

Chapter 8

Conclusion and Recommendation

The purpose of this study is to analyze the development of anti-money laundering regime in responding to the progress of money laundering practices. It examines the internationalization and criminalization of money laundering through the creation of international standards. Furthermore, it examines the legal effects of the international standards on the basic principles of sovereignty, jurisdiction, and law enforcement, and the negative implications that exacerbate the effectiveness in implementing and enforcing money laundering laws and regulations. A wide array of theories, state practices, and opinions of jurists are used to uncover the conceptual as well as practical challenges in countering money laundering practices. This chapter provides conclusions to the study and introduces recommendations for policymakers and possible future research.

8.1. Conclusions

8.1.1. The Issues of Money Laundering and Anti-Money Laundering Regime

It is acknowledged that money laundering and anti-money laundering regime have evolved over time. The research of this study reveals that money laundering has been conducted in cross-border territories through various techniques and methods. These phenomena have led the laundering techniques shift from conventional to more complicated and professional means. Complexity refers to the use of sophisticated technologies in which the laundering techniques are infinite and complicated. Professionalism deals with the employing of professional money laundering facilitators who assist and design schemes for conducting money laundering. In responding to the progress of money laundering, the anti-money laundering regime has developed its standards to focus on internationalization and criminalization. Internationalization aims to bring money laundering regulations and enforcement from a domestic to an international level. Criminalization, meanwhile, aims to define the acts of money laundering as a crime and the perpetrator as a criminal.

8.1.2. Anti-Money Laundering Regime and its Challenge to National Sovereignty

As reviewed in this study, it is inevitable for money laundering practices to have a cross-border character. To cope with this development, the anti-money laundering regime established international instruments. Binding and non-binding rules are two kinds of international instruments that manage the anti-money laundering regime internationally. The former refers to treaties concluded by countries; the latter refers to recommendations, international standards, or codes of conduct issued by international or intergovernmental organizations. Within this context, two critical issues that need to be addressed are the compliance of states with international standards in the framework of the anti-money laundering regime and its implication on the basic principles of national sovereignty. In respect of the binding rules, the compliance of states is still highly questionable. Some states are reluctant or simply unwilling to comply with the convention obligations. Meanwhile, other states are failing to comply with the duties imposed by the conventions. Regarding the non-binding rules, states, both members and non-members of the FATF, relatively comply with the international standards developed by the FATF. The question is why non-member states of the FATF comply with those international standards despite the standards being non-binding and the states concerned not being involved in the rule-making process of the standards.

This study reveals that a coercive force is a crucial factor motivating non-members of the FATF to follow non-binding rules. Even though the nature of the FATF standards is voluntary, non-member states that do not comply with these standards risk being put on a 'blacklist'. In this case, non-compliant states face diplomatic pressure to conform to these standards. They also face the threat of limited access to international financial networks and disinvestment pressures from the member states which are dominated by the developed countries. From the standpoint of national sovereignty, a question is raised as to whether it is appropriate for developed countries to determine the scope and context of international standards and then have them applied on non-member states dominated by developing countries. This condition is regarded contradict the notion of 'sovereign equality' since there is a lack of equal legal rights between states. Furthermore, by enforcing the implementation of the FATF standards on non-member states, a certain number of the FATF policies will intervene in national affairs. This contradicts the basic principle of non-interference.

It is what this research argues that globalization, global governance, and international standards in the framework of the anti-money laundering policy reduce the power of any state in making and implementing laws and

regulations within its jurisdiction. In other words, state sovereignty has eroded due to globalization, global governance, and international standards. But in the case of money laundering, the eroded of national sovereignty far more considerable in the developing countries than developed countries. The international standards, which are sponsored by the FATF, were mainly created by the developed countries with well-developed financial systems. The developing countries were mainly absent from these discussions.

8.1.3. Anti-Money Laundering Regime and Its Challenge to Criminal Jurisdiction

As has been discussed in this study, beside internationalization, the development of anti-money laundering regime was concerned towards the creation of international standards that criminalize the acts of money laundering. The process of criminalization may be seen as any conduct involved in the laundering process being considered a criminal offence. One critical aspect of the development of anti-money laundering regime towards criminalization is the legal effects on the basic principles of criminal jurisdiction. This study reveals the changing character of criminal jurisdiction in facing cross-border money laundering, from a territorial to an extraterritorial jurisdiction, and finally to a long-arm jurisdiction.

Territorial jurisdiction refers to the authority of a state to establish its jurisdiction over a given conduct taken place in its own territory. From this perspective, no state can apply its criminal laws to conduct occurring within the physical territory of another nation. If money laundering takes place within the territory of one state, there is no problem in determining the *locus delicti* of the crime. However, when the criminal offence is a cross-border crime that affects a number of jurisdictions, it poses problems in exercising the *locus delicti* and in determining which state has jurisdiction over the crime. In facing this problem, the territoriality principle might be applied by categorizing it into the acts doctrine and the effects doctrine. However, practical impediments arise when the offence takes place only abroad and without any effect on its own territory. Here in this context, the territoriality principle being insufficient in exercising criminal jurisdiction for cross-border money laundering cases.

