

**UNIVERSITY OF NAIROBI  
SCHOOL OF LAW  
LLM PROJECT**

**AN ASSESSMENT OF THE LEGAL FRAMEWORK IN KENYA FOR COMBATING  
MONEY LAUNDERING**

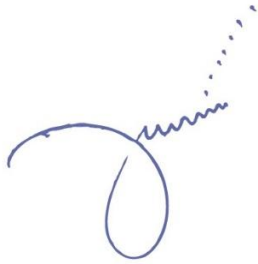
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**A Thesis Submitted to the University of Nairobi in Partial Fulfilment of the  
Requirements for the Award of the Degree of Masters of Laws (LLM)**

**2020**

**DECLARATION**

I, **VICTOR VINYA MULE**, do hereby declare that this is my original work and the same has not been submitted and is not currently being submitted for a degree in any other University.



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- 2. Kenya Proceeds of Crime and Anti-Money Laundering Act, No 9 Laws of Kenya, Sections 1-134.**
- 3. Kenya Penal Code Cap 63, Part II.**
- 4. Kenya Criminal Procedure Code Cap 75, Sections 1-395.**
- 5. Kenya Anti- Money Laundering Regulations of 2012, Section 1-42.**
- 6. Kenya Anti-Corruption and Economic Crimes Act No. 3 of 2003, Sections 16-74.**
- 7. Kenya Public Officer Ethics Act, 2003 Act 4 of 2003. Section 23 & Part IV.**
- 8. Kenya Narcotic Drugs and Psychotropic Substances Act No 4 of 1994 Section 9 & Part IV.**
- 9. Seychelles Anti- Money Laundering Regulations of 2012; Sections 1-17**
- 10. The Corruption, Drug Trafficking, and Other Serious Crimes (Confiscation of Benefits) Act (CDSA) Singapore.**
- 11. The Organized Crime Act 2015 (OCA) Singapore.**

**Abbreviations.**

AML- Anti-Money Laundering

ML- Money Laundering

GDP- Gross Domestic Product

NYS- National Youth Service

POCAMLA - Proceeds of Crime and Anti-Laundering Act 2009

FRC- Financial Reporting Centre

CBK- Central Bank of Kenya

KACA- Kenya Anti-Corruption Authority

AC- Anti-Corruption

FATF- Financial Action Task Force

IFC- International Financial Centre

KDF- Kenyan Defense Forces

MNC, s- The Role of Multinational Corporations

UNDCP- United Nations Drug Control Program

IMF- International Monetary Fund

WB- World Bank

FSAPs- Financial Sector Assessment Programs

NTF- National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism

CMA- Capital Markets Authority

TFML- Task Force on Money-Laundering

ARA- Assets Recovery Agency

KYC- Know Your Customer

DCI- Directorate of Criminal Investigations

DPP- Director of Public Prosecutions

KRA- Kenya Revenue Authority

EACC- Ethics and Anti-Corruption Commission

CDD- Customer Due Diligence

ECDD- Enhanced Customer Due Diligence

ML/TF- Money Laundering/Terrorism Financing

POCA- Proceeds of Crime Act 2002

OCA- Organized Crime Act of 2015

CDSA- Corruption, Drug Trafficking and Other Serious Crimes Act

MACMA- Mutual Assistance in Criminal Matters Act

MAS- Monetary Authority of Singapore

TM- Transaction Monitoring

STRs- Suspicious Transaction Reports

QA- Quality Assurance

### **International Legal Instruments**

United Nations Convention against Illicit Transfer in Narcotic Drugs and Psychotropic Substances, 1988

United Nations Convention against Corruption (UNCAC)

United Nations Convention against Transnational Organized Crime (UNTOC); United Nations

Conventions for Countering Terrorism and Terrorist Finance.

The International Money Laundering Information Network (IMLN)

United Nations Convention against Corruption (UNCAC)

### **Regional Legal Instruments**

East Africa Community Customs Management Act (Tax evasion) and East African Police Chief

Cooperation Organization to combat crime.

The Harare and London Scheme for Mutual Assistance in Criminal Matters within the Commonwealth (MLA).

Multilateral Convention on Mutual Administrative Assistance in Tax Matters, February 2016  
(Tax evasion)

### **National/Domestic Legal Instruments**

The Proceeds of Crime and Anti-Laundering Act 2009 (POCAMLA 2009)

Proceeds of Crime and Anti-Money Laundering Act, Chapter 59B of the Laws of Kenya (POCAMLA)

The Proceeds of Crime and Anti-Money Laundering (Amendment) Act 2017  
(POCAMLA 2017).



## CHAPTER 1: INTRODUCTION

### 1.0 Introduction

This study assesses the adequacy of Kenya's legal, policy, and institutional framework in dealing with money laundering and the ways it has addressed its adverse effects. It examines the development of money laundering legislation globally, and Kenya in particular, international best practices in money laundering and the lessons Kenya can learn from more successful jurisdictions. It finally makes recommendations on the way forward. The focus of the study is the determination of whether the existing legal regime is effective and efficient in dealing with an ever-changing vice of money laundering.

The process of Money laundering involves a series of transactions that aim to legitimize illegally obtained funds in an attempt to cover the real source of the money.<sup>1</sup> Principally, money laundering consists of concealment of all the income and assets accrued from criminal activity or in facilitating crime.<sup>2</sup> It happens when funds appear to originate from somewhere other than their true criminal origins.

The effects of money laundering are detrimental to both the economy and society in general. For example, it obscures the original criminal or another funding source usually used by criminals, terrorists & other criminal organizations to legitimize funds and obscure the criminal origin.<sup>3</sup> Money laundering correlates with reductions in the gross domestic product (GDP). Illicit activity impacts negatively on business and economic growth as it allows legitimate companies to compete with "subsidized" crime. Besides, it has the potential to impact negatively social, political, and ethical components of society, and ultimately democratic processes.<sup>4</sup>

Money laundering has received serious attention not only in Kenya but around the world due to the challenges inherent in its detection, prevention, and prosecution.<sup>5</sup> The scale of the problem was revealed through the "Panama Papers" that leaked 11.5 million documents

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<sup>1</sup> Article 3b, United Nations Convention Against Illicit Transfer in Narcotic Drugs and Psychotropic Substances, 1988; Section 3, Proceeds of Crime and Anti-Money Laundering Act, Chapter 59B of the Laws of Kenya (hereinafter POCAMLA); Muthoni Kimani, *Investigating Money Laundering and Proceeds of Crime*, 2017

<sup>2</sup> G Kegoro, Money laundering patterns in Kenya (2002) Monograph Series 135, available at <[www.iss.co.za/pubs/Monographs/no90/chap5.html](http://www.iss.co.za/pubs/Monographs/no90/chap5.html)> (accessed 12 March 2020).

<sup>3</sup> Colleen Cross, *The Evolution of Money Laundering*, available at [www.ColleenCross.com](http://www.ColleenCross.com), accessed on 12 March 12, 2020.

<sup>4</sup> Ibid

<sup>5</sup> World Bank, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, 2<sup>nd</sup> ed (World Bank: Washington, 2006) at 1.1

belonging to the Panamanian law firm known as Mossack Fonseca that showed financial and attorney-client information for more than 214,488 offshore entities.<sup>6</sup>

The complexity of money laundering is exacerbated by the fact that newer and even more sophisticated techniques that are a step ahead of existing legal structures are being innovated daily by criminals. In particular, is the increased use of official financial channels, both banking and non-banking institutions, to launder proceeds of criminal activities.<sup>7</sup> Banking institutions may be used through insurance firms, the stock market, commercial banks, underground banking, online banking, and E-cash.<sup>8</sup> Similarly, non-banking institutions such as law firms, currency smugglers, travelers' cheques, gambling, casinos, money exchange offices, money transfer offices, back-to-back loans, fictitious sales and purchases, shell companies, trust offices, the black market of foreign currency, capital market investments, derivatives, pre-paid phone cards, and real estate acquisition are among other means used by criminals to clean up illegal money.<sup>9</sup>

### **1.1 Background**

As observed in the previous section, money laundering is an offence that entails making dirty cash or illegally obtained property to appear clean. This involves the movement of dirty money either through the formal or institutional systems to disguise the source of the dirty money or through informal sectors to be able to derive value through the purchase of items and services.

The offence of money laundering is prevalent in Kenya, just as it is in other parts of the world. Consequently, Kenya has been grappling with the offence through the enactment of legislation and formulation of Government policies to combat the vice. The first Act of Parliament that dealt with the offence of money laundering was the enactment of the Proceeds of Crime and Anti Money Laundering Act in 2009 was the first legislative step in dealing with the offence of money laundering. The Act criminalizes the offence of money laundering and other related offences under part Two (2). The Act further creates three (3) institutions with diverse mandates in the fight against money laundering. The three institutions are the Financial Reporting Centre, the Anti-Money Laundering Advisory Board, and the Asset Recovery Agency. Part Four of the Act creates obligations for reporting institutions with regard to monitoring, verifications, establishing, and maintaining the identities and records of customers.

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<sup>6</sup> Ibid

<sup>7</sup> Brigitte Unger, *Offshore Activities and Money Laundering: Recent Findings and Challenges* (European Parliament: Utrecht, 2017) at 15-21

<sup>8</sup> Ibid

<sup>9</sup> Ibid

The Act further makes provision for recovery, confiscation, forfeiture, and seizure of proceeds of crime in addition to other measures aimed at denying criminals the pleasure of enjoying the fruits of the ill-gotten wealth.<sup>10</sup>

Arguably, the enactment of the Proceeds of Crime and Anti-Money-Laundering Act in 2009 was Kenya's first significant step in the right direction in the fight against money laundering. Due to the dynamic nature of the offence, it is difficult to measure precisely how much money has been laundered in Kenya. A lookup carried out with the aid of the Global Financial Integrity Center showed that more than US\$13.5 billion flowed illegally into or out of Kenya from 2002 through 2010 through the misinvoicing of exchange transactions, fueling crime, and costing the Kenyan authorities at least US\$3.92 billion in misplaced tax revenue.<sup>11</sup>

To similarly assist this argument that money laundering legal guidelines have been headquartered on the sociological faculty of thought, Guy Stessens argues that, "notwithstanding the prerogatives of parliament to criminalize money laundering, the combat in opposition to money laundering was once fought using 'soft law' instruments." The term 'soft law' refers to the broad typical ideas as an alternative than prescriptive rules. This strategy is due to the changing and evolving nature of the crime of money laundering. For this reason, the authoritarian/strict approach to law would be rendered obsolete as the crime develops.<sup>12</sup>

In similarly inspecting why the other schools of thinking have not deemed to be applicable, I start by way of searching at the positivist faculty of thought. This school distinguishes regulation from morality, arguing that conflicting claims over what constitutes morality may want to lead to civil strife. The positivists also argue that law needs to be no longer based on morality because reactionaries should argue that regulation is ethical and hence, cannot be changed, thereby obstructing prison reforms.<sup>13</sup> However, this college of thought can't shape the foundation of money laundering rules because morality nevertheless performs a role in the legislative prohibitions projected in the Proceeds of

Crime and Anti- Money Laundering Act. Proceeds of crime are defined as proceeds from any offense under the legal guidelines of Kenya, which consists of aggression under the Sexual

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<sup>10</sup> Act No.9 of 2009 Laws of Kenya.

<sup>11</sup> <http://www.gfintegrity.org/kenyas-removal-fatf-gray-list/>. Report by Grace Zhao, July 14, 2014.

<sup>12</sup> Guy Stessens, 2003, Money Laundering, a new International Law Enforcement Model. Cambridge University Press, Page 15

<sup>13</sup> Hart H.L.A. 1994. The Concept of Law.2nd ed. P.A. Bulloch and J. Ra zeds, Clarendon Press, Oxford at pg. 206.

Offenses Act<sup>14</sup> Narcotic Drugs and Psychotropic Substances (Control) Act,<sup>15</sup> which is based on morality.

Roscoe Pound (1870-1964), a supporter of the sociological college of thought, argues that the regulation needs to be regarded as a capacity to stop by using itself. He argues that law ought to be seen as the reconciler of conflicting interests through ordering human habits to make the items of existence and the means of satisfying claims go-round as some distance as possible with the least friction and waste. To Pound, there are claims or interests which exist independently of the regulation and which are urgent for cognizance and security. This model of law, however, fails to recognize that such legal guidelines which show up to restrict the activities of dominant groups, such as factories regulation or anti-trust regulation. Which at face value seems to constrain the powerful, may additionally be in the interest of most effective if administered inadequately. Thus, legislation pollution may further be in the pastimes of massive companies who are, then, enabled to knock out small competitors.<sup>16</sup>

That is no longer to say that class interests are the only ones that affect legislation; however, they play an essential role in the passage of the bill. Modern sociological thinkers, such as Ehrlich,<sup>17</sup> argue that the sociological school of the law goes past protecting classes, organizations, and clusters of people, on the whole, the minority, and includes the safety of the social order against people who are beyond the grain of society. This protection might also be effected via means of a part of the criminal law, police law, and procedural law. The sociological college of thought, therefore, views the law as ‘living,’ and this has an independent value, which consists of the reality that it constitutes the basis of the legal order of human society.

Ehrlich argues that to uphold this order, one needs to view the usages and the relationship of legal relations, codes of conduct, independently of the question of whether they have already determined expression in judicial decisions or statute. For instance, the banking machine has an order which has a legal facet as well as that of the mercantile institution, which is regulated in detail using the business code. The vital advantage of a rule-based regulatory regime supported with the aid of the positivist school is its predictability and certainty. The regulated entities are in a position to make decisions without annoying that their actions will be second-guessed through regulators.

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<sup>14</sup> Act No 3, of 2006.

<sup>15</sup> Cap 245, Laws of Kenya.

<sup>16</sup> Becker, Howard S. 1963. *Outsiders*. Chicago, IL: The University of Chicago Press p. 21

<sup>17</sup> Ehrlich, E.1967. *Fundamental Principles of the sociology of law*; Harvard Law Review Journal at p.145.

The hassle with the rule-based approach, however, is a lack of flexibility and the inability to provide for new regulatory challenges, which can also, from time to time, arise in the path of regulation. Principles-based law that follows the sociological school is generally extra flexible and higher sensitivity to context, but doubtlessly less confident. There are additional challenges of enforcement below the principles-based method given that, in most cases, violation of a principle alone may not justify punitive motion.<sup>18</sup>

The approach supported by utilizing the sociological school thinkers is that regulation ought to exhibit some positive basic features. First, it needs to focus on defining broad themes, articulating them in a bendy and outcome-oriented way, accepting enter from industry, and managing incoming records effectively. Secondly, it argues that to be in a position to take benefit of the regulations, the industry wants life-like lead times to regulate the new model, education and support, and the capacity to matter on legacy regulations in the course of the transition period. Further, the regulator's habits must be reasonable, predictable, and responsive, and it ought to have the statutory power to promulgate standards and interpret them.<sup>19</sup>

The development of anti-money laundering law in Kenya appears extra ideal for the sociological approach. The enormity of the offense and its evolving nature and the concern in predicting its regulatory needs with certainty. Given the new and creative energies that criminals are applying across the world, it is hard to predict with simple task what flip the offense of money laundering will take in the future. As a result, fixing anti-money laundering rules may also not solely be an arduous task. However, it may also additionally show to be an exercise in futility if the elements of the offense outgrow the regulations in a short duration of time. In developing the anti-money laundering law, the sociological college of thinking would weigh quite a few pursuits in terms of what the bill hopes to achieve. This faculty views regulation as a social group to fulfill social wants, that is, the claims and needs and expectations concerned in the existence of civilized society, by giving effect to as an awful lot as we may, with the least sacrifice so some distance as such desires perhaps relaxed or such claims given impact by using the ordering of human conduct via politically organized society.<sup>20</sup> In the context of the development of anti-money laundering legislation, the anti-money laundering

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<sup>18</sup> Stessens, G 2005. Money Laundering: A new International Law Enforcement Model, Cambridge University Press, New York p.232.

<sup>19</sup> Cristie Ford, 2008. Principles Based Regulation. A Research Study Prepared for the Expert Panel on Securities Regulation.

<sup>20</sup> Freeman, M.D & Lloyd of Hampstead, 2001: D.L, Lloyd's introduction to jurisprudence. Sweet & Maxwell, London. Page 659.

law is friendly and, at the same time, bendy to allows for the detection and prevention of the crime of money laundering consistently over some time to structure sound precedent.

Thus when the Narcotic Drugs and Psychotropic Substances Act was enacted in 1994, it illegalized the laundering of funds and assets acquired from the trafficking of drugs only. This negated proceeds from other criminal activities. Therefore, the regulation only accounts for proceeds from drug trafficking, disregarding income from other illegal activities. In 2003, the president signed the Anti-Corruption and Economic Crimes Act that covers money from all economic crimes.<sup>21</sup> Kenya has sought to set East African standards in the regulation of financial crime. However, Parliamentary delays have continually hampered multiple revisions of the country's anti-money laundering legislation and institutional limitations, diluting the impact and assertiveness of regulations. Kenya's law has struggled to keep up with the technological innovations of the burgeoning nontraditional money payment and remittance industry, thereby exposing the country to a variety of evolving money laundering and financial crime risks.<sup>22</sup>

## **1.2 Statement of the Problem**

The Central Bank of Kenya (CBK) has a mandate under the Proceeds of Crime and Anti-Money Laundering Act<sup>23</sup> to regulate the laundering of funds in the financial system. A significant challenge facing the regulation is that it only applies to financial institutions and mortgage companies. The Banking Act is responsible for defining and regulating these organizations. The economic system, however, does not exclusively consist of these institutions. The facilitation of the money laundering system involves many other notable players, including foreign exchange bureaus, credit and savings societies, building and housing societies, and other micro-finance institutions.

The complexity of the transactions involved in the cover-up of illegal funds appears to cover a scope more extensive than the law allows. The proposal focuses mainly on the relationship between a client and the banker. At the same time, the extent of illegal transactions extends to all suspicious activity involving individuals who may not necessarily be clients of the bank. For instance, individuals such as accountants, lawyers, shareholders, etc. are not

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<sup>21</sup> George Kegoro, *The Control of Money Laundering and Terrorist Funding in Kenya*, in Charles Goredema, *Tackling Money Laundering in East and Southern Africa: An Overview of Capacity*, (2004) 1 (107) *ISS Monograph Series* 48.

<sup>22</sup> Sharon Cheramboss, *A perspective on Kenya's Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017* (Africa Practice: Nairobi, 2017).

<sup>23</sup> Cap 59B of the Laws of Kenya.

included in the regulation. Therefore, it becomes difficult for the banks to follow up on the individuals if there are not clients.

### **1.3 Significance**

The purpose of this report is to assess the competency of the Kenyan framework in fighting money laundering. The discussion delves into the history money laundering legislation in comparison with other countries to determine which lessons Kenya can learn in dealing with the destructive effects of money laundering. Moreover, the paper will endeavor to educate on the most efficient use of the system to fight the laundering of money in Kenya.

### **1.4 Research Questions**

1. What challenges is Kenya facing in the anti-money laundering campaign?
2. To what extent is Kenya's legal, policy, and institutional system adequate in suffering the adverse effects of money laundering?
3. What is the comparison between the Kenyan legislation in money laundering and other international jurisdictions, and what can be learned?

### **1.5 Hypothesis**

The current institutional framework and legal policies in Kenya are not sufficient to deal with the adverse effects of the scourge of money laundering.

### **1.6. (A) Broad Objective**

To examine the regulatory mechanisms that Kenya has adopted in addressing money laundering

### **1.6. (B) Specific Objectives**

1. To evaluate the challenges Kenya faces in the struggle against money laundering
2. To investigate the adequacy of Kenya's legal, policy, and institutional framework in combating money laundering and also examine the evolution of the Anti-money laundering legal regime
3. To compare money laundering legislation from other international jurisdictions
4. The study also seeks to make recommendations on how to strengthen the effectiveness of the institutional frameworks mandated to fight money laundering under the Act and how to achieve the best results without duplication of roles and resources.

### **1.7 Theoretical Framework**

Money laundering is a vice in society that can cause harm to the very fabric of society. The understanding of the natural law school is that the law in society purposes to secure the

common good<sup>24</sup> , and therefore, the community has a legitimate benefit in prohibiting the adverse effects of laundering money; that is harmful to society overall.<sup>25</sup> These are in sharp contrast with the utilitarian theory that firmly believes that individuals are only interested in what brings them happiness by avoiding what would bring about pain.<sup>26</sup> The theoretical foundation of this study, therefore, is based on utilitarianism or the economic theory of law. The reason for choosing the two schools is to show that the violation of money laundering legislation has supported both positive and natural law, as will be elucidated below.

### **1.7. a The Theory of Utilitarianism**

Jeremy Bentham and John Stuart Mill developed the theory of utilitarianism<sup>27</sup>, and they believed that there are only two motivations in life, what Bentham describes as “two sovereign masters”<sup>28</sup>: the pursuit of happiness and avoidance of pain. Mills calls it the principle of utility.<sup>29</sup> The starting point of the discussion is that Bentham did not believe in the concept of human rights, which he dismissed as “nonsense on stilts.”<sup>30</sup> However, the most critical aspect of utilitarianism that concerns this study is the concept of individual self-interest in those who choose to practice money laundering. In the same way, if one wants ice cream, the pragmatic view is that the choice should be based on the one that provides the most pleasure (happiness) by avoiding the one that brings displeasure.

Utilitarianism is a theory that attempts to evaluate the variety of considerations facing people when they are making choices. These include moral principles of actions, the law, and character traits. It is also similar to consequentialism because it focuses on the repercussions of one’s actions, law, and policies, in the determination of right or wrong. In a functional language, the choice to be made is the one that “maximizes utility,” or action or policy that produces the most significant amount of good.

### **1.7. b Natural Law School**

The primary purpose of the legal systems is to secure justice. According to Aquinas, the central idea behind natural law is that the only justification for positive law is preserving the common good of the community.<sup>31</sup> The condition that the function of the law is to enforce

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<sup>24</sup> Sergio Cotta, *Law and Natural Law*, (1983) 37 (2) *the Review of Metaphysics* 270.

<sup>25</sup> Mill, John Stuart, *Utilitarianism, On Liberty and Considerations on Representative Government*, London: (Dent: London, 1993) at chapter 1, para 9.

<sup>26</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 1789. Available at <http://www.utilitarianism.com/jeremy-bentham/index.html>, accessed on 24 February 2020.

