A New Criminal Jurisdiction to Combat Cross-Border Money Laundering

by Hanafi Amrani

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Abstract

Purpose – The purpose of this study is to analyze the emergence of the changing face of criminal jurisdiction in dealing with cross-border money laundering that develops dynamically due to the development of globalization.

Design/methodology/approach – This research was a doctrinal legal research using conceptual approach concerning the very strict principle of territorial jurisdiction in criminal law. This study also used case approach related to the application of extraterritorial jurisdiction and long-arm jurisdiction in some cross-border money laundering cases. The collection of legal materials was carried out through literature as well as case study and was analyzed qualitatively based on data reduction, presentation and concluding.

Findings – This study revealed that territorial jurisdiction which was originally strictly enforced by state sovereignty over crimes that occurred in its territory then changed widely with multi-territorial perspective. Because of its condition, the state then expands its authority to deal with money laundering as a cross-border crime involving more than one territorial state, namely, by using extraterritorial jurisdiction and then developed into a long-arm jurisdiction trend that allows state authorities to prosecute foreigners outside its state boundaries.

Originality/value – The research finding can be used as one of the alternatives by countries to break the territorial jurisdiction in combating the cross-border money laundering.

Keywords Extraterritorial jurisdiction, Territorial jurisdiction, Cross-border money laundering, %2C Long-arm jurisdiction

Paper type Research paper

Introduction

It is not exaggeration to argue that the globalization has indeed affected various sectors of human life, including law and economics. Ease of transaction which becomes timeless was the only example of a positive impact that can be received from this phenomenon. Meanwhile, globalization more specifically from a legal context has benefited participants not only in the legal acts but also in the illegal one as well (Ahmed, 2016). The expansion and spread out of crimes into worldwide operations such as money laundering were the bad side of this trend (Amrani, 2017).

Money laundering is a crime that moves dynamically and encounters various important issues in its development. One of the interesting things to deeply analyze is about money laundering jurisdictions due to the internationalization process. This type of crime is committed across the boundaries of multiple jurisdictions in which criminals, proceeds and documentary evidence can easily move from one jurisdiction to another (Rueda, 2001; Mugarura, 2016). By using the development of technology which facilitates the method of transferring illicit funds across borders, criminals use them to make money laundering easier to accomplish and are harder to detect (Sornarajah, 1999; Mikeladze, 2018).

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Furthermore, this crime can be characterized as a transnational crime that raises worldwide problems (Bossard, 1990; Brown, 2008; Mueller, 1999; Passas, 2003; Narayan, 2019).

As a transnational or cross-border crime, money laundering concentrates on all actions criminalized by regulations from more than one country (Article 3(1)(b) of The United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances). Holmes (2003) said that in the case of transnational money laundering, there must meet one of two conditions. First, the jurisdiction where the illegal results were washed is different from the jurisdiction where the predicate violation occurred. Second, financial transactions that facilitate laundering reach several national jurisdictions. The notion of cross-border transnational crime initially was not a legal concept but merely a criminological (Mueller, 2001; da Silva, 2020), sociological, economic and even political concept (Serano, 2002; Simmons *et al.*, 2018). By looking at the natures of money laundering as one of transnational crimes, the prevention and suppression of this crime more emphasizes on multilateral efforts at an international level (Martin, 1990; Ebikake, 2016).

The criminalization of the money laundering affects particular problems concerning the existing rules and principles of criminal jurisdiction. These problems arise mainly because of the complexity and transnational characters of money laundering that may be committed across the boundaries of multiple jurisdictions (Nguyen, 2020). In such a case, the offenders could be subject to the money laundering laws of several jurisdictions. This in turns may lead to the jurisdictional conflict because two or more sovereign entities that have a right to assert criminal jurisdiction over the same crime. In addition, it may also lead to the difficulty in prosecuting nonresident defendants outside the boundaries of the state (Sulaimani, 2016).

