Title of the Paper: 'Anti-money Laundering Law and Policy as a double edged Sword!'

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1. **Introduction**

The thesis of this paper was drawn from the author's presentation to security agencies in Kampala in August 2019.[2] In his presentation, the author opined that investigations into money laundering offences should be triggered when a financial institution forms suspicions of potential money laundering offences to have been committed.[3] Some of the questions he sought to answer during the presentation was whether sharing information on "accountable persons or the regulated sector" in Uganda's AML 2013 with newspapers before investigations are concluded doesn't amount to tipping off presumed money laundering culprits? How should investigations be conducted? The foregoing questions call upon oversight agencies not to be overzealous when conducting investigations into suspicious money laundering transactions but to ensure caution and desired due diligence. This proposition does not mean that oversight agencies like Bank of Uganda (BoU) or the Financial Intelligence Authority (FIA) or any other oversight agencies for that matter should not carry out the required investigations. It should also be noted that banks are bound by contracts with clients and therefore ill-advised disclosure of information to a newspaper could amount to a breach of contract. Information can only be shared under compulsion by the law or to protect the public from harm, which is the main responsibility of security agencies.[4] What happens if "accountable persons or those the Statute is designed to regulate" who are being investigated and have been published in newspapers are found to be innocent after they have been named and shamed? This would jeopardize the interests of the bank involved in many ways, not least that it could find itself involved in protracted costly litigations. The purpose of the paper is therefore to articulate the intricate balance of the need for regulation and ensuring that businesses are able to operate with minimal interference.

The seriousness attached to money laundering and its predicate offences regulation such as countering financing of terrorism in Uganda is underscored by the adoption of Anti-Money Laundering Act in 2013, (amended in May 2017).[5] This Act lays down a series of measures and procedures for regulating individuals and businesses in the regulated sector (called an "Accounting Person" in the Statute) to prevent money laundering and predicate offences. Since 2007 Uganda has been a member of the Financial Action Task Force's (FATF) monitoring and evaluation under the FATF's on-going global AML-compliance process. This means that Uganda subjects herself

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[2] "The role of Security agencies in prevention of Money Laundering and its Predicate offences in Uganda", a paper presented to security agencies in Kampala on 5th August 2019.

[3] The Financial Intelligence Authority (FIA) has the mandate to carry out investigation under Anti-money laundering Act in Uganda

[4] This principle is laid down in the highly cited case of *Tournier v National Provincial and Union Bank of England*: CA 1924, which despite the fact that it is an old case is still good law.

[5] This Act amends the Anti-Money Laundering Act, 2013, to harmonise the definitions used in the Act; to provide for the carrying out of risk assessments by accountable persons; to provide for the identification of customers and clients of accountable persons; to provide for procedures relating to suspicious transactions; to harmonise the record keeping requirements and exchange of information obligations with international practice; and for related matters.

to the assessment of the implementation of anti-money laundering and counter-terrorist financing (AML/CFT) measures.[6] In practice, the Anti-Money Laundering (AML) regulation is normally designed to be a double-edged sword. Firstly, it should help to prevent money laundering and financing of terrorism; but secondly, it should foster an environment of enhanced confidence in the banking sector to promote economic development. For instance, Financial Intelligence Authority (FIA), (under Part IV of Anti-Money Laundering Act) is empowered to investigate and interrupt the process criminals can easily exploit to place dirty money into the financial economy. The majority of countries have adopted anti-money laundering prevention measures to safeguard the integrity of the financial institution. In the UK, the Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017 (MLR 2017) came into force on 26 June 2017.[7] The MLR 2017 implements the EU's 4th Directive on Money Laundering to replace the Money Laundering Regulations 2007 which was previously in force.[8] This means that if countries do not adopt anti-money laundering legislation, they would be exploited as safe havens by criminals since they cannot be prosecuted without the law criminalizing such activities. International Covenant on Civil and Political Rights (1966) provides that no one shall be held liable or guilty of any offence on account of any act or omission that did not constitute a criminal offence under national and international law at a time the offence was committed. This principle is also reinforced by Article 7(1) of the European Convention on Human Rights provides*:* "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national *or* international law at the time when it was committed."[9]