<sup>27</sup> Mill above

<sup>28</sup> Bentham above

<sup>29</sup> Mills above

<sup>30</sup> Bentham above

<sup>31</sup> Sergio Cotta, *Law and Natural Law*, (1983) 37 (2) *The Review of Metaphysics* 270.



moral standards is pivotal in jurisprudence and the discussions of Devlin and Hart.<sup>32</sup> Devlin's critics have voiced strident objections to his fundamental proposition that the erosion of morality turns into the disintegration of society. All of them concede that some kind of usually customary morality is a strong glue of any organization. But they can't take delivery of the proposition that the destruction of any precise canon of morality should purpose the disintegration of society. One of Devlin's cruelest critics, Professor H.L.A. Hart, expressed his disagreement with Devlin's central view by contending that it used to be "absurd": To go from the acceptable proposition that some shared morality is indispensable to the existence of any society to the unacceptable scheme that organization is same with its morality as that is at any given second of its history so that the exchange in its morality is equivalent to the destruction of a society. The former proposition might be even typical as a necessary substitute than an empirical truth relying on an entirely plausible definition of community as a physique of men who hold personal ethical views in common. But the latter proposition is absurd. Taken strictly, it would stop us announcing that the principles of a given social order had improved, and would persuade us as an alternative to saying that one society had disappeared and another one taken its place. But it is solely on this absurd criterion of what it is for the same organization to continue to exist that it could be asserted without proof that any deviation from a society's shared morality threatens its existence.<sup>33</sup> It is quite doable to preserve that human societies would be impossible except the presence of a neighborhood of such general moral ideas. But alternatively, this may be assumed that the concept of what it is for a society to be destroyed has been clarified, neither common sense nor records appear to help the supposition that the violation of any specific moral requirements prescribed via public morality may additionally threaten the life of social order.<sup>34</sup>

Thus according to Devlin, legal moralism-positive morality ought to be enforced, disregarding any undue harm some people may endure. Hart, on the other hand, argues that Devlin views legal moralism as legal paternalism that favors limitations on the freedoms of individuals in a bid to protect them from themselves.<sup>35</sup> Hart, contrary to Devlin, pitches that the sole purpose of the law is to protect people and not the community.

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<sup>32</sup> Patrick Devlin, *The Enforcement of Morals* (London, New York and Toronto: Oxford University Press, 1965) at.9.

<sup>33</sup> HART, *supra* note 8, at 51-52

<sup>34</sup> Nagel, *supra* note 16, at 275.

<sup>35</sup>H. L. A. Hart, *Law, Liberty and Morality* (1963) at 50.

The thesis of Devlin's argument is that criminal law is implemented to protect society, which an organization is defined as a community of ideas.<sup>36</sup> Based on Devlin's view, the primary influencer of morality in the community is Christianity, and for which laws enacted to protect. Devlin further views that the law has never adequately defined the differences between Christian ethics and those accepted in societal norms. According to Devlin, "the law has never yet had the occasion to inquire into the differences between Christian morals and those which every right-minded member of society is expected to hold." The disintegration thesis by Devlin argues that society would completely break down if it did not have shared moral code.

### **1.7. c Mill's Harm Principle**

In consideration of the negative repercussions of laundering funds on the economy and security of society, Individuals are only allowed to interfere with another person's liberty only during instances of self-preservation or protection, and the legislation covers these. The implication, therefore, is that, to prevent harm to others, it is right to exercise legal powers over individuals against their will as is eminent without effective laws on money laundering. Considerations such as if a person is right, whether moral or positive, do not warrant enough to harm another.<sup>37</sup> Based on Mill's arguments, the only morality that is recognizable as imperative in maintaining the community as a civilized government is social self-preservation.

Furthermore, a society cannot fully function without the existence of a commonly accepted moral code of conduct for the citizens. For that matter, the community has a legitimate interest in using the law to enforce its conventional morality. However, the use of law to preserve society is not without limits, as articulated below.

### **1.8 Review of Literature Materials**

The literature review below is undertaken to dispose of duplication and to provide an evident appreciation of the existing information base on the subject. The study is based on authoritative, new, and authentic sources, such as journals and textbooks. On the improvement of anti-money laundering regulation, Becker<sup>38</sup> argues that, traditionally, there used to be no anti-money laundering to combat money laundering. But it had been thru monetary and fiscal policies which focused on legal, financial transactions, while the legislation of crime has typically left out its economic aspects. To bridge this gap, Becker argues that clarity in regulation has to commence with the perception of the crime of money laundering. While the

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<sup>36</sup> Devlin

<sup>37</sup> Ibid

<sup>38</sup> Becker, G.1968.Crime and Punishment: An Economic Approach. Journal of Political Economy, p.169-217.

perpetrators of money laundering goal at modeling their behavior and habits to make dirty money show up clean. Anti-money laundering law requires a multidisciplinary strategy of aspects of law, criminology, sociology, and political science, to be able to address these social and crook factors crime of money laundering. For instance, he argues that one has to comprehend how criminals behave and which criminal restrictions they count on to face.<sup>39</sup> Becker additionally notes that most regulation focuses on the banking and the financial sector industry, something which is borne out of the focus that this region can play a pivotal role in the improvement of the criminal area as the most preferred vehicle for money laundering. He provides that the manipulated side of money laundering consists of regulatory agents, who choose to combat money laundering and of financial intermediaries who can both be trustworthy and compliant or dishonest and non-compliant and consequently, asymmetric records and essential agent troubles are typical for this market. Becker identifies another crisis in combating the problem of money laundering as being problematic in accomplishing international cooperation to enhance harmonious legislation. One most important concern is with the definition of what things to do represent money laundering.<sup>40</sup> He argues that currently, one is bound to the countries' legislation and variations in prison definition. An individual can solely be prosecuted for money laundering if the underlying crime is on the listing of crimes that are predicate crimes for laundering. For instance, he factors out that proceeds from tax evasion are a predicate crime in the US, whereas in Germany, only proceeds from business and criminal companies are predicate crimes. In Austria and Switzerland, tax evasion is no longer a crime. In some jurisdictions, proceeds from playing are predicate crimes, while in others they are not. On the different hand, Masciandaro et al. argue that there is an extraordinary college of jurisprudence that relates unlawful or crook things to do to finance, and that, due to this separate development, the modern-day criminal and monetary theories have not addressed financial crime sufficiently so far, and this creates a demanding gap in literature; lately, the problem of combating money laundering has emerged as a challenge to debate that has been accentuated in the public and political arena.<sup>41</sup> They add that, given the super variety of money laundering techniques, it is very tough for the police to prosecute money laundering. In many countries, the police are educated to pursue the actual criminals for murders and theft. To

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<sup>39</sup> Ibid Note 44 p216.

<sup>40</sup> Ibid note 44 p103.

<sup>41</sup> Donato Masciandaro, Elod Takats and Brigitte Unger 2007. *Black Finance: The Economics of Money Laundering*. Edward Edgar Publishing Limited, p72-84.

charge an intelligent, financially literate money launderer would, therefore, necessitate a great deal additional differentiated competencies than the regular police training.<sup>42</sup>

B. Unger and G. Rawlings argue that the world nature of money laundering makes international cooperation important.<sup>43</sup> Most law assumes that countries can make a deliberate preference of whether to let money laundering occur or not. They expect that an anti-money laundering coverage will be adopted and carried out at will and will be sufficient. According to them, the legal guidelines forgot that some countries, such as Seychelles in the 1990s, deliberately offered their services to criminals. However, they argue that it can also appear that states that establish massive functioning financial markets entice all types of investors, consisting of crook ones. Countries then start to rent measures to combat money laundering to keep their recognition as reliable financial centers. On the development of money laundering law, they argue that, with the increase of crime, defenses furnished for in the law, such as disclosing the supply of money or proving that one was not aware of the source of funds, only facilitate the aiding of money laundering. For instance, they argue that a bank employee can flout the requirement to file suspicious transaction reviews for transactions above certain thresholds. Who chooses to ignore and not document a client who indicates up to ten times in a day to credit a sum, which is just slightly beneath the reporting requirement. Similarly, bank personnel can pick to file a small transaction on a separate account to divert attention from the main narrative. They also word that regulators throughout the world have also registered problem that economic establishments are becoming increasingly satisfied that the key to heading off regulatory and criminal scrutiny under the anti-money laundering regime is to file new suspicious transaction reports. This is because the discretion of what transaction to document generally lies with the financial institutions. They, therefore, conclude by noting that countrywide laws can't be drawn in isolation and that the hassle of money laundering has to be looked at as an externality.

Ferwerda evaluated in order to construct a standard definition of money laundering used in utilizing unique legislations and global corporations and in contrast with one another.<sup>44</sup> Concerning the supply of the subject, he factors out that some definitions refer only to dangerous criminal acts. In contrast, others also encompass other illegal activities, such as tax

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<sup>42</sup> Ibid, p 257.

<sup>43</sup> Unger B and G. Rawlings 2005. *Competing for Criminal Money*. Paper prepared for the conference of the Society for the Advancement of Socio-Economics (SASE), Budapest.

<sup>44</sup> Ferwerda J, 2010. *Criminals saved our Banks: The Effect of Money Laundering during the Financial Crisis*. Paper for the course Inclusion and Exclusion in Contemporary European Societies Challenges of a New Europe: Chances in Crisis IUC Dubrovnik, Utrecht University School of Economics.

evasion, unlawful copying, unlawful gambling, and illegal prostitution. He also argues that the fundamental trouble with these definitions is two, namely, one, economists have categorized money laundering each as a stock and a flow will be taken into consideration when making rules and, two, the definitions, for this reason, some distance are nonetheless missing the vital issue of the actual crimes to which money laundering refers.

Unger and Busuic argue that the definition of predicate offenses is the most necessary legal hassle in arriving at a definition of money laundering. Particularly from a hereditary factor of view, the 'Achilles' heel in defining and criminalizing money laundering relates to the so-called 'predicate offenses,' understood to imply the crook offenses which generated the proceeds, thereby making laundering necessary. Hiding or disguising the supply of positive profits will, of course, now not amount to money laundering unless these proceeds had been obtained from a criminal endeavor that is a predicate crime. Therefore, what exactly stands to money laundering, which actions, and who can be prosecuted are mostly dependent on what constitutes a predicate crime for the cause of money laundering.

William F. Wechsler argues that the cutting-edge law on money laundering assumes that all dollars or most funds will be channeled thru the banking system.<sup>45</sup> However, regardless of having described money laundering as the Act of directing the proceeds of crime, rules have failed to recognize the range of parts of the economic system that are shadow/underground and, in simple terms, criminal, that infiltrate dirty money into the economy. For instance, he argues that the proceeds of crime out of the production of faux or counterfeit items and social fraud, such as extortion, may go undetected. This is because the principle of peculiarity used to pick out the supply of such funds when they are channeled through the banking machine might also be met. He additionally notes that under-regulated banking structures that facilitate the infiltration of dirty money have sparked economic meltdowns in the world. He adds that the law has to take cognizance of quite many strategies of money laundering. Some of the techniques used to keep away from or ward off detection of money laundering, for example, smurfing and structuring (breaking up of large deposits into smaller deposits which helps avoid the foreign money transaction reporting requirements), are used to introduce smaller amounts of illicit money into the essential system. Since the law has made it a necessity in many countries to document transactions above a certain threshold, money launderers will strive to continue to be slightly beneath the benchmark for reporting.<sup>46</sup>

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<sup>45</sup> William F. Wechsler 2001. *Follow the Money*; Foreign Affairs. Vol. 80. Published by; Council on Foreign Relations, p. 40-57.

<sup>46</sup> *Ibid* p. 61

Wouter, Kalin, and Goldsworth argue that policies on money laundering need to be informed by using statistics.<sup>47</sup> They add that global and national initiatives show that money laundering can effectively be fought in theory. Still, on the practical side, there is a substantial decrease in reports on suspicious transactions. They, however, note that some economic institutions in state-of-the-art economies entrenched money-laundering controls, in theory, to only enlarge their competitive edge with no intention of observing the requirements of anti-money laundering laws. While this ought to be actual for sophisticated monetary centers, bribery and corruption are still the standard vicinities in these countries. It is challenging to determine the real effect of anti-money laundering regulations, even although they are adopted into law.<sup>48</sup>

They additionally argue that some felony establishments are structured in such a way that any legislation that does no longer goal accurate the areas of the problem is likely to lead to substantial wasted effort and useless checks. Such work then detracts from the fee of regulating money laundering and generates a mechanism of unthinking processes to the issue. Institutions such as non-governmental organizations, charities, and trusts, are run through front-liners who are not always the founders and, relying on the jurisdiction, they need not reveal their actual, beneficial owners, making it impossible for the law to penetrate in their operations. However, they conclude by mentioning that international locations cannot have enough money to persevere in finding methods and potential to combat money laundering and terrorist financing successfully, in the absence of which nations will run the risk of too many economies being run by way of criminals and corrupt governments thereby destabilizing economies.<sup>49</sup>

Kaspersen, on the other hand, contends that modern escape clauses in money make enforcement of anti-money laundering control exceptionally difficult.<sup>50</sup> One such recent development is betting over the web and additional money related exchanges that are carried out within the cyberspace. He notes that lawful requirement for casinos and gambling exercises because it was, is exceptionally troublesome, and an unused escape clause for money laundering through the web has presently risen, making it indeed more troublesome to regulate.

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<sup>47</sup> Wouter H. Muller, Christian H. Kalin and John G Goldsworth, 2001. *Anti – Money Laundering: International Law and Practice*; John Wiley & Sons.

<sup>48</sup> *Ibid* p. 9-10

<sup>49</sup> *Ibid* p.15.

<sup>50</sup> Kaspersen, H.W.K 2005. 'De Wet op kansspelen en handhaving in Cyberspace'. Presentation held at the seminar 'Gokken en georganiseerdecriminaliteit'. 6th of April 2005, Centre for Information and Research on Organised Crime, Amsterdam, Vrije Universiteit.

Guilhem contends that there may well be a connection between money laundering and monetary crises.<sup>51</sup> He states that the post-cold war budgetary framework rested on two presumptions about the way the fiscal framework ought to be represented. One of them was thought of as a mechanical showcase that thought little of the significance of legal guidelines that were instrumental to the improvement of a capitalist economy over the last two centuries as well as the critical burden forced by the need for such legitimate measures in transitional economies. This co-existence of free worldwide capital streams and national organization and administrative frameworks made a void in which transnational economic and monetary delinquencies thrived. Because of these economies, debasement and criminal exercises played a significant portion in creating open obligation and redirecting reserves to theoretical abroad budgetary markets. He concludes by noticing that a ruthless, kleptocratic, and, within the conclusion, mafia fashion of abuse created considerable demand for money laundering on worldwide capital markets, which includes the need for Russian treasury bonds, and was once an essential factor in the Russian monetary disaster of 1998. Guilhem had additionally previously demonstrated that full-size profits, derived from organized crime and corruption, were deposited in Swiss banks and re-invested in Russia to finance the developing national debt.<sup>52</sup> He argues that this went without detection due to the fact of the ever-evolving criminal methods that had been used to introduce ill- gotten positive aspects to the economic system. These techniques covered separating the crook recreation from the supply of the funds utilizing growing complex layers of financial transactions designed to protect the audit trail.

Peculiarity portrays the numerous stages through which grimy stores are coordinates into the legitimate economy by utilizing a transparent, authentic exchange to camouflage illegal proceeds, subsequently making it troublesome to identify and direct such streams of dirty money.<sup>53</sup> This is fulfilled through the buying of resources, such as a genuine estate, securities, or other money-related funds, or extravagance merchandise, which are represented by other lawful forms and private contracts. This includes stones, gold, and other reasonable asset bargains, which are difficult to distinguish since, regularly, they are secured by a path of bribery

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<sup>51</sup> Guilhem Fabre 2005. *Prospering on Crime: Money Laundering and Financial Crisis*. Working paper No.5; Centre for East and South East Asian Lund University, Sweden.

<sup>52</sup> Fabre, Guilhem 2003. *Criminal Prosperity; Drug trafficking, money laundering and financial crises after the cold war*. London-New York: Routledge Curzon, p163-164.

<sup>53</sup> Quirk, Peter J. June 1996, *Macroeconomic Implications of Money Laundering*. International Monetary Fund Working Paper 96/66.

and debasement are conducted in a shrouded way absent from the banks and other regions where the law requires checking to require place.<sup>54</sup>

Levi contends that it is improbable that the viability of anti-money laundering laws could be decided with any degree of precision given the assessment issues involved in evaluating such a problem. He states that there can be no unique measurement of the charges of regulation balanced in opposition to the harms related to money laundering.<sup>55</sup> According to him, this is compounded by employing the reality that, in some jurisdictions, it is not possible to measure its accuracy. The widespread terrible effects of money laundering on economic improvement because of other deeply entrenched practices, such as bribery, corruption, and the levels of crime. Charles Goredema carried out an evaluation that showed that the factors that expose the economic and industrial sectors in the Southern African Development Community (SADC) to money laundering are growing developments of crime, in the structure of drug trafficking, money in transit robberies, and an unchecked black market.<sup>56</sup> He concluded that SADC states are yet to undertake complete responses to money laundering. At the very least, the incidence of predicate crime and different unlawful things to do, which yield money for laundering, needs to be measured. The existence of a twin economic system in many parts of the sub-region should be regarded in formulating strategies against money laundering. There are warning signs that participation in the formal economy, and its institutions, is not as high as is assumed via emerging anti-money laundering laws.

G. Kegoro argues that as long as other factors, such as bribery and corruption, are still a common region in certain countries, it is tough to determine the actual effect of anti-money laundering guidelines even when they are adopted into law.<sup>57</sup> He similarly argues that bad document of law enforcement in the past in Kenya and poor keeping of public records, in particular on registered companies and registered land, make it challenging to realize cases of money laundering and additionally reduces the need to launder money. Earlier on, Kegoro pointed out that reports had shown that, in Kenya, the police could barely cope, and serious

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<sup>54</sup> Quirk, Peter J. 1997. Money Laundering: Muddying the Macro economy, International Monetary Fund Working Paper, pg. 10.

<sup>55</sup> Levi, Michael and William Gilmore 2002. Terrorist Finance, Money Laundering and the Risk of Mutual Evaluation: A New Paradigm for Crime Control. *European Journal of Law Reform* p 337-364.

<sup>56</sup> Goredema, Charles, "Money Laundering in East and Southern Africa: An overview of the threat", Institute for Security Studies, Paper 69, April 2003

<sup>57</sup> Kegoro, George, "Tackling Money Laundering in East and Southern Africa, An Overview Of Capacity: Volume One, Chapter 3, The Control of Money Laundering and Terrorist Funding in Kenya", Institute for Security Studies, Monograph 107, October 2004, p. 38-75.



crimes often go un-investigated. There would be, therefore, no incentive to launder money in a jurisdiction the place regulation enforcement is weak.<sup>58</sup>

The move section of the authors listed above identified flaws in anti-money laundering legislation in the United Kingdom and different European Countries. They also gave recommendations on what amendments ought to be made to the anti-money laundering law to make it useful. Some of the recognized flaws include failure to understand the nature of the crime of money laundering, failure to expect the evolving nature of the crime of money laundering, lack of precise enforcement mechanisms, reliance on unskilled events to police the controls prescribed in anti-money laundering legislation, the complexity of go border investigation and prosecution of anti-money laundering offenses. The critical guidelines discovered from the above literary works are that for the regulation towards the crime of money laundering to be effective, it cannot be regarded in isolation from the underlying predicate offenses. The crook and civil law enforcement frameworks have to be revamped to include cutting-edge ways of combating the predicate offenses and establish institutional structures that complement the mechanisms prescribed in the anti-money laundering laws. These consist of strengthening controls with the aid of while decreasing the cost of legislation to encourage compliance. Kegoro's analysis of the Kenyan situation was once performed earlier than a formal money laundering regulation was enacted, some of the loopholes he identified nonetheless stay unaddressed. He, however, put in strong arguments such that, given the progressing country of development of the economic system in Kenya, an elaborate regulatory framework wants to be put in location to fight this evolving offense of money laundering from all angles. The defects identified by the authors on the current anti-money laundering regulation in a range of European international locations will additionally support my speculation that the Proceeds of Crime and Anti- Money Laundering Act of 2009 does not establish a comprehensive and unusual felony and institutional framework in combating money laundering in Kenya. The pointers proposed by way of the authors will also partially informs some of the tips made in my thesis. The above literature evaluates, on the other hand, did cowl and analyzed the challenges confronted by way of African countries consisting of Kenya in the development of anti-money laundering rules since the authors focused on European countries. My thesis will fill this gap in literary works with the aid of focusing on Kenya with a case find out about the Seychelles legislation.

### **1.9 Overview and Challenges in Combating Money Laundering**

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<sup>58</sup> George Kegoro; Profiling Money Laundering in Eastern and Southern Africa; Unpublished 2002.

Kegoro, in the article, *the Control of Money Laundering and Terrorist Funding in Kenya*<sup>59</sup>, observes that ineffective policies and systems compounded by corruption have systemically hampered Kenya's attempt to combat the laundering of money. The argument is that, historically, institutions to fight crime in Kenya are toothless and weak with little official support.<sup>60</sup> Until 2003, there was no other legal recourse to fight corruption except the Prevention of Corruption Act. The government in 1993 set up an anti-corruption unit in the police, but it was disbanded two years later after a mysterious fire burned down its headquarters. Then in 1997, the government established the Kenya Anti-Corruption Authority (KACA) through the amendment of the Prevention of Corruption Act to fulfill the conditions set forth by donors. The authority's first director was appointed and dismissed by the president in less than a year after he attempted to prosecute ranking Kenya Revenue Authority directors for failing to collect taxes amounting to KShs230 million. Kegoro further floats the argument that the current regulatory systems Kenya use in fighting laundering of money exist as part of the financial sector. The Central Bank of Kenya plays a central role in detecting and reporting money laundering.

The journal article by Dulacha Galgalo Barako and Alistair Brown titled *Evaluating Anti-Money laundering Initiatives: A Country Perspective* is a study that aims to establish the attitudes and perceptions of various stakeholders as concerns the new anti-money laundering regulations. There are several challenges that the country faces in the fight against money laundering and the implementation of effective policy measures to control the adverse effects of the vice on the socio-economic development in Kenya. The article also delves into the diverse views expressed by respondents from various stakeholder groups on the proposed Anti-money laundering legislation. The only way to control money laundering effectively is through the cooperation of the people, the government, and MNCs. Even with reasonable policies and institutional structures, the fight against the vice is futile without this collaboration.