This paper is aimed at analyzing aspects of the limitations of criminal jurisdiction in responding to these conditions. In this context, it will be found that the implementation of money laundering jurisdictions is very difficult to enforce because the natures of such crime involve even more than one related territory in this global era. Hence, the application of this jurisdiction needs to be expanded to deal with money laundering as a cross-border crime. The evolving theory of criminal jurisdiction from a territorial to an extraterritorial and then to a long-arm jurisdiction will be explored and critically analyzed. The adequacy of traditional doctrine of criminal jurisdiction in dealing with cross-border money laundering is examined. A new approach in settling complicated crime situations such as money laundering is also discussed.

Research method

This research was a doctrinal legal research using conceptual approach concerning the very strict principle of territorial jurisdiction in criminal law. This study also used case approach related to the application of extraterritorial jurisdiction and long-arm jurisdiction in some cross-border money laundering cases. The collection of legal materials was carried out through literature as well as case study and was analyzed qualitatively based on data reduction, presentation and concluding.

Limits of territorial jurisdiction to overcome cross-border money laundering

Territorial jurisdiction in dealing with a crime played a very important role, especially to determine where the crime was committed. The term "jurisdiction" encompasses several definitions and possible meanings (Dodson, 2008; Hirst, 2003; Beale, 1923; Hovell, 2018). Malanczuk (1997) points out that at times jurisdiction simply refers to territory, whereas at other times refers to the power exercised by a state over persons, properties or events (Blakesley and Stigall, 2007; Colangelo, 2007). This means that the nature and scope of jurisdiction varied depending on the context in which it is to be applied (Blakesley, 1982; Hildebrandt, 2021). From such a perspective, jurisdiction has different forms that may involve the authority of a state to establish prescriptive, judicial and enforcement

jurisdiction (Colangelo, 2007; Coughlan *et al.*, 2007; Li, 2020). The term "jurisdiction" concerns the legal competence of any state to make, apply and enforce the rules of conduct upon persons, properties, or events (Lowe, 2006; Morris, 2019). As such, Justice Holmes pointed out that jurisdiction was addressed "the right of a state to apply the law to the acts of men" (Borlini, 2008).

The classical theory of jurisdiction stated that one of the rules regarding which court has authorized and which criminal law will be applied. Jurisdiction regulates how a crime can be dealt with so that it can be resolved through appropriate criminal legal instruments as the state's authority for these crimes. In this context, it became known as national criminal jurisdiction which also includes prescriptive, executive and adjudicative jurisdiction. Driven by the principle of sovereign equality and territorial integrity of states, in general, criminal jurisdiction is facultative rather than mandatory. The exercise of criminal jurisdiction is ultimately a matter for individual states (Nguyen, 2020). On a substantial basis, every state has its right to claim its territorial jurisdiction, giving it the authority to establish jurisdiction over given conduct taking place in its territory (Sornarajah, 1999). Two aspects of territorial jurisdiction include substantive and procedural jurisdiction. The first aspect relates to the power of a state to define any conduct as a crime and to act on the substantive criminal law regarding the conduct. The second refers to the power of a state to investigate, prosecute and try to defend who violates the substantive criminal law. In sum, any state has the power if the state in question has a personal jurisdiction over a particular defendant (Roxstrom and Gibney, 2017)

Territorial jurisdiction is applied when the government has a control over certain geographical locations. So, it is clear that all crimes are local (Sornarajah, 1998) because this relates to the right of a state to apply the law to a prohibited conducts (Borlini, 2008; Fekete, 2008; Blakesley, 1982; Roxstrom and Gibney, 2017). The application of this principle becomes easy if the type of crime is conventional. For combating transnational or cross-border crimes, this basically will be difficult to exercise. This condition, of course, raises some of the complexity of the problems in overcoming the character of cross-border money laundering. The question remains about the adequacy of territorial jurisdiction in resolving money laundering cases. As is the case, George Kris illustrates the complexity of money laundering and the involvement of multiple jurisdiction in the following case:

