

MONEY LAUNDERING AND LEGAL GLOBALIZATION: WHERE DOES THE UNITED STATES STAND ON THIS ISSUE?

**HEBA SHAMS, LEGAL GLOBALIZATION: MONEY LAUNDERING LAW
AND OTHER CASES, Sir Joseph Gold Memorial Series Vol. 5, The
British Institute of International and Comparative Law (2004).**

*Reviewed by Ellen S. Podgor**

INTRODUCTION

Money laundering is a major problem for both the United States and the international community. It is a crime of relatively recent vintage, having its growth in the years following computerization and the expansion of information technology. Money laundering is a crime of many variations, many approaches, and a host of different laws, as countries do not always have consistent approaches. Combating money laundering, therefore, requires consideration of issues of national, transnational, and international jurisdiction.

In her book, *Legal Globalization: Money Laundering Law and Other Cases*, Heba Shams provides a superb review and analysis of jurisdictional questions related to money laundering. Although money laundering serves as the theme of this book, the overarching concern relates to how to combat this criminal conduct in a global society. Money laundering laws provide a case study to demonstrate the jurisdictional challenges faced by nations working to eradicate this form of criminality.

This critique first will provide a brief overview of Ms. Shams's extraordinary work. As she reflects on jurisdictional issues relevant to money laundering from both a national and international perspective, the United States, appropriately, is not the focal point. Thus, the next section of this review examines whether the U.S. approach to money laundering, in its legislation and application, fits within the construct suggested by the author of this book. In many respects, the United States is already a participant, both in the global effort to contain money laundering and in what Ms. Shams terms the "supranational legal order."¹ But the

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1. See HEBA SHAMS, LEGAL GLOBALIZATION: MONEY LAUNDERING LAW AND OTHER CASES

idiosyncrasies of U.S. money laundering laws present concerns. While being a leader in fighting money laundering activity, the U.S. Department of Justice has used new statutes creatively to expand prosecutorial power beyond its intended purpose.

I. NEW MODALITIES FOR COMBATING MONEY LAUNDERING

Tracing money laundering laws from their inception in 1970,² through internationalization in the 1980s,³ to the laws' use in response to terrorist acts following September 11,⁴ sets the stage in providing an overview of the growth and development of this area of law. Heba Shams captures the chameleon qualities of money laundering legislation by showing the shift from its initial use to combat drug activity, to its more recent focus of curtailing terrorism. Ms. Shams justly notes that Professor Norman Abrams sees this evolutionary process as a "shift" "from the objective dangerousness of the *act* to the personal dangerousness of the *person*."⁵

Ms. Shams warns readers of the "diversity" and variation that one will find in domestic money laundering laws.⁶ As such, the task of examining money laundering laws from both a national and international perspective presents a monumental task. Heba Shams places money laundering in the context of globalization, in that she believes "[u]nderstanding money laundering law as a legal phenomenon is not possible without an understanding of the context in which it emerged."⁷ The problem that arises is the vast range of definitions afforded the term "globalization."⁸ As noted by the author, "[g]lobalization is not a process that is simply

193–236 (2004).

2. Most notable is the United States Bank Secrecy Act passed in 1970. Title II of the Bank Secrecy Act provided the basis for financial institutions to report domestic and foreign currency transactions. *See* Pub. L. No. 91–508, 84 Stat. 1114 (1970), recodified pursuant to Pub. L. No. 97–258, 96 Stat. 877 (1982). *See also* SHAMS, *supra* note 1, at 17–26.

3. SHAMS, *supra* note 1, at 26–38 (discussing the United States Money Laundering Control Act of 1986, the British Laundering Statutes in the 1980s, the Vienna Convention of 1988, and the Basel Principles of 1988).

4. *Id.* at 39–42 (discussing the creation of the Financial Action Task Force and post-September 11 response). In the United States the post-September 11 response regarding money laundering is seen in the Patriot Act's passage of the "International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001." *See* Pub. L. No. 107–56, tit. III, Oct. 26, 2001, 115 Stat. 296.

5. SHAMS, *supra* note 1, at 6 (citing Norman Abrams, *The New Ancillary Offenses*, 1 CRIM. L. FORUM 7 (1989)).

6. *Id.* at 43.

7. *Id.* at 110.

