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## FOREWORD

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## MONEY LAUNDERING: THE STORY OF BLACK TO WHITE

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BY HARSHIT MISHRA & AKANCHA<sup>1</sup>

### ➤ INTRODUCTION

Money Laundering is amongst the most multifaceted and sophisticated offence which has posed to be a conundrum around the world. It is a process of camouflaging the original owner of the illegal money and portraying it to be legitimate.<sup>2</sup> With the global rise in the organized crimes, this menace has set prominence again. *Ergo*, it is paramount to keep a check on this perilous cycle of conversion of illicit currency as once the nature of the currency is turned legitimate it can be reused to finance the organized crimes which ultimately poses a grave threat not only on the criminal system but also on the financial systems in jurisdictions around the world.<sup>3</sup>

There are clear pieces of evidence to prove that physical currency is the most preferred vehicle of choice for money laundering thereby also being the root cause for all the organized crimes.<sup>4</sup> However, the use of cash cannot be eliminated absolutely from the economy. *Arguendo*, the latter part of the paper explains in detail the approaches to curb this offence by balancing the two extremes: acknowledging the use of physical currency in the economy and curbing its misuse thereby combating money laundering.

### ➤ CONCEPT OF MONEY LAUNDERING

Every jurisdiction has a different set of definitions to constitute the activities involved in the offence of Money Laundering albeit, all definitions encompass the similar elements<sup>5</sup>. Money Laundering is a series of clandestine transactions done by camouflaging the original owner with the aim of obscuring the illicit money into the legitimate financial market.<sup>6</sup>

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<sup>2</sup> Enakshi Jha, *Money – Laundering: The Dirty Crime Eroding the Banking System*, SCC ONLINE, (2016) 2 HNLU SBJ 1, at 2, 2.

<sup>3</sup> Sachet Singh, *Black Money and Voluntary Disclosure of Income Scheme: Two Sides of the same Coin*, SCC ONLINE, (2014) 1 KIIT Student L Rev 1 at 3, 4.

<sup>4</sup> Peter Sands et al., *Limiting the Use of Cash for Big Purchases – Assessing the Case for Uniform Cash Threshold*, M- RCBG, Associate Working Paper Working Paper Series, No – 80, HARVARD KENNEDY SCHOOL, September 2017 at 23, 25.

<sup>5</sup> V. Kumar, *Controlling Money Laundering in India – Problems and Perspectives*, IGIDR (Feb. 28, 2019, 3:01 PM), [http://www.igidr.ac.in/conf/money1/mfc-11/Singh\\_Vijay.pdf](http://www.igidr.ac.in/conf/money1/mfc-11/Singh_Vijay.pdf).

<sup>6</sup> 34 MICHAEL LEV & PETER REUTER, *MONEY LAUNDERING: CRIME AND JUSTICE, A REVIEW OF RESEARCH*, 289-376, (2006).

The United Nations Office on Drugs and Crime ('UNODC') defines this offence as "*the method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid the suspicion of law enforcement agencies and prevent leaving a trail of incriminating evidence*"<sup>7</sup>

In India, Money Laundering has been defined under the Prevention of Money Laundering Act, 2002<sup>8</sup> (PMLA), the primary legislation governing the anti-laundering scheme. Section 3<sup>9</sup> of the Act lays a detailed definition of this offence. It defines 'Money Laundering' as any process connected to the 'proceeds of crime' and may include concealing, acquiring, possessing or using such property, provided that such property is claimed to be untainted.<sup>10</sup> The term 'proceeds of crime' has been defined under Section 2(1)(u) and includes any property derived directly or indirectly through criminal activities specified under the Schedule of the Act. Further, on a conjoint reading of Section 2(1)(u) with Section 3, an element of *mens rea* is not dispensed, therefore, it is likely that person not facing a trial of offences specified under the Schedule, may still be liable for money laundering.<sup>11</sup> Moreover, this offence is not an independent crime under the legislation but a predicate offence i.e. proceeds of another crime are the subject matter of laundering.<sup>12</sup>

#### ➤ MODUS OPERANDI & TECHNIQUES OF LAUNDERING

Unlike other offences, money laundering is accomplished through a chain of transactions which ultimately converts illicit or "black money" into legitimate source or "white money". The three quintessential stages are<sup>13</sup>-

1. **Placement-** Under this stage the illegal currency enters the financial system commonly through the legitimate financial institutions. This is done to manipulate the funds and make them more liquid to avoid detection.<sup>14</sup> Several international jurisdictions have framed regulations to curb this menace at the first stage itself, as it becomes impossible to trace the money trail after crossing this stage. Placement is generally done by opening several fake bank accounts and depositing money in them.

