Reporting Obligation under the Anti Money Laundering and Anti Terrorism Financing Act, 2001. Duty of Bank Secrecy

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ABSTRACT: *This is a conceptual paper containing introduction, main body, conclusion and references. The paper is mainly doctrinal, relying mainly on statutory provisions under Anti Money Laundering and Anti Terrorism Financing Act, 2001 (AMLATFA, 2001. The paper examined the significance of provisions related to reporting obligation (on financial institutions, emphasis on banks) in the fight against money laundering and terrorist financing. It was revealed that reporting obligation may contribute immensely in countering money laundering and terrorist financing, even though it appears to be in conflict with the duty of banking secrecy. Thus, reporting obligation on financial institutions clearly breached the duty of banking secrecy (which is the basis of banker-customer relationship). However, the breach of duty of secrecy may be justified considering the widespread effect of money laundering and terrorist financing; which have become a global problem. It is argued that, the fight against money laundering and terrorist financing would hardly succeed without disclosing certain information by financial institutions. There is need to enforce strict penalty for any financial institution that negligently disclosed customer's information to any person apart from the legally recognized person.*

KEYWORDS - *Banking secrecy, Money laundering, Terrorist financing, Reporting obligation*

1. INTRODUCTION

The link between banking secrecy, money laundering and terrorist financing is still unclear and whether reporting obligation on banking institutions is a threat to bank's duty of secrecy will be discussed in this paper. The paper begins by defining the terms money laundering and terrorism in order to have clear insight about the two terms. "Money laundering" has been defined to mean "the act of a person who engages directly or indirectly in a transaction involving proceed of unlawful activity; including any such person who receive or transfer such proceeds into or outside Malaysia, and a person who knowingly conceals such transaction is said to be within the meaning of money laundering" [1]. According to Common Wealth Model Law, money laundering is said to involved transaction with proceed of crime; which includes person who with knowledge that such proceed was obtained from criminal activity and still went ahead to engaged in such transaction[2]. In this regard, AMLATFA, 2001 enforced penalty on any person who actually commits or abets the commission of the offence [3].

From the above definition; it is seen that money laundering has been linked with illicit fund obtained from illegal activity. One is said to be guilty of the offence of money laundering by engaging directly or indirectly in carrying out illegal transaction relating to proceeds obtained there from.

On one hand, the term "terrorism" has not been defined under AMLATFA (2001). Section 1 of AMLATFA, 2001 only made reference to provisions of Malaysian Penal Code where the term "terrorist's property" and "terrorism financing" were defined (S. 130 Penal Code). Thus, so many activities including; kidnapping, protection of nuclear material were said to be amongst terrorist activities [4]. However, lack of precise definition of terrorism and terrorist's activity is not peculiar to AMLATFA, 2001. This calls for international concern to devise ways of countering these activities; and subsequently resulted to the enactment of various legislation in the world. In this regard, AMLATFA, 2001 made provisions on reporting obligation that appears to override the duty of banking secrecy. Now this paper would briefly consider reporting obligation.

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2. REPORTING OBLIGATION

AMLATFA, 2001 with a view to counter the effect of money laundering and terrorists financing placed reporting obligation on various institutions. The institutions mean: any person, including branches outside Malaysia of that person who engages in any activity, amongst which includes various financial institutions; insurance companies; and many other bodies provided by (S. 3 AMLATFA, 2001). Making reference to AMLATFA, 2001 it is seen that reporting institutions encompassed many bodies/ organisations including financial institutions. However, this paper would emphasize on financial institutions; particularly banks, since the paper concerns reporting obligations and duty of bank secrecy. Thus, money laundering through financial institutions (banks in particular) is carried out through some processes, which are: (a) placement, (b) layering and, (c) integration [5]. These processes are further explained: (a) placement is the first stage, which involved depositing dirty money into a bank account in order to make them legitimate [6]. (b) layering according to Angela [7] involved separating such proceed from their source by creating complex transactions with a view to hide their original root; and, (c) integration is the process of making illicit funds to appear as legitimate. These were carried out through (bank) as financial institutions [8].