Money laundering as a cross border crime presents a new set of challenges at the international level. According to Pereira and Fontana in *Using Money Laundering Investigations to Fight Corruption in Developing Countries: Domestic obstacles and strategies*

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<sup>59</sup> George Kegoro, *The Control of Money Laundering and Terrorist Funding in Kenya*, (Institute for Security Studies: Cape Town, 2004) at 39

<sup>60</sup> Ibid

to overcome them<sup>61</sup>, measures aimed at combating money-laundering serve to enable policymakers. Tackling money laundering at the domestic level faces numerous challenges. The greatest is the lack of enough information and familiarity with anti-money laundering laws and other regulations, mostly among developing countries. Pereira and Fontana are also of the view that another obstacle to the prevention of money laundering is the lack of a centralized structure explicitly tasked to deal with the vice. The paper by Pereira and Fontana provides arguments for the challenges inherent in fighting money laundering. Although it is a comparative study between Tanzania and Albania, the reasons advanced could as well apply to Kenya. However, the context of the course is different, as its focus is on anti-corruption measures, a field that is slightly different from the current one.

Brian David Schwartz, in his article *Deficiencies in Regulations for Anti-money Laundering in a Cyber Laundering Age*, 2009, venture into the overview of modern techniques of moving illicit money. In a digital world where there is a rise in online banking, digital currency, and the theft of personal identification information, the current anti-money laundering policies are ineffective and easily circumvented. The study by Brian, therefore, is crucial in understanding the various deficiencies that the current systems have, and recommend specific feasible approaches to combat the vice.

### **1.10 Money Laundering Legal Regime**

According to Peterson Institute for Money Laundering in the article *Anti-Money Laundering Regime and Its Challenge to Law Enforcement*,<sup>62</sup> one of the biggest challenge facing anti-money laundering is that it is a process involving multiple players including from the international community. Such cases call for the constant movement of all the parties informing the documentary of evidence of the accused person/s from one jurisdiction to another. Due to the differences in laws in different countries, the anti-money laundering campaign requires cooperation among the nations. The main reason behind this argument is that criminals move their funds around always through financial institutions worldwide to obscure the source.

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<sup>61</sup>Pedro Gomes Pereira and Alessandra Fontana, *Using Money Laundering Investigations to Fight Corruption in Developing Countries: Domestic obstacles and strategies to overcome them*, Working Paper Series No 14 (Basel Institute on Governance: Basel, 2012).

<sup>62</sup> Peterson Institute for Money Laundering, *Anti-Money Laundering Regime and Its Challenge to Law Enforcement*, available at [https://piie.com/publications/chapters\\_preview/381/4iie3705.pdf](https://piie.com/publications/chapters_preview/381/4iie3705.pdf), accessed on 28 February 2020.

Constance Gikonyo, in her article, *Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes*, aims to identify processes that facilitate the identification of funds obtained illegally and the laundering activities involved. The Kenyan ports, roads network, and air transport terminals are havens for drug traffickers and smugglers and hence, increased laundering activity. The article also analyzes various legislation set in the constitution to combat ML to identify loopholes and implementation challenges. Understanding these oversights will play a crucial role in developing effective policies to counter ML. Moreover, the paper aims to provide information on the susceptibility of Kenya's anti-money laundering systems to encourage legislative and structural change.

*The Growing Threat of Money Laundering: The Significant role financial services institutions can play in curbing money-laundering activities*, 2019 is a journal article by Ejanthkar, Santosh, and Leepa Mohanty that aims to discuss the concept of ML from an international perspective. The overview includes the history of the vice and the common tactics used the world over. It is vital to this study to explore and understand the broader process of ML internationally, to be able to apply the knowledge in analyzing the challenges in the Kenyan system. Moreover, ML activities from other countries are also part of the problem as the funds flow through Kenya either for investment or as a stop in transactions to hide the sources.

Muthoni Kimani writes in her article *Investigating Money Laundering and Proceeds of Crime*, 2017 that one of the most critical global agendas is fighting ML to curb the financing of terrorism activities. She further urges that ML is the glue that is holding together the transnational crime, and without the vice, most local and international looters and fraudsters will have no avenue to move funds. Therefore, the study will offer critical insight into the mechanics behind hidden transactions that amount to ML. Moreover, the author also outlines ways through which illegally acquired money is used to finance terrorism, and this is another focus of this report.

### **1.11 International Measures to Combat Money Laundering**

Four major bodies spearhead anti-money laundering activities worldwide. To counter money laundering and terrorism financing, the Financial Action Task Force (FATF) was set up with the responsibility of formulating and promoting policies on a national and international level. The International Money Laundering Information Network (IMLN) is the second body that exists to aid governments, companies, and individuals to fight money laundering. IMLN is internet-based and involves the cooperation of various countries and groups around the

world.<sup>63</sup> The third one is the United Nations Office of Drugs and Crime (UNODC), which also conducts a worldwide anti-money laundering campaign. The purpose of the organization is to empower member states, enabling them to implement anti-money laundering measures. Lastly, the fourth one was the United Nations Convention against Corruption (UNCAC), which has the powers of detecting all forms of money laundering and to establish as criminal offences the laundering of the proceeds of corruption and the establishment of the offence of concealment or proceeded retention of property, which is the consequence of any of the offenses set up as per UNCAC.

### **1.12 Research Methodology**

This research is doctrinal legal research. It includes finding and deciphering primary and secondary wellsprings of law and blending those sources to frame a standard or rules of law. As a major aspect of this cycle, evaluation and critique of contending or conflicting sources might be required. This includes the Legal materials, Case and Digest, Lawful history, Case Reports, Judgments, and Reports of Committees.

### **1.13 Methods of Data Collection**

Data for this project will be collected using two methods: first is a desktop review of primary and secondary data, then a critical comparison between policies between anti-money laundering and mechanisms in Kenya and other jurisdictions.

#### **Secondary Data**

Sources of secondary data are textbooks, journal articles, legal commentaries, online sources, conference/workshops papers, reports, and unpublished thesis/dissertations.

#### **Primary Data**

The main sources of primary data for this project will include national, regional, and international legal instruments. Widespread legal devices will comprise the Constitution of Kenya and related legislations. International and regional legal agencies will consist of The Financial Action Task Force (FATF) Recommendations, as a best practice globally for anti-money laundering legal regime. FATF Regional Bodies whose mandate is to ensure that anti-laundering and measures aiming to counter the financing of terrorism are implemented in respective areas. In this region, it is the Eastern and Southern Africa Anti-Laundering Group. The Third EU Directive passed by the EU Parliament in 2005 for purposes of preventing the use of the financial system to finance money laundering and terrorist activities. Last is the

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<sup>63</sup> Ibid

South Africa legislation on money laundering (Financial Intelligence Act, No 38 of 2001) and (No. 11 of 2008) regulatory frameworks.

### **1.14 Chapter Framework**

Chapter 1: Introduction and Background

Chapter 2: Kenya's Money Laundering Vulnerabilities and Legal Framework.

Chapter 3: Role of international organizations and regional bodies in addressing money laundering

Chapter 4: International Best Practices in Anti-Money Laundering

Chapter 5: Conclusion and Recommendations

## CHAPTER TWO

### KENYA'S MONEY LAUNDERING VULNERABILITIES & LEGAL FRAMEWORK

#### 2.0 Introduction

Several regulatory measures at the national, regional, and global levels, aimed at combating money laundering (ML) have been put in place. Most of these measures were initiated with the help of International Organizations in their efforts to mitigate the impact and effects of money laundering across borders.<sup>64</sup>

Before the enactment of the Proceeds of Crime and Anti-Money Laundering Act in 2009, Kenya had enacted other laws covering various crimes that generate proceeds of crime susceptible to money laundering. As illustrated in the previous chapter, these laws included the Narcotics Drugs and Psychotropic Substances (Control) Act, 1994, and the Anti-Corruption and Economic Crimes Act, 2003. None of these pieces of legislation expressly provided for the criminalization of money laundering as a stand-alone offence and other related offences and incidental matters.

This chapter will assess some of the factors that make Kenya vulnerable to Money Laundering (ML) and the legal framework put in place to tackle the vice. The process of ML involves a network of interconnected operators from various organizations who act as gatekeepers to use loopholes in the system, both locally and internationally, to aide in illicit cash flows.<sup>65</sup> Moreover, the network involved in ML consists of highly ranked professionals. They seek the services of experts such as bankers, attorneys, chartered accountants, and auditors to facilitate the process of hiding the trail of money obtained through criminal activities.<sup>66</sup> Therefore, this predicament raises the question of how development partners and other donor nations ought to respond to plans by aid-recipient countries to create an IFC.<sup>67</sup>

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<sup>64</sup> Ali, S.A. 2003. 'Money Laundering Control in the Caribbean'. KluwerLaw International Vol 16.Pg 36.

<sup>65</sup>World Bank, Illicit Financial Flows (IFFs). The World Bank July 7, 2017. URL: available at <http://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs>, accessed on 23 May 2020.

<sup>66</sup> Partnership for African Social and Governance Research, *Illicit Financial Flows in Kenya: Mapping of the Literature and Synthesis of the Evidence*(PASGR: Nairobi, 2018) at 8 (*Hereinafter* PASGR)

<sup>67</sup>Attiya Waris, 'The Creation of International Financial Centers in Africa: The Case of Kenya'. U4 BRIEF September 2014 No 8 Chr. (Michelson Institute: Bergen, 2014)

Kenya joined the global battle against money laundering and was amongst the first countries to ratify the Vienna Convention<sup>68</sup>, the Palermo Convention.<sup>69</sup> Kenya is additionally a member of the Financial Action Task Force (FATF)<sup>70</sup> and a full member of East and South Africa Anti-Money Laundering Group (ESAAMLG).<sup>71</sup> Kenya is, therefore, under a responsibility to domesticate these Conventions and to incorporate the recommendations of the two international bodies in its domestic legal framework. FATF Recommendations three and four require States, as a threshold, to criminalize money laundering on the foundation of the Vienna Convention and the Palermo Convention. States are required to set the predicate offenses, whose proceeds represent money laundering, and these ought to include the broadest possible range of crimes.

## **2.1 Lack of Political Will**

The environment for the proliferation of ML does not necessarily occur due to inadequate legal framework, but the lack of political will to enforce already existing laws and regulations. The main challenge in combating ML in Kenya is the lack of political will and not poor policies or structural constraints. The success of a government system is derived from formal and informal structural arrangements that promote the legitimacy of a state, prosperity and increase public revenue. Commitment to these arrangements requires cooperation amongst the taxpayers and politicians. However, politicians in Kenya use their positions to facilitate the process of laundering to finance themselves and their political agendas. This, in turn, lowers the taxpayer's essential willingness to participate in the tax system.<sup>72</sup>

## **2.2 Corruption**

Corruption is one of the crimes that generate proceeds susceptible to money laundering. Arguably, the most significant concern about money laundering is Kenya's deep-rooted corruption and political patronage that leads to the growth of a non-transparent financial system.<sup>73</sup> In 2011, the Transparency International Corruption Perceptions Index ranked Kenya

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<sup>68</sup> United Nations Convention against illicit trafficking in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; adopted in December 1988. Kenya became a signatory to the Convention on 10th October 1992 and domesticated the Convention with the enactment of the Narcotic Drugs and Psychotropic Substances Control Act in 1994.

<sup>69</sup> United Nations Convention against Transnational Organised Crime of 2000. Kenya became a signatory to the Convention on 16th June 2004.

<sup>70</sup> Kenya is an associate member of FATF by virtue of its membership at ESAAMLG. ESAAMLG became an associate member of FATF in June 2010.

<sup>71</sup> Kenya was among the founding members of ESAAMLG in the meeting of August 2009.

<sup>72</sup> Ibid

<sup>73</sup> Letete *supra* note 26.



154th out of 182 countries most in the most corrupt countries. One political scientist defines Kenya as having a “bandit economy” due to predatory patrimonial relations that have engulfed the political elite.<sup>74</sup> In 2004, up to \$2bn was siphoned out of public funds and redirected to private portfolios. The revelation was made in the Kroll Report, during the Kibaki government that documented a massive web of individuals and corporate entities used to facilitate fraud and money laundering of the proceeds generated therefrom.<sup>75</sup> The inquiry also revealed several properties that were acquired under mysterious circumstances both locally and in South Africa, Europe, and other countries. Moreover, the 2005 Goldenberg Report showed a loss of over \$500 million in export subsidy fraud, and the money ended up stashed in foreign accounts. There has been no formal response or action towards implementing the recommendations of the reports from any government since then.

Corruption is exacerbated by the existence of a financial system that is neither transparent nor accountable with the effect that it is difficult to disentangle the web of individual persons behind the numerous corporations that link together with financial institutions to facilitate ML.<sup>76</sup> Compounding this is the politically controlled business environment, which involves collaboration between the elite political class containing the government and the big corporations that manipulate the various markets.<sup>77</sup> The continuous capital outflows caused by corruption have become a significant concern for Kenyans, who are aware of the continually rising debt acquired in their name. Besides, the rising poverty levels and depletion of resources through corruption and ML have led to increasing debt levels and below-average moral tax accountability among the state and its citizens.<sup>78</sup>

### **2.3 Weak Legal and Institutional Framework**

Political patronage, lack of political will leads to corruption, tax evasion that arises from the abuse of discretionary power that is majorly a result of undermined institutions in the systems.<sup>79</sup> Based on this situation, therefore, ML is perpetrated with the intent of hiding illegally acquired funds but not because of differences in international interest rates or

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<sup>74</sup>Mutahi Ngunyi, “Liberalizing the Bandit Economy,” Daily Nation, 9 July 2000, available at <http://www.zaimoni.com/KenyaCorruption.htm>. Accessed on 4 June 2019.

<sup>75</sup>Massa, I. ‘Capital Flight and the Financial System’ Overseas Development Institute (ODI) Working Paper 413. 2014. Available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9392.pdf>. Accessed on 13 May 2020.

<sup>76</sup>Massa *supra* note 32.

<sup>77</sup> Were *supra* note 12 at 21

<sup>78</sup> Ibid

<sup>79</sup>Ndikumana, L., and J. K. Boyce, Capital Flight from Sub-Saharan African Countries: Updated Estimates, 1970–2010.

macroeconomic policy disparities.<sup>80</sup> Primarily, the fight against ML is made futile by the endemic corruption in Kenya that causes the need for funds to be robbed to foreign countries to avoid detection. Moreover, the vice of ML in Kenya involves top business entities and gurus in cooperation with the government making it utterly impossible to curb corruption.<sup>81</sup>

During a case study of how the business corridor between Kismayu and Nairobi is used in sugar smuggling, evidence revealed collaboration between Kenya Defense Forces, militia, politicians, long-haul truck drivers, and unscrupulous businesspersons to facilitate the trade.<sup>82</sup> The political marginalization of the northern part of Kenya by successive regimes has led to an increase in the Sugar smuggling routes. Looting and mismanagement of domestic sugar production in parts of Western Kenya are also because of political discord and the power struggle. The contraband sugar smuggled via Kismayu in Somali is majorly from Brazil, as compared to that imported by licensed traders via the port of Mombasa.<sup>83</sup>

#### 2.4 Legal Gaps

Existing gaps in the law are more likely to give rise to a conducive environment for money laundering rather than discourage the vice. For an instant, an amendment to the Finance Act 2018, Clause 38, introduced a repeal to Section 37B (4) of the Tax Procedures Act 2015. The purpose of the amendment is to exempt money returned from other nations under amnesty as outlined in the provisions of the Proceeds of Crime and Anti-Money Laundering Act. The section was also aimed at encouraging other countries to remit money, properties, and other assets acquired using illegally siphoned funds by public officials and businesspersons back into the country. The repatriated funds were intended to boost economic growth in the country, especially considering the efforts towards revenue mobilization.<sup>84</sup> However, the same clause also creates a loophole whereby funds from terrorism and criminal activity can be repatriated back into the country. Such a blanket exemption leaves the country vulnerable to money laundering due to the lack of knowledge of rules and disclosure procedures set forth under the Proceeds of Crime and Anti-Money Laundering Act and the CBK Prudential Guidelines. Consequently, a pathway is formed where suspicious money could enter the nation and continue funding crime and terrorism.<sup>85</sup>

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<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup>Rasmussen, J, *Sweet Secrets: Sugar Smuggling and State Formation in the Kenya–Somalia Borderlands*. DIIS Working Paper 2017: 11” (Danish Institute for International Studies: Copenhagen, 2017) at 11.

<sup>83</sup> Ibid

<sup>84</sup>Patrick Njoroge, *Talking Points for the Presentation on Section 33c of the Banking Act*, National Assembly Departmental Committee on Finance and National Planning, Central Bank of Kenya 2019.

<sup>85</sup> Ibid

## 2.5 The Role of Multinational Corporations (MNCs)

MNCs and private sector organizations are the Primary players involved in running global financial and business systems and, to a significant extent, most governments.<sup>86</sup> MNCs are multinational organizations that have headquarters in one country and a branch or several subsidiaries in various nations. The power wielded by these corporations around the globe; therefore, hints to the conclusion that they are probable and involved in high-level corruption and play a pivotal role in money laundering. The law allows MNCs to keep information concerning the profits of their subsidiaries secret in most cases.<sup>87</sup> KPMG East Africa acknowledged that it is a reality that MNCs are gradually fleecing world governments and not just a perception. Therefore, all East African countries ought to purpose to control money laundering through the MNCs.<sup>88</sup>

Current corporate scandals show that opaque company structures coupled with corruption and the multinational nature of money laundering are the key proponents of the vice in Kenya.<sup>89</sup> According to Transparency International, it is possible to make such organizations accountable by encouraging public reporting of anti-corruption programs put in place to allow for updated monitoring by stakeholders.<sup>90</sup> Even though MNCs and private sector organizations' awareness of the advantages accrued from continuous corporate reporting on several corporate social responsibility issues, the majority are not willing to do so for their anti-corruption programs, and their use is limited to the Global Reporting Initiative recommendations.

## 2.6 Anti-Money Laundering Legal framework in Kenya

In 2003, the government formed the National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF).<sup>91</sup> The Task Force comprised two representatives each from the Ministry of Finance, Ministry of Trade and Industry, Ministry of Foreign Affairs, Central Bank of Kenya, Police Department, Criminal Investigations Department, National Security Intelligence Service, Banking Fraud Investigations Department, Kenya Bankers Association, Capital Markets Authority, Insurance Regulatory Authority, Kenya Revenue Authority, and the Immigration Department. The Task Force's mandate was

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<sup>86</sup>Okoth, E. 'Dodgy Multinationals Denying Kenya Billions of Shillings in Revenue', Daily Nation Monday September 21, 2015. Available at <https://www.nation.co.ke/lifestyle/smartcompany/How-multinationals-fleece-Kenya-through-tax-evasion/1226-2879578-tebr98/index>. accessed on 28 May 2020.

<sup>87</sup> Ibid

<sup>88</sup>Global Financial Integrity, *Explore the Data: Illicit Financial Flows from Developing Countries 2002-2011. How to Read the Reports' Findings* (GFI: Washington, D.C., 2013).

<sup>89</sup>Transparency International; *The Benefits of Anti-Corruption and Corporate Transparency. Working Paper* (International Secretariat: Berlin, 2016).

<sup>90</sup> Ibid

<sup>91</sup> NTF was gazetted on 25th April 2003 by Hon. Minister for Finance (G.N.No.2702).

once to sensitize the public on the risks of money laundering and financing of terrorism and to prescribe measures to fight the money laundering, to strengthen a national policy framework on anti- money laundering and financing of terrorism, and to make appropriate hints through the policy framework to the relevant Government corporations on the countrywide method to fight money laundering and terrorism.

Measures aimed at combating money laundering were put in place, pending the enactment of laws and formulation of regulation to curb money laundering. The Central Bank of Kenya released Guidelines on combating laundering in January 2006, which set the minimum requirements that banks must observe while opening bank accounts for customers.<sup>92</sup> The guideline also required banks to set up policies and put in place inside measures to stop money laundering, such as the appointment of a Money Laundering Reporting Officers.<sup>93</sup> The 2002 Capital Markets Licensing Regulations for capital markets intermediaries required licensees to enhance customer due diligence and maintain customer statistics on their identity, nature of the business, and origin or supply of money and obtain a written declaration that the data from the client is accurate.<sup>94</sup>

It took Kenya seven years after the institution of the Task Force to formally enact Kenya's Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) 2009,<sup>95</sup> which came into effect on June 28, 2010. The Act was operationalized in 2013 when the Money Laundering Regulations<sup>96</sup> were formulated, and the Financial Reporting Centre commissioned in April 2013. The Central Bank of Kenya revised its 2006 Prudential Guideline on Money Laundering for the banking sector in 2013.<sup>97</sup>

POCAMLA is the basic anti-money laundering legal framework in Kenya which contains the core provisions regarding the definition of the offence of money laundering and measures for tracing and confiscating proceeds of crime. The Act criminalizes and defines money laundering as; getting into an arrangement to conceal or hide the nature, source, or area of proceeds of crime.<sup>98</sup> It makes it an offense to acquire, use, or possess a property that one knows that it is or forms part of the proceeds of crime.<sup>99</sup>

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<sup>92</sup> CBK/PG/08 of 2006 Section 6-8.

<sup>93</sup> CBK/PG/08; Guideline on the Proceeds of Crime and Money Laundering (Prevention) issued on 1st Jan 2006

<sup>94</sup> Legal Notice 125 of 19th July, 2002 on the Capital Markets (Licensing Requirements) (General) Regulations, 2002; Section 80 on Prevention of Money Laundering and other illicit activities.

<sup>95</sup> Act No. 9 of 2009, Cap 59B.

<sup>96</sup> Legal Notice 59 of 2013.

<sup>97</sup> Guideline on Proceeds of Crime and Anti-Money Laundering- CBK/PG/08.

<sup>98</sup> Ibid Section 3(i)

<sup>99</sup> Ibid Section 4

In addition to defining and criminalizing money laundering, the Act creates ancillary offenses associated with money laundering. The ancillary offences are directed at reporting institutions and consist of tipping off a suspect in a money-laundering investigation<sup>100</sup> and transmitting or transferring proceeds of crime or money intended for criminal activities.<sup>101</sup> Failure to file a record as required under the Act, or making a false or fraudulent report to a reporting organization established under the Act is also an offense, and so is malicious reporting.<sup>102</sup> Failure to examine on an ongoing basis, customer due diligence, reporting, and file retaining requirements is also an offense under the Act.<sup>103</sup> Reporting institutions under the Act are required to keep the identities of the customers they deal with, to report all large and unusual client transactions, and to also retain such files for seven years from the date the enterprise or transactions are completed.<sup>104</sup> Under the Act, it is an offense to fail to cooperate for the duration of investigations with any officer, failure to produce information or to respond to a request made under the Act, or misuse of information, failure to comply with an order of the court or hindering any person in the performance of any functions under the Act.<sup>105</sup> Under the Act, an individual charged with an offense of ML may raise as a defense that he had reported a suspicion in compliance with sections 44 and 47 (a).<sup>106</sup>

The Act additionally supersedes all commitments as to mystery forced by any law or rule and gives resistance against any criminal obligation under any regulation or customary law so long as the data identifies with the examination of an offense under the Act.<sup>107</sup> However, the Act appears to hold the promoter customer benefit. In this way, advocates can't be constrained to unveil any information received in the course of offering guidance to their clients or throughout leading any legal procedures for the sake of a client.<sup>108</sup> The avoidance of customer relationships from the ambit of the Act is the provision that lawbreakers can misuse. This is because illegal tax avoidance activities regularly utilize the administrations of experts with highly specialized ability in making complex structures that are being used as vehicles for washing criminal funds.<sup>109</sup>

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<sup>100</sup> Ibid Section 8.