> If the proceeds derived from a drug trafficking operation are physically carried out in country A in which it was obtained and deposited into a financial institution in country B (placement); transfer from the financial institution through various other financial institutions in various countries to another financial institution in country C (layering); and finally paid into a number of corporations in various countries in purported payments of shared transfers (integration); then the investigators/prosecutors in country A would not have much hope in tracing, let alone, confiscating, the proceeds of the drug trafficking without using mutual legal assistance. (Kriz, 1992)

From the above case, three kinds of problems may be identified. The first problem related to punishment of the perpetrator of the predicate offense (s) and money laundering. This crime is indeed the most unique because of its characteristics which can also be called an advanced crime with certain predicate offenses. Money laundering is a process of changing the results obtained from an underlying criminal offense, called a predicate offense, to a property that appears to be legitimate (Sjahdeini, 2007; Teichmann, 2020). The questions may arise in this regard, such as whether money laundering is an autonomous crime or continuation of its predicate offense; whether the author of the predicate offense can be treated as the author of money laundering; and whether the perpetrator of the predicate offense can be convicted as

a subsequent launderer. In answering these questions, different opinions from legal scholars and practitioners are used and divided into two categories.

The first opinion considers that money laundering is the continuation of the primary offense. It argued that money laundering is identical to concealment, in which the author of the primary offense cannot be the author of the laundering. Accordingly, concealing illegal funds is intended merely to avoid being detained. It also assumes that there is no new legally protected interest in the laundering offense except for those that have existed in the primary offense (Pinto and Chevalier, 2006). Another reason for this is that it is not allowed to apply two offenses for a single action because of *ne bis in idem* (Pinto and Chevalier, 2006; Maugeri, 2018). As such, this opinion assumes that as a derivative offense, money laundering remains unpunished. This is because the conduct is considered to be a co-penalized act where the punishment of money laundering is already included in the punishment of the primary offense (Pinto and Chevalier, 2006).

The second opinion considers that there is a real distinction between the primary crime and the laundering offense. As a consequence, contrary to the first opinion, it is possible to punish the laundering as a separate offense and thus is separately punishable. According to this opinion, there are different protected interests between the primary crime and money laundering (Pinto and Chevalier, 2006; AL-Rawashdeh, 2020). Money laundering interests are not only for the administration of justice but also for the national and international economic order. Several countries as well as international legal instruments, follow this opinion. Switzerland, for example, prosecutes money laundering committed in this country even though the primary crime is perpetrated abroad (Kohler, 1990; Ferwerda and Reuter, 2019). They consider that any person conducts money laundering if criminal proceeds are converted or transferred to conceal its source from unlawful activity. As a consequence, the laundering offense is separated from the predicate crime, thus meaning that the punishment can be cumulated.

The second problem deals with gathering evidence such as bank records that may be spread out in several jurisdictions. Opening bank records in a foreign country poses problems if it follows a strict bank secrecy law. Even though there is mutual legal assistance, on a practical level, it is not an easy task to realize. This is because the requested country may be reluctant or unwilling to meet the request. At this point, there are two reasons why foreign governments may have an uncooperative stance; the first is the inequality of views between countries in their respective laws. Foreign governments sometimes do not see the request for assistance as valid in their legal context because they do not know the exact fact that the request is legitimate and the relevant differences that exist between the requested country's legal system and the requester's. The foreign governments can also see foreign demand as a direct threat to their sovereignty (Hinterseer, 2002; Zolkaflil *et al.*, 2019). Moreover, law enforcement is part of the sovereign right of the state for violations that occur in its territory.

Finally, the problem focuses on recovering the proceeds of crime. Finding, freezing, forfeiting and confiscating the proceeds of crime as well as instrumentalities are necessary steps. In seeking the existence of the criminal proceeds, a "paper trail" is essential for a successful prosecution. Wilke noted that "the use of stored transaction data for backtracking functions as evidence in the subsequent proceedings" (Wilke, 2008). However, this method is not easy to realize because the launderer tries to obscure the audit trail by converting it from dirty money into a legitimate income and then using it to buy a property or invest in business industries.