2. The Size of Illicit of Financial Flows (IFFs)

The IMF estimates that the developing world loses US$946.7 billion and up to 5 percent of Global GDP to illicit financial flows every year. The cumulative outflows from the top fifteen exporters of illicit capital (excluding Saudi Arabia, the United Arab Emirates, Qatar and Costa Rica) amounted to US$4.2 trillion, which was slightly over 70 percent of total outflows from developing countries in 2018.[10] Unfortunately, Africa poor as it is leads other regions in terms of illicit outflows to GDP ratio per year. Analysing illicit flows as a ratio of GDP brings to bear the severity of financial outflows can have on a developing economy development and stability. While illicit outflows from Africa is estimated at 7.7 percent of developing country outflows, this loss at an average of 5.7 percent of GDP per annum has an outsized impact on the continent economic development.[11] While, it is common knowledge that all financial flows leave a traceable trail, the nature and complexity of the financial system, (for instance the use of shell companies and NGOs

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[6] Uganda is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) strengthening its regional cooperation on AML/CFT-issues. Uganda has developed strong connections with international financial systems. It has a capital market and growing opportunities to enhance its banks, money dealers and other financial institutions.

[7] Regulation 8 of MLR 2017 lists the 'relevant persons' to whom the regulations apply (and who therefore also have the duty to report per POCA 2002, s. 330–331). These are: credit institutions;•financial institutions; auditors, insolvency practitioners, external accountants and tax advisers; independent legal professionals; trust or company service providers; estate agents; high value dealers; and casinos.

[8] On June 26th, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("MLR 2017") came into force in the UK. MLR2017 implements the European Union's Fourth Directive on Money Laundering and replaces two separate sets of rules, the Money Laundering Regulations 2007 and the Transfer of Funds Regulations 2000.

[9] The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

[10] The estimated amount of money laundered globally in one year is 2 - 5% of global GDP, or $800 billion - $2 trillion in current US dollars.

[11] Poor countries are losing $1 trillion a year to illicit capital flows – seven times the volume of aid donated by donors.

to shield away illicit financial flows) coupled with the high cost of compliance on banks and other financial institutions, makes it extremely difficult to fight money laundering and illicit financial flows with ease globally. In all honest, regulation of businesses against money laundering and financing of terrorism imposes a heavy cost burden on poorer countries and should be funded by developed economies for some countries to easily operate desired International Anti-Money Laundering standards. It also needs to be noted that banks cannot be allowed to operate in a lawless business environment, which makes money laundering an international and national security issue.

3. Dynamics of Money Laundering regulation

Anti-money laundering (AML) regulation in developing countries has been adopted to comply with the global AML standards such as the FATF 40+9 recommendations against money laundering.[12] It is worth noting however that owing to development challenges in less developed economies, some of the foregoing standards are too sophisticated for them to domesticate. Thus, one can pose the question whether AML regulation in the developing countries cohort is cost-effective considering the cost burden it imposes on firms or whether anti-money laundering laws have been adopted as a result of coercion are designed to meet the changing conceptions of social acceptance in transnational networks of global order. Anti-Money laundering regulations on poorer countries and the need for oversight agencies such as the Financial Intelligence Authority (FIA) and the Inspector General of Government (IGG) has imposed on the regulated sector. The severe implications of these crimes on society's security has required, and largely received, cooperation from international institutions such as the UN, the OECD/FATF, the World Bank, the IMF, and the Basel Committee. The facilitative role of international organisations is supplemented by different levels of national compliance initiatives world-wide, compounded by the associated costs burden on national governments. Despite the massive efforts in the foregoing regard, the effectiveness of AML tools to combat corruption and other predicate offences is questionable. It should be noted that ffinancial flows fleeing corporate taxes is what has exacerbated development challenges in many less developed countries. This practice has worsened inequalities, increased vulnerability to crises, and dealt unquantifiable political damage to countries as unplanned money infiltrate regulatory systems. More often the cooperation rendered by countries to others is based upon various individually desired interests even countries have a collective responsibility to work together.

Some developing economies have chosen to become compliant to the fight against money laundering as an imperative of attracting foreign financial assistance (aid and loans) from donor agencies and Foreign Direct Investments (FDI). Some countries are cognizant that the scourge of money laundering is not higher on their agenda as the fight the scourge of HIV/AIDs and other diseases, poverty and its adverse development effect on the stability of those countries. Ironically, loans and financial aid received by countries to support economic development projects has been siphoned back to countries where it came from. This raises many questions than answers as to why stolen money can navigate the globe through the international financial system with relative ease. The leaked Panama Papers (2016) highlighted the severity of concealment of stolen wealth by Politically Exposed Persons (PEPs) and tax-evaders around the world through the use of shell companies. The leaked Panama papers helped countries recover more than $1.2 billion in back-taxes and penalties publicly collected by governments around the world after the 2016 investigation. As an example of an early outcome of the data leak, Iceland's Prime Minister, Sigmunduavr Díð, resigned in the wake of revelations that his family had owned Wintris, a company incorporated in the British Virgin Islands. It underscored the gatekeeper typology by exposing the extent to which unscrupulous gatekeepers like the Mossack Fonseca law firm

