penalty for money laundering is, ‘conviction after trial before the High Court be liable to a fine which shall be not less than the value of the property in respect of which the offence is committed and not more than three times the value of such property or rigorous imprisonment for a period of not less than five years and not exceed twenty years or both such fine and imprisonment.

Section 4 of the PMLA is on ‘presumptions’. ‘It shall be deemed until the contrary is proved, that any movable or immovable property acquired by a person has been derived or realized directly or indirectly from any unlawful activity, or are the proceeds of any unlawful activity if such property (a) Being money, cannot be or could not have been (I) part of the known income or receipts of such person; or (ii) Money to which his known income or receipts has or had been converted; or (b) Being property other than money, cannot be or could not have been (I) property acquired with any part of his known income or receipts; and (ii) Property which is or was part of his known income or receipts; and (iii) Property to which is any part of his known income or receipts has or had been converted. As per the Act, any “property” is inclusive of, ‘Currency or asset of any kind whether movable, immovable, tangible or intangible, whether situated in Sri Lanka or elsewhere. This includes legal documents or instruments in any form whatsoever including electronic or digital form, evidencing title to or interest in such assets. The section showcase the sensitivity of crime it is not only restricted to property and money but extends to ownership of title as well.

According to the Act, ‘Unlawful activity ‘means any act, which constitutes an offence under the below-mentioned statutes.

- a. The Poisons, Opium and Dangerous Drugs Ordinance (Chapter 218);
- b. Any law or regulation for the time being in force relating to the prevention and suppression of terrorism;
- c. The Bribery Act (Chapter 26);

- d. The Firearms Ordinance (Chapter 182), the Explosives Ordinance (Chapter 183) or the Offensive Weapons Act, No. 18 of 1966.
- e. The Exchange Control Act (Chapter 423), and any Rules, Orders or Regulations made thereunder;
- f. An offence under Section 83C of the Banking Act, No. 30 of 1988;
- g. Any law for the time being in force relating to transnational organized crime;
- h. Any law for the time being in force relating to cyber-crime;
- i. Any law for the time being in force relating to offences against children;
- j. Any written law for the time being in force relating to offences connected with the trafficking or smuggling of persons;
- k. The Customs Ordinance (Chapter 235) and any Regulation, Rule or Order made thereunder;
- l. The Excise Ordinance (Chapter) 52 and any Regulation, Rule or Order made thereunder;
- m. The Payment Device Frauds Act No 30 of 2006 and any Regulation, Rule or Order made thereunder;
- n. The National Environmental Act No 47 of 1980 and any Regulation, Rule or Order made thereunder
- o. An offence under any other written law for the time being in force which is punishable by death or with imprisonment for a term five years or more; provided however that, notwithstanding anything to the contrary in the preceding provision, any offence under section 386, 388, 399, and 401 of the Penal Code (Chapter 19) shall be deemed to be an unlawful activity for this Act; and
- p. An act committed within any jurisdiction outside Sri Lanka, either which would constitute an offence in that jurisdiction or which would if committed in Sri Lanka amount to an unlawful activity within the meaning of this Act.

The law in Mauritius is progressive. It does not restrict to a set of predicate offences. In the case of *Director of Public Prosecutions v AA Bholah* [2011], it was held that “Money laundering may be charged and proved without proof of a particular predicate offence”.

Section 6 is on secrecy obligation; accordingly, secrecy obligation is overridden in PMLA. 'The provisions of this Part of this Act shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by any written law or otherwise and accordingly any disclosure of information by any person in compliance with the provisions of this Part of this Act shall be deemed not to be a contravention of such obligation or restriction'. Therefore, lawyer-client relationships, accountants or principal-agent relationships cannot be used as a defence to be immune from the crime.