<sup>7</sup> Aseem Chawla, *Worldwide: Prevention of Money Laundering: A Global Panorama*, MONDAQ CONNECTING KNOWLEDGE & PEOPLE (Jan. 27, 2019, 1:08 pm), <http://www.mondaq.com/india/x/591688/Money+Laundering/Prevention+of+Money+Laundering+A+Global+Panorama>.

<sup>8</sup> Prevention of Money Laundering Act, 2002, No: 15, Acts of Parliament, 2003, (India).

<sup>9</sup> *Ibid*; Section 3 – *Offence of Money Laundering*.

<sup>10</sup> Nimesh Tarachand Shah vs Union of India, WP (Cri) No: 67 of 2017, SC.

<sup>11</sup> J Sekar Vs. Union of India, WP (Cri.) No: 5320/2017, (Delhi HC).

<sup>12</sup> *Supra* Note 5.

<sup>13</sup> Rama Raju Vs Union of India, MANU/AP/0125/2011/ [2011] 164 Comp Cas 149 (AP).

<sup>14</sup> Australian Government, *Introduction to Money Laundering*, AUSTRALIAN TRANSACTION REPORTS AND ANALYSIS CENTRE (Feb. 27, 2019, 11:23 PM), [http://austrac.gov.au/elearning/pdf/intro\\_amlctf\\_money\\_laundering.pdf](http://austrac.gov.au/elearning/pdf/intro_amlctf_money_laundering.pdf).

2. **Layering-** This stage is also referred to as the structuring stage. It embroils a complex trail of financial transactions with the ultimate aim to make the source of origination untraceable. The launderer transfers funds to countries designated as tax havens and reinvests them into the country of origin. Layering can be concluded through fictitious sale and purchase, special purpose vehicle, electronic funds transfer, shell companies etc.
3. **Integration-** The last stage involves the blended money in the legitimate market to be re-injected in the market as legitimate funds. Investing in new business and enterprises are the platforms for investing this currency. The other ways include real estate investment, gold market etc.

➤ **INTERNATIONAL REGIME TO CURB MONEY LAUNDERING**

With the growth and integration of the financial systems around the world, organized crimes have achieved international dimensions. This has led the international community to join together and frame rules, treaties, and regulations thereof to counter-act the same. Some of the major initiatives at the international level are explained hereinbelow-

1. **The Basel Committee (1974)** - The Committee is the first international legal instrument formed after the serious disturbances in the banking system and international currency. The objective of the Committee was to frame principles that addressed the supervisory issues in the banking system globally.<sup>15</sup> The three major principles laid down by the Committee included- measures for supervisory arrangements for the nation, international banking and in the area desired by the Committee.

Later in December 1988, the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering laid down four major principles to protect the banking system, which included- customer identification, framing effective national policies governing the banking system, cooperation with the national authorities and adherence to the statements enshrined in this principle.

2. **UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances(1988)**- The Convention is amongst the three important treaties in force, dealing with money laundering in drug trafficking. It identifies the nexus between money laundering and drug trafficking. The Convention provides a platform for the enactment of domestic legislation criminalizing laundering of drug money and identifying, freezing and seizing the same.

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<sup>15</sup>BIS, Prevention of Criminal Use of the Banking System for The Purpose of Money – Laundering, (Feb. 27, 2019, 11:33 PM), <https://www.bis.org/publ/bcbasc137.pdf>.

3. **Global Programme against Money Laundering (GMPL) (1997)**- The programme was established as a mandate from the 1988 Convention. The objective of the programme was to build an anti-money laundering regime for the signatory states through technical cooperation and research, for combating money laundering involved in all serious offences.<sup>16</sup> It also focused on raising awareness in the public and private sector about the offence.
4. **Financial Action Task Force (FATF) (1989)** - This inter-government body was constituted by the G7 countries (United Kingdom, Italy, Canada, France, Germany, USA, and Japan) with the primary objective of promoting national and international policies for combating issues akin to terrorist financing and money laundering. In the year 1990, it suggested forty anti-money laundering measures with nine special recommendations in 2001 against terrorist financing. The recommendations given by this body revolved majorly around three criteria's namely- Legal Governance, Financial Regulations, and International Cooperation.
5. **Strasbourg Convention (1963)** -The Convention extended the scope of money laundering beyond drug trafficking to encompass its relation with other organized crimes. The council focused on area-specific measures to combat terrorism.<sup>17</sup> Other initiatives by Europe includes EC Anti-Money Laundering Directives 1991, Warsaw Convention specifying other measures of combating terrorism and money laundering.
6. **Wolfsberg AML Principles**- Transparency International, a Berlin-based NGO in collaboration with eleven private sector banks laid down eight golden principles for curbing money laundering in private banking sector. It was the first set of non-binding principle guidelines governing the private banks and their relationship with the clients and strengthening the investigation mechanisms to track down launderers.<sup>18</sup>