[12] These Recommendations, together with their interpretative notes, provide the international standards for combating money laundering (ML) and terrorist financing (TF).

implicated in the Panama Papers are able to facilitate financial crimes by exploiting the lawyer-client confidentiality/privilege to do so.[13]

Money launderers conjure manipulative schemes to conceal the true nature and provenance of money that is being laundered. Title III of the US Patriot Act—the International Money Laundering Abatement and Anti-terrorist Financing Act deals specifically with money laundering as financial crime[14]. The PA expanded the scope of financial institutions adding the credit unions, futures commodity merchants. It also covered various accounts (demand deposit, savings deposit, asset account, credit account, correspondent account, payable-through account.) The Act granted the power to the Treasury to examine the financial institutions and scrutinize the suspect accounts. The Act required the financial institutions to design anti-money laundering programs, at least to embrace—(A) the internal policies, procedures and controls are in place; (B) the designation of a compliance officer; (C) an on-going employee training program; (D) an independent audit function to test the programs.[15]

The Patriot Act (PA) called for enhanced customer due diligence for correspondent and private banking accounts holders, and also to prohibit the business engagement with foreign shell banks. The Act required the proper record keeping in the US so that the law enforcement agencies could access them per 120-hour rule and foreign bank records shall also be obtained per law enforcement request no later than 7 days after the request receipt. Verification of identification of the customer is also required before the account is opened and consulting lists of known or suspected terrorists or terrorist organization provided to the financial institution by government agency is an imperative.[16]

The PA created mechanisms through which financial institutions can share information among themselves, with regulators and law enforcement agencies. FinCEN was created to main a government-wide data access service which means various suspicious transaction reports should be submitted to FinCEN.[17] While countries are obliged to enact robust anti-money laundering measures, the truth be told over-regulation burdens businesses with additional operational costs, which in turn eats away would be profits. For example the financial costs involved with implementation of the Patriot Act for the US financial institutions slashed profits margins of many financial institutions in the US.[18] After the passage of PA, Institutions were required to implement changes to KYC, SAR but the criticism was that it was hastily passed for what seemed to be political than prevention of money laundering reasons, for example the fusion of countering financing of terrorism with money laundering. The reporting requirements were impinging on financial institutions partly because of the measures introduced to conform to compliance requirements. Data indicated that between 1996 when suspicious activity reports (SARs) were first launched through 2003, 1,278, 716 SARs were filed however over a quarter of a million such reports filed in 2003 alone. [19] The Intelligence Authorization Act for Fiscal Year 2004 and the Patriot Act expanded the scope of surveillance activities and equipped law enforcement agencies, the power to infringe upon fundamental rights of US citizens. The Patriot Act itself stipulates that

[13] Financial crimes are crimes perpetuated through any illegal activity such as the use of "clever practices" to hoodwink authorities in order to gain unfair advantage or profit.

[14] US Patriot Act, Section 302 (b) (1)

[15] James Fisher and others, 'Assessing the impact of the USA Patriot Act on the financial service industry', (2005) , Journal of Money Laundering Control, Vol. 8 Issue 3, page 243-251

[16] Ibid

[17] Eric J. Gouvin, 'Bringing out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism', (2003), Baylor Law Review, Vol. 55:3, page 974.

[18] Consulting firm data showed that in Y2005 US brokerages alone spent approximately USD700million on technology for the Act compliance.

[19] Eric J. Gouvin, 'Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism', (2003), Baylor Law Review, Vol. 55:3, p, 974

the records of the US financial institutions have a high degree of usefulness in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.[20] The mandatory information submission undermined the liberty of US citizen which created tensions between banks and their clients. Previously the FBI agent needed to obtain a court order to access financial records from the financial institutions but because of the above changes, there is no longer need for FBE to seek judicial approval or demonstrate probable cause or a reason to believe that a targeted person is involved in terrorist activity, or even a crime.[21] To a certain extent, the erosion of personal liberty and privacy is a huge sacrifice for the US citizens. A wider sonar approach under an intelligence effort for information collection made the financial institutions (as the reporting entities) sandwich dilemma. And bankers should also make in-depth thinking that once the fear of terrorism fades, their customers could bring suits to assert their traditional rights of financial privacy. [22].