<sup>101</sup> Ibid Section 7.

<sup>102</sup> Ibid Section 9 &10.

<sup>103</sup> Ibid Sections, 44, 45 and 46.

<sup>104</sup> Ibid Sections 5&11.

<sup>105</sup> Ibid Sections 13, 14, 15

<sup>106</sup> Ibid Section 6.

<sup>107</sup> Ibid Sections17 and 123.

<sup>108</sup> Ibid Sections 18.

<sup>109</sup> <http://www.wsj.com/articles/swiss-attorney-generalexpresses-concern-over-halt-of-malaysian-1mdb-probe-1454083061>

The Act further defines and broadens the meaning of “financial institutions’ to include thirteen entities and individuals which may not fall under the Banking Act but which transact currency.<sup>110</sup>

The Act further defines six “designated non-financial businesses or professions,” which include gambling clubs, land organizations, managing in valuable metals, rehearsing bookkeepers, and non-legislative organizations.<sup>111</sup> The Act likewise distinguishes different administrative bodies and forces upon them the commitment to report any dubious exchanges or exercises that the governmental agency or its staff may experience during the ordinary course of their duties and obligations.<sup>112</sup> These bodies are the Central Bank of Kenya, the Insurance Regulatory Authority, Betting and Authorizing Control Board, Capital Markets Authority, Institute of Certified Public Bookkeepers of Kenya, Estate Agents Registration Board, Non-Governmental Associations Co-appointment Board, and the Retirement Benefits Authority.<sup>113</sup>

While POCAMLA makes it an offense for an "individual," for example, lawful or regular individual to submit the crimes referenced above,<sup>114</sup> the proceeding with tax evasion announcing commitments just applies to reveal organizations which incorporate budgetary establishments and assigned nonbusiness institutions.<sup>115</sup> This forced dependence on the private segment makes a single direction organization between the law authorization offices and the private foundations in the discovery of the offense of illegal tax avoidance. The announcing foundations are regularly set up with a target of benefit, making likewise pay expenses to empower the administration to pay law requirement organizations. It might consequently appear unlawful to abridge the rights and opportunities of private foundations by forcing a law authorization trouble on them with accurate results of rebelliousness. The law authorization offices likewise don't have a corresponding duty to continually update the detailing establishments on the advancement made on the announced cases. The money related detailing places it that it is built up under the Act, which is managerial that depends on different offices to do examinations. In any event, the FRC ought to be commanded to distribute reports and patterns on the results of investigations following the statements made by organizations.

The Act acknowledges that having the best possible distinguishing proof of a person at the origin of a client makes it simpler to encourage an examination on the equivalent at

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<sup>110</sup> Ibid Section 2.

<sup>111</sup> Ibid Section 2.

<sup>112</sup> Ibid Sections 36 (1).

<sup>113</sup> Ibid First Schedule.

<sup>114</sup> Ibid Section 2.

<sup>115</sup> Ibid 11 - Makes it an offence for a reporting institution to fail to observe the requirements of Section 44-46 which have specific money laundering obligations for reporting institutions.

whatever point a doubt emerges. The Act puts an essential commitment of doing the vital client due to steadiness in the detailing establishments. Due persistence incorporates distinguishing the character of the clients utilizing dependable and specific documents,<sup>116</sup> setting up definitive valuable proprietors, possession structures, and controlling. Makes it an offense for a revealing foundation to neglect to watch the necessities of people in the back of institutions such as trusts, NGOs.<sup>117</sup> This provision of the Act follows FATF Recommendation 10 that monetary establishments must be prohibited from keeping anonymous accounts, accounts belonging to companies whose nature of the enterprise is not straight away verifiable and debts in, of course, fictitious names. This requirement to behavior the crucial purchaser due diligence applies retrospectively, and institutions are required to acquire the imperative patron identification files even on current clients that were in their database before the Act got here into force.<sup>118</sup> This requirement also creates an administrative burden on private establishments primarily due to the fact the Act prescribes the same set of conditions without making leeway for establishments to require much less documentation for less unstable customers.

The Act calibrates the due diligence requirement to enable institutions to provide a higher center of attention to more risky customers. The Act furnishes a risk categorization matrix and education that establishments can use in assigning hazard levels to their customers. The Act further requires that as soon as the acceptable customer small print and data are in place, the reporting institution has to put in area measures to check against any deviation from the indicated account or customer profile, and, instantly, the organization should be searching for rationalization from the customer. In this regard, the Act requires a reporting organization to monitor, on an ongoing groundwork, all complex, unusual, suspicious, substantial, or different transactions as may also be precise in the regulations, whether executed or not. It shall pay attention to all unique patterns of operations, to insignificant, but recurring patterns of transactions that have no apparent economic or lawful purpose.<sup>119</sup> To be able to comply with this requirement totally, an organization is required to put in location healthy internal controls and inside reporting tactics and designate necessary personnel who shall be responsible for monitoring and reporting of suspicious transactions.<sup>120</sup> The Act goes beforehand and lifts the veil of incorporation on the compliance duties for a body corporate, utilizing putting a private function on a director, manager, secretary, or any different officer of the body corporate, such

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<sup>116</sup> Ibid Section 45 (1) (a &b).

<sup>117</sup> Ibid Section 45(3).

<sup>118</sup> Ibid Section 45(2).

<sup>119</sup> Ibid Section 44 (1).

<sup>120</sup> Ibid Section 47.

as employees, of reporting institutions who fail or permits or offers consent for the noncompliance with the provisions of the Act.<sup>121</sup> Reporting establishments are also required to keep customer and transaction data that make it feasible to set up the details of the character conducting the transaction, the dates, nature, and currency of operations for a length of seven years.<sup>122</sup> This requirement capability that institutions have to invest in science and personnel to be in a position to fulfill the requirement. The law should then have collaborated with provisions for permitting digital proof and electronic storage of information, to similarly mitigate the have an effect on of extra files retention requirements.

The Act also requires that upon suspicion that any transaction or activity could constitute or be associated with money laundering or the proceeds of crime, a reporting institution shall record the suspicious or uncommon transaction or recreation to the Financial Reporting Centre. This document has to be in the prescribed layout and be made immediately or inside seven days of the date the transaction or endeavor that is considered to be suspicious occurred. Also, reporting establishments are required to file reports on all money transactions equivalent to or exceeding the amount of USD 10,000 as prescribed in the Fourth Schedule of the Act, whether they appear to be suspicious or not.<sup>123</sup> Specific reporting tasks are also placed on accountants involved in the coaching and advice of purchasers in the following sectors, particularly buying and selling of real estate, managing of patron money, securities or different assets, management of banks, financial savings, or securities accounts; the company of contributions for the creation, operation or management of companies, establishment, maintenance or management of buying and selling of commercial enterprise entities.<sup>124</sup> The Act, notably, leaves out the lawyers and different gurus involved in the transactions mentioned above, growing a colossal loop gap that can be exploited utilizing criminals.

The Act creates establishments to coordinate and help in the realization of its goals and objectives. These establishments are the Financial Reporting Centre (FRC),<sup>125</sup> the Anti-Money Laundering Advisory Board,<sup>126</sup> the Assets Recovery Agency,<sup>127</sup> and the Criminal Assets Recovery Fund.<sup>128</sup> The FRC is the essential operational group for assisting in the identification of the proceeds of crime. Its mandate includes receiving suspicious transactions from reporting

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<sup>121</sup> Ibid Section 16(6).

<sup>122</sup> Ibid Section 46.

<sup>123</sup> Ibid Sections 44 (2&3).

<sup>124</sup> Ibid Section 48.

<sup>125</sup> Ibid Part III.

<sup>126</sup> Ibid Part IV.

<sup>127</sup> Ibid Part VI.

<sup>128</sup> Ibid Part XI.



institutions, coaching reporting establishments concerning the necessities of the Act, creating a database of all reviews and suspicious transactions, carrying out investigations, and request for such different information from reporting institutions. Besides, the FRC can enter into reciprocity agreements with any foreign economic intelligence gadgets to allow it to discharge its functions.<sup>129</sup>

The FRC is solely administrative and has little or no capacity to expedite the investigation and prosecution of suspected cases of money laundering. These two principal functions mainly lie with the police and the Office of Directorate of Public Prosecutions. There are four fashions of FIUs: judicial, regulation enforcement, Administrative, and hybrid.<sup>130</sup>

□ The Judicial Model is established within the judicial branch of government wherein “disclosures” of the suspicious financial undertaking is obtained via the investigative businesses of a country from its industrial area such that the judiciary powers can be added into play, e.g., seizing funds, freezing accounts, conducting interrogations, detaining people, conducting searches, etc.

□ The Law Enforcement Model implements anti-money laundering measures alongside already present regulation enforcement systems, helping the efforts of multiple regulation enforcement or judicial authorities with concurrent or once in a while competing for jurisdictional power to research ML.

- The Administrative Model is a centralized, regulatory position, independent, which gets techniques and realities from the money related sectors and sends revelations to legal or law requirement experts for arraignment. It highlights as a "buffer" between the budgetary and the law authorization networks.

- The Hybrid Model fills in as an exposure mediator and a hyperlink to both legal and law requirement specialists. It joins components of at least two of the FIU models.

It is now not clear why Kenya selected to have an administrative FIU. Still, in my view, it is the weakest of all the models presented above, considering the specialized ability and intricate evidence required to prosecute a case of suspected money laundering correctly. The Anti-Money Laundering Advisory Board is mandated to propose the Director of the FRC in the execution of his duties.<sup>131</sup> The Assets Recovery Agency (ARA) has the other essential position of tracing, confiscating, executing court docket orders, and recovering any property

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<sup>129</sup> Ibid Section 24.

<sup>130</sup> <http://www.egmontgroup.org/about/financial-intelligence-units-fius>

<sup>131</sup> Ibid Section 49.

that has been declared as proceeds of crime under the Act.<sup>132</sup> The Criminal Assets Recovery Fund, which shall be comprised of all the money that is realized by using the corporation in the route of fulfilling its mandate.<sup>133</sup> The deprivation of a restoration organization has since permitted the degenerate to parade their poorly gotten riches and managed them sufficient opportunity to cover and launder it, usefully subverting any legitimate cycles towards them. However, the ARA has had numerous successes in the current past; in 2015, the ARA traced and iced up belongings suspected to be part of the KES 791 Million fraud at NYS.

Notably, POCAMLA neither gives prosecution powers to the FRC nor the ARA; as such, the investigation and prosecution of money laundering and related offenses under the Act are nonetheless vested on the police and the director of public prosecution's office. The nature of complaints is two-fold; the FRC fingers over suspicious transaction reports obtained underneath this Act to the competent regulation enforcement authorities and criminal lawsuits are instituted.<sup>134</sup> Where the courtroom finds the defendant guilty of an offense of money laundering, it may, on the software of the Attorney-General, the ARA Director, or on its very own motion, inquiries into any benefit which the defendant can also have derived from the offense.<sup>135</sup> In looking to confiscate that property which the defendant is suspected of having benefited from, or acquire retraining orders to cease the defendant from transferring the ownership, civil proceedings apply.<sup>136</sup> Deterrence as out of 1,000 corruption cases that had been pronounced in 2015, solely 50 have been endorsed for prosecution according to a record launched utilizing the Public Service Commission. There was once now not a single conviction.<sup>137</sup>

To further give effect to the provisions of POCAMLA, several other Acts had been amended to encompass money laundering in the scope of their mandates. These were the Extradition (Contiguous and Foreign Countries) Act,<sup>138</sup> the Extradition (Commonwealth Countries) Act,<sup>139</sup> Narcotic Drugs and Psychotropic Substances (Control) Act.<sup>140</sup> This resulted in the inclusion of the offense of Money Laundering amongst the crimes committed by using an individual guilty of dealing with any prohibited components beneath the Act. This genuinely

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<sup>132</sup> Ibid Part VI.

<sup>133</sup> Ibid Section 110.

<sup>134</sup> Ibid Section 24(b).

<sup>135</sup> Ibid Sections 61.

<sup>136</sup> Ibid Section 56.

<sup>137</sup> <http://www.businessdailyafrica.com/Opinion-and-Analysis/Asset-Recovery-Agency-must-target-pastcorruption/539548-3024968-pex54yz/index.html>

<sup>138</sup> Cap 76.

<sup>139</sup> Cap 77.

<sup>140</sup> Act No. 4 of 1994.

enabled the kingdom not solely to penal complex the offender however also to confiscate any proceeds/gains from the sale of such substances.

POCAMLA gives the Attorney General<sup>141</sup> and the FRC<sup>142</sup> the energy to enter into agreements that allow for international cooperation with financial talent devices and enforcement agencies. Specifically, the Attorney General might also request another authority in any other united states to allow for proof to be taken, difficulty a warrant of seizure of property from that country, demand for assistance in arranging for a man or woman to come and attend proceedings.<sup>143</sup> Similarly, Kenya is also required to help and avail such facts as perhaps requested by some other investigation in a money laundering offense.<sup>144</sup> All the requests received from outdoor shall be registered in a courtroom of regulation utilizing the Attorney General, and such as other nearby processes to authenticate and provide impact to such orders and requests, shall be followed.<sup>145</sup> The Act gives for further rules to be made through the Minister for Finance concerning many specific sections of the Act to operationalize them wholly.<sup>146</sup>

In 2012, the Proceeds of Crime and Anti Money Laundering Act was once amended to expand the definition of "monetary instruments" to encompass cheques and different negotiable instruments. The Act used to be also modified to permit reporting establishments and their authorized officers to lift out investigations into suspicious activities.<sup>147</sup> In 2015, the Act was similarly amended to support the function of the economic reporting center via introducing similar tasks on reporting entities to provide also information and file reviews on compliance with the FRC from time to time. The amendments did not then again grant the FRC with prosecution powers; however, mandated the director to refer to any validated cases of money laundering to the suitable law enforcement groups for further handling.<sup>148</sup>

The Act provides for the detection of proceeds of crime by focusing on institutionalized remittances. However, Kenya is prone to money laundering due to many other factors, amongst them being the reality that there are universal bribery and corruption in Kenya.<sup>149</sup> Kenya is nonetheless primarily a money financial system that is characterized by way of an excessive

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<sup>141</sup> Ibid Section 118.

<sup>142</sup> Ibid Section 24 L

<sup>143</sup> Ibid Section 116.

<sup>144</sup> Ibid Section 118.

<sup>145</sup> Ibid Section 119&120.

<sup>146</sup> Ibid Section 134.

<sup>147</sup>The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2012.

<sup>148</sup> Finance Act No. 14 of 2015, Sections 50 & 51.

<sup>149</sup> [www.transparency.org](http://www.transparency.org).

volume of money primarily based transactions and the existence of alternative remittance channels and simple structures that are now not adequately envisaged underneath the Act.

The Act additionally looks to shift the burden of proof to the accused in a possible case of money laundering, which is pretty unprecedented. Section 65 of the Proceeds of Crime and Anti- Money Laundering Act, it is prima facie evidence that the defendant handled proceeds of crime if it is found that the defendant had, besides ample cause, failed to divulge the data or source of the property/funds being suspected to be laundered, the funds/property are therefore presumed to have originated from illegal sources or crook activities. While this may also be logically viable, legally, it, the burden of proof has regularly rested with the prosecution in a criminal case, for them to prove the particular offense the defendant has committed past life like doubt.

Failure to comply with this observe was punishable with the aid of a best of up to Kenya shillings Three Hundred Thousand (KES 300 000) or imprisonment for a period now not exceeding three (3) years or both. In case of trouble, be aware underneath this section, the Commission and its Director had been required to own some cloth from which it is “reasonably suspected” that the person to whom the word was once being issued had been involved in corruption or financial crime. In the absence of reasonable suspicion of involvement in bribery or financial crime, the Commission and its Director would have no energy to trouble a word under Section 26 of the Act. The relevance of what we are pronouncing right here will emerge as evident in due course.

The POCAMLA leans closely towards regulated and formalized sectors and locations onerous reporting duty on these sectors, however daily, there are emerging choice ways of carrying out economic transactions. This is facilitated by using new applied sciences and choice remittance channels, which are broadly prevalent such as Hawala banking. The Act, therefore, would require to be continually revised to take away any redundant provisions and put in measures to put in force towards money laundering through creating technologies and alternative money remittances channels.

The Proceeds of Crime and Anti Money Laundering Regulations of 2013<sup>150</sup> were promulgated to give force to most of the provisions of the Act. Specifically, the Regulations furnish the structure and frequency of filing of the weekly cash transaction reports, which was not recently accommodated under the Act.<sup>151</sup> The Regulations, too, require announcing

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<sup>150</sup> Legal Notice 59 of 28th March 2013.

<sup>151</sup> Ibid note 58 Section 34.

foundations to do yearly exposure appraisals of the money washing, reliable with the nature and size of the organization.<sup>152</sup> Risk appraisals help the announcing establishments and the FRC to have the option to put center around hazardous segments and clients and simultaneously diminish the weight on okay regions to empower the organizations to run. From the Regulator's point of view, it is a board instrument that encourages them to organize how assets and exertion will be distributed.<sup>153</sup> The Regulations additionally require revealing organizations to ceaselessly incorporate or consider the effect of tax evasion dangers while growing new procedures, items, or conveying new technology.<sup>154</sup>

Another significant advance in the improvement of hostile to illegal tax avoidance enactment in Kenya is The National Payment System (Anti-Money Laundering Regulation for the Arrangement of Mobile Payment Services) Regulations, 2013 were additionally drafted and given to the general population for remarks. E-Money Regulations were also discharged to the general society for comments. Explicitly, these, once gazetted, will require versatile installment administrations and E-cash guarantors to guarantee that they and their operators agree to the appropriate arrangements of the Proceeds of Crime and Anti-Money Laundering Act and the guidelines given as far as the said Act.<sup>155</sup>

## **2.7 Conclusion**

The preceding chapter analyzed the provisions of crucial regulation that criminalizes money laundering and the institutional framework set up underneath the Act. The Act can be described as a step in the proper route in that it criminalizes the offence of money laundering. The Act additionally has gaps that would want to be addressed to decorate its relevance and effectiveness.

Critical gaps that have been discussed below the Act consist of a lack of an advantageous investigation and enforcement mechanism. As a result, there has no longer been a successful money laundering prosecution in Kenya, seeing that the inception of the Act. In my view, this gap can be closed by giving the FRC prosecution powers aligned with the constitution. This will shorten the time taken to conclude a case of suspected money laundering due to the fact that the investigation and prosecution will be finished through the same agency. Alternatively, Kenya can think about adopting a judicial model that consists of having a specialized legal section to deal with economic crimes and suspected money laundering cases.

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<sup>152</sup> Ibid Section 6.

<sup>153</sup> Owen Martin, 2005. "Enforcing anti money Laundering Defences", Central Banking Publications, Tavistock House, London.

<sup>154</sup> Ibid Note 58 Section 7.

<sup>155</sup> Regulations made under the National Payment System Act; No. 39 Of 2011.

This will then mean that suspicious financial recreation reviews are acquired immediately by way of the investigative groups such as the police and the Ethics and Anti-Corruption Commission and handled by using the specialized judicial unit. This will do away with the want to have unbiased administrative FRC and also reduce the cost to the taxpayers of having to preserve an impartial FRC.

In my view, enforcement is very tough within the fragmented contemporary framework where a suspicious transaction report is lodged with one the FRC, the investigations are completed both the police and the EACC and then prosecuted by way of the directorate of public prosecutions. This may result in the suspects shifting the funds suspected to have been laundered, ensuing in the path of money laundering growing cold.

Another downside of the Act is that it locations arduous reporting tasks on reporting institutions such as banks. This may additionally weaken the effectiveness of the Act because the reviews are bound to be many, and some might also have no substance at all. This ought to then divert interest to the actual suspicious cases if an institution decides to be selective in its reporting. The law provides a defense to reporting establishments in that they are exempt from liability as long as they show that they filed a suspicious transaction record with the FRC.<sup>156</sup> A group may want to consequently choose to document low amounts suspected to be laundered by using a client and go away out more considerable amounts alleged to be laundered with the aid of the equal customer.

Kenya has taken the foremost steps towards establishing and enhancing its anti-money laundering legal and policy frameworks. This has been via the enactment of the Proceeds of Crime and Anti-Money Laundering Act, the promulgation of regulations thereunder. This, in principle, addressed deficiencies recognized in the previous related to the failure to criminalize money laundering. However, despite Kenya's high-level political dedication to work with the FATF and ESAAMLG to address its strategic anti-money laundering coverage and legislative deficiencies, Kenya has not made sufficient progress in the implementation of an adequate enforcement mechanism to deter the commission of the offense of money laundering. The POCAMLA leans heavily in the direction of regulated and formalized sectors and locations onerous reporting obligation on these sectors. Still, daily, there are emerging choice ways of carrying out financial transactions, and these loopholes would want to be sealed thru legislative mechanisms for them to be efficient.

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<sup>156</sup> Section 6 POCAMLA



## **CHAPTER THREE**

### **ROLE OF INTERNATIONAL ORGANISATIONS AND REGIONAL BODIES IN ADDRESSING MONEY LAUNDERING**

#### **3.1 Introduction**

In response to the developing risk of ML internationally and its detrimental enormities on the societal and pecuniary improvement of states, several global and regional companies are more desirable of their efforts to fight money laundering. These businesses played and continue to play a vital function in evolving international principles to combat ML and are waging hard to stimulate consciousness. They have also set specific soft regulation standards and directives to assist countries in boosting high-quality AML regimes inside their jurisdictions per the worldwide principles.