#### ➤ NATIONAL ANTI-MONEY LAUNDERING INITIATIVES

With India emerging as a financial center, its vulnerability to money laundering activities has increased proportionately. In the past few years, India has attracted the world's attention with its zealous approaches for fighting against money laundering and other economic issues. This menace plagues India on two levels. First is the international level which commonly includes Hawala Transactions and is checked *via* the foreign exchange laws i.e. Foreign Exchange Management Act, 1999 (**FEMA**) and

<sup>16</sup>Owais Hasan Khan, *International Anti – Money Laundering Regime and India*, SCC ONLINE, CNLU LJ (6) [2016-17] 179, at 186, 187.

<sup>17</sup>Strasbourg, 8. XI. 1990.

<sup>18</sup>Kris Hinterseer, "The Wolfsberg Anti-Money Laundering Principles" Vol. 5 Issue: 1, JOURNAL OF MONEY LAUNDERING CONTROL (Feb. 26, 2019, 10:35 PM), <https://doi.org/10.1108/eb027291>.



Black Money and Imposition of Tax Act, 2015. The second level is the domestic level which is regulated *vide* various legislation including Indian Penal Code, Criminal Procedure Code, Benami Transactions Act, 1988, PMLA, 2002, Income Tax Act. This segment of the paper examines some anti-laundering measures taken up by the government-

1. **Criminalizing Money Laundering-** India being a signatory to the Vienna and the Palermo Convention, with its aim to eradicate money laundering from the country, declared this menace as an offence by the enactment of two legislation namely- PMLA,2000 and Narcotic Drugs and Psychotropic Substance Act, 1985 (**NDPS**). Section 3 of the PMLA and 8A of the NDPS defines money laundering and has been detailed in the former part of the paper. The punishment for this offence is three years imprisonment extendable up to seven years and fine up to five lakh rupees.<sup>19</sup> Section 5 of the PMLA, 2002 also empowers the Directorate to seize the property under an apprehension of its involvement in such offence.<sup>20</sup> Both the Acts also provide a detailed procedure for investigation and conviction for Money Laundering and offences related thereto.

## 2. Enforcement Mechanisms

- **Directorate of Enforcement (ED)** - This investigative arm of the government was established in 1956. The responsibilities of the Directorate include collecting information from different agencies, analyzing it and investigation. The Directorate ensures compliance and enforcement of certain provisions for three legislative enactments namely-PMLA 2000, Conservation of Foreign Exchange Preservation of Smuggling Activities Act, 1974 (**COFEPOSA**) and FEMA, 1999.
- **Reserve Bank of India (RBI) (1935)** - RBI is the sole principal authority regulating the various financial institutions in India. The institution issues timely guidelines and circulars for regulating the laundering issues and the procedure and manner of issuing the information in the banks<sup>21</sup>. Some of the guidelines include- KYC, Client Record Keeping and other guidelines thereof.
- **Financial Intelligence Unit- INDIA (FIU-IND) (2004)**- Financial Intelligence Unit is an independent government institution established on the 29<sup>th</sup> recommendation of FATF and headed by the Ministry of Finance. Its primary objective is receiving, analysis and dissemination of information as per international standards. It also acts as a central repository by maintaining the national database of all suspicious cash transactions.

<sup>19</sup>Prevention of Money Laundering Act, Sec 4 (2002).

<sup>20</sup>Prevention of Money Laundering Act, Sec 5 (2002).

<sup>21</sup>Rule 7(4), Financial Institution and Intermediaries Rules, 2005.

3. **Linking of Permanent Account Number (PAN) with Aadhaar Card** - The Hon'ble Apex court upheld the constitutional validity<sup>22</sup> of Aadhaar and mandated its linkage with PAN Card, for filing income tax returns and for availing government welfare services and subsidies. This centralized system will not only curtail tax evasion but also black money deposited through fake accounts. Linkage of Aadhaar with PAN Cards will also diminish the problem of shell companies in the country.
4. **Demonetization** – The multi-prolonged approach of the Indian government has been far-reaching in decreasing the illegal money in the economy and accelerating electronic payment modes.<sup>23</sup> The policy removed INR 500 and INR 1000 currency notes from being a legal tender and introduced new currency of INR 2000. Albeit the policy fetched a disruptive impact on the economy, it curbed counterfeiting and other organized crimes to a great extent.<sup>24</sup> However, the latter part of the paper details the flaws in the strategy and execution of the policy that hindered in its optimum accomplishment.