Applying extraterritorial jurisdiction: the need for a "physical presence"

The limitation of territorial jurisdiction has resulted in an ineffective handling of money laundering offence so that it should be able to use a new wider method. The territorial jurisdiction is indeed very beneficial to deal with crimes, but the problem is how to ideally implement territorial jurisdiction against money laundering as a cross-border crime. An idea to apply jurisdiction that is wider than just a strict on the theory of territorial jurisdiction in one country can be an alternative, namely, extraterritorial jurisdiction and the new long-arm jurisdiction.

Money laundering crimes has involved cross-border state jurisdiction both in committing crimes and their effects. To cope with the issue of state jurisdiction, each country can expand its territorial jurisdiction beyond its borders. This then led to the idea of a country to use extraterritorial jurisdiction to expand its domestic law that are carried out outside the country's territory. The term extraterritorial has a very significant meaning to the development of the prevention of crime. It is possible that transnational money laundering can be dealt with transnationally as well. Extraterritorial jurisdiction explains that a state can exercises its jurisdiction without "real" and "substantial" territorial links (Durrieu, 2013; Foley, 2017).

One of the highlights in implementing this principle is as applied in the USA to its money laundering law. The States has active applied extraterritorial jurisdiction through the anti-money laundering regime. Section 1956(f) of the 1986 Money Laundering Control Act (MLCA) regulates in detail the extraterritoriality of the US Anti-Money Laundering laws. Extraterritorial jurisdiction in this provision can be applied to actions of US citizen abroad and non-US citizen who conduct within or partly within the USA. US citizens and companies, along with their foreign subsidiaries, are included in the former. The latter consists of foreign nationals and entities placed within the boundaries of the USA. Section 1956 (f) explains that extraterritorial jurisdiction over behavior prohibited by this section if the behavior is carried out by US citizens or, in the case of non-US citizens, the behavior occurs in part in the USA and transactions or series of transactions involving funds or monetary instruments with a value exceeding $10,000 (Hagler, 2004).

Extraterritoriality of the US money-laundering law exemplified in the case of Banco De Occidente which is a Colombian bank that has no connection or presence in the United States. The US government alleged that the Banco de Occidente branch of Panama had received a transfer of drug money from another bank located in the USA and then sent transfers overseas. Based on these allegations, the US persuaded the relevant authorities in West Germany, Canada and Switzerland to combine them in the freezing of the Banco de Occidente assets, which amounted to around $80 million. Frozen assets have no relationship to funds that are tainted by money laundering activities. The USA justified its action on the theory that $80m has represented a replacement fund. The seizure of Banco de Occidente funds around the world represents about half of its total assets, and this action immediately forced banks to go bankrupt (Morgan, 1997). Thus, part of the transaction occurred in the territorial jurisdiction of the United States. Therefore, it was reasonable if the Court charged under the US Money Laundering Law as mentioned in Section 1956(f). The essential component of the extraterritoriality principle of the provision is the conduct of non-US citizens occurs at least "in part" in the USA.

The development of the implementation of extraterritorial jurisdiction in the USA experienced a very significant shift. Over the years, the application of exterritorial jurisdiction has been extended to the criminal conduct occurred outside the USA. In the case of USA v. Stein, the perpetrator who was outside the USA, initiated a transfer of funds from a place within the USA to a place outside the USA. In this case, the Court assumed that a

transfer of funds across the USA border was considered to be "in part in the USA" even if the defendant ordered such transfer without setting foot in the USA (Hagler, 2004). A foreign citizen conducting the illicit transfer of funds whilst being abroad was still liable under the affected country. This is defined in section 1956(f) of the MLCA. Due to the liquidity of the *actus reus* of money laundering, this territorial relationship with the US jurisdiction can be expanded very far. It can be illustrated if illegitimate money is transferred through US banks as part of the cross-border laundering process this transit will be sufficient to give the US criminal jurisdiction over the entire washing process, so that every foreign bank involved in this process shall thus be subject to the criminal jurisdiction of the USA (Shams, 2004).