The Proceeds Act 2002 (PA) and its antecedents were designed to protect financial institutions from exploitation against money laundering and predicate offences. [23] The PA created measures to prevent criminal exploitation for illegal gain, ideally which is the same thing with illicit financial flows. An illegal gain can loosely be defined as a financial benefit accrued to a person from illegal activities such as lack of transparency in which financial transactions are conducted. Therefore global AML standards are used by the FATF to dissuade stakeholders from doing businesses with jurisdictions which lack effective regulatory mechanisms to curtail the threat of money laundering or its predicate offences. Oversight institutions normally use "naming and shaming" as a regulatory mechanism against non-compliant jurisdictions. For example, a jurisdiction could be named and shamed for not effectively enacting measures to prosecute money laundering offences. In 1997 the IMF and other donor agencies stopped aid to the government of Kenya for its failure to prosecute and convict alleged corruption cases in the country. Most notably, there were allegations of wide spread corruption which came to the fore in 2005 when John Githongo, a whistle-blower (who had been appointed as the country's anti-corruption tsar but soon fled fearing for his life) after reporting rampant corruption in Kenya's public offices. The alleged corruption scandals were perpetuated by a group of Kenyan public officials, ministers and businessmen who manipulated procurement contracts through overpriced or fake contracts for equipment of all kinds, from printing presses to arms. The funds stolen were so astronomical that it amounted to perhaps as much as 16% Kenya's annual national budget. The ripple effect of corruption scandals can be highlighted by the fact that more than half of the population of Kenya lives on less than $2 a day and the money stolen in corruption could have paid for antiretroviral drugs for every HIV-infected patient in the country for a decade.[24] For the past two decades, there was not a single prominent politician who was prosecuted in Kenya, not to mention that many of those who were accused of corruption remained in prominent public positions. However, it appears that the pendulum is now about to swing in a different direction due to public pressure in Kenya and the changing attitude in Switzerland where some supposedly ill-gotten gains always ended.[25] After earlier attempts to prosecute alleged corruption perpetuators failed, the case came to the fore again in 2013 with demands for payment of certain contracts still outstanding to be halted. President Uhuru Kenyatta, at first refused to pay but got independent advice, from the IMF among others, that balking on payments would harm Kenya's chances of raising money in the bond market, which

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[20] Ibid

[21] Swartz, N. "Patriot Act's Reach Expanded despite Part being struck down', (2004), Information Management Journal, Lexmexa: March/April, Vol. 8, issue 2, pp. 10-15.

[22] Ibid

[23] Spencer Pickett and Jennifer M Pickett, Financial Crime Investigation and Control (John Wiley and Sons, Inc (2002).

[24] Economist Magazine 15 March 2018.

[25] Economist Magazine (note 24)

it was about to do. When some of the contracts were paid, a public backlash ensued.[26] Fortified by public support, the president initiated a new prosecution, notwithstanding that some within his own ethnic group, the Kikuyu, connected to Anglo Leasing, a shell company with an address in Britain at the center of the alleged scams.[27] Investigators combed through boxes of evidence that had not previously been seen. They were aided by the Swiss government, which supplied its own documents and experts, as well as by the Serious Fraud Office in London. The apparent shift in Switzerland attitude towards corruption is a welcome prospect that could curtail the threat of money laundering and corruption globally. This is because, however robust regulatory regimes are, they cannot achieve their purpose unless they are accorded the goodwill of the international community. Failure of anti-money laundering regulations has largely been compounded by tax haven countries. A tax haven is a country or territory where taxes are low or even non-existent, banking secrecy allows money to be stashed away and completely hidden and where the supervision of banks is often poor. This allows individuals and corporations from all over the world to exploit the possibility of tax evasion, money laundering or illicit dealings.[28]

4. Unravelling financial crimes and money laundering nexus

All financial crimes generally tend to involve manipulative schemes designed to conceal provenance and true nature of the activities which generate laundered assets. They involve a violation of acceptable practices of financial institutions even though stakeholders expect to adhere to in executing their duties and obligations. A case in point could be tax evasion because for as long as it generates illicit proceeds of crime, it will be caught by definition of money laundering predicate offences. Since tax evasion schemes and money laundering operations often appear to use similar techniques, many money laundering experts believe that the quest for optimal "fiscal advantages" is frequently used as a cover for moving to or through such locations what are in reality criminally derived moneys.[29] Indeed, many organisations and private entities have worked in tandem to forge measures against money laundering because it undermines stability and integrity of global financial markets.