➤ **LOOPHOLES PLAGUING ANTI- MONEY LAUNDERING REGIME & POSSIBLE SUGGESTIONS**

This segment of the paper analyses the efforts made by India to curb this menace and its effectiveness. It further highlights the loopholes prevailing in the current anti-laundersing legislation and the potential changes to curb the same.

- **POLICY CHANGES**

1. **Check and Balance on the availability of cash in the economy-**

Physical currency is not an illegal commodity *per se*, rather it depends on its usage. The essence of the argument is that cash due to its universal acceptance may be used in daily life for small transactions but the feature of anonymity adds to its pervasive use in money laundering and other organized crimes like terrorist funding, human trafficking, drug dealings etc. Despite the unabating efforts to promote the digital economy, cash still remains a dominant payment mechanism or the most preferred method for facilitating major legitimate economic activities.<sup>25</sup>

<sup>22</sup> Justice K.S Puttaswamy (Retd.) Vs Union of India (2017) 10 S.C.C 1 (India).

<sup>23</sup> *Supra* Note 4.

<sup>24</sup> Haylea Campbell, *The Global War on Cash: Another Front in the Fight Against Corruption and Crime*, RUSI COMMENTARY (Feb. 27, 2019, 11:42 PM), <https://rusi.org/commentary/global-war-cash-another-front-fight-against-corruption-and-crime>.

<sup>25</sup> John Bagnall et al., *Consumer Cash Usage: A Cross-Country Comparison with Payment Diary Survey Data*, ECB, Working Paper Series No. 1685 (Frankfurt: ECB, 2014) at 4, 5.

*Ergo*, this holds no surprise that cash is the main legal facilitator of organized crimes with almost negligible chances of detection.<sup>26</sup>

With the intent to curb this menace, below mentioned changes are a few steps focusing on the elimination of high-value cash transactions and limiting its storage –

- ***Eliminating High Denomination currencies***- Despite several decries taken globally to wither cash; it is apparent that the argument to eliminate cash completely from any economy is completely misplaced. *Ergo*, the only possible way is to curb the illicit use of cash with its continued legitimate use in the economy. With the above-given skew, the efforts must be made to curb the use of large volumes of cash by making it difficult to transact, move and store. As cash has its own issues, smaller the denomination, the more is the weight which in turn requires more logistics and planning to move it. Focusing on the abovementioned approach, discontinuing high denomination notes from the economy will aid the same.

Moreover, many developed economies to name a few like USA<sup>27</sup>, Europe<sup>28</sup>, Singapore<sup>29</sup> have discontinued the use of higher denomination notes on account of giving the country a boost to anti-money laundering activities. India following the same footsteps, introduced the demonetization policy on 8<sup>th</sup> November 2016 which has been discussed in detail in the former segment of the paper. However, the policy could not be a huge success due to its flawed execution and strategy. Currently, the highest currency denomination in the Indian economy is INR 2000, which must be eliminated to the earliest. The highest currency denomination must be limited only to INR 500 and gradually decreased if needed.

- ***Imposing cash thresholds*** - As noted above, cash will always thrive in any economy. Consequently, uniform thresholds placed on cash transactions will be the lowest risked and effective legislative initiative for constraining the illegal use of cash.<sup>30</sup> This potential initiative will not only combat illicit use of cash but will also regulate tax frauds.<sup>31</sup> Aiming the same the Special Investigation Team proposed a ban on the cash transactions over INR 3 lakhs which was further lowered to INR 2 lakhs in March 2017<sup>32</sup>. The initiative was more

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<sup>26</sup>*Supra* Note 4.

<sup>27</sup>*Supra* Note 2.

<sup>28</sup> ECB, 'ECB Ends Production and Issuance of €500 Banknote', Press Release, 4 May 2016.

<sup>29</sup> JX Low, *Why larger denomination notes possess a high money laundering risk*, AML-CFT (Feb,06, 2019, 01:30 am), <https://aml-cft.net/large-denomination-notes-poses-high-money-laundering-risk/>.

<sup>30</sup>*Supra* Note 2.

<sup>31</sup> EC, 'Inception Impact Assessment: Proposal for an EU Initiative on Restrictions on Payments in Cash', ECFIN.DDG1.C.5, Jan, 23, 2017 (Feb, 26, 2019, 6:02 PM), [http://ec.europa.eu/smart-regulation/roadmaps/docs/plan\\_2016\\_028\\_cash\\_restrictions\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_028_cash_restrictions_en.pdf).