8. *Id.* at 59–111.

happening to the society. In many ways it is a process that is brought about by the society itself.”⁹

Money laundering presents an array of substantive and procedural issues. For instance, it is a “derivative offense” largely associated with other forms of criminal conduct.¹⁰ Procedural conflicts also can arise when enforcing a country’s money laundering laws internationally. In addition, money laundering is a crime that crosses three spheres: national, transnational, and international.

The book explores different modalities for responding to money laundering in a globalized world. State-based solutions are explored, such as providing extraterritorial jurisdiction to prosecute the conduct,¹¹ and seeking international cooperation.¹² The deficiencies of each of these approaches are noted. For example, when extraterritorial jurisdiction is extended to provide a country with jurisdiction to prosecute, conflicts may develop between the laws and regulations of the country seeking to prosecute and the country where a bank or entity may be located. Ms. Shams notes that “stretching the national jurisdiction” through extraterritorial application can “result[] in antagonizing other countries and invoking conflict and retaliatory actions.”¹³

Heba Shams also discusses two modalities that focus away from state-based responses. These are “privatization as a modality of global governance”¹⁴ and “supranational legal order.”¹⁵ Both of these constructs approach money laundering from a global perspective.

To some extent, efforts to combat money laundering have been conducted in the global arena, thus providing a “supranational” feature to money laundering law.¹⁶ The Financial Action Task Force (FATF) represents a clear step toward global enforcement through a “supranational legal order.”¹⁷ Ms. Shams’s book provides explicit details of the FATF’s “origin, mandate, and nature.”¹⁸ The United States is one of the countries that participates in this international body, although Ms. Shams is clear to

9. *Id.* at 110.

10. *Id.* at 7.

11. *Id.* at 120–30.

12. *Id.* at 146–59. Heba Shams also discusses de-globalization and harmonization.

13. *Id.* at 124.

14. *Id.* at 163. *See also id.* at 161–92.

15. *Id.* at 193–236.

16. *See id.* at 209.

17. *See id.* at 209–11. *See also* Financial Action Task Force, <http://www.fatf-gafi.org> (last visited Dec. 17, 2005).

18. SHAMS, *supra* note 1, at 210–12.

note that the “FATF is not an international organization.”¹⁹ Although it operates as a “supranational agency” as opposed to being an “international organization,” it provides a significant change in the conception of consent and a departure from the historical State-based approach.²⁰

A “supranational legal order” is not without concerns, specifically with respect to State sovereignty.²¹ Having a global agency as the source for combating money laundering may be seen as stripping an individual nation of its power to combat this crime according to the laws of that country. Ms. Shams notes that there are also concerns when an international body with a restrictive membership imposes its position on non-member States via coercion or compulsion.²²

Although this book clearly examines money laundering in the context of globalization, it is also a book drawing a much larger picture. Heba Shams re-examines how best to handle transnational criminal conduct.

II. THE UNITED STATES, A “SUPRANATIONAL LEGAL ORDER,” AND MONEY LAUNDERING

Applying what the author provides in this work to U.S. money laundering laws presents two interesting observations. First, U.S. money laundering laws are not confined to one statutory provision, but include an array of different offenses that are scattered throughout the United States Code. Second, money laundering statutes operate broadly in the United States, with the crime often added to garden variety fraud cases. These two observations may present stumbling blocks to addressing money laundering using a globalized model.

A. *U.S. Money Laundering Statutes*

Money laundering crimes in the United States are addressed on three levels.²³ First, the Bank Secrecy Act requires financial institutions to provide information to the government on transactions exceeding a certain amount.²⁴ A financial institution that fails to comply not only can be held

19. *Id.* at 215.

20. *Id.* at 215–30.

21. *See id.* at 193.

22. Ms. Shams notes the power held by the FATF as an “unaccountable institution” with countries “that sustain[] damage by an FATF action” having no “venue for redress.” *Id.* at 230.

23. *See generally* Helesa K. Lahey, *Money Laundering*, 42 AM. CRIM. L. REV. 699 (2005); ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL*, 182–96 (2004).