The primary purpose of financial crimes prevention has always been to protect the integrity of the financial system from abuse or being exploited for criminal purposes. This is why on many occasions when a particular bank is associated with criminality, many customers tend to shun it because no one would want to acquiesce criminality or to be associated with a "tainted bank." The Financial Action Task Force (FATF) and other oversight agencies have played a facilitative role in protecting the integrity of global financial institutions from the adverse effect of money laundering

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[26] Economist Magazine (note 24)

[27] The Swiss ambassador to Kenya, Jacques Pitteloud recently went to the National Television and declared, "This is a warning that Switzerland is the wrong place for your stolen money." If all countries worked together to deny safe haven to stolen wealth often from less developed countries, corruption and money laundering would easily be a thing of the past. While it is important to focus regulation on countries where corruption and money laundering are originated, the effective tool in the fight against these offences are implemented of counter-measures at a recipient of proceeds of crime country level.

[28] Tax havens come in many shapes and sizes and they are found all over the world. They largely include Overseas territories - Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Isles; Gibraltar; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; St. Helena and St Helena Dependencies (Ascension and Tristan da Cunha); South Georgia and South Sandwich Islands; Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus; and the Turks and Caicos Islands. Many of these 'Bounty Bar' islands have been successful in attracting huge amounts of foreign money and one of them, Cayman Islands, is now the 5th largest financial centre in the world after London, New York, Tokyo and Zurich. There, in just one office, Ugland House, in George Town, the capital, which houses a legal practice 18,800 corporations alone are registered

[29] FATF, 1999, *FATF Norms: 40 Recommendations*, Paris

and other financial crimes from criminal exploitations. The FATF has worked closely with other agencies such as the World Bank and IMF to put measures designed to interrupt the free flow of money in the international financial system including offshore centres and other non-cooperative states. Perhaps one also needs to mention the fact that many countries have lent their cooperation to the FATF in the fight against money laundering without formal international agreements is testamentary of the trust stakeholders have in it as an oversight institutions (global standard setters). It needs to be noted that international regulation of financial crimes takes place in the realm of international law either by enactment of treaties or soft laws to foster normative practices to be implemented by countries globally. However, in a geo-political context, international law is not particularly suited to solving emerging disputes like national laws of states. There is no global court like the global supreme court which creates a gap in enforcement of engendered regulatory regimes whether on money laundering or not. Are international anti-money laundering regulation overused by global standard setters such as FATF for their purposes or whether some of the regimes that have been churned out over the years are a response to a global need? There is a need to ensure that engendered regulatory regimes are applied without favour or discrimination against some countries. This also calls upon oversight institutions to co-opt all countries especially less developed ones to reflect the heterogeneity of stakeholders and their varying levels of development. It has become a practice that many oversight institutions tend to be dominated by powerful players' side-lining small poor countries even when they are all member of these institutions. It is also important that the use of certain terms such as "predicate offences" be defined with precision s that it does not keep evolving to capture literally any offences and every crime including overlapping with theft offences. For as long as the conduct of financial institutions violate established regulatory norms their actions can also be caught within the definition of money laundering predicate offences. Money laundering and its predicate crimes have many adverse effects on society such as undermining the reputation of financial institutions and jurisdictions; erosion of investor confidence; reduction of competitiveness; investment instability; the unpredictability and volatility of international capital flows and exchange rates; the loss of control of sound economic policy; and the undermining of growth, development, innovation, and the integrity of financial institutions and markets.[30] Additionally, many governments have become a victim of the devastating effects of financial crimes, which is why it always needs to be interrupted by put robust measures in place against it. The abuse of financial markets means that there is no limit on criminalizing non-violent, deliberatively manipulative practices that provide a gain through unlawful economic practices that adversely affect governments, institutions, economies and, ultimately, the global financial system. The ever increasing powers conferred upon regulatory authorities to prosecute alleged financial crimes are underscored in the definition of Proceeds of Crimes which has a broad scope to literally cover a wide range of financial crimes

5. Powers of Confiscation under POCA

The powers of confiscation of the Proceeds of Crime derived from (POCA) 2002 should be applauded because it has the potential to discourage criminals from engaging in financial crimes if they are going to profit from it. POCA applies to any offence in respect of which the defendant has derived a financial benefit (covering offending which took place after 24 March 2003). This includes both summary only offences in the Magistrates' Court and more serious offences which may be committed to the Crown Court and subject to an unlimited fine. Although the Magistrates' Court has only very limited power to make a confiscation order, it is obliged to commit a convicted defendant to the Crown Court when the prosecution has asked it to, with a view to confiscation being considered by that higher court. The availability of confiscation in cases of