The case is reflected in the argument by Hagler that the defendant does not need to have "a physical presence" within the US borders at the time the offense was committed (Hagler, 2004; Tiwari *et al.*, 2020). Thus, it is possible to convict someone under Section 1956(f) of the MLCA if the illicit funds were transferred to or from the USA even though the perpetrator is being abroad. Observing the characteristics of this case, it is apparent that the court interpreted the extraterritorial criminal jurisdiction very broadly. With such a complex form of crime, extraterritorial alone is not enough to overcome it, a broader policy must even be carried out to resolve the problem of money laundering as a transnational crime. From this perspective, there has been a shift of jurisdictional theory over money laundering from extraterritorial jurisdiction to a new theory of criminal jurisdiction that called long-arm jurisdiction. The following section will analyze this development by giving detailed hypothetical cases to create a better understanding of this matter.

From physical presence to minimum contact: toward long-arm jurisdiction

In the previous sections, it was apparent that there had been an inadequacy of territorial as well as extraterritorial jurisdiction in coping with the acts of money laundering. The USA was the only a country that aggressively has responded to the development of money laundering offenses that have a transnational character. Here, in this context, the USA founded the extraterritorial jurisdiction in the MLCA of 1986 particularly in section 1956(f). It regulates the extraterritorial jurisdiction of conduct by a US citizen or a non-US citizen when it occurs in part in the territory of the USA. The legislation requires an "actual presence" of the crime within the territory of the USA. However, due to the development of international trade and technology, foreign persons or corporations can commit any crime beyond the territory of the USA – a so-called long-arm jurisdiction.

The term long-arm jurisdiction refers to the ability of state authorities to prosecute foreigners outside its state boundaries. The case of International Shoe v. Washington (Gooch, 1998; Lipshie, 2018) has demonstrated this development. A foreign corporation was exercised by the Washington State Court despite the principle of the place of business occurring outside the forum state. The Supreme Court changed the personal jurisdiction from "having a physical presence" within the affected country to "having minimum contact." The Court determined that the leading case on specific jurisdiction, and its descendants, the legal process requires that if a defendant is not present in the forum territory, he [must] have a certain minimum contact with it so that the maintenance of the lawsuit does not offend the traditional notion of fair play and substantial justice (326 US 310, 316, 1945). To satisfy due process, the Court required that "minimum contact be continues and systematic." The Court reasoned that agents acting on behalf of a foreign corporation are still liable in the affected country. The Court also reasoned that a corporation is liable under the country it selects to conduct business with. If there is sufficient contact between the affected country and the foreign defendant, then the Courts have the authority to

exercise jurisdiction. In this case, the court applied a two-step test in determining whether the case was liable to its activities. This was done through, at first, analyzing the connections between "the defendant" and "the forum state"; and then through determining "whether the actions of the defendant took place within the authorizing jurisdiction."

Furthermore, Section 1956(f) of the MLCA requires that the conduct by the USA or foreign citizen occur in part in the territory of the USA. However, over time, the extraterritorial jurisdiction developed beyond the framework of section 1956(f) of the Act. In its development, the extraterritoriality of the USA money laundering laws may also be applied to "foreign entities even though these are operating with no subsidiaries or branches within the USA boundaries." The Banque of Leu case was a clear example of the extraterritorial jurisdiction applied by the USA. At that time the Luxembourg bank, Banque Leu (Luxembourg), S.A., filed a guilty plea for money laundering at the USA District Court in San Francisco, CA. The bank agreed to lose $2.3m to the USA and more than $1m to Luxembourg. Banque of Leu wants to expand the private banking deposit base. As part of its efforts to achieve this goal, the bank hired an account manager who was fluent in Spanish who has contact with South America. After that, as an effort, the new manager opened a variety of accounts by Colombia. Two of these accounts are the basis of criminal charges, both of which are related to US dollar accounts and opened in Luxembourg with cash. As a result, more than $2.3m was deposited into the account during the one year. Deposits made are in the form of cashier checks sent from bank customers in Colombia to Luxembourg for deposits. The bank, in turn, sent the cashier's check to his correspondent bank in New York City for collection. Whereas the US correspondent bank then sent the cashier's check to the Bank of America check processing center, located in Northern California, where they were finally paid (Munroe, 1995; Teichmann and Falker, 2020).