There are various obligations imposed on financial institutions under AMLATFA, 2001. The relevant obligations includes; (a) reporting any transaction exceeding an amount as may be specified by the enforcement agencies or suspicious transactions under section 14 AMLATFA (2001), (b) customer identification under section 16 AMLATFA, (2001) (c) opening of accounts in false name under section 18 AMLATFA (2001). This emphasised that banks should know the identity of their customers, which is popularly called "Know Your Customer" KYC [9], which stressed on knowing not only the identity of customers but also transactions going through the account [10]. In this regard, AMLATFA, 2001 made it mandatory on banks to operate an account only in the true name of account holder and the identity of all persons dealing with the account. The banks are said to be liable in negligence where they failed to make necessary investigations as to the true identity of their customers [11]. The implication is that the identity of bank customers and transactions relating to the account are reported to the enforcement agency; which may be a threat to the customer's duty of confidentiality. However, AMLAFTA, 2001 exempts reporting institutions from any liability for disclosure of customer's information [12].This exemption from liability is part of the main issues which this paper aimed to examine. Angela acknowledged the effort of government in regulating money laundering. However, she viewed financial institutions at the receiving end, since they are shouldered with strict obligation to report which is outside their core mandate of banking business [13]. Having considered the reporting obligation next is to consider the duty of banking secrecy.

3. BANKING SECRECY

The duty of confidentiality has been recognized as an essential pillar in banker–customer relationship, which exists as an implied term based on contractual relationship. The whole relationship between bank and its customers is centered on the duty of the bank not to disclose customer's information. Where a bank wrongfully disclosed such information, the bank is liable to the customer for breach of contract. A bank may equally be liable to the customer in negligence [14]. This principle of banking secrecy was judicially pronounced in the celebrated case of (Tournier v. National Provincial and Union Bank of England [15]. The significance of *Tournier's* case cannot be understated; this is because the issue of preserving confidentiality as between bank and its customer is very important, as it goes beyond the business of banking: as it extents to the kind of society we live [16]. This duty needs to be protected in order that bank customers may feel that their funds and identity are safe. The court has laid down certain exceptions where disclosure of customer's information could be made [17]. These are: (a) where the disclosure is under the compulsion of law (b) Where there is a public duty to disclose(c) where the interests of the bank require disclosure; and (d) where the disclosure is made by the express or implied consent of the customer (Tournier v. National Provincial and Union Bank of England,1924).

The above position laid down by case law was recognized in Malaysia under the Civil Law Act (1956) and enactment was made to the same effect under sections 97-102 the Banking and Financial Institutions Act (1989). The Act made provision against disclosure, as a general provision, just as in Tournier's case. However, certain exceptions were equally provided where disclosure could be made without liability. The exceptions provided under the statutes appear to be much wider than the exceptions laid down by the court in Tournier's case [18]. These exceptions are: (a) where the customer or his personal representative, has given permission in writing; (b) where the customer is declared bankrupt or in case of a corporation it was wound up; (c) where the information is required for *bona fide* commercial purposes; (d) where

there is an action by the bank against a customer; (e) Where a licensed institution is served with a garnishee order; (f) where information relates to credit facilities; and (g) where such disclosure is required by any statutes [19]. These are the circumstances under which disclosure is allowed. Having examined the duty of bank to maintain secrecy of its customers; as well as circumstances under which disclosure is allowed, this paper would now consider whether the duty of disclosure/ reporting obligation in the fight against money laundering is in conflict with the duty of bank secrecy.