Whereas these standards have been adopted worldwide, it is also profitable to reflect on consideration of the gentle law influences regulation-making. It ought not to be confused that global guidelines and standards do no longer always enshrine acceptable practice. International agreements emerge from an inherently political technique in which countrywide actors are in search of to defend perceived countrywide competitive interests, regularly regardless of whether or not these may additionally be reconciled with the referred to goals of growing efficiency and advertising steadiness in the broader market.<sup>157</sup>

This chapter discusses the role of several global and regional frameworks in addressing money laundering. The chapter further looks at international and regional conventions and quite many pointers with the aid of global and regional bodies on money laundering. In conclusion, the chapter discusses whether or not international frameworks and policies form the ‘best practice’ on which international locations should model their neighborhood money laundering frameworks, or whether or not international locations define their very own techniques to fight money laundering.

#### **3.2 Development of global problem about money laundering**

The realization that battle money laundering required governmental intervention was made in the Nineteen Seventies in the United States due to the early connection of money laundering to illegal trafficking in narcotic drugs and the social harms it brought.<sup>158</sup> Before the 1970s, governments centered their efforts on fighting towards predicate crimes directly, with

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<sup>157</sup> Edwards, F.R. and Patrick, H.T. eds 1992. *Regulating International Financial Markets, Issues and Policies*. Dordrecht: Kluwer Academic Publications 40.

<sup>158</sup> Michael Levi and Peter Reuter. Eds 2006. *Essay on Money Laundering*. Published by the University of Chicago; p 290.



little or no success as crook positive aspects still discovered themselves in the financial system; worse; even massive quantities of money that have not been necessarily from an illegal supply ought to be transferred for unlawful purposes. This two-fold aspect of money transfer is what made rules focus on combating money laundering via the scrutiny of money transfers. Funds switch was once not damaging on its own. However, because it was discovered that it facilitated illegal activities, measures had to be imposed on the exterior sellers involved, such as banks, insurance plan groups, and real property agents, to elevate out scrutiny of dollars despite the social harms brought about utilizing predicate crimes being exterior to them.<sup>159</sup>

In response to the developing danger of ML and its unfavorable outcomes to the social and budgetary improvement of nations, numerous worldwide and regional firms joined in the fight. These businesses played and still do play an energetic position in the setting of global standards to scuffle ML and had been amongst the first campaigners to promote international recognition about money laundering threats and risks. Initially, they aimed at supporting international locations globally to strengthen superb anti-money laundering regimes inside their jurisdictions under global standards.<sup>160</sup> With these initial desirable intentions, the foreign firms later started applying stress on countries for them to comply or domesticate these standards, failure of which they would face severe repercussions from the international community. These businesses blanketed the United Nations Office on Drugs and Crime (UNODC),<sup>161</sup> Financial Action Task Force (FATF), International Organization of Securities Commission (IOSCO), the World Bank, the Basel Committee on Banking Supervision, and the International Monetary Fund.

The United Nations played the best position in shaping coverage and law on money laundering. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, implemented in 1988 (hereinafter the Vienna convention),<sup>162</sup> used to be the first convention that recognized and give a lecture on the troubles of proceeds of crime and used to be similarly the first worldwide instrument that required states to criminalize

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<sup>159</sup> UK Cabinet Office, June 2000. Recovering the Proceeds of Crime. A performance and Innovation Unit Report. Available at <http://www.gov.uk/+/...cabinetoffice...uk/.../cabinetoffice/.../crime> last accessed on 25th August 2020.

<sup>160</sup> United Nations Institute for Training and Research 2009. Fundamentals of Anti-Money Laundering International Standards and Compliance Issues; Page 5.

<sup>161</sup> UNODC's law enforcement, Organized crime and Anti-money laundering Unit is responsible for carrying out the global programme against money laundering, Proceeds of crime and the financing of terrorism, was established in 1997 in response to a mandate given through the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

<sup>162</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Adopted on 19th December 1988 and opened for signature on 20th December 1988. Kenya acceded to the Convention on 18th October 2000.

ML.<sup>163</sup> Although this Convention focused on proceeds from drug trafficking, other Conventions have multiplied this definition. Today's description of the offense of money laundering includes dollars generated through a vast range of crook activities, referred to as predicate offenses, which include robbery, human trafficking, drug trafficking, palms trafficking, corruption and bribery, fraud, kidnapping, smuggling, extortion, forgery, piracy, insider buying and selling and market manipulation, counterfeit currency, racketeering.

International bodies, such as the World Bank and the IMF, records that demonstrated that money laundering and the associated predicate offenses had enormous economic and social penalties for nations worldwide. The IMF estimated the amount of laundering at 2-5 percentage of the world's gross domestic product, almost USD 600 billion, even at the lowest quit of the scale. One of the most devastating effects of money laundering is its impact on government revenues as money laundered effectively represents profits that evade tax. Misreporting and underreporting income is one of the most common methods of conducting money laundering. Consequently, the expand of predicate offenses and money laundering needs Public expenditure enforcement, which draws further on federal revenues.<sup>164</sup> However, there are no estimates of how a whole lot of these amounts are spent through criminals and their enterprises and how much is laundered.<sup>165</sup> To this end, the international community concluded that if unchecked, money laundering may want to have very devastating outcomes on the social and monetary development of a country.<sup>166</sup>

The pressure from the worldwide neighborhood to criminalize the offense of money laundering expanded throughout borders as the offense was once as a transnational Offense in nature. In 1989, quite many international locations throughout the world joined fingers to establish the principal foreign body to fight money laundering, namely, the Financial Task Force (herein referred to as FATF). FATF is an inter-governmental body that used to be installed via G-7 countries.<sup>167</sup> Its mandate protected examining money laundering methods and trends, organizing worldwide standards, and creating and advertising policies, both at countrywide and global levels, to tackle money laundering.<sup>168</sup>

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<sup>163</sup> Ibid Article 3

<sup>164</sup> United Nations Office on Drugs and Crime; October 2011. Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Crimes. Research Report by UNDOC Pg.19.

<sup>165</sup> William F. Wechsler, July/August 2001. Follow the Money. Report by US Foreign Affairs Office Pg. 45.

<sup>166</sup> Quirk, Peter J. 1997. Money Laundering: Muddying the Macro economy, International Monetary Fund Working Paper, pg. 9. Quirk 1996, p 9.

<sup>167</sup> G-7 Countries are France, Canada, Germany, Italy, Japan, United Kingdom and United States.

<sup>168</sup> Recommendation 1- FATF.

FATF issued forty hints with nine exclusive recommendations to supply nations with the initial framework for preventing, detecting, and suppressing both money laundering and terrorist financing, among them the advice that governments should criminalize money laundering on the foundation of the Vienna Convention.

Countries had been urged to apply the crime of money laundering to all severe offenses with a view to inclusive of the broadest range of predicate offenses. The advice stated that these offenses have to extend to conduct that occurred in any other country, which constitutes an offense in that which would have included a predicate offense had it occurred domestically. This fashioned the basis for calls to enact specific legislation to combat money laundering across all the countries in the world.

FATF Recommendation Two identified the monetary device as the primary avenue for channeling the proceeds of crime, and it urged that the unchecked use of the money the system had the viable to undermine man or woman economic establishments and, ultimately, the integrity of the entire monetary sector. Some writers have also supported FATF with the aid of arguing that failure to take measures on economic institutions may want to additionally have detrimental macroeconomic effects and affect the change rate through giant transfers of capital flows, and could lead to rent in search of and distorted useful resource allocation.<sup>169</sup>

### **3.3 International Policy and Legal Frameworks to Combat Money Laundering**

The first global agreement that attempted to address the developing chance of money laundering was once the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic components of 1988.<sup>170</sup> The Convention focused its efforts on the freezing and seizure of proceeds of drug trafficking. It offers full measures towards drug trafficking and urges worldwide cooperation to counter drug trafficking and its profits.<sup>171</sup>

In the subsequent revisions, other predicate offenses had been introduced to the definition of money laundering and its associated crimes in addition to the drug trafficking offenses identified below Article 3 of the Convention. The Convention, therefore, required parties to criminalize, law the production, manufacture, extraction, education and imparting for

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<sup>169</sup> Combating Money Laundering and Terrorist Financing; a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses; Second Edition; Commonwealth Secretariat, 2006.P6.

<sup>170</sup> Vienna convention;Dec 19, UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Adopted on 19 December 1988 and opened for signature on 20th December 1988 and came into force on 11th November 1990).

<sup>171</sup>Ibid Article 10.

sale, distribution, dispatch, and brokerage, dispatch in transit of any narcotic drug or psychotropic substance underneath their domestic laws.<sup>172</sup>

Further, in its efforts to tackle the hazard of money laundering, the UN adopted the International Convention for the Suppression of the Financing of Terrorism in 1999.<sup>173</sup> The Convention criminalized any acts intended to motive loss of life or somber physical harm to any different character not enchanting a vital role in the warfare circumstances of the armed clash when the purposes of such activities with the aid of its nature are to intimidate a population or to compel an authority or a worldwide organization to do or to abstain from doing any act.<sup>174</sup> Specifically concerning money laundering, each kingdom party to the Convention is required to take splendid measures under its domestic criminal principles, for the identification, detection, and freezing or seizure of any funds used or allocated to commit the offenses set forth underneath Article 2.<sup>175</sup>

The Convention also calls the states to take extraordinary measures for the forfeiture of funds used or allotted for the reason of committing the offenses below the Convention.<sup>176</sup> The Convention offers due consideration to the sharing of the proceeds of crime with the nations, and the place where the crime was once dedicated or the dollars originated from. To this end, the Convention calls for states to provide consideration to concluding agreements that allow for the sharing of such proceeds regularly and the funds that have been forfeited.<sup>177</sup> States are additionally required to reflect on account of mechanisms whereby money derived from the forfeitures referred to in this Article are utilized to compensate victims of offenses related to beneath the Convention or their families. This has to be done while no longer prejudicing the rights of third parties.<sup>178</sup>

The offenses underneath this Convention shall be protected as extraditable offenses.<sup>179</sup> State parties are required to have the funds for the most considerable measure of help in connection with criminal investigations or crook extradition court cases in admire of the

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<sup>172</sup> The General Assembly at its 17th special session in 1990, by resolution S-17/2, adopted the political Declaration and Global programme of Action on international cooperation, against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances. The General Assembly at its 20th special session in 1998 broadened the mandate of the political declaration and the measures for countering money- laundering to cover all serious crime, not just drug related offences.

<sup>173</sup> Adopted by the General Assembly Resolution 54/109 of 9th December 1999. The Convention came into force in April 2002. Source UN Treaty Collection, <<http://treaties.un.org>.

<sup>174</sup> Article 2

<sup>175</sup> Article 8(1)

<sup>176</sup> Article 8(2).

<sup>177</sup> Article 8(3).

<sup>178</sup> Articles 8(4 &5).

<sup>179</sup> Article 11.

offenses beneath the Convention. Parties may also not be in the position to refuse a request for mutual assistance on the floor of financial institution secrecy.<sup>180</sup>

Parties are required to take all possible measures, among other things, by way of adapting their domestic legislation, if necessary, to stop and counter preparations in their respective territories for the commission of these offenses inside or outside their boundaries.<sup>181</sup> Such measures consist of requiring economic institutions and other professionals worried in financial transactions to utilize the most environment-friendly standard available for the identification of their traditional or occasional customers, as nicely as customers in whose pastime bills are opened and pay attention to uncommon or suspicious transactions and record such transactions suspected of stemming from criminal activity.<sup>182</sup> States are additionally required to adopt guidelines prohibiting the opening of debts where the remaining beneficial owners are no longer identifiable, and measures from ensuring that such establishments confirm the identity of the real proprietors of such transactions.<sup>183</sup>

State parties are required to license all-cash transmission agencies, adopt measures to monitor the cross-border transmission of money, and cooperate with the rest of the countries in the investigation of crimes recognized underneath Article 2 of the Convention.<sup>184</sup> This Convention additionally targeted sharply on countering terrorist financing and, in particular, called on states to criminalize terrorist financing<sup>185</sup> and establish mechanisms to become aware of any report and evidence of funding of terrorist acts.<sup>186</sup> The Convention has a secure link to money laundering in that it created a uniform, particular and thorough framework for global cooperation in fighting terrorism financing comparable to that of money laundering to beautify worldwide collaboration in both areas.<sup>187</sup>

The UN additionally felt the want to flip its interest to cross-border cooperation and specifically adopted the Palermo Convention against Transnational Organized Crime.<sup>188</sup> The Convention was once utilized in response to the growing threat of transnational offenses and determined that if a crime crossed borders, so must law enforcement. The Convention

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<sup>180</sup> Article 12.

<sup>181</sup> Article 18 (1).

<sup>182</sup> Article 18(1b).

<sup>183</sup> Article 18(1b,i).

<sup>184</sup> Article 19 & 20.

<sup>185</sup> Article 18.

<sup>186</sup> Article 18.

<sup>187</sup> Article 13 & 14.

<sup>188</sup> The UN Convention against Transnational Organised Crime (Adopted by the General Assembly Resolution 55/25 of 15th November 2000 and entered into force on 29th September 2003).

represents a significant step in the battle in opposition to transnational organized crime, such as money laundering. It signifies the growing want to enhance worldwide cooperation to handle the issues. Concerning ML, the Palermo Convention obliges its parties to take decisive measures. State parties are required to institute a complete domestic regulatory and supervisory regime to deter and become aware of all forms of money laundering for banks and non-bank financial institutions and, where different splendid bodies mainly Susceptible to money laundering. The Convention requires events to place extraordinary emphasis on patron identification, record-keeping and reporting suspicious transactions.<sup>189</sup>

The Convention additionally obligates each country party to set up money laundering as a criminal offense and to encompass the broadest viable vary of crimes within the description of established crimes dedicated within the jurisdiction.<sup>190</sup> State parties have been required to set up administrative, regulatory, regulation enforcement, and different authorities dedicated to combating money-laundering, such as domestic law, judicial bodies. Specifically, the Convention requires the establishment of a financial intelligence unit to serve as a countrywide center for the collection, analysis, and dissemination of facts concerning possible money laundering. Further, kingdom parties are required to think about enforcing feasible measures to observe and reveal the movement of money and fantastic negotiable instruments across their borders. Situation to safeguards and make sure appropriate use of information and barring impeding, in any way, the motion of respectable capital. Such a measure requires that states report money and suitable negotiable instruments.<sup>191</sup> State parties are also required to adopt measures to allow the repossession of the proceeds of crime. These are to be accompanied by way of procedures to detect, trace, restrict, or trap any objects acquired from ML.<sup>192</sup>

The Palermo Convention is vital due to the fact it has prolonged the offense of money laundering to encompass a variety of crimes that can supply upward shove to money laundering, and strongly urges kingdom events to cooperate at a worldwide level to fight money laundering<sup>193</sup> Similar to the Financial Action Task Force (FATF), it necessitates that nations to include all severe crimes inside the vary of predicate offenses and, hence, provide for a broader definition of money laundering.<sup>194</sup>

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<sup>189</sup> Art 7.

<sup>190</sup> Art 6.

<sup>191</sup> Art 7.

<sup>192</sup> Art 12.

<sup>193</sup> Art. 13.

<sup>194</sup>Art.6 (2) provides that the offence of money laundering shall be applied, “to the widest range of predicate offences”.

The UN also adopted the Convention against Corruption<sup>195</sup>, primarily as an instrument aimed at hostilities corruption. Still, regarding money laundering, events are required to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank institutions. It also involves the establishment of means to become aware of and deter all forms of money laundering, emphasizing on purchaser identification, document keeping, and the reporting of suspicious transactions.<sup>196</sup> The Convention additionally requires state parties to put in place measures to make sure that positive facts used to be captured during money remittances, together with offering beneficial information on the originator of the transaction, to keep such information during the charge chain and to enhance scrutiny to transfers of money that do no longer comprise complete statistics on the Originator.<sup>197</sup>

As the UN was once formalizing its message against money laundering in these three fundamental conventions, it made several declarations along the way to tackle the needs that the UN General Assembly identified as immediate. In 1994, the UN General Assembly adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime.<sup>198</sup> The announcement used to be adopted by using the world ministerial conference on organized transnational crime held at Naples, Italy, in 1994, to encourage universal collaboration amongst states to forestall and manipulate organized transnational crime, which included money laundering. The UN, in doing, so as they were extending a full guide to the struggle of the world legislative convention by appreciative and commending all bodies in the UN device to understand and put into effect it within their systems.

After the Naples Declaration, the UN Assembly adopted the partisan resolution and Action Plan against ML at its twentieth unique sitting in New York, in 1998.<sup>199</sup> This was once an awareness of the truth that the problem of money laundering had unfolded to global tiers and was once threatening the uprightness, dependability, and security of budgetary establishments and specialists structures. The Declaration expected states to participate in

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<sup>195</sup> The UN Convention against Corruption, 31 October 2003, A/58/422 (adopted by UN General Assembly on 31 October 2003, entered into force on 14th December 2005 in accordance with Article 68(1) of Resolution 58/4 of 31st October 2003.) available at: <http://www.refworld.org/docid/4374b9524.html>, last accessed on 24th August 2020.

<sup>196</sup> Ibid Art 14 (1).

<sup>197</sup> Art 14 (3).

<sup>198</sup> Naples Political Declaration and Global Action against Organized Transnational Crime. UNGA Res. GA/49/159 (23 December 1994) UN Doc. A/Res/49/149

<sup>199</sup> Political Declaration and Action Plan Against Money Laundering, UNGA Res.S20/4D (10 June 1998).

global and provincial activities intended to advance the usage of exceptional measures to battle ML effectively. This would contain the institution of distinctive legislative frameworks to criminalize the laundering of proceeds derived from severe crimes. The structures have been to prevent criminal and different illicit dollars from getting access to the national and global monetary systems. The Declaration called on states to put in force efficient and fantastic regulation requirement measures to outfit gear for brilliant recognition, examination, and indictments of crooks worried in ML, extradition strategies, and information sharing systems.

After the reception of the Political Declaration and Action Plan against ML by the method of the General Assembly, the order of the UN Global Programme Against Money Laundering, Proceeds of Crime and Financing of Terrorism<sup>200</sup> was strengthened to include all serious crimes, without drug-associated offenses. The program was mandated to provide help to the member states in the implementation of the declarations and conventions and, specifically, in the development of policies and enactment of legislation that would supply the effect on global requirements or criminal instruments against money laundering. The program was once also mandated to provide technical assistance to member states to implement countrywide legislative and necessities confined in the 1998 statement to fight money laundering. The unit used to be additionally mandated to inspire member states to cooperate at the national and global level in combating money laundering employing changing information and imparting mutual assistance.

To obtain its goal of helping its states in fighting ML, the UN Global Program created and printed two model laws, each for different law and standard guideline with legal offense frameworks,<sup>201</sup> to help states set up their countrywide enemy of ML system as per the overall lawful instruments, explicitly the FATF suggestions, the Vienna Convention, and the Palermo Convention. These mannequin laws have been consistently modernized to remember any changes for the global principles.

Notwithstanding the above Resolutions and Conventions, the UN General Assembly embraced different goals to battle ML, including the Political Declaration and Global Program

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<sup>200</sup> Established in 1997 in response to the mandate given to the United Nations on Drugs and Crime (UNDOC) through the Vienna Convention- Ibid note 15 (n2).

<sup>201</sup> For Common law systems, see the 2003 UN Model Law on Money-Laundering, Proceeds of Crime and Terrorist Financing at<<http://www.imolin.org/imolin/rn/poctf03.html>>. For Civil systems, See the 2005 UNODC and IMF Model-Legislation on money laundering and financing of terrorism. at<<http://www.unodc.org/documents/money-laundering/2005> accessed 12th Oct 2019.



of Action, taken at the Seventeenth General Assembly Special Session on Drugs,<sup>202</sup> General Assembly Resolution 45/123<sup>203</sup>, which encouraged the reporting of suspicious or unusual transactions to a national organization in every state, and the development of superb communication among competent authorities to facilitate the investigation and prosecution of money laundering activities.<sup>204</sup>

To fortify the UN's efforts in issuing ideas towards money laundering, The Basel Committee on Banking Supervision also issued a declaration titled; the Prevention of Criminal Use of the Banking System For The Purpose Of Money in December 1988, referred to as the Basel Statement.<sup>205</sup> This assertion contained five principles that the bank's administration ought to make sure are located within their establishments to assist in the suppression of money-laundering thru the banking system, countrywide and international. Banks are to keep the integrity of the financial sector and the buoyancy of the public in the finance section, utilizing placing in region gorgeous structures and tactics to deter and observe ML and to liaise with law enforcement agencies.<sup>206</sup> The concepts specially set out to do more regular, current exceptional practices amongst banks by using stressing on, having environment friendly and tremendous strategies in place to determine the identification of all its clientele and to observe the legal guidelines and regulations about financial transactions.<sup>207</sup> The Basel standards are restricted to banks only. They have not prolonged to any other money transfer service provider and, therefore, can't structure the foundation of a comprehensive felony framework to combat money laundering.

The first international coverage measures, which shape the framework for global cooperation in the fight in opposition to money laundering, are the FATF recommendations. FATF is an intergovernmental physique installed in 1989 employing G-7 countries<sup>208</sup> to allow them to work collectively towards tackling the trouble of money laundering. FATF was given

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<sup>202</sup> UNGA Res. 17/13 (23rd February 1990) UN Doc A/S-17/1 Available at <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/S-17/13](http://www.un.org/ga/search/view_doc.asp?symbol=A/S-17/13), accessed on 23rd August 2020.

<sup>203</sup> International Cooperation in Combating Organized Crime, UNGA Res. 45/123 (14 December 1990) UN Doc; A/Res/45/123.

<sup>204</sup> Measures to Improve Co-ordination and Co-operation in the International Struggle against Illegal Production of Drugs, Illicit Drug Traffic and Drug Abuse; A/ Res /38/680.

<sup>205</sup> The Basel Committee was established in 1974 by the central bank governors of the G 10 countries. Its main objective is to improve supervisory understanding and the quality of banking supervision worldwide by promoting international cooperation on banking supervisory matters.

<sup>206</sup> Ibid Principle III and IV.

<sup>207</sup> Basel Committee on Banking Supervision, The Prevention of the Criminal Use of the Banking System for the purpose of money laundering (December 1998) available on <http://www.bis.org/publ/bcbasc>.