<sup>32</sup>Section 269ST, 271DA, Income Tax Act, 1961

favoured in the country as compared to the demonetization policy.<sup>33</sup> However, the provision is too vague as it fails to give a clear picture of the varied cash limits in different sectors, which leaves wide loopholes and again cash being the king. Moreover, the limit of INR 2 lakhs is still a high value and the limit needs to be reduced further. Given the skew of the Indian economy, the threshold on cash transaction might be limited to INR 50,000 by the government and any transaction exceeding the given amount must be investigated, albeit the said threshold can also be reduced further. Moreover, the threshold must be uniformly applicable to both financial institutions and high-value purchases. It must also extend to business to business transaction and not be merely limited to business to consumer transactions.

- **Reporting bulk cash movements-** There are sufficient evidence from various law enforcement agencies to conclude that bulk cash movements create major problems in the economy. For instance its use for purchasing high-value products which ultimately leads to the laundered money being vanished, tax evasion by dealers through under-invoicing. Banks need to be diligent in reporting any bulk transaction that does not consummate with the previous transactions and in any way can be related to laundering.<sup>34</sup> Albeit, India not only needs a centralized and well-established mechanism to give effect to the reporting policy but also requires an appropriate legal base and operational structure for further investigation by banks<sup>35</sup>.
- **Promoting digitization-** Shifting from the use of physical currency notes to electronic alternatives of transactions is one of the best approaches to minimize the illicit use of cash as well for reducing the problem of tax evasion. The Indian government has taken several initiatives to bolster the digital economy in the country like the introduction of Internet Banking, Mobile Wallets, UPI, BHIM etc. and to inculcate a sense of vigilance amongst the general public. According to a survey the volume of digital transactions in 2017-18 has risen from 32% to 62%.<sup>36</sup> However, digitization cannot boom in the Indian economy until banking systems are strengthened and security concerns are addressed thereto.

<sup>33</sup>The World Bank, *GDP Per Capita (current US\$) 2017*, (Feb, 26, 2019, 6:07 PM), <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=IN>.

<sup>34</sup> Online Desk, *Four steps to net the 'clever' black money hoarder : SIT to Modi Govt*, NEWS INDIA EXPRESS (Feb. 26, 2019, 02:44 PM), <http://www.newindianexpress.com/nation/2016/nov/11/four-steps-to-net-the-clever-black-money-hoarder-sit-recommendations-to-modi-govt-1537492.html>.

<sup>35</sup>*Supra* Note 7.

<sup>36</sup> Shreya Jain, *Digital Payment in India to supersede Cash & Non – Digital Payments by 2022*, REPORT IDC (Feb, 26, 2019, 02:50 PM), <https://www.idc.com/getdoc.jsp?containerId=prAP43454117>.

## ➤ LEGISLATIVE CHANGES

**Changes in the Prevention of Money Laundering Act, 2002:**

Amongst the zillion efforts made by the government to curb money laundering, the most important legal instrument has been the PMLA, 2002. The Act was drafted with the objective to combat money laundering and issues related thereof.<sup>37</sup> However, even after a decade of the legislation, there have been almost 2,260 cases with a conviction rate of only 2<sup>38</sup>. The increasing number of cases with such a slow conviction rate is sufficient evidence to prove the inefficient implementation and deficiency in the system. *Ergo*, some major amendments under the Act in order to widen its scope and secure an effective conviction rate is a pressing need.

**Money Laundering must be a standalone offence:**

One of the key recommendations of FATF was to make the offence of money laundering a standalone offence.<sup>39</sup> Even after the numerous amendments in the PMLA, 2002 the offence of money laundering remains a predicated offence i.e. contingent upon the fate of cases decided under other offences listed under the Schedule and upon investigation by the other agencies like the Income Tax Department or CBI or Police. *Ergo*, the investigation by the ED largely depends on the data provided by these agencies thereby creating a fundamental difficulty in confiscating the property in absence of conviction in any other crime and giving bounteous time to the launderer to escape from his acts.<sup>40</sup> This generalized approach of no proceedings solely relating to money laundering even if there is *corpus delicti* against him is a threat to the democratic system.<sup>41</sup> In a number of cases like the 2G Scam Case<sup>42</sup> or Airtel- Maxis Case<sup>43</sup> the angle of money laundering fell apart as the courts acquitted the accused charged under other Schedule offences.