[30] FATF, 1996, *FATF Norms: 40 Recommendations*, Paris

regulatory breach was established by POCA but, until recently, we are beginning to witness prosecutors use these powers as part of their enforcement regime. The case that brought POCA for regulatory offences to the fore was a planning case, the case of R v Del Basso and Goodwin.[31] Mr. Del Basso's company owned land which it rented to the local football club. Planning permission was granted for 201 parking spaces on the land, but only for those attending football matches. Permission for a park and ride scheme was rejected. Despite this, the land was used for a park and ride and repeated warnings to desist were ignored, resulting in an enforcement notice being served. This was also ignored and the parking operation expanded, by then operated through a parking business. As a result, prosecution followed with each of the landowner company, football club, parking company, Del Basso and Goodwin prosecuted and all pleading guilty. Mr. Del Basso was fined £15,000 and £20,000 costs. As the court concluded, it appeared that he regarded such an expense as a necessary business risk.[32]

In assessing the foregoing risk, their Lordships found that Mr. Del Basso did not account for the confiscation proceedings that followed. Legitimate business costs (such as staff wages, tax etc.) were irrelevant for the purposes of confiscation and could not be deducted from this figure. It was also irrelevant that the income was applied for the benefit of the football club and the defendants did not make any personal profit. Mr. Del Basso was ordered to pay £760,000 – the total value of his assets. In this scenario, if a defendant acquires further assets in the future, the prosecution can continue to pursue those assets until the benefit has been paid. Since the order for £760,000, Mr Del Basso acquired assets and has now repaid the full £1.8m of his criminal benefit.[33] An appeal to the Court of Appeal failed and, as the judge imposing the confiscation order said: "Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect, they are in the same position as thieves, fraudsters and drug dealers."[34]

6. **Public policy**

Public policy considerations are used by regulatory authorities and prosecutors to confiscate assets of criminals and it has become a source of income to finance oversight agencies in their work. Under section 22 of POCA 2002, confiscation is a five-step process which involves the following:

1. The court must conduct a confiscation enquiry if the prosecutor requests it or the court can proceed of its own volition.[35]
2. The judge must decide whether the defendant has a criminal lifestyle.
3. The judge must then determine whether the defendant has benefited from criminal conduct. If the defendant has a criminal lifestyle this triggers a historical enquiry into the defendant's general criminal conduct. If the defendant does not have a criminal lifestyle the judge considers the benefit from the offences that the defendant has been convicted of.
4. The judge determines the gross value of benefit from the defendant's criminal conduct. If there is a criminal lifestyle then the judge must apply the relevant assumptions. The burden of disproving an assumption is on the defendant.

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[31] R. v. Del Basso and another [2010] EWCA Crim 1119

[32] Del Basso and another (note 31).
[33] Del Basso and another (note 31)
[34] Del Basso and another (note 31).
[35] Section 22, POCA (2002)

5. The judge must make a confiscation order in the sum of the benefit unless the defendant can prove that the value of all their existing assets (the 'available amount') is less, in which case the court will make an order in that amount.
6. A period of imprisonment in default of payment will be imposed

Under the foregoing framework, the proceeds accrued from a confiscation order are collected by the Ministry of Justice then distributed to the Home Office in accordance with an agreed protocol with HM Treasury. The Home Office retains 50% then, significantly, passes 18.75% to the prosecuting authority, 18.75% to the investigating authority and 12.5% to Her Majesty's Court Service. Local authorities will typically be both the prosecuting and investigating authority and so in line for 37.5% of any order made.[36] As the Del Basso case illustrates, seeking confiscation can result in a significant share of the award which, in times of decreasing budgets incentivizes law enforcement authority with more injection of cash.

7. Scope and application of POCA

The basic framework for the confiscation regime is to ask the following three questions:

1. Has the defendant benefited from his/its criminal conduct?
2. What is the value of the benefit that has been obtained?
3. What sum is recoverable from the defendant?