<sup>208</sup> Group 7 countries were France, Canada, Germany, Italy, Japan, United Kingdom and United States.

the mandate to set requirements and promote the outstanding implementation of legal, regulatory, and operational measures for combating money laundering, terrorism, and the financing of proliferation and other associated threats to the integrity of the international economic machine each at countrywide and international levels. In collaboration with different worldwide stakeholders, the FATF also works to discover national stage vulnerabilities to defend the global monetary device from misuse. Currently, the membership of FATF consists of 32 international locations and territories and two regional organizations.<sup>209</sup> FATF additionally works with close collaboration with other global and regional organizations, comprising the World Bank, the IMF, Eurasian Group, Eastern, and Southern Africa AMLG, to adopt guidelines to combat money laundering. So far, FATF has dispensed its support to fight ML and counter-terrorist financing.<sup>210</sup>

Recommendation 1 requires states to carry out risk assessments by using identifying, assessing, and taking action, inclusive of setting up an authority or mechanism to coordinate movements to examine risks and practice resources aimed at making sure that risks are mitigated successfully. These authorities have to similarly require economic establishments and specified non-financial groups to identify, assess, and take action to reduce money laundering dangers associated with their businesses. The advice also provides for extraterritorial jurisdiction in that Predicate offenses must extend to conduct that took place in some other country, which constituted an offense that would have included an offense if it had passed off domestically. This dual criminality, the place the offense should be acknowledged in both nations, ought to be considered as restrictive; however, in instances where the habits are an offense in one United States of America only, FATF encourages countries to furnish mutual assistance.

Recommendation 2 requires each country to set up a national coordination mechanism concerning the improvement and implementation of insurance policies and things to do to combat money laundering. These insurance policies ought to be knowledgeable via the dangers identified nationally, and states are required to set up money laundering as a criminal offense inside their national felony systems following the Vienna Convention and the Palermo Convention.<sup>211</sup> However, due to the fact, the Vienna Convention primarily offers with the crime of drug trafficking, it defines money laundering

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<sup>209</sup> List of membership countries and jurisdictions is available at < <http://www.fatf-gafi.org>

<sup>210</sup> Information about the FATF and its efforts to combat money laundering is found at <http://www.treasury.gov.za> and <http://www.gafi.org>, Accessed on 23rd August 2020.

<sup>211</sup> FATF Recommendation 3

from the view factor of drug trafficking only. The only money laundering predicate offenses supplied beneath Article 3 of the Vienna Convention are conversion or switch of property, understanding that such property is derived from a crime of drug trafficking; concealment or cover of the true nature, source, and place of wealth knowing that such property is derived from an offense of drug trafficking; and the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from a misdemeanor of drug trafficking.<sup>212</sup>

The definition of money laundering beneath the Palermo Convention is alternatively more comprehensive than the one beneath the Vienna Convention. It includes a variety of predicate crimes that can give upward jab to the crime of ML. The Convention typically uses the word “proceeds of crime” and without limiting it to the offense of drug trafficking. It requires states to follow the offense of money laundering to the broadest possible range of predicate offenses.<sup>213</sup> Thus, underneath both the Vienna Convention and Palermo Convention, states are required to criminalize the offense of money laundering inside their prison systems. States can describe the predicate offenses by referring to all offenses or use a criterion in choosing the offenses, which are both primarily based on a category of serious crimes or the penalty of imprisonment applicable to the predicate offense.

For states not having a minimum threshold of offenses inside their felony system, the predicate offenses ought to include all crimes punishable with the most of which are more significant than one year’s imprisonment. However, whichever strategy a country can also take, the FATF advice requires it to include the following twenty offenses within the vary of predicate offenses inside their felony systems, that is participation in an organized crook team and racketeering; terrorism, together with terrorist financing, trafficking in human beings and migrant smuggling; sexual exploitation, inclusive of sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illegal hands trafficking; unlawful trafficking in stolen and different goods; bribery and corruption; fraud; counterfeiting currency; piracy of products; environment crime; murder; severe bodily harm; kidnapping; illegal restraint and hostage-taking; robbery or theft; smuggling; extortion; forgery; piracy; insider trading and market manipulation.<sup>214</sup>

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<sup>212</sup> Art. 3 Vienna Convention.

<sup>213</sup> Ibid Art 6(2).

<sup>214</sup> See, FATF list of designated categories of offences <http://www.fatf-gafi.org>.

Recommendation 4 provides for the mental thing of the offense of money laundering. The suggestion requires that the prison systems of a kingdom need to ensure that the intent and information necessary for committing the crime of money laundering can be inferred from the objective, as furnished beneath both the Vienna Convention and the Palermo Convention. Each kingdom has been given the discretion to decide the structure of intent or understanding that would be integral to represent the offense of money laundering. A country has, therefore, to figure out whether or not that mental element will be the ‘actual knowledge’ or if it will be ‘mere suspicion’ that the assets are the proceeds of corruption; similarly, it can undertake the ‘should have known’ or ‘should be suspicious’ well-known for culpability. According to the mannequin regulation on money laundering for civil law experts, all three elements, namely, proper knowledge, suspicion, or need to have acknowledged that the property is the proceeds of crime, constitute the required mental issue of money laundering.<sup>215</sup> Recommendation 5 requires that states undertake extraordinary measures within their prison systems to allow competent authorities to confiscate the proceeds of crime derived from committing money laundering, collectively with the property, gear, or different means used or supposed to commit money laundering. Such measures would encompass making provisions inside the prison system that will enable regulation enforcement authorities to identify, trace, and evaluate the property that is the situation to confiscation or is suspected of being proceeds of crime.

Recommendation 6 and 7 require states to put into effect focused financial sanctions to comply with the United Nations Security Council resolutions touching on to the prevention and suppression of terrorism and terrorist financing.<sup>216</sup> These resolutions require states to freeze, delay the money or other property and make sure that such money is no longer available to any person who is specified beneath the resolutions noted above as a terrorist, international crook, or a character listed in the UN Security Council (UNSC) for fraud, bribery or any severe different offense.

Recommendation 8 requires states to evaluate the suitability of the regulations and guidelines relating to articles that can be neglected for the funding of radicalism. These entities include non-governmental organizations whose source of funding

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<sup>215</sup> UNODC, ‘Model Legislation on Money Laundering and Financing Terrorism’ (1st December 2005).

<sup>216</sup> These Resolutions include, the United Nations Security Council under Chapter VII of the Charter of the United Nations, including in accordance with resolution 1267(1999) and its successor resolutions; or pursuant to Resolution 1373(2001).

is handy to dim or divert into other covert activities. Recommendation 9 requires states to make sure that the economic institution secrecy laws do no longer inhibit the implementation of FATF Recommendations. Proposal 10 requires states to ensure that identity of persons organizing business relationships and carrying out financial transactions at the commercial establishments is established thru the vital due diligence process. The requirement to raise out due diligence be set out in the law or other enforceable procedures. Further, under Recommendation 11, states are required to make sure that monetary institutions retain consumer and transaction files for at least five years. Such documents need to be sufficient to allow reconstruction of individual transactions (including the quantities and kinds of currencies involved) to provide, if necessary, proof for the prosecution of crook activity.

FATF additionally recommends that additional due diligence measures are taken for positive activities and individuals. Recommendations 12- 16 provide examples of specific customers, events, and places extra owing diligence would be required. These include politically exposed persons (PEPs),<sup>217</sup> the place establishments are necessary, in addition to the reasonable due diligence, to take additional measures to mitigate the hazard by obtaining senior management approval for setting up such relationships. These requirements for PEPs need to observe to household members or shut associates. Other activities of the place that needs extra measures to be taken are in correspondent banking relationships.<sup>218</sup> Significantly the respondent institution ought to fully understand the nature of the respondent's business and to determine from publicly available information the recognition of the institution. Concerning money or value transfer services (MVTs),<sup>219</sup> states are required to make moreover sure that natural or legal individuals that furnish money or cost transfer services are licensed or registered and difficulty to find structures for monitoring and making sure compliance with the relevant due diligence steps, such as figuring out herbal or criminal persons that lift out MVTs barring a license or registration, and follow the gorgeous sanctions. New technologies and wire transfers have additionally been identified as things to do the place states, and institutions should hire additional due care when carrying them out.

In addition to carrying our due diligence with their resources, states are allowed to rely on statistics of parties supplied to determine if such an undertaking meets the FAFT necessities with the financial institution. Where economic institutions have branches and

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<sup>217</sup> Rec 12.

<sup>218</sup> Rec 13.

<sup>219</sup> Rec 14.

subsidiaries in other jurisdictions, states are required to make sure that such institutions observe due diligence measures steady with the home state requirements. FATF additionally designates some countries, individuals, relationships as high risk. In this regard, financial institutions are required to practice a greater well-known of due diligence when dealing with them, and different counter-measures as will be prescribed from time to time via FATF.<sup>220</sup>

Further measures to prevent money laundering by using FATF encompass reporting suspicious transactions to the critical authorities, where an institution has practical grounds to suspect that money is the proceeds of a crook activity or are related to terrorist financing. In reporting suspicious transactions, economic institutions, their directors, officers, and personnel need to be included in reinforcing the law from crook and civil liability, if they document their suspicions in genuine faith, even if they did no longer understand precisely what the underlying crook endeavor, regardless of whether unlawful pastime occurred. Upon filing record institutions, employees and their directors are equally prohibited through regulation from disclosing the reality that a suspicious transaction record has been submitted.<sup>221</sup>

The Recommendations also spin the net more comprehensive in terms of businesses and professions that should observe these FATF guidelines, besides financial institutions. The customer due assiduousness and record possession requirements set out in References 10,11,12,15 and 17 also apply to designated non-financial businesses including casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, accountants, trust and company service providers. These categories also carry out due diligence on their customers and transactions, are also required to report suspicious transactions.<sup>222</sup> All these financial institutions and professions are required to establish the ultimate beneficial ownership (UBO) of all those they deal with. These legal arrangements where UBO has to be developed include trusts, issuers of bearer bonds or shares, nominee accounts. In this regard, domestic laws should provide or allow for the querying of such arrangements to establish the UBO without being in breach or conflict.<sup>223</sup>

FATF Recommendations require that states set aside institutions to carry out adequate supervision and regulation of these institutions. These supervisors should be able

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<sup>220</sup> Rec 17-19.

<sup>221</sup> Rec 20-21.

<sup>222</sup> Rec 23.

<sup>223</sup> Rec 24-25.

to vet institutions before licensing them and should have powers to monitor, compel the production of documents, and impose sanctions for failure to comply. Each state is required to establish a specific financial intelligence unit to serve as a national center for the receipt and scrutiny of dubious transaction reports and other shreds of evidence relevant to money laundering and associated offenses. The unit should be able to investigate, identify, trace, and initiate actions to freeze and seize property that is or may become subject to confiscation or is suspected to be from the proceeds of crime.<sup>224</sup>

Kenya is a party to the following International Instruments, Convention on Psychotropic Substances, date of accession 18th October 2000. United Nations Convention in opposition to illicit trafficking in Narcotic Drugs and Psychotropic Substances, date of membership 9th February 1973. Kenya is a partner member of FATF via the Southern African Anti-Money Laundering Group (ESAAMLG), which was shaped in 1999 in Arusha, Tanzania.<sup>225</sup> Similarly, in the West African sub-region, the Intergovernmental Action against Money Laundering in Africa (GIABA) used to be established in 2000 via the leaders of the Economic Community of West African States (ECOWAS) to coordinate FATF's efforts to combat money laundering.<sup>226</sup> The decisions made at the regional fora are communicated again to the global FATF fora. FATF then tracks these decisions, such as the development of the enactment of legislation and the operationalization of these legal guidelines to combat money laundering. Failure to attain some commitments made to FATF makes the collaborating nations vulnerable to losing worldwide aid and cooperation towards their economic and social development.<sup>227</sup>

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<sup>224</sup> Rec 29-35.

<sup>225</sup> SAAMLG was launched at a meeting of Ministers and high-level representatives in Arusha, Tanzania, on 26-27 August 1999. A memorandum of understanding (MoU) based on the experience of the FATF and other FATF-style regional bodies was agreed to at that meeting. ESAAMLG became an Associate Member of the FATF in June 2010. Following the signature of the MoU by seven of the potential member countries; (Tanzania, Uganda, South Africa, Botswana, Kenya, Lesotho and Seychelles), ESAAMLG came into formal existence. Currently, all members (Angola, Botswana, Comoros, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia, and Zimbabwe) are Commonwealth countries which have committed to the FATF Forty Recommendations. The group held its first meeting on 17-19 April 2000 in Dar es Salaam, Tanzania. Following the events of 11 September 2001, ESAAMLG expanded its scope to include the countering of terrorist financing.

<sup>226</sup> The Inter-Governmental Action Group against Money Laundering in West Africa (GIABA) was established by the Economic Community of West African States (ECOWAS) Authority of Heads of State and Government in the year 2000 through decision A/DEC.9/12/99 of the ECOWAS Authority of Heads of State and Government establishing the Inter-Governmental Action Group against Money Laundering in West Africa. Through decision A/DEC.6/12/00, the statutes of GIABA containing its mandate regarding money laundering was adopted and later amended through decision A/DEC.3/01/05 amending Articles 8 (ii), 9 (ii) and 9 (iii) of the Statutes of GIABA to extend its mandate to cover financial terrorism.

<sup>227</sup> Referenced from, FIN-2012-A003- The Financial Crimes Enforcement Network (United States Department of the Treasury) issue of March 6, 2012. Under that publication, the following jurisdictions were published in an advisory to all Banks as being deemed as having strategic deficiencies in their anti- money laundering regimes for

### 3.4 Regional Policy and Legal Frameworks Addressing Money Laundering

Notwithstanding the endeavors of global associations in battling ML, different local associations and important gatherings likewise assume a vital function in the battling ML. These bodies are either sorted out as per their topographical region or by explicit purposes of the associations. The Asia/Pacific Group on ML (later on 'APGML) is a self-governing body formed in 1997 in Bangkok, Thailand, to bring issues to light and help member states in the Asia/Pacific area to battle ML. APGML comprises of 40 governments and many global and regional eyewitnesses, as well as the United Nations, International Monetary Fund (IMF), and the World Bank.<sup>228</sup> Its main functions are to assess compliance by its members with the global anti-money laundering and anti-terrorism standards through a robust mutual evaluation program and to contribute to the worldwide policy development of anti-money laundering and counter-terrorism financing standards by active associate membership status in the FATF.<sup>229</sup>

The Caribbean Financial Action Task Force (CFATF)<sup>230</sup> was formed in 1992 as a product of a meeting organized by 20 states of the Caribbean basin in Aruba in May 1990, and in Jamaica in November 1992. CFATF consists of 30 countries and has issued 19 Endorsements in relevance to the wants and needs of their area and to match that of FATF 40 Commendations.<sup>231</sup> CFATF aims to achieve the effective implementation of its recommendations, and it monitors and assesses the progress of member states through various methods, including the self-assessment program. CFATF also participates in

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which each jurisdiction had provided a high level political commitment to address within certain timelines. These countries included Angola, Morocco, Algeria, Namibia, Sudan and Zimbabwe.

<sup>228</sup> Membership and observers list can be found on, <http://www.apgml.org>.

<sup>229</sup> The establishment of APG and its secretariat was by the Commonwealth Secretariat in conjunction with the FATF. They began 'awareness raising' in the Asia/Pacific region in the 1990's as part of its global strategy. A number of symposia were held: the first in Singapore in April 1993. A second symposium was held in Kuala Lumpur, Malaysia in November/December 1994, at which time 16 Asia-Pacific jurisdictions and regions endorsed and agreed to implement the FATF's 40 Recommendations. In order to achieve more concrete results, a regional Secretariat named, the "FATF Asia Secretariat", was established in 1995, funded by Australia. In co-operation with other international bodies, the FATF Asia Secretariat continued to work to consolidate support for anti-money laundering measures. Its primary objective was to obtain wide regional commitment to implement anti-money laundering policies and initiatives and secure agreement to establish a more permanent regional anti-money laundering body. Typologies Workshops were held in Hong Kong, China in October 1995 and November 1996, and the Third Asia Money Laundering Symposium was held in Tokyo, Japan in December 1995. At the Fourth (and last) Asia/Pacific Money Laundering Symposium (in Bangkok, Thailand) in February 1997, the APG was officially established as an autonomous regional anti-money laundering body by unanimous agreement. A Secretariat was also established to serve as the focal point for APG activities. It is located in Sydney, Australia and its funding, as well as funding for all APG activities, is provided by all APG members in accordance with a specific funding formula based upon the individual GDP for each member. This information is available at <http://www.apgml.org/>, last accessed on 30th August 2020.

<sup>230</sup> [www.cfatf.org](http://www.cfatf.org) accessed on 23rd August 2020.

<sup>231</sup> CFATF 19 Recommendations <<http://www.cfatf.org/eng/recommendations/cfatt/> accessed on 23rd August 2020.



training and technical assistance programs, biannual plenary meetings for professional representatives, and annual ministerial meetings.<sup>232</sup>

The Council of Europe on the Evaluation of Anti-Money Laundering Measures and Financing of Terrorism was established in 1997. Currently, it has 28 permanent members and two temporary members. The real target of the Council is to guarantee that its states have set up viable AML strategies and systems to battle ML and consent to the global principles. It assesses the members' compliance with international money laundering standards, prepares documentation for mutual evaluation, conducts studies on money laundering trends, and makes proposals to the accessed nations, intending to improve the competence of their AML measures.

In an expression of their efforts towards the fight against money laundering, the Council of Europe espoused the Convention on Laundering, Rife, Impounding, and Repossession of the Proceeds from Crime, referred to as the Strasbourg Convention, which opened for signature on 8th Nov 1990.<sup>233</sup> The Convention aims at strengthening the cooperation of its members in the fight against money laundering. Also, The Convention necessitates each party to approve such legislative and other procedures to enable confiscation of proceeds or property of such value, which would correspond with such proceeds and adopt measures that facilitate international cooperation and investigative assistance between states.<sup>234</sup> This Convention restricts its membership and jurisdiction to the member states of Europe. However, some non-member states have since signed the Convention, but the immediate obligations are for the Council members of Europe.<sup>235</sup> The scope of the Convention is also restricted to confiscation and cooperative measures amongst member states.

To supplement the Council of Europe's efforts, the council of European Communities (CEC) also put measures in combating money laundering, which is reflected in two directives adopted in 1991 and 2001 on prevention of the use of the financial system for money laundering, referred to as the CEC directives.<sup>236</sup> The Directives represents the first stage in combating money laundering at a community level, and they recognized that

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<sup>232</sup> CFATF Mutual Evaluation; <http://www.cfatf.org/news/news.asp> accessed on 23rd August 2020.

<sup>233</sup> Convention of the Member States of the Council of Europe, done at Strasbourg on the 8th Day of November 1990. Official Gazette, International agreements, 14/1997, Act on the Ratification of the Convention on laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

<sup>234</sup> Ibid Article 6.

<sup>235</sup> Non-members include, Australia, Canada, Colombia, Kazakhstan, and United States of America.

<sup>236</sup> Council Directive 91/308/of 10th June 1991 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering [Official Journal L166 of 28th June 1999]. Amended by the Council Directive 2001/97/EC of 28th December 2001. [Official Journal L 344 of 28th December 2001].

the effectiveness of efforts to eliminate money laundering was mainly dependent on the close coordination and harmonization of national implementing measures. In defining money laundering, the Directives take over the definition given in the 1988 United Nations Vienna Convention. The Directives sharply focus on the conduct of Credit and financial institutions and require them to accurately identify their customers through obtaining supporting and verification evidence of their customers and to cooperate fully with the authorities responsible for combating money laundering. The European community revised the original Directive of 1991 in 2001 in tallying a prerequisite for its Adherent States to “prohibit” laundering of funds derived from drug offenses.

These two directives were replaced by another Directive in 2005,<sup>237</sup> to find a harmonized approach towards ML across the European Union. However, the application of the CEC Directive was difficult, and member states were unable to agree on a broad list of criminal activities to which the Directive would apply. For instance, illegal activity under the Directive was defined as a crime specified in Art 3 (1) (a) of the Vienna Convention, which covered drug trafficking and any other activity designated as such for this Directive by each member state. However, Article 15 of the Convention entitled member states to adopt stricter provisions. In July 1998, the European Community announced plans to extend the scope of the Directive in an attempt to make it more effective.<sup>238</sup> The proposals included the extension of the criminal activities already covered in the Directive to events by and professionals outside the financial services sector, for example, auditors, lawyers, and real estate agents and to extend the definition of suspicious transactions to cover other proceeds of a crime other than drug trafficking. However, the commission recognized that many member states, especially the UK, have already gone beyond the requirements of the directive and established measures that covered most crimes, including crimes outside the financial sector.

The main shortcoming with the EC Directive was that it was difficult to harmonize its provisions with those of the UN Conventions. The international conventions required jurisdictions to enact new legislation criminalizing money laundering and determine the predicate offenses that would result in money laundering. The existence of separate related crimes in the UK created potential anomalies. The defenses availed in the Directive and

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<sup>237</sup> (2005/60/EC) of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Source; Official Journal of the European Union OJ L 309/15.

<sup>238</sup> ‘Money Laundering, EU Directive to be extended’ The European Commission. [www.europa.eu.int](http://www.europa.eu.int), accessed on 23rd August 2020.

under the conventions made it possible for someone to file a report concerning one suspected offense and leave another, creating thus a huge loophole.<sup>239</sup>

The Financial Action Task Force on Money Laundering in South America is an intergovernmental association formed by 10 South American states in 2000.<sup>240</sup> Its principal objective is to help its states in battling ML by ceaselessly improving their public enemy of ML approaches under the global guidelines and to fortify collaboration between its countries. The Task Force conducts appraisals of its states to assess their consistency with global policies against ML, give specialized help to individuals, create viable AML systems and being in agreement with the international norms by screening and adopting the new patterns and procedures on ML, and to spread mindfulness about the equivalent among part states. The Middle East and North Africa Financial Action Task Force<sup>241</sup> is a self-ruling association formed on 30th November 2004 by 14 Middle East and North Africa states at a gathering held in Manama, Bahrain. As of now, it has 18 states and has numerous global bodies and assemblages taking an interest in its exercises as observers.<sup>242</sup> The Task Force's primary mandates are; adopting the recommendations of FATF on money laundering and building adequate arrangements throughout the region to combat money laundering and terrorist financing effectively under the particular cultural values, constitutional frameworks, and legal systems in the member countries.

The Americans, in recognition of the severe threat that money laundering throughout the hemisphere, held a ministerial conference in Buenos Aires, Argentina, on December 1-2, 1995. This was attended by representatives of 29 of the 34 states of the hemisphere.<sup>243</sup> At the end of the conference, the Communiqué of the Summit of the Americas Conference Concerning the Laundering of the Proceeds and instrumentalities of crime was adopted by those in attendance. The stated committed themselves to establish effective anti-money laundering programs in their jurisdictions. All the requirements mirrored the 40 FATF requirements. The implementation of the communiqué was to be done within the framework of the Organization of the American States, which comprises of 35 individuals from the Western side of the equator, who have consolidated to reinforce collaboration and fine qualities and safeguard the necessary intrigue and discussion the

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<sup>239</sup> Stessens, G. 2005. Money Laundering a New International Law Enforcement Model. Cambridge University Press, New York.