Displaying the importance of deterring the crime of money laundering, Part IV deals with provisions relating to extradition and mutual assistance in relation to the offence of money laundering. This evidences the importance of the mutual legal assistance requirement. Section 26 of the Act is on the duty of the Minister to notify requesting state, of measures taken against persons for whose extradition a request is made. Section 27 of the PMLA stipulates that 'Sri Lanka may assist commonwealth countries in investigations and prosecution of offences. Sri Lanka will give the same assistance to countries other than Commonwealth countries upon agreeing with such Countries'. Since money laundering is transnational, mitigating and preventing money laundering cannot be taken trivially. Due to this, the Act vests power to deal with other countries to serve justice by enforcing the law.

Sri Lanka has an impressive list of organizations bestowed with the power to combat money laundering,

- Attorney General's Department
- Central Bank of Sri Lanka (CBSL)- Department of Banking Supervision,
Department of Supervision of Non-Bank Financial Institutions
- Commission to Investigate Allegations of Bribery or Corruption
- Department of Cooperative Development, within the Ministry of Food Security □ Department of Immigration and Emigration:
- Department of Inland Revenue,
- Insurance Board of Sri Lanka
- Ministry of Foreign Affairs
- Ministry of Finance and Planning Sri Lanka Customs
- Ministry of Justice

- Non-Government Organizations Secretariat
- Office of the Chief of National Intelligence
- Registrar of Companies/Registrar General Department
- Secretary to the Ministry for Defence
- Sri Lanka Police -Criminal Investigation Division, Terrorist Investigation Division, Police Narcotic Bureau, Interpol Bureau. Human Trafficking/People Smuggling Division

4. Conclusion

It is crystalline that money laundering is solely detrimental to the economy in many ways it affects the tax system, financial institutions, banking system and widens the social gap creating income inequality. Furthermore, front companies, non-governmental organizations are challenges as ascertaining beneficial ownership is strenuous. Research has identified the laws relating to money laundering and the lacunae in money laundering. It was found, that even though, Sri Lanka has a plethora of laws, implementation of these laws is hindered due to the flaws in the justice system. Such as the inability to use special investigation techniques, confiscation procedures and mishaps in implementation. In addition ambiguities of laws is another reason behind the escalation of money laundering cases. Finally, research has come up with the below-mentioned recommendations.

5. Recommendations

- Card transactions and unregulated transactions

Due to the card facility to withdraw money, the tendency to withdraw money is high as it is unsupervised and efficient. This is a major challenge in Sri Lanka as there are numerous incidents of credit card fraud and online fraud. Thus, is imperative to strictly comply with laws and limit the number of withdrawals.

- Knowledge sharing among agencies and training to individuals

It is crucial to share knowledge and expertise between the agencies. Moreover, personnel must be trained in line with international standards as well as they must be technically competent.

- Infrastructure

There must be a separate unit consisting of all stakeholders to prevent and minimize money laundering. The unit must be an independent, which will also be supplementary to statutory bodies. The unit will be a supervisory mechanism

to prevent fraudulent activities by launderers. This unit must consist of police officers, accountants, bankers, prosecutors and forensic experts. Bringing all of them under the same umbrella will be effective.

- Police information

It is paramount to extend confiscation measures to third parties. Therefore, police must be vested with powers to utilize special investigation techniques rather than being restricted to archaic police information practices. In addition, mechanisms utilized must be on par with international standards

- Non-governmental organizations and front organizations

Money launderers fund their illegitimate business using the cover of charities and trust. Despite this, the true motive of those organizations is to generate revenue by illegal means. One of the major hurdles is that money comes from anonymous donors rather than a particular person, which is a blessing for criminals. Accordingly, the state must be vigilant to identify who is the beneficial owner; merely approving transactions of the trust will not be a prudent choice. (Know your customer- KYC)

- Designated Non-Financial Businesses and Professions (DNFBP sector)

Lawyers, accountants and similar classes who enable illicit wealth (FACTI 2021) must be brought within the ambit of the AML/CFT regulatory framework leaving no room to use the defence on non-disclosure.

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