4. DUTY OF BANK SECRECY AND REPORTING OBLIGATION WHETHER IN CONFLICT?

The role of banks in carrying out day to day business cannot be over emphasized. The relationship between customer and his bank was built based on the fact that the bank would keep his information undisclosed. In the process a customer makes many confidential statements to his bank for different purposes, with the hope that such information are never meant to be disclosed, as it may be detrimental or injurious to the customer [20]. This relationship is equally as important to society as it is to a lawyer and client or medical doctor and patient [21]. This is what banking secrecy entails. However, the law laid down certain exceptions where by disclosure of such information would not make banks liable (S. 85 Bills of Exchange Act, 1949).

On one hand, money laundering has been identified as a process use for hiding proceeds of crime, which include transporting cash out of the country, purchasing businesses through which funds can be channeled and other avenues of combating illicit fund. These activities were mainly carried out through banking institutions and later; the proceeds may be used to finance terrorist activities amongst other crimes [22]. Government felt there is need to devise measures of countering these illegal activities, as they have negative effects to the integrity of financial institutions, as well as the economy of nations [23]. In the same vein, AMLATFA, 2001 seeks to lay down a comprehensive legal and regulatory frame work with a view to counter the effect of money laundering and terrorists financing. This is because banking secrecy is regarded as facilitating movement of funds derived from illicit activities; since banks arguably tend to be more concerned with their business than exposing their customers, to the detriment of their business. Bank secrecy therefore had hindered prosecution of culprits, as banks could not act against the duty they owed to their customers [24]. However, the law imposed duty on banks to disclose customers' information with a view to combat the effect of money laundering.

The reporting obligation placed on financial institutions; which include banks may be in conflict with the duty of banking secrecy. This can be seen in reporting various suspicious transactions [25]. Thus, the parameter to determine whether transaction is suspicious or not is not clearly stated under AMALATFA, 2001. In contrast, it can be said that, the duty of banking secrecy as laid down in *Tournier's* case admits certain exceptions where disclosure could be made. A bank does not require consent of its customer before it reports to the relevant enforcement agencies. However, where it was required by law such a bank would not be guilty for wrongful disclosure [26]. In essence, the provision under BAFIA which exempts banks from liability may be in conflict with duty of banks secrecy.

This paper had earlier examined the rational behind enacting laws that override duty of bank secrecy. The reason had been to sanction the integrity of financial institutions and to combat money laundering and terrorists financing, which is to the public interest as a whole. The basis of the law's protection of confidence is that there is a public interest that confidence should be preserved and protected by the law; nevertheless the public interest may be outweighed by some other countervailing public interest and provisions of law which favours disclosure of customer's information [27].

5. CONCLUSION

The paper commenced with discussion on preliminary matters having to do with the meaning of money laundering and terrorists financing. It has been pointed out that money laundering has to do with dealing directly or indirectly with illicit funds, which are penalized under AMLAFA, 2001. The paper examined some of the ways through which money is been laundered. It was established that, banking institutions due to the duty of secrecy they owed to their customers have facilitates movement of funds without being detected by authorities concerned. The need for more international cooperation and compliance with strict licencing requirement for banks would contribute toward enhancing better reporting obligation [28].

On one hand, various provisions of AMLATFA, 2001 which obliged financial institution to report certain transactions and careful scrutiny of customers was a result of effort to counter money laundering and terrorists financing. It

has become obvious that, the need to override duty of secrecy on the banks is to the public interest as a whole. However, section 79(3) AMLATFA (2001) restricts banks from further disclosure to any one except to the relevant enforcement agencies. The reporting institutions are only obliged to disclose customer information to the enforcement agencies; any disclosure apart from that would not absolve them from liability. Therefore, the duty of secrecy is only overridden to the extent of reporting obligation only, but there is need for strict compliance by the banks in this regards.

Finally, there is a justification for overriding of secrecy since it is to be in the best interest of the state and the integrity of financial institutions. This may not affect the business of the banks; in that an honest customer fears no disclosure/ scrutiny in relation to his account. It is therefore recommended that strict rules should be imposed on banking institutions that will prevent unwarranted disclosure of customer's transactions. This will protect customers and enhance their confidence on banking institutions.

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