In determination of questions 1 and 2 above, a distinction is made where the defendant has a "criminal lifestyle" and where he does not. If the defendant (either a corporate or an individual) has a "criminal lifestyle", the court must decide what he has benefited from his general criminal conduct according to a number of assumptions set out in the legislation. In essence, the defendant would have to prove any assets obtained in the previous six years were not derived from the proceeds of crime. A corporate defendant with previous convictions, or where offending has continued for a sustained period, may qualify for these lifestyle provisions. It is interesting to note that the court in the Del Basso case confirmed (by reference to conditions in the legislation) that criminal activity over a six month period was sufficient for the defendants to have a "criminal lifestyle".[37]

7.1 Proportionality?

The principle of proportionality is used as a criterion of fairness and justice in statutory interpretation processes, especially in public law, as a logical method intended to assist in discerning the correct balance between the restriction imposed by a corrective measure and the severity of the nature of the prohibited act. In this regard, the court will look to criminal benefit. In relation to a money laundering offence, this is the total value of property or pecuniary advantage "obtained" –whether the prescribed preventive measures reflect it. In particular, the benefit obtained does not mean the profit and a defendant does not need to retain the benefit of his crime. There is no deduction for expenses and even if a defendant made no profit from the criminal activity, the full amount of benefit obtained may be the subject of confiscation. There is also no requirement to apportion the amount obtained between multiple defendants (for example, where the same benefit is obtained by more than one party). The Crown may therefore recover through confiscation more than the total amount in which joint participants benefited.

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[36] ibid
[37] Ibid

8. Taking a leaf from POCA

The Proceeds of Crime Act (POCA) 2002 has been criticized that it is sometimes draconian because once the prosecutor asks the court to embark upon the confiscation process, it must do so without any question. However, in recent years there has been some judicial recognition that there may be occasions where the confiscation provisions go too far, and that there is some scope within the current legal framework for the court to intervene. A court may consider confiscation of assets for an abuse of the process, for example, in circumstances where a defendant has not voluntarily repaid the benefit obtained illegitimately. However, such circumstances of abuse of process are now effectively covered by the recent Supreme Court case of *R v Wayah* which considered the issue of proportionality.[38] The Supreme Court recognized that POCA must be given effect in a manner that is compliant with Article 1 of the First Protocol to the European Convention on Human Rights which relates to peaceful enjoyment of possessions. In that case, the Court ruled that a judge should refuse to make a confiscation order that would be disproportionate. This does not mean that it should not make an order at all; but it should only accede to the prosecution's application to the extent (i.e. in such sum) as would be proportionate. It would be unusual that a criminal lifestyle case would be disproportionate and the case of Waya will not circumvent the principal aim of the legislation in any case – that being to deprive offenders of the proceeds of their offending. Although it is a welcome revision of the previous judicial view that draconian provisions of POCA had to be applied literally, it cannot and will not provide relief from the significant consequences of the legislation in many cases. At this stage, the principal impact of Waya is likely to be in cases where the income derived from offending has already been repaid in some way, and analogous situations. Pending further judicial consideration, the precise ambit of the application of the proportionality principle is as yet unknown. It is worth noting that POCA confiscation regimes can potentially have far reaching ramifications for both corporations and individuals who are convicted of any crime. Those who may previously have considered that the commission of regulatory breaches, which may give rise to relatively minor criminal sanctions, was a "necessary business risk" should think again. It follows that the need to have in place rigorous and effective systems designed to ensure compliance with the relevant provisions is paramount.

Uganda adopted an Anti-Money Laundering act in 2013 (amended in 2017) to tight lose ends in its anti-money laundering regulatory law and policy framework. For example, while offences generating laundered money (proceeds of crime) were criminalised, money laundering was not and this created aperture/gaps for possible criminal exploitation. It however needs to be noted that since 2007 Uganda has been a member of the Financial Action Task Force's (FATF) monitoring and evaluation under the FATF's on-going global AML-compliance process. Uganda therefore subjects herself to the assessment of the implementation of anti-money laundering and counter-terrorist financing (AML/CFT) measures. It is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) strengthening its regional cooperation on AML/CFT-issues. Uganda has developed strong connections with international financial systems. It has a capital market and growing opportunities to enhance its banks, money dealers and other financial institutions. Therefore, Uganda needs to enact requisite laws and policies to secure the stability of its financial and security markets. Secondly, the dictates of the principle of legality is that "there is no crime or punishment that should be suffered by any person where there is no law." This means that if Uganda did not adopt anti-money laundering act, it would be a safe haven for criminals from all over the world. International Covenant on Civil and Political Rights (1966) provides that no one shall be held liable or guilty of any offence on account of any act or omission that did not constitute a criminal offence under national and international law at a time the offence

[38] [2012] UKSC 51

was committed. Equally, Article 7(1) of the 1950 European Convention on Human Rights provides: *"No* one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national *or* international law at the time when it was committed".

