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# CHAPTER I

## GENERAL INTRODUCTION AND SCHEME OF STUDY

## MONEY LAUNDERING IN INDIA

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## INTRODUCTION

Money laundering can be described as a procedure, which is intended at legitimizing the proceeds of crime. Even though criminals have tried to launder their crime proceeds ever since decades but the term 'money laundering' came into existence from the practice of 1920's Chicago Mobsters - Al Capone buying & running local laundries with their betting, rackets & liquor profits[1].

Money laundering has been described in a number of different ways: money laundering is the procedure by which one conceals the existence, illegal foundation, or illegal application of earnings, & then disguises that earnings to make it appear legitimate; or Money laundering is the progression of taking the proceeds of criminal activity & making these proceeds legal; or Money laundering is the act of converting money derived from illegal activities into spends able or unpreserved form.

U.S. Customs Service has given this definition of Money laundering: "Money laundering is the procedure whereby proceeds, plausibly believed to have been derived from criminal activity, are transported, transferred, transformed, converted or intermingled with legitimate funds for the purpose of concealing or disguising the exact nature, resource, disposition, movement or possession of those proceeds. The aim of money laundering process is to make funds derived from, or associated with, illicit activity appear legitimate."

The principle of money laundering is to decrease or eliminate the risks of seizure, forfeiture and confiscation so that the fruits of criminal proceeds can be enjoyed without intervention by law enforcement.

## OBJECTIVE OF RESEARCH

[1] The first reported lighting of the term "money laundering" in a legal context was not until 1984 (see United States vs. $4,255,625.39,et seq., 551 F.Supp. 314,SD Fla 1984)

The purpose of this paper is to examine the term "Money Laundering," to find the grey areas of the Prevention of Money laundering Act and give suggestions / recommendations to overcome such problems. The major objectives of Money Laundering activities are:

- Revealing the source of illegally obtained money and placement, layering and integration of such funds
- To analyze the effects of this crime on the Economy as well as the Society.
- The legislative measures adopted to fight this crime.
- To identify the grey areas of counter measures and provides suitable solutions.
- To prevent, combat and control money laundering.
- To deal with any other issue related with money laundering.

## RESEARCH QUESTIONS

The present study forwards following set of research question:

Whether the study will lead to suggestions to curb the activities?

Whether the recent Amendment Bill of 2012 is sufficient to fill the gap with 2002 PMLA Act?

Whether curbing of the activities will help the Indian Economy considering the gigantic proposition of the money laundering?

## SCOPE OF RESEARCH

The scope of this research is restricted to various statutes regarding money laundering and its effects on the economy which is a very serious replication on our economy .In furtherance to this it will be evaluated whether these provisions are sufficient enough to give a better and successful result.

## SIGNIFICANCE OF RESEARCH

This research is being carried out with a view to help and make public aware about the laws and respective punishments relating to Money laundering in India.To adopt Anti-money laundering standards and also to find out the lacunas which our legal system has and the effect of money

laundering on the economic system as well as the effect on the society, and also the efforts of the government, the grey areas taken in view of this problems.

It will let us know why after giving clear cut guidelines relating to money laundering, the budget, and the economy. This research will enable the society in a way to find out the root cause of this problem and to overcome it.

This research is be beneficial for academicians, students, lawyers, student committee, judges and also all those interested to learn about money laundering in India specifically and throughout the world in general. This research will be used as a source of study material for future academicians or researchers.

The improvements and suggestions if any made can be used by the legislatures to fill in the gaps in an enactment in order to make appropriate amendments.

## METHODOLOGY

In the present research the methodology employed is the blend of qualitative and quantitative research.

The qualitative methodology has been taken to get the better understanding of theoretical inputs, tallying them with practical, experiential data and logically building a case for overall systemic research for Prevention of money laundering and its effects on the economy. A two -way data gathering and analysis was