Whereas territorial jurisdiction lacks the necessary power in prosecuting cross-border money launderers, the extraterritorial principle allows for it. The extra-territorial principle in this context refers to a state's authority in exercising jurisdiction over a criminal conduct committed beyond its territorial limits. This leads to the question of whether the defendant should be physically present within the state concerned. In the context of money

laundering, a foreign citizen who causes or orders the transfer of illicit money from or to any state by telephone or other means while abroad is deemed to have acted 'in' the state in question. Through this case, it is argued that the defendant does not necessarily have to have a physical presence within the forum states during the commission of money laundering offences. As a result, jurisdiction and money laundering laws and regulations have shifted and extended from the extraterritorial principle to a 'long-arm jurisdiction'.

Long-arm jurisdiction refers to the right of a state to exercise personal jurisdiction over a non-resident defendant outside the state concerned. In this case, the jurisdictional principle has shifted from an 'actual presence' to a 'minimum contact' between the defendant and the forum state. Another development of money laundering laws and regulations concerns the use of negotiable instruments of one country for criminal purposes. Jurisdiction would apply to the country from where the negotiable instrument originated. This is due to the fact that all such instruments must clear through the state concerned. Here in this context, the courts have an authority to exercise jurisdiction over foreign defendants if they have sufficient contacts within the state in question.

8.1.4. Anti-Money Laundering Regime and Its Challenge to Law Enforcement

This study reveals that money laundering practices currently transcend the boundaries of national jurisdiction. The criminalization of this act is one aspect that is significant in responding this type of crime. The critical aspect of the criminalization process for the regime is its legal effect on law enforcement matters. In this case, criminal law has extended beyond the boundaries of sovereign states, and has resulted in, law enforcement becoming increasingly internationalized. In terms of its origin, law enforcement is limited by the jurisdiction and sovereignty of any state. However, in the context of the globalized world that resulted in the emergence of transnational crimes, this condition cannot be considered anymore. Any one country cannot deal with the problem of transnational money laundering with unilateral action, instead requiring interstate cooperation in law enforcement matters. Law enforcement has thus shifted from a domestic role to one with an international scope.

The internationalization of law enforcement refers to the application of domestic law to criminal activities occurring beyond the territorial limits of the state in question. In this case, it is necessary to provide international modalities of cooperation, such as extradition, mutual legal assistance, and the confiscation of the proceeds of crime. However, in practice, there are several

challenges in conducting international cooperation for law enforcement matters. Those challenges involve the traditional concept of sovereignty, the divergence of national legal systems, and the capability to perform interstate cooperation.

8.2. Recommendations

Internationalizing the anti-money laundering regime is one of the dynamic aspects in responding to the developments of money laundering practices. As reviewed earlier in this research, its internationalization aims to raise the issue of money laundering to an international level. This condition leads to the creation of 'international standards' in regulating the general acceptance of how states, corporations, and individuals behave. However, it is highly recommended for states to pay close attention in formulating and implementing such standards. Several alternatives may be proper to consider. Firstly, in formulating the scope and context of international standards, the interests of those countries that are directly affected by them should be represented. Secondly, the international standards should be implemented on the countries that have consented to it. Thirdly, the legitimacy of sanction should be considered when imposing a sanction on countries that do not comply with the international standards.

The research of this study reveals that the development of anti-money laundering towards criminalization had a great influence on the basic principles of criminal jurisdiction. In this sense, the principles of criminal jurisdiction have changed dynamically in responding to the cross-border nature of money laundering practices. The changing character of jurisdictional theory started from a territorial to an extraterritorial jurisdiction, and then moved on to a long-arm jurisdiction. It could be said that the long-arm jurisdiction is a new theory of criminal jurisdiction over money laundering that has aggressively been supported by developed countries including the United States of America. It has also been proved that the theory can anticipate and solve the cross-border and multifaceted nature of money laundering practices. Therefore, developing countries may consider the implementation of 'long-arm jurisdiction' in money laundering cases to be adopted as benchmark models. However, in formulating and implementing the long-arm jurisdiction, it is highly recommended for countries to do further inquiries and ensure that the implementation of the theory is in accordance with, and not contrary to, the long-standing principles of the legal system of the state concerned.

In responding to the cross-border and multifaceted nature of money laundering, the basic principles of law enforcement has also changed

dynamically from a domestic role to having a globalized scope. This means that any individual state requires the cooperation and collaboration of other states in prosecuting this type of crime. Such collaboration is manifested in bilateral or multilateral cooperation, such as extradition, mutual legal assistance, and confiscation of the proceeds of crime. Despite the availability of these forms of cooperation, in practice, it is hard to implement these modalities. This study identified at least three factors that challenged international cooperation in law enforcement matters. These factors include the traditional perception on sovereignty, the divergence of national legal systems, and the capability to perform interstate cooperation. This study highly recommends that further research be done regarding these factors and try to identify the sources of the problems that challenge the effectiveness of interstate cooperation in law enforcement matters.