<sup>37</sup> Anirban Bhattacharya, *India: All You Need to Know About The Law Relating To Money Laundering in India*, MONDAQ CONNECTING MIND & KNOWLEDGE (Feb. 26, 2019, 03:01PM), <http://www.mondaq.com/india/x/589978/Money+Laundering/All+You+Need+To+Know+About+The+Law+Relating+To+MoneyLaundering+In+India>.

<sup>38</sup> PTI, *Prosecution in 370 cases under PMLA, two convictions: Arun Jaitley*, ECONOMIC TIMES (Feb. 26, 2019, 03:05 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/prosecution-in-370-cases-under-pmla-two-convictions-arun-jaitley/articleshow/59699946.cms?from=mdr>.

<sup>39</sup> Devesh K. Pandey, *Money Laundering maybe made a criminal offence*, THE HINDU (Feb. 04, 2019, 15:24), <https://www.thehindu.com/news/national/money-laundering-may-be-made-criminal-offence/article18279241.ece>.

<sup>40</sup> *Ibid*.

<sup>41</sup> Arti Singh, *Prevention of Money Laundering Act :Why PMLA needs a relook*, FINANCIAL EXPRESS (Feb. 26, 2019, 03:21 PM), <https://www.financialexpress.com/economy/prevention-of-money-laundering-act-why-pmla-needs-a-relook/1283175/>.

<sup>42</sup> Subramanian Swamy vs A. Raja, (2012) 9 SCC 257 (India).

<sup>43</sup> M/s. Advantage Strategic Consulting Pvt Ltd v/s Union Of India, W.P No – 40240 of 2015, (Madras).

The Hon'ble Karnataka High Court in *Smt. K. Sowbaghya vs Union Of India*<sup>44</sup> appreciated the fact that on a conjoint reading of Section 5<sup>45</sup>, 8<sup>46</sup> and 2(1)(v)<sup>47</sup> of the PMLA, 2002 it is evident that the legislature through amendments in the PMLA, 2002 anticipates making the offence of money laundering a standalone offence *de hors* a Schedule offence, if circumstances warrant. Additionally, in standalone laundering cases, the laundered assets become *corpus delicti* and should be forfeitable as such.<sup>48</sup>

*Arguendo*, the offences under the PMLA, 2000 must be segregated into “parent offence” and “propagated offence” to circumvent the overlapping of offence of money laundering with other offences under other special legislation like the Copyright Act, Indian Penal Code etc. thereby creating a legislative mess.

Conversely, making this crime a stand-alone offence will change the entire landscape. It will facilitate the ED in conducting a primary investigation thereby reducing dependence on reports and conviction in other offences ultimately resulting in greater prosecution and efficiency.

1. **‘Pro- Creditor’ amendments in PMLA, 2000** – The legislature introduced the PMLA, 2000 with intent to combat and control money laundering and offences related thereto. However, the Act has been ineffective in dealing with “proceeds of crime”. On scrutinization of Section 5<sup>49</sup> of the Act it is apparent that the ED has wide discretionary powers under the PMLA, 2000 to confiscate the property if there is a *reason to believe* that the said property is obtained from “proceeds of crime” and its possession with the accused can frustrate the proceedings in any manner. The Act also fails to lay down a detailed time frame for adjudication of these offences. The aforementioned arguments evince that until the dispute is not adjudged by the Adjudicating Authority under the PMLA, 2002 the property of the accused cannot be alienated and is under “secure zone”<sup>50</sup> thereby economically relaxing the accused and bringing everything to a standstill. Moreover, in the absence of any strict time frame under the Act, the judicial delay also adversely affects these cases. This not only affects the government and the victim's

<sup>44</sup> W.P No: 14649 of 2014 (GM - RES), Kar HC.

<sup>45</sup> Prevention of Money Laundering Act, 2002; Sec 5 - *Attachment of Property involved in money laundering*.

<sup>46</sup> Prevention of Money Laundering Act, 2002; Sec 8 – *Adjudication*.

<sup>47</sup> Prevention of Money Laundering Act, 2002; Sec 2(1) (v) – *Definition of property*.

<sup>48</sup> *Supra* Note 26.

<sup>49</sup> *Supra* Note 27.

<sup>50</sup> Nikesh Tarachand Shah vs Union of India, WP (Criminal) No: 67 of 2017, (SC).

interest but is also economically adverse as the unused or frozen assets gradually turn into NPA's.<sup>51</sup>

Henceforth, the rules under the Act must be interpreted to facilitate the dispossession of the accused from his laundered property in a limited time frame and disbursing it to the innocent victims of his crime i.e. banks, unpaid employees etc. thereby protecting them from extensive litigation. The intent of the proceedings must be to utilize such property for the growth of the country rather than its inclination to put the launderer behind the bars as there are other special legislation to penalize the accused for various the crimes propagated through money laundering i.e. Negotiable Instrument Act, Indian Penal Code etc.