9. Complying with a raft of regulatory requirements

It is worth noting that every time a regulatory regime is adopted, the process of implementing it begins when institutions introduce measures to transpose the new regulatory changes accordingly. For instance in May 2017, Uganda introduced an Anti-Money Laundering Amendment Act (which amended the Anti-Money Laundering Act, 2013). This Act was introduced to streamline risk assessment measures required of accountable persons; to provide for the identification of customers; to provide for procedures relating to suspicious transactions; to harmonise the record keeping requirements and exchange of information obligations with international practice; and for related matters."

Anti-Money Laundering regulation have been churned out at a supranational level fast paced, trickling out in individual countries in a piecemeal fashion than countries can afford to cope with. Financial Institutions, big and small are all required to adopt the same regulatory requirements, a one size-fits all approach has a tendency to hurt poorly resourced financial institutions disproportionately. There is evidence that complex and overlapping regimes by FATF, Basle Committee, OISCO, IMF/World Bank have constrained the ability of countries to harness them efficiently. Banks are regulated nearly from every conceivable corner, some of these regulation require extensive reporting requirements, mandating firms to provide data on trading venues, client profiles, liquidity and trade execution, among other things. They also require qualitative information to evidence how firms are adhering to best practice requirements in their trading procedures. Compliance firms must show that they're making a good-faith effort and that they are organized, efficient to diagnose, correct and ultimately avoid mistakes.

To comply with the raft of the current regulatory requirements, firms will need to pull the collect sufficient data and to apply the appropriate rule-sets based on the regulatory environment in a country. The overlap is that multiple teams often end up accessing the same data on their own—a situation that not only leads to data redundancy and duplication, data sourcing complexity that can potentially cause serious issues in the event of data discrepancies. Complying with even one complex new regulation—such as the AML/CFT regulation evolved by different oversight agencies is going to require huge budgets to fund compliance requirements such as training and putting robust systems in place. This will eat up profits margins of firms making poorly resourced firms difficult to compete. For example in Uganda, according to Anti-Money Laundering Act (2013 as amended), requires businesses in the regulated sector to adopt necessary changes in line with the new regulatory requirements. Many Banks have come to the realization that it cannot be business as usual, they will need to rethink their approaches including adopting innovative solutions to copy with their regulatory requirements. With so much legwork to do literally speaking with a lot of data to delve through, financial institutions will need to take advantage of data sets churned out at different oversight regulatory levels. Thus, we argue that compliance teams will need to adopt robust approaches to unravel their regulatory requirements using the same data shared across agencies.

In order to untangle the knot of requirements, financial institutions and other businesses will, besides rethinking their processes, take advantage of advances in communication technology to meet their regulatory requirements. The increasing complexity of the financial landscape has undoubtedly made life more difficult for Banks and other financial institutions to comply with their regulatory requirements. On the positive note, it has made it easy for them to engage in and

innovative financial products and services. Firms will need to take advantage of advances in technology to consolidate their compliance approaches and to avoid being penalised with hefty fines and to lag behind desired regulatory changes.

10. Conclusion

Terrorists, drug dealers and other criminal elements have demonstrated the agility, ability and capacity to exploit loopholes in anti-money laundering regulatory system to remain a step ahead of enforcement agencies. Money launderers tend to seek out countries or sectors where there is a low risk of detection due to weak or ineffective anti-money laundering programmes. Regulatory agencies cannot close their eyes to the fact that the main objective of money laundering is to get the illegal funds back to culprits by moving funds through a labyrinth of financial networks available today. Thus, regulatory agencies should be pro-active not to just react to what has already happened (post-mortem) because criminals tend to coil in their shell and pounce when their timing best fits them. To do this, regulatory agencies should be facilitated and well-resourced to be robust in the fight money laundering and predicate offences. The overarching purpose of any anti-money laundering regulation should be to protect the integrity of the financial system by keeping out criminals and therefore regulators should be overzealous in enforcement of AML/CFT and to hurt the economy. When agencies form suspicion of money laundering activities they should quickly freeze customers' accounts without giving them notice to move those assets abroad. Banks will need to educate customers in the design of anti-money laundering policy approaches because a study conducted by the Guardian Newspaper (UK) in 2010 found that 80 percent of Banks do not educate customers on how to safeguard against financial crimes such as credit and debit card fraud. The training programme should include communication with customers in a language free of terminology and technical jargons to sensitize them against money laundering. Money laundering is a complicated international relations issue than the theory and practice against it seem to presuppose! The challenge to the current global anti-money laundering regulatory framework remains that it is still fragmented, devoid of mechanisms that are respondent with varied regulatory environments across countries. Therefore, the fight against money laundering/countering financing of terrorism remains pretty much work in progress!