In the above case, the criminal act has been committed outside the USA. However, the USA court claimed a criminal jurisdiction over this case by arguing that the Banque of Leu used US dollars as a negotiable instrument. As a consequence, the court assumed that the bank is susceptible to the US criminal jurisdiction. The legal justification of the court, as one author commented that "the used of US dollar notes by banks as a negotiable instrument deems them susceptible to US criminal jurisdiction in money laundering offence" (Munroe, 1995).

Over time, through the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (The USA PATRIOT ACT) (Seay, 2007), the Court established a general personal jurisdiction over foreign banks that maintain bank accounts at USA financial institutions (Cossette, 2003; D'Angelo, 2017). Congress assumed that a long-arm authority over foreign banks, which has correspondent accounts in the USA, because the significance of such accounts was sufficient to invoke personal jurisdiction within the bounds of the Constitution (Cossette, 2003; Nash, 2019). The notion is that "the foreign bank will then make itself whole by debiting the customer's foreign account, letting the customer take his objections to the court in the USA that authorized the seizure" (Cassella, 2002). An example of this matter is found in the USA PATRIOT ACT 2001, title 18, section 981(k), which states that "if criminal proceeds are deposited in a foreign account in a foreign bank, and that bank has a correspondent US based account at a US bank, the US government can seize an amount of money equal to the criminal proceeds from the correspondent account."

The above circumstances showed us the dynamic aspect of criminal jurisdiction in dealing with cross-border money laundering offenses. Criminal jurisdiction has shifted from territorial to extraterritorial jurisdiction and then to a long-arm jurisdiction. These types of jurisdiction allow a state court "to gain personal jurisdiction over an out-of-state defendant who transacts business within the state, commits a tort within the state, commits a tort

outside the state that causes an injury within the state, or owns, uses, or possesses real property within the state" (Jurisdiction, 2008; Al Banna, 2017). This condition was made clear in the case of USA v. Stein. In this case, the district Court found that "a foreign citizen who causes or orders a transfer of proceeds from or to the USA by telephone or other means while abroad is deemed to have acted 'in' the USA for purposes of section 1956(f)" (Hagler, 2004).

Conclusion

The development of the era marked by globalization has changed many things in aspects of legal issues. This includes in the handling of cross-border money laundering that has influenced the change in the face of the territorial jurisdiction from what was originally relied on the territoriality principle very strictly changed to the extraterritorial and up to the long-arm jurisdiction. The reason for this was that the use of the territoriality principle did not seem to be able to offer solutions to the problem of criminal jurisdiction that involved cross-border money laundering which has more than one state's jurisdictional authority. From this development, it is clear that the dynamic aspects of criminal jurisdiction are being faced in money laundering offenses that have cross-border dimensions.

Due to the development of technology which followed by the increasingly complicated and sophisticated methods used in conducting cross-border money laundering, the USA has formulated the extraterritoriality principle in its statutes and long-arm authority implemented through its judicial interpretations. This condition is a new phenomenon where a country like the USA formulated its extraterritorial jurisdiction in its Statutes explicitly. At this point, the USA does not hand over the interpretation of criminal jurisdiction to the Courts. Other countries may consider the US laws and Supreme Court decisions concerning the formulation and implementation of extraterritorial and long-arm jurisdiction in its money laundering laws as benchmark models. However, in formulating and implementing the extraterritorial and long-arm jurisdiction, further inquiries are important being made to ensure that the implementation of this type of criminal jurisdiction is in accordance with, and not contrary to, the long-standing principles of legal systems of the states in question.

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