The judiciary in a recent ruling in *SREI Infrastructure Finance Limited v/s. Sterling SEZ and Infrastructure Limited*<sup>52</sup> upheld that the PMLA has no jurisdiction to attach the property of the accused to a “secure zone”, undergoing Corporate Insolvency Resolution Process. This decision will expedite the disbursement of the laundered property as well as will benefit the real victims of the menace i.e. the creditors. The decision is a step towards the logical interpretation of the Act while maintaining its constitutional flavor.

## **2.Exclusion of sectors highly prone to laundering-** Precious metal and Real estate

Sectors are one of the most prone sectors to the offence of money laundering. There is a pressing need to form stringent provisions to curb this menace prevailing in these sectors. The legislators with the intent to bring these sectors under the umbrella of the PMLA, 2002, amended the Act whereby these sectors will be governed by the Act *only* on the discretion and on the passing of an executive order by the government.<sup>53</sup> However, any such order by the government is still awaited. Furthermore, the legislation like Real Estate Regulation and Development Act, 2016 (RERA) lacks proper implementation. *Ergo*, the government must abandon such equivocal approach and must bring necessary amendments to regulate these sectors so that laundering can be curbed to a great extent.<sup>54</sup>

## **3.Comprehensive Enforcement Agency-** PMLA, 2002 limits its efficiency in cases of complex laundering or terrorist financing issues.<sup>55</sup> The Eighth Report of the Second

<sup>51</sup>Abhinav Sekhri, *Fixing India's Money Laundering Regime*, GAB – THE GLOBAL ANTI – CORRUPTION BLOG. (Jan,27, 2019, 16:19), <https://globalanticorruptionblog.com/2017/11/13/fixing-indias-anti-money-laundering-regime/>.

<sup>52</sup>M.A 1280/2018 in C.P. 405/2018, NCLT Mumbai.

<sup>53</sup>*Supra* Note 51.

<sup>54</sup>*Supra* Note 36.

<sup>55</sup>Satya Prakash, 'Money Laundering will need more teeth', HINDUSTAN TIMES, (Feb, 26, 02, 2019, 12:25 PM), <https://www.hindustantimes.com/delhi-news/money-laundering-act-needs-teeth/story/o5etKDhHC4VHEK7CJy0kDP.html>.

Administrative Reforms Commission titled “Combatting Terrorism: Protecting by Righteousness”<sup>56</sup> proposed that keeping the Directorate of Enforcement as the nodal agency some powers under the PMLA, 2002 must be delegated to strengthen the institutional coordination mechanisms between the information collecting agencies and the Directorate of Enforcement thereby forming a comprehensive enforcement agency to deal with this offence. This legislative converge will help entities to have easier access to information as well as deal with all the complex issues of this menace by bridging the gap between laundering and other criminal offences.<sup>57</sup>

### ➤ **Administrative Changes**

1. **Coordination between the center and the state-** More the decentralized, more the better. Uniform implementation of laws relating to money laundering and rules thereof in every part of the country will prove to be an effective approach in combating the offence.<sup>58</sup> The country has been reckoned by many multi-billion scams in the past due to the disagreements prevailing between the Center and the State. The recent incident whereby the West Bengal, Chhattisgarh and Andhra Pradesh state governments revoked their consent to conduct raids by CBI ultimately leading the laundered money to vanish and offenders to escape is an illustration of non-coordination between the center and the state<sup>59</sup>. Therefore, not only the center but all the state governments should be equally committed to enforcing uniform anti-laundering laws around the country thereby removing any tussle between them.
2. **Underfunding of Enforcement Agencies-** The Enforcement Agencies lack inadequate latest technology due to inadequate financial funding which ultimately creates hindrances in their investigation. Moreover, this problem is catalyzed by the non-convergence of the funding of the separate agencies. *Ergo*, convergence of funds for even and proper distribution of fund requires urgent attention of the government.
3. **Due diligence by the Banking Sector-** Banks play a major role in detecting the laundered money at its nascent stage or the placement stage. Although the government has introduced several rules and regulations to obligate banks to perform due diligence, the Banking Sector needs to be more vigilant in detecting, investigating and reporting suspicious transactions as well as must keep a check on the authenticity of the information provided to them. For

<sup>56</sup> Govt of India, *Second Administrative Reforms Report, Combating Terrorism Protecting by Righteousness*, June 2008, <http://smartprep.in/wp-content/uploads/2016/12/8-Combating-Terrorism.pdf>

<sup>57</sup> *Supra* Note 2, at 14.