24. 31 U.S.C. §§ 5311 et. seq. (2004).

criminally liable, but liability also can be premised upon the “collective knowledge” of its employees.²⁵

Money laundering statutes also are found in the criminal code. These statutes relate to “laundering of monetary instruments”²⁶ and “engaging in monetary transactions in property derived from specified unlawful activity.”²⁷ Although extraterritorial application is explicitly provided for in these statutes, the money laundering statutes do not provide the government with unlimited discretion on prosecuting conduct outside the United States.²⁸

Finally, after finding a statutory loophole that impaired the ability of the government to combat money laundering, Congress passed a money laundering statute that was incorporated in the tax code. Here one finds the requirement that “trades or businesses” provide information to the government upon receiving in excess of a certain sum of money.²⁹

These three sets of statutes placed throughout the United States Code all relate to the laundering of money and all have different requirements. They are not consistent with respect to extraterritorial application. Additionally, U.S. money laundering laws are not static. There are ever-changing developments that supplant existing legislation.³⁰ The lack of a unified money laundering statute raises questions about the viability of a globalized approach to combating money laundering. Questions likely to arise are: (1) whether national laws would be complementary to the global approach; (2) whether new laws still could be adopted within the nation;

25. See *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987) (finding it appropriate to use a collective knowledge instruction for corporate criminal liability).

26. 18 U.S.C. § 1956.

27. *Id.* § 1957.

28. *Id.* § 1956 (f) provides as follows:

There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.

Id. See also *id.* § 1957(d).

29. See 26 U.S.C. § 6050I. The trade or business is required to provide this information on a tax form labeled Form 8300. See Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485 (1992).

30. Heba Shams notes the adoption of the “*International Money Laundering Abatement and Anti-Terrorism Financing Act*,” passed as Title III of the USA Patriot Act. See SHAMS, *supra* note 1, at 40. In the United States one additionally finds the passage of the *International Money Laundering Abatement and Financial Antiterrorism Technical Corrections Act of 2004*, Pub. L. No. 108-458, tit. VI, subtit. C (§§ 6201-6205) Dec. 1, 2004, 18 Stat. 3745.

and (3) whether the United States would be allowed to maintain its individual sovereignty in prosecuting extraterritorial conduct.

B. Application of Money Laundering Laws in the United States

In addition to the variety of U.S. statutes for prosecuting money laundering conduct, specific applications of these statutes may serve as a barrier to adopting a globalized front for combating money laundering. Of particular concern here is the U.S. use of money laundering statutes in cases that do not demonstrate the typical characteristics of a money laundering crime.

Heba Shams notes how the United States has used money laundering laws with “simple transactions.”³¹ She includes a list of cases that reflect money laundering charges related to everything from “purchasing a vehicle” to “simple wire transfers.”³² It is clear that it is relatively easy for prosecutors to include money laundering charges within a typical garden variety fraud indictment. This ease is magnified by the fact that little is required to show a sufficient interstate nexus for making this a federal crime.³³ Ms. Shams also notes how a U.S. court’s sentence can be enhanced when the accused uses “sophisticated laundering techniques.”³⁴

In some cases prosecutors will use the money laundering charge as leverage to secure a plea agreement.³⁵ In other cases it is merely there to increase the sentence in a fraud case. Irrespective of the role this added charge plays, it is a benefit the government would not like to lose. As such, the same questions that arose in considering a globalized approach to money laundering are likely to be questions in considering the availability of this statute outside the context of the generic money laundering type of offense.

CONCLUSION

The fact that money laundering laws exist in the United States, that this country has been at the forefront in moving other countries to adopt comparable legislation, and the key role of the United States in the FATF,

31. See SHAMS, *supra* note 1, at 48.

32. *Id.*

33. *Id.*

34. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2C1, 1(b)(2)(C)).

35. See Teresa E. Adams, Note, “Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?,” 17 GA. ST. U. L. REV. 531, 571 (2000).

would imply that the United States is committed to a global strategy to curtail this problem. The U.S. recognition of globalization, however, may fall short if there is any impediment to the breadth and variety of existing laws within this country.³⁶ Whether this would impede the “legal global governance” scheme considered by Heba Shams in this book is uncertain, but it clearly warrants discussion in reconsidering money laundering or any other transnational crime in a global context.

36. *See also* International Office of National Drug Control Policy, <http://www.whitehousedrugpolicy.gov/publications/international/factsht/laundrying.html> (last visited at Dec. 17, 2005).