<sup>240</sup> [www.gafisud.org](http://www.gafisud.org) last accessed on 23rd August 2020.

<sup>241</sup> <http://www.menafatf.org>, accessed on 23rd August 2020.

<sup>242</sup> The organizations objectives are outlined at <http://www.menafatf.org/topiclist>, accessed on 23rd August 2020.

<sup>243</sup> [www.imolin.org/imolin/badecl95.html](http://www.imolin.org/imolin/badecl95.html). Accessed on 30th August 2020

outstanding issues facing them and the world. In 1999 the Organization formed its AML unit (AMLU) to give specialized help and preparation on legal and monetary measures to law-requirement offices of its states to battle ML. AMLU has created specific courses and programs on ML, which are dependent on the standards set by the FATF and the Communiqué for investors, controllers, judges and investigators, budgetary insight units, and law implementation organizations.<sup>244</sup>

### **3.5 Conclusion**

Kenya is bound by the Vienna Convention and the FATF suggestions by the uprightness of being a piece of ESAAMLAG. The international instruments expect states to find a way to guarantee that their legal and institutional structures are sufficient to battle tax evasion inside their purviews. States are needed to embrace and actualize laws that are reliable with their social conditions, legitimate statutes, and constitutions just as worldwide guidelines, to battle illegal money laundering. This proposition has taken a gander at how Kenya has tamed these arrangements and distinguished gaps. These gaps are because of strain to tame, which brought about the reception of these international instruments absent a lot of thought to the neighborhood and social conditions in Kenya.

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<sup>244</sup> [http://www.cicad.oas.org/Lavado\\_Activos](http://www.cicad.oas.org/Lavado_Activos) last accessed on 30th August 2020

## **CHAPTER FOUR**

### **4.0 INTERNATIONAL BEST PRACTICES IN ANTI MONEY LAUNDERING**

The main reason for introducing best practices in any scheme is to work out on lessons and measures Kenya, like any other African Nation, will learn from the United Kingdom (UK) and Singapore jurisdictions in its effort to improve its AML governance and in developing an excellent legal framework. The United Kingdom and Singapore are chosen for being members of the Commonwealth, whose legal systems are derived from the common law. They do have a shared history just like that of most African nations, including Kenya.

The UK is amongst the principal money and economic powerhouses not only in Europe but across the globe. The UK thus attracts businesses that may launder money. In response to the threat of money laundering, the UK has developed an AML regime coextensive with this risk. The United Kingdom has incorporated a variety of international AML instruments into its legal frameworks. In 1988, the United Kingdom signed the Vienna Convention and domesticated it through the Criminal Justice Act, 1990.

Additionally, the UK has also signed the Palermo Convention against transnational organized crime. An analysis of the United Kingdom's anti-money laundering legal structure reveals that it complies with the Vienna and Palermo Conventions. Accordingly, it can be correctly stated that the United Kingdom is devoted to implementing excellent international practices against the vice.

#### **4.1 Proceeds of Crime Act 2002 (POCA 2002)**

The enactment of the POCA 2002 amalgamated all the ML crimes in the UK into one piece of legislation. Money laundering offenses measure thus, in small place into words, that definitions regarding every one of them seem deceptively uncomplicated. There are three principle money-laundering offenses created by the POCA alongside four connected crimes, namely, involvement in hiding activities, acquiring, possession, and concealment of criminal property. "Criminal property" is outlined as assets that an individual is aware of or suspects to represent a profit or profit derived from criminal conduct. Under the POCA, an individual could also be needed or opt to report a suspicion or data of money lavation either wherever consent is required to avoid the commission of an offense or wherever premeditation can be established proactive news obligation applied. Within the former case, wherever permission is needed, an individual makes "authorized disclosure" under section 338 of POCA

seeking acceptable consent under section 335 of POCA. POCA defines three types of “failure to disclose” offenses, namely, a crime for appointed officers operating within the regulated sector, offense of different appointed officers, and an offense for persons used within the organized sector.

Based on section 333A, it's an offense for persons within the regulated area to “tip-off” after an STR has been filed. Where an individual knows that an STR has been submitted and goes ahead to disclose records to another party who might influence the investigation, then they will have committed the offense of tipping-off as an addition to the money laundering offense. It isn't clear whether disclosure for these functions consists of so-called “constructive disclosure,” which would possibly arise, for example, in which a middleman terminated the client's retainer, or delays carrying out those instructions. The offenses below PCA practice to all people. The MLR, on the other hand, is confined in scope, applying only to people engaged in certain varieties of activities.<sup>245</sup>

#### **4.2 AML in Singapore**

Singapore maintains one in all the bottom domestic crime rates within the world. Thus, most of Singapore's exposure to the risks of money laundering arising from crimes that occurred overseas. Singapore's AML regime has undergone vital reform since the last assessment in 2008. Singapore encompasses a robust legal and institutional framework for combating ML. The technical compliance framework is exceptionally robust concerning enforcement, seizure, targeted money sanctions, preventive measures for and therefore the management of FIs, and international cooperation; however, less thus concerning transparency of legal persons and arrangements, and preventive actions and sanctions for non-compliance for selected non-financial businesses and professions (DNFBPs). Money establishments were operational in Singapore square measure needed to place in situ sturdy controls to notice and deter the flow of illicit funds through Singapore's national economy. Such restrictions embrace the necessity for money establishments to spot and recognize their customers (including useful owners), to conduct regular reviews of accounts, and any suspicious transactions. Money establishments ought to conjointly discuss with steerage Papers permanently practices for combating concealing and AML/CFT.5.6 AML Legal Framework in Singapore.

The framework for combating money laundering in Singapore' consists of several legal instruments of which the main ones are:

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<sup>245</sup> Ibid

- The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA): condemning ML and forces the necessity for individuals to record suspicious exchange reports (STRs) and make a divergence at whatever point forex or merchandise surpassing S\$20,000 are done into or of Singapore ;
- The Organized Crime Act 2015 (OCA): this statute criminalizes operations linking systematized criminal businesses, including money laundering, and the parties involved in such organized crime and any profits derivative from it.

### **4.3 Monetary Authority of Singapore (MAS)**

The leading institution for the regulation of AML in Singapore is bestowed on the Monetary Authority of Singapore (MAS). MAS is established in accordance with section 27A (7) of the MAS Act. Its main objective is to give effect to Resolution 2231 (2015) of the Security Council of the United Nations, which criminalized ML. MAS has adopted the methodology of constantly modifying Anti-Money Laundering initiatives that must be applied to new techniques for perpetrating financial crimes. To ensure companies comply with these rapidly changing AML laws, MAS provides technical and legal experts who are always ready and willing to offer assistance.<sup>246</sup>

### **4.4 Transaction monitoring (TM)**

Transaction observation (TM) in Singapore is considered as a critical element on top of things money institutions' (FIs) anti-money laundering and countering guidelines and procedures. This is frequently true particularly once onboarding customers, FIs measure wished to perform due diligence exams to weed out and handle any potential hiding risks, in addition to proliferation finance (PF) dangers, at the onset. This doesn't necessarily suggest that hazards don't occur. They will show up later, over the route of business relations with the FI. At the same time, these danger factors are likewise obscured on the various transactions involved and through FIs' performance of general screening and evaluations to update client data, making it easier to detect and eradicate. An efficient metal machine allows FIs to discover and assess whether or not or no longer have customers' transactions created suspicion as soon as the idea of in opposition to their man or woman backgrounds and profiles. Set structures conjointly facilitate the holistic opinions of client transactions over periods, to observe for any suspicious trends or activities with a purpose to occur. Singapore has a powerful TM gadget that is comprised of the subsequent elements,

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<sup>246</sup> MAS Guidance *supra* note 68 at 2

- A well-structured framework: The risks FIs face are dynamic, and the transactions they perform are many and varied. FIs, therefore, ought to often evaluate and beautify TM frameworks, and accomplish that while trigger activities occur. These critiques ought to be purposed to sustain effectiveness though keeping in touch with the changing risk environment.
- Constant threat awareness: Aimed at making sure proper functioning and effectiveness of their TM systems, FIs must ensure that in a position and well-trained individuals to come up with appropriate policy structures and the best ways to implement these recommendations.

#### **4.5 Robust Implementation**

The hallmark of AML in Singapore is that it provides a mechanism for robust implementation. A first venture in operationalizing any TM machine is ensuring the first-class, accuracy, and consistency of personnel's handling of TM signs generated. MAS' inspectors take a look at several scenarios wherein the effectiveness of banks' TM becomes, first of all, undermined via weaknesses in the body of employees' threat cognizance, starting from one-off errors to extra common or systemic ones that counseled more extensive risk attention deficiencies within the corporation. The character of ML ought to require a few first places of job frame of people to direct pre-exchange tests before executing exchanges surveyed to present more severe dangers or identified with better possibility clients. Those tests incorporate,

- Inquiry at the history and motivation behind transactions that surpass predefined limits to ensure arrangement with benefactor profiles.
- Engaging clients, submitting call surveys at the exchange date that detail critical risk contemplations (for example, the nature of the association among shoppers and recipients, making sense of the start and excursion spot of assets), and appending supporting records gave by utilizing the client.

#### **4.6 Alerts Handling and Documentation**

While most FIs have hints and techniques (P&ps;) in the vicinity for handling alerts and one-of-a-kind ML crimson flags, a constant locating from MAS' inspections is that FIs want to improve at the timeliness and extremely good in their body of workers' alerts clearance and documentation. FIs make sure that easy and concise methods exist for his or her TM employees to evaluate and expand signals generated via their structures, and that their P&ps; are supported with the resource of training, steerage, and session channels (together with compliance features or scenario rely on experts rules) to allow analysts to make the right alternatives.



TM analysts workout of due diligence and mission earlier than brushing off signs and FI's venture extra complicated instances to senior analysts such that better threat transactions and money owed is taken into consideration with a more experienced eye. TM analysts must apprehend the ML dangers they are trying to find to mitigate. Where appropriate, analysts ought to gaze beyond person warnings to overview clients' history of past dealings and signals for you to holistically check out whether or not or no longer broader ML behaviors' may have exhibited past the possibility of the straight away alert. In which frontline skills are known as upon to engage clients and gain besides facts vital for TM analysts to verify alerts properly, FIs ought to monitor and make sure that the frontline frame of employees addresses the one's requests for records in a well-timed and elegant manner. Analysts are more celebrated prepared to task frontline's factors and assertions, and not take delivery of them at face fee without desirable sufficient due diligence (together with corroborating the elements using to be had fundamental facts and available facts, or asking for assisting documents in which suitable).

FIs facilitated the fostering of an AML lifestyle that supports the effective execution of TM, and need to discourage business interests overriding legitimate danger worries surfaced from TM. In this regard, FIs make sure that hazard concerns are nicely deliberated. Alternatives regarding the signals are correctly documented, with any crucial chance mitigation steps duly accomplished. FIs frequently examine their resourcing for TM capabilities to ensure a super balance is struck. That body of workers with TM roles are not overloaded and appropriately equipped to perform their features.

FIs don't forget to submit STRs on customers with adverse information or other signs and symptoms concerning financial crime. FIs perform CDD and transaction reviews for such customers assessed to pose more serious dangers. FIs will document those tests and justifications, which include while an STR isn't filed. FIs additionally acclimate themselves with the STRO on-line Notices and revealing stage (SONAR) propelled on 20 August 2018, and record suspicious exchanges electronically through the best in class STR shape, ensuring that all the related fields in the configuration are appropriately populated to the amount attainable.

FIs keep records and helping archives for every single suspicious exchange. This remembers cases for which signs were raised. Yet, options were taken to no more extended history them to STRO (as an example, wherein the FI assessed there to be inadequate grounds to set up reasonable suspicion). To do particular proper duty, wherein STRs have been now not filed, the idea and in which vital the chance mitigation measures are taken is nicely substantiated and documented. FIs phrase that while certain transactions or activities may not

be deemed suspicious on time, the situation may also trade over the route of subsequent operations or traits, wherein case FIs revisit and re-have a look at the instances and report STRs as appropriate. To make sure the consistency of team of workers assessments, FIs periodically updates their ML red ticker tapes and talks the most cutting-edge-day risk considerations, along facet any new-fangled or rising ML typologies, to senior control and frame of people submit-STR Practices.

FI identifies suspicious activities concerning a consumer's accounts or transactions. Similarly to submitting STRs, the FI decides to hold the relationship; it guarantees that suitable, more desirable measures are taken to manage the repatriation of that money owed being abused for ML. These more significant measures consist of imperiling the accounts to elevated analysis, acquiring permission and senior control endorsements previous to performing dealings similarly, and brush up the risk type and further business relations with the customer. The FI also recalls any ongoing cooperation with regulation enforcement of agencies in deriving the route of movement and make sure that their actions do now not tip-off the patron.<sup>247</sup>

#### **4.7 Quality Assurance (QA)**

Periodically, FIs pattern the exceptional in their indicators coping with that permits you to stumble on and rectify unfortunate instances in addition to any weaknesses determined in their TM structures or techniques. To this impact, many banks have installed area impartial QA applications to continuously sample signs managing and check the robustness of their TM processes. FIs have ensured that the extent of QA finding out carry out is commensurate with the dimensions in their business, the number of transactions, and the nature and complexity of dangers they face. MAS expects FIs with weaknesses of their TM methods, or that have these days finished remediation with coping with such shortcomings, to behavior QA trying out on a larger pattern of signs to affirm that the gaps had been correctly remediated.

#### **4.8 Risk Awareness**

To make sure there is continued effectiveness inside the execution of TM controls, FIs has fostered a robust AML lifestyle and risk cognizance within the course in their establishments. FIs' board and senior authority speak their hazard urge for food and an emphasis on AML as a priority at some point of all three traces of protection, which includes assisting for the healthy behavior of TM. FIs embed AML related performance signs in personnel appraisal frameworks and reimbursement practices intending to inculcate individual

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<sup>247</sup> MAS Guideline 2.28

employees' ownership of AML issues and ensure suitable workforce obligation to increase or mitigate ML dangers. Particularly, FIs need to don't forget instituting established standard overall performance measurements that hyperlink AML compliance (together with TM conduct) to value determinations for folks in the TM manner chain, overlaying all three traces of defenses and significantly along with the frontline. Vital performance signs (KPIs) associated with TM may also consist of ok scrutiny of abnormal transactions, quality of challenge with the useful resource of the second line, timeliness and adequacy of responses with the support of the frontline, and the right closure of signals.

#### **4.9 Governance of AML**

Strong AML governance and control oversight is vital to set the proper tone for TM controls execution and robust hazard control. FIs' board and senior authority need to active workout oversight of the crucial issue ML dangers and their mitigation, which incorporates continually assessing and enhancing the effectiveness in their companies' AML framework and controls. To make sure the right oversight of the TM method, FIs' board and senior manipulate have ensured that clean, present day-day and relevant AML regulations and practices are placed in a location and that there are effective TM systems supported by using right enough inner knowledge and resources. TM features ought to take delivery of accessible and remarkable duties for their respective obligations within the TM system chain (e.g., for indicators coping with and submitting of STRs).

FIs are expected to enforce dominant reporting structures to ensure that their board and senior control are updated on significant ML risks in a well-timed manner. Based totally on MAS' inspections, there's scope for FIs to beautify their reporting and escalation of the following considerable hazard topics along with device implementation delays, IT incidents or device barriers impacting the agencies' TM talents, effects and remediation of compliance or QA opinions, and daily updates and with regard to alert getting older facts. FIs have ensured that the era of TM statistics is capable of offering senior control with an ok evaluation and context of the timeliness and high-quality of the employer's TM signals managing and backbone. Besides remedial measures in educating; and whether or not those effectively mitigate the agency's ML risks.

Also, any occasion or condition that would probably negatively affect the enterprise's TMs abilities is right away highlighted to senior manipulate and to the board wherein warranted. The board and senior manipulate ought to make sure the implementation of actual sufficient risk-mitigating measures where this is wanted, for example, where device fixes require extra time to complete, and their risk effects are fabric. The findings from any critiques

on the business enterprise's TM effectiveness (as finished via compliance, QA, or audit capabilities) is fed to senior control, with checks of whether or not or no longer the technology and power of TM signals are commensurate with the FI's risk urge for food. Senior control is saved apprised of the progress of remedial moves to evaluate if extra intervening time measures are required to mitigate the dangers.

FIs have strengthened their governance and oversight of tax crime danger control. They have got developed tax danger evaluation frameworks for their clients and frequently assess the effectiveness of their tax risk mitigation measures. Formalized techniques had been located in location to make sure the powerful identity and assessment of tax crimes purple flags that floor in the course of TM in which there are grounds to suspect that transactions are associated with tax crimes, FIs continuously behavior higher monitoring and in which appropriate, discontinue the connection. Ought to FIs be inclined to keep these customers, approvals need to be acquired from senior management with the substantiating motives adequately documented. Suspected tax-illicit sports activities are suggested in STRs.<sup>248</sup>

In conclusion, the two practices chosen are a hallmark that Kenya, although it has masses to analyze in growing a robust AML prison framework. The jurisdictions show that the implementation of world frameworks (FATR and UN hints on AML and other rules) isn't best essential, but some, along with the United Kingdom, have even passed those standards. The popularity AML by way of manner of the two jurisdictions is based on four crucial achievements: a properly-calibrated framework that responds to converting threat environment. Secondly, a substantial threat reputation that ensures the right functioning and effectiveness of TM structures finished by using the usage of able and well-knowledgeable staff who was exercising sound judgment in targeting unusual transactions, sports activities, and behaviors. Thirdly, giant integration thinking about the truth that an effective AML regime is as strong as its weakest link.

The United Kingdom and Singapore have no longer handiest followed these frameworks; however, they have ruthlessly enforced provisions of global contexts. It can't be emphasized sufficiently that adopting should be observed via the enforcement of criminalizing ML. The reputation quo of freezing, seizing, and confiscation structures, the imposition of preventive regulatory necessities on numerous professions, the installed order of an institutional financial unit (FIU), the advent of a practical supervisory framework, the putting in of channels for domestic and global cooperation.

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<sup>248</sup> MAS Guideline 4.7

The first-rate practices display that achievement in AML may be located in getting the right of entry to as a whole statistics as it viable to facilitate chance assessment. Pre-transaction tests and publish transaction checks, proper coping with indicators and documentation, and adequate oversight of the TM technique that introduces a further layer of safeguards. Singapore has created incentives for its staff inside the FIs utilizing developing an AML appraisal format, compulsory AML education that emphasizes on developing a way of life of AML. The two jurisdictions consequently have fundamental training on the sturdy implementation of ALM. For this reason, they remain critical reference factors for Kenya and other international locations. They have to stick to its efforts to provide help to nations with promising or growing AML frameworks and its active involvement in international forums.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 Summery**

This research aimed to analyze the challenges Kenya is facing in the anti-money laundering campaign and the current regulatory structure of AML in Kenya. It further sought to identify best practice to prevent money laundering and to look at the potential practices which could be implemented in Kenya to strengthen the AML legislative framework as compared to other international jurisdictions. Though there was some criticism in the previous chapter highlighting key issues, this brief final chapter focuses more on contemporary recommendations that need immediate attention. However, a brief review of each chapter would be useful here.

Chapter one explained and set out the aim, objectives, the problem statement, but mostly highlighted the complex nature of ML in Kenya.

In chapter two the literature relevant to this thesis, concepts, and legal terminology were discussed. It noted the explanatory limitations of stages of money laundering, and highlighted the often impenetrable, vague legal documentation on Kenya's Money Laundering Vulnerabilities and Legal Framework and further identified the critical gaps that are available and maximized by money launderers.

In chapter three the focus was on the role of international organizations and regional bodies in addressing money laundering and assessed the legislation presently available to prevent money laundering by looking into international and regional frameworks in addressing money laundering using different conventional pointers.

In chapter four the focus was specifically on specific AML measures and the importance of developing strategies in preventing money laundering in line with the International Best Practices in Anti-Money Laundering and what will Kenya learn from the international jurisdictions in its effort to improve its AML governance and in developing an excellent legal framework.

Kenya is significant in Africa due to its location, economic development, political stability, growth of the business, and centralization in the financial world to the areas of both legitimate business and organized crime. The challenges of reducing money laundering in Kenya are directly related to the surrounding area, which includes the surrounding political instability and criminal elements, and the aspects of the financial environment in Kenya, which is still focused on large cash transactions, noted for the larger difficulty in controlling or monitoring.

Anti-money laundering (AML) systems are valued for the ability to reduce criminal activities internationally and locally. Kenya, along with most countries in the world, has worked to develop legislation and regulation that prevents these activities from occurring in their countries. In the case of Kenya, themes were found that demonstrated a need for policy to include more technology to enable enforcement of anti-money laundering initiatives; training and access to data transactions that occur through banks and financial institutes; and increased authority to act in applying sanctions in cases where illegal activities are occurring. Also, the study noted that AML policies did not always result in the ability of police to act in an AML capacity.

During the research, it was evident that longer terms in their profession typically indicated more belief that the system worked, or that the system worked sufficiently as compared to other countries internationally; however, Kenya is not considered to be completely compliant or successfully based on FATF ratings. Respondents to this study also found that the policies in place needed further support and required additional training and authority to properly address the issues challenging the regulations and its compliance.

Money laundering is an international problem focused on by several international organizations designed to develop regulations and standards that countries can implement to reduce the presence of the problem in their country. However, the difficulties of implementing these policies are the inconsistency of the financial systems, both within Kenya and in nearby countries. This was particularly present in the results that were found regarding the AML structures and in the intent of financial organizations to create consistency between countries, including in the FATF regulations and standards, which have the direct intent of creating regulations that prevent complications of financial transaction legitimacy resulting from differences in the systems. The study largely perceived the difficulties facing Kenya as a being the direct result of outside influences and sources of incoming money.

This study is an assessment of the AML legal framework in Kenya. To examine the regulatory mechanisms that Kenya has adopted in addressing money laundering, and to make a comparative analysis of money laundering legislation from other jurisdictions (the UK and Singapore) and lastly, to suggest ways of enhancing the effectiveness of the legal mechanisms in combating money laundering. The research set out to answer three research questions. Namely, the challenges faced by Kenya in dealing with money, the extent to which Kenya is capable of legal, policy, and institutional framework are adequate in dealing with the adverse effects of money laundering. In answering the first question on the challenges faced by Kenya in dealing with money laundering, it was observed that Kenya is still vulnerable to AML owing

to various gaps in the law. This is mostly because of its centrality as the most important financial center in the East African region. It does not help that the FATF has mentioned Kenya among prerogatives that have not made adequate development in addressing deliberate AML shortages as a sign of its vulnerabilities.

On the financial front, it has caused the flaring of the backing deficits for groundwork and social coverage processes for poverty decline in Kenya, increase in the amount of debt, and the depletion of government revenue because of the larceny of public resources and contraction of the tax base as personal capital is illegitimately shifted out of the country. The social consequences include a waning in expenditure on available amenities, worsening of societal growth results such as fitness and edification. The most crucial vulnerability is the shortage of political will and the incapacity of the political determination to build an authentic and valid nation. That is why ML may be an outcome of the vulnerable legality of the country, which lets in sleaze and rent-seeking from unimpeded leaders in the context of extractive dogmatic institutions. Others would encompass political patronage that ends in the boom of a non-transparent financial system that is not accountable to the public. This might be further to the manipulation of unrestricted electricity that is allowable by weak political and legal instruments to advance private ends.

The second question on the evolution of the AML legal regime shows it grew in response to increasing pressure from the international community to criminalize the offense of money laundering, which transnational crime in nature. This did not hide the fact that ML has latent to dent legitimate financial bodies, legal economies, and in the worst-case scenarios, the national sovereignty of nation-states. The cross border nature of ML is evidence that no single country is competent enough to effectively deal with it due to reasons of territorial jurisdiction inherent in criminal trials irrespective of whether it is a developed or a developing nation.

The growth in globalization further made ML a crime that goes beyond national borders, therefore the push for the establishment of an international legal regime. The fundamental contraptions of the worldwide AML include the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the Convention in opposition to Transnational Organized Crime (2000), the Convention on Corruption (2003), and the FATF Forty Recommendations on Money Laundering (2012). An essential one is the FATF that has pursued three principal tasks: first, is monitoring members' development in applying measures to counter money laundering; second, reviewing money laundering strategies and countermeasures, and thirdly promoting the adoption and implementation of appropriate measures by using nonmember countries.



In Kenya, AML advanced and became driven through the civil service, with some complementary work being carried out through the monetary sector. The earliest efforts at the establishment of a national legal framework to fight money laundering commenced in 2003 when the government created the National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF). NTF had four mandates: to sensitize the public on risks of money laundering and financing of terrorism. The intention came to prescribe measures to fight money laundering, to broaden a countrywide policy framework on anti-money laundering and financing of terrorism, and to make appropriate tips via the policy framework to the relevant Government corporations on the national method to combat money laundering and terrorism.

The Kenya Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) was enacted in 2009. The principal instruments of the international AML include the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the Convention against Transnational Organized Crime (2000), the Convention on Corruption (2003), and the FATF Forty Recommendations on Money Laundering (2012). The most important one is the FATF that has pursued three main tasks: first, is monitoring members' progress in applying measures to counter money laundering; second, reviewing money laundering techniques and countermeasures; and thirdly, promoting the adoption and implementation of appropriate measures by nonmember countries.

In Kenya, AML evolved and was determined by the civil service, with some harmonizing work being prepared by the economic zone. The earliest efforts at the establishment of a national legal framework to combat money laundering began in 2003 when the government created the National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF). NTF had four mandates: to sensitize the public on the dangers of money laundering and financing of terrorism. The intention was to prescribe measures to combat money laundering, to develop a national policy framework on anti-money laundering and financing of terrorism, and to make appropriate recommendations through the policy framework to the relevant Government agencies on the national strategy to combat money laundering and terrorism. Kenya's Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) was enacted in 2009 and came into effect on June 28, 2010.

The laws against illegal tax avoidance are not successful because the most severe issues emerge concerning enforcement and authorization. Such gaps make it difficult for global success in AML. However, the rudiments of a genuinely comprehensive AML framework give hope that with time all countries would indeed join the fight. Through the efforts of the IMF

and the WB, model AML has been developed whose import has been to inform national legislations. Further, the co-operation of member states has made it possible to share information, intelligence that is critical in fighting trans-national criminal offenses such as ML. The third question on the adequacy of Kenya's legal regime in combating ML showed that in as much as Kenya had made some progress in its AML regime, a lot remains to be done. In 2003, the government set up the National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF). However, the civil service mainly drove that, in 2006, the Central Bank of Kenya released a guideline on money laundering. In 2009, the Proceeds of Crime and Anti-Money Laundering Act (POCAML) of 2009 came into being as Kenya's first AML legislation. The Proceeds of Crime and Anti-Money Laundering (Amendment) Act 2017 is Kenya's primary legislation on money laundering. The Act has, in effect, implemented international AML regulations, mainly those stipulated by the FATF recommendations.

POCAML has three main objectives: to condemn illegal tax avoidance and give measures to battling it ML, the recognizable proof, following, freezing, seizing, and confiscating of proceeds of wrongdoing, and in conclusion, to accommodate worldwide participation and help with ML examinations and proceedings. They are required to clear customer identification, proper record-keeping obligations, report suspicious transactions, internal control procedures, and training programs for employees, financial institutions as police officers. Other institutions under the Act have also been granted a supervisory role, including; the Central Bank of Kenya, the Betting and Licensing Control Board, the CMA, ICPAK, the Insurance Regulatory Authority, and the Retirement Benefits Authority.

Some gaps still exist in Kenya's AML legal regime. An example is the extension of a previous assessment absolute for money moves repatriated from wages or ventures held in foreign nations by one year to empower the settlements of assets held outside Kenya into the country to help the economy considering current domestic income mobilization struggles. Therefore, success in the fight against ML should give attention to these gaps in addition to mandatory training of frontline staff and the expansion of the mandate of the FRC to cover undesignated reporting institutions. The fourth question is how Kenya's legislation in money laundering compares with other jurisdictions and what lessons can be learned. The study chose two best practices as an indicator that Kenya still has a lot to learn in developing a practical AML legal framework. The focus of AML in the two jurisdictions is based on four main achievements: a well-calibrated structure that responds to changing risk environment.

The UK and Singapore have not only adopted these frameworks but have ruthlessly enforced provisions of international structures. It cannot be emphasized enough that the adoption of international frameworks should be followed by enforcement and criminalizing of ML. The establishment of freezing, seizing, and confiscation systems, the imposition of preventive regulatory requirements on many businesses and professions, and the establishment of a Financial Institutional Unit (FIU).

### **5.1 Importance of the Findings**

The importance of the findings is that Kenya still has a lot of work to do in its effort to combat ML. This will mainly involve the development of the proper governmental will to facilitate the formation of a robust AML legal regime and its enforcement. Political goodwill is also necessary for the development of a culture of the rule of law and breaking networks of corruption that enhances the growth of tax evasion, drug trafficking, and money laundering. Information gathering is key to AML; enough investment should be made in intelligence gathering, pre and post monitoring of transactions, incentives for staff, and proper oversight mechanisms. Lastly, mandatory training would be necessary to ensure front office staff is appropriately equipped with adequate tools, skills, and knowledge for reporting suspicious transactions of illicit funds.

### **5.2 Conclusion**

Kenya has taken noteworthy ventures towards condemning the offense of ML through the sanctioning of the anti-money laundering and institutional system. The Act appears to have been demonstrated around the International Conventions and the 43 mandates of the Financial Action Task Force with a practical zero taming. The severe usage of the law consequently makes such duties on some private parts, for example, banks, insurance agencies, and other announcing elements that wind up, making them deep down centered and diminishes seriousness after some time. The inconvenience of criminal approvals and hefty budgetary punishments on announcing organizations that neglect to follow the law clarifies that regardless of the law against ML being pointed eliminating the returns of crime, overreliance on revealing foundations not just appears to be a confusion of the law however additionally an interruption into the private endeavors. While there were significant push and investigation on the execution of money laundering necessities and doubt revealing by banks. Other managed monetary specialist organizations, there is little proof that a similar life has been received on the "non-directed divisions," including attorneys prompting on business exchanges, bookkeepers, or assessment guides.

The impression of those inside the directed segments is that the expenses of consistency with the AML system in the area are excessively high, and there are proceeding with worries over the viability of the regime. In any case, the soul and the targets of the AML system are to decrease wrongdoing by making it less gainful and removing its subsidizing; to ensure the notoriety and honesty of business and to evade monetary and severe twists. Each legitimate individual working in industry or fund must help these destinations, and each calm disapproved of the council must enact against any wrongdoing that is undermining the soundness of the country. Unwieldy and troublesome as it might be, the anti-money laundering laws, despite everything, should be consented to, anyway the law effectively needs to be looked into and controlled in a way that guarantees adequacy to discover that its targets are being met.

The Government and the law authorization specialists need to keep up the pace of change by controlling the prerequisites to guarantee that no superfluously oppressive or cumbersome arrangements stay present in either the legitimate foundation or how it is applied. Maybe much more significant, correspondence with the directed area should be done in a way that persuades them that their commitment is both significant and influential. The adequacy of the system can't be upgraded without the cheerful and willing consistency of those inside its degree. The title of the AML Legislation-Proceeds of Crime and Anti-Money Laundering Act infers that the Act covers continues from all way of wrongdoings that are submitted on the Kenyan soil. Anyway, the usage of the Act is this way delayed as Kenya remains powerless against illegal ML and money related misrepresentation because of its vital situating and feeble controls across numerous implementation parts.

First of all, Kenya is the money related center point of East Africa, and its financial transactions and money related areas are developing in complexity. Illegal ML and psychological oppression funding movement happens in both the formal and the casual regions and gets from both local and unfamiliar crime. Such movement incorporates transnational sorted out wrongdoing, defilement, sneaking, illegal exchange medications and fake products, and untamed life dealing. Even though banks, wire administrations, furthermore, versatile installment, and banking frameworks are accessible to progressively enormous numbers of Kenyans, there are likewise flourishing, casual, and unregulated systems. What's more, other settlement frameworks that encourage money based, unreported exchanges that the Legislature of Kenya can't follow. Unfamiliar nationals, and specifically the substantial ethnic Somali occupant and displaced person populaces, basically send and get settlements universally. Portable installment and banking frameworks are progressively significant and make following

and exploring dubious exchanges troublesome. However, they can encourage examinations and follow, particularly contrasted with swaps executed in real money.

Kenya is additionally considered as a travel point for global drug dealers among different nations inside Africa. This has been portrayed to be brought about by powerless fringe; furthermore, customs controls expanding the exchange-based cash laundering.<sup>249</sup> There is a dark bazaar for pirated/fake merchandise in Kenya, which fills in as a powerful travel nation for East and Central African states. Products set apart for travel to these northern hall nations are not dependent upon Kenyan traditions obligations, yet Kenyan specialists recognize that numerous such merchandise is frequently sold in Kenya. Multiple elements in Kenya are engaged with sending out and bringing in inventory, including non-benefit elements.

Corruption additionally stays a significant obstacle to a working system that can a cleanup of such activities in Kenya. Kenya positioned 136 of 177 nations on Transparency International's corruption index file. Charges of inconsistencies openly tenders are successive. Price Waterhouse Coopers report records bookkeeping extortion, acquisition misrepresentation, tax avoidance, furthermore, pay off and defilement as territories of significant concern, all of which influence over a quarter of organizations and some of which influence up to 33% of the organizations in Kenya.<sup>250</sup>

Kenya needs to satisfactorily investigate the abundance of open authorities riches and bank records ought to be examined to the degree permitted in the constitutions and the Open officials' Ethics Act<sup>251</sup> Unconfirmed Business day by day reports of November 13, 2015, showed that "Negotiators from 11 nations drove by the US and Britain have taken steps to force travel prohibitions on Kenyans embroiled in defilement in the midst of reports of elevated level unite in the nation. Reports asserting the theft of citizens' money and buy of merchandise and enterprises by government employees at swelled costs have raised weight on President Uhuru Kenyatta, who has vowed to handle wild debasement in his government. Contributors and a few other noticeable people have voiced concerns about defilement in Kenya in late days."<sup>252</sup> There are a couple of instances of nations in the world that limit or deny explicitly lawmakers or open authorities from building up and holding abroad financial balances as an approach to corruption and ML. In Kenya, Article 76 of the 2010 Constitution denies State officials from

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<sup>249</sup> Drug Trafficking Patterns to and from Eastern Africa, January 2016. United Nations Office on Drugs and Crime. <https://www.unodc.org/easternafrika/en/illegal-drugs/drug-trafficking-patterns.html>

<sup>250</sup> Price Water House Coopers, 2014. "Economic Crimes, a threat to businesses globally". Price water house coopers Global Economic Crimes Survey.

<sup>251</sup> Act No. 4 of 2004.

<sup>252</sup> <https://www.businessdailyafrica.com/Envoys-warn-of-travel-ban-on-corrupt-officials/-/539546/2954354/-/item/1/-/aet3rr/-/index.html>

keeping up financial ratios outside the nation. Yet, there are concerns that this arrangement is, in effect, to a great extent, ignored.<sup>253</sup>

Nonetheless, there is no freely available archived record of how these different nations authorize these limitations, and more exploration/assets would be assigned to discover how these guidelines are being actualized by and by and what their effect is on forestalling ML. The first step in this course could be to correct Regulation 22 of the Continues of Crime and Anti-Money Laundering Regulations 2013 that expresses that Open authorities will remain PEPs for a further five years even after they stop to hold open workplaces. The FRC ought to be ordered to keep up and distribute yearly an information base of all people who fall under the meaning of Politically Exposed Persons to help the requirement of Article 76 further.

The recognition of the offense of ML is likewise extraordinarily hampered by the different roads benefited to Kenyans for banking and cash transmission. One of the most regularly utilized techniques utilized by clients to evade the location of ML is being multi banked. The AML Act ought to subsequently engage banks to share data and trade data among themselves for reasons for ML screening for tax evasion purposes. The POCAMLA ought to make a prerequisite for private elements and people associated with cash washing to proclaim their wellspring of riches to the money related detailing place without the association of revealing organizations, to aid the authorization and move the weight of neglecting to check the abundance of assets and wellspring of riches from the revealing establishments to the people and the Financial Reporting Center.

### **5.3 Recommendations**

This section makes many recommendations for addressing the challenge of AML. The recommendations are grouped thematically relating to statutory and policy framework changes. It is recommended that the Government, both the National Assembly and the Executive, should find a way to rescind Section 37B (4) to the Tax Procedures Act 2015. The Executive ought to along these lines explicitly start this procedure since it is the arm of government charged with robust authorization of AML systems in the nation. On its part, the National Assembly ought to administer to drop this segment because the ability to make and unmake laws of this nature rests basically inside its command.

#### **1. Discontinue the Exemption of International Trade and Free Zones**

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<sup>253</sup> Allah.Jamah, 2011, Activists want Civil Servants with Foreign Accounts Probed, The standards for fairness and justice, 7th October 2011. <http://www.standardmedia.co.ke>.

The study recommends that current exemptions of International Trade and Free Zones from AML law should be revoked. This is a significant loophole in the law because, as shown elsewhere in chapter two, international trade and especially the role of multinational corporations form part of the conduit for ML operations in Kenya. However, the CBK has issued guidelines with mobile payments. This is according to its mandate conferred under the National Payment Act. These guidelines define the parameters of AML operations required not only for delivery of a mobile money payment but for enforcement of AML legislation for the amount of mobile money.

## **2. The Need to establish a criminal evaluation and reform committee under the Act**

The Proceeds of Crime and Anti- Money Laundering Act wishes to be amended to consist of a legal overview committee that will be accountable for reviewing the effectiveness of the Act. The parameters of evaluation may include reviewing the reporting institutions, the rising techniques of laundering money and suggesting amendments to the Act to loosen up the requirements on the old methods of money laundering that had been recognized in the Act which are outdated and recommending more practical approaches for monitoring these emerging methods of money laundering.

This committee will additionally acquire the views of the reporting institutions and set new provisions or put off obsolete provisions under the prevailing precise monetary and social stipulations as adverse to copying and pasting the global units and suggestions barring due consideration of the unique conditions.

## **3. Addressing corruption, which is crucial in money laundering**

For as long as Kenya continues to feature on the corruption index, any efforts to fight the results of corruption and other malpractices will proceed to be hampered. They will result in being mere window dressing efforts. Ewan Sutherland notes that "Until fantastic controls are introduced, rent-seeking via government ministers via front agencies created to "win" procurement contracts will continue. The frauds concerning the procurement of networks wished to support the police and navy are especially severe, given the internal and exterior threats confronted by way of Kenya."<sup>254</sup> Using reflections from the defunct Kenya Anti-corruption Commission, it has

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<sup>254</sup> Ewan Sutherland , (2015) "Bribery and corruption in telecommunications: the case of Kenya", info, Vol. 17 Iss: 3, pp.38 - 57

been further shown that corrupt folks take advantage of existing gaps in legislation to sidestep justice, a circumstance created through the very fluid nature of corruption in which it rests on various interpretation.<sup>255</sup>

#### **4. Align the implementation of the Proceeds of Crime and Anti- Money Laundering Act with the provisions of the Competition Act**

The critical goals of the Competition Act as supplied for under Section 3 of the Act are to create an environment conducive for investment. Both foreign and local, seize national duties in appreciating the regional integration initiatives, and also in bringing federal opposition law, coverage, and practice in line with excellent worldwide practices; and promote the competitiveness of national undertakings in world markets. The rigorous implementation of the global AML regime has had a reported negative influence on the commercial service area. It has significantly impeded the way international economic establishments do enterprise across borders.<sup>256</sup>

International companies that have subsidiaries in Kenya and Africa at large are slowly withdrawing from the vicinity due to poor enforcement of these financial crimes legal guidelines and regulations, which exposes them to fines and penalties. In jurisdictions such as the United Kingdom, these legal guidelines are enforced strictly. In a document launched through the Financial Services Authority in 2011,<sup>257</sup> procedures had been made for worldwide corporations domiciled in the UK and operating in other excessive threat jurisdictions to reduce the extent to which a company can be used for purposes related to financial crime.

#### **5. Close the intentional regulatory gaps.**

The effectiveness of AMLR may want to be more advantageous through closing intentional regulatory gaps under the Proceeds of Crime and Anti-money Laundering Act. For instance, the AML Act is silent. It exempts client or lawyer relationships from scrutiny. Yet, it entirely opens up the banker or client relationship to full scrutiny. This provision overrides all the privacy laws and obligations that the reporting entities may additionally have.<sup>258</sup> No legal responsibility based on a breach of duty as to secrecy or any limit on the disclosure of information, whether or not imposed by means of a law, the common law, or any agreement, shall occur from the exposure of any statistics in compliance with any duty imposed by

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<sup>255</sup> Amukowa, W. (2013), "The challenges of anti-corruption initiatives: reflections on strategies of the defunct Kenya's Anti-Corruption Commission," *Mediterranean Journal of Social Sciences*, Vol. 4 No. 2, pp. 481-504.

<sup>256</sup> Act No. 12 of 2010.

<sup>257</sup> <https://www.fca.org.uk/static/documents/fsa-aml-final-report.pdf> accessed on 10th January 2020.

<sup>258</sup> Section 17 of the Proceeds of Crime and Anti- Money Laundering Act.



using this Act without the case of the customer relationship.<sup>259</sup> Questions such as the source of funds, essential points of associated parties, and underlying transactions are hard to confirm from these patron accounts. This immunity under the Act also means that Legal practitioners can probably help people and firms wishing to launder money, shape their transactions, form trusts and different complex structures, use of bearer shares in such a way that the real proprietors of that money are no longer recognized

#### **6. Resolving the Problem with investigation and prosecution as proposed under the Act**

The Proceeds of Crime Act proposes several ways that can be used in the uncovering, investigation, prosecution, and confiscation of suspected proceeds of Money Laundering. The investigation and prosecution proceedings are crooks with a well-known proof of past sensible doubt as in all crook cases. The confiscation proceedings are civil and can only be invoked after an efficiently criminal prosecution. Faced with an almost active listing of money laundering methods and specialists, investigators and prosecutors consequently want to specialize and form groups of investigators who, together, can provide the crucial mix of skills.

#### **7. Putting in a formalized treaty signed approach.**

The contemporary Anti- Money Laundering regulation is modeled around international or regional treaties and tips via the relevant bodies such as the Financial Action Task Force. The initial promulgation of the Act was once really out of stress with delicate threats of sanctions being imposed upon non-compliant countries. These bodies are continually calling for the improvement of the provisions of the present money-laundering Acts. Therefore, Kenya ought to put a platform in the region to help the Financial Reporting Centre in the comparison and localization of these proposed amendments. For instance, the Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism (GPML) has developed, in collaboration with UNODC's Legal Advisory Section and International Monetary Fund (IMF), mannequin legal guidelines for each common regulation and civil law legal systems. These legal guidelines are meant to help countries in setting up their anti-money laundering/countering the financing of terrorism (AML/CFT) regulation in full compliance with the international prison instruments.

#### **8. Compulsory Training for Frontline Staff**

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<sup>259</sup> Ibid Section 18.

There is a need to put in place legal provisions for compulsory training of staff working in potential ML frontline stations such as banks, Sacco's insurance firms, among others. It is only after an inquiry that the truth can be ascertained. This would include the establishment of an ongoing education program for anti-money laundering. The economic group would be mandated to provide ongoing training for appropriate personnel regarding their responsibilities under the program, including schooling inside the detection of suspicious transactions. There is a need for further research to be done on the effect of ML on sustainable development because Kenya has experienced very many scandals such as the Goldenberg, Anglo Leasing, National Youth Service 1 and 2, the Maize Scandal, and more recently, the Dams scandal. All these scandals have involved massive loss of state revenue, and it is believed the proceeds were used to fund local projects such as in the construction industry and political campaigns.

This look has mounted that fulfillment in AML may be located in getting admission to as many statistics as it is feasible to facilitate hazard assessment because fighting ML is intelligence-based. Pre-transaction checks and submit transaction checks, right coping with signals and documentation, and proper oversight of the TM system that introduces a further layer of safeguards. Adopting some acceptable practices from other jurisdictions, which includes Singapore and the United Kingdom, might add impetus to the measures. Moreover, it is suggested that the Government, both the National Assembly and the Executive, should find a way to rescind Section 37B (4) to the Tax Procedures Act 2015. The Executive ought to along these lines explicitly start this procedure since it is the arm of government charged with robust authorization of AML systems in the nation. On its part, the National Assembly ought to administer to drop this segment because the ability to make and unmake laws of this nature rests basically inside its command.

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