<sup>58</sup> *Supra* Note 5.

<sup>59</sup> PTI, *After Andhra Pradesh, now West Bengal withdraws ‘general consent’ accorded to CBI*, ECONOMIC TIMES, (Feb, 26, 2019, 5:30 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/after-andhra-pradesh-now-west-bengal-withdraws-general-consent-accorded-to-cbi/articleshow/66658195.cms>.



instance, imposing stricter KYC norms will help banks to keep a better check on the transactions.<sup>60</sup> RBI should also issue timely circulars regarding the same.

- INTERNATIONAL CHANGES

1. **Identifying and cooperating with high-risk jurisdictions-** The international flavor of money laundering involves transferring money from one jurisdiction to other with an ultimate aim to conceal its true origin. The transfer of laundered money is commonly done in jurisdictions having weak anti-laundering legislation. The key to curb this offence is international harmonization of legislation.<sup>61</sup> India needs to corporate and coordinate with jurisdictions lacking stringent anti-laundering legislation to investigate into such offences and deport launderers to India. Additionally, the government should obligate the Indian companies investing in such countries to make the requisite disclosures. Although the government has taken initiatives like the Automatic Information Exchange and Double Taxation Avoidance Agreement, however, these efforts are limited to only certain countries thereby leaving a gap for the escape of offenders.
2. **Reverse Piercing the Corporate Veil-** This concept originated in the United States but is yet to be recognized in India.<sup>62</sup> The principle aims to eliminate the separate legal existence of a corporate entity and its owners or shareholders. According to the said principle, a subsidiary company is an agent of the parent company and can be held accountable for the acts of the parent company. The principal will curb the formation of shell companies<sup>63</sup> as the substance of the companies is given priority over its form.
3. **Stringent norms for Shell companies-** Shell companies haven't been defined under Indian legislation. However, these companies are entities established domestic or offshore without any active business operation, constituted for the purpose of tax evasion or money laundering.<sup>64</sup> The Panama Paper leak revealed the fact that such companies can also be operated as an illegal vehicle.<sup>65</sup> Henceforth, by striking a balance between the ease of doing business and fraudulent activities shell companies must be defined under the Companies

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<sup>60</sup>Supra Note 43.

<sup>61</sup>Ibid.

<sup>62</sup> NEPC India Ltd. v/s SEBI, Appeal No: 40/2001, Securities Appellant Tribunal, Mumbai.

<sup>63</sup> Moneycontrol.com, *What are Shell Companies? All you need to know*, MONEYCONTROL.COM, (Feb. 07, 2019, 06:10 PM), <https://www.moneycontrol.com/news/business/earnings/sat-ind-consolidated-december-2018-net-sales-at-rs-60-78-crore-up-128-53-y-o-y-3499611.html>.

<sup>64</sup> Sakshi Rai, *Cracking the Whip on Shell Companies ? Not Really*, THE WIRE (Feb. 28, 2019, 7:45 PM), <https://thewire.in/business/modi-government-sebi-shell-companies>.

<sup>65</sup> Ibid.

Act, 2013.<sup>66</sup> Additionally, with the use of advanced technology like the Big Data, Aadhaar Filings and the due diligence of the capital market regulators use of shell companies for illegal actions can be curbed to a great extent.

- CONCLUSION

Money Laundering has bridged the gap between the organized crimes and the financial world, ultimately resulting in destabilization of global peace and security. For the Indian economy to flourish the huge amount of currency generated through devious means that is stashed in the foreign banks must be regulated and transported back to its origin. *Ergo*, for the equivalent, the institutional mechanisms and resources must be provided with the latest technologies and proper funding. The government also needs to implement stringent and effective anti-money laundering measures regionally, nationally and globally.

The most potent initiative to curb this menace was the enactment of PMLA, 2002 but still, a huge amount of money is laundered within and outside the country. *Ergo*, the gaping holes in the enforcement mechanisms and the provisions need proper and timely amendments to curb laundering completely from the nation. Additionally, the judicial advancements in this area will improve the conviction rates thereby deterring the offenders of this menace. *Arguendo*, plugging the legislative loopholes and better enforcement mechanisms is the way forward to curb this offence on national as well as international platform.

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<sup>66</sup> Press Information Bureau, *Task Force in Shell Companies for effective tackling the malpractice*, MINISTRY OF FINANCE, GOVT OF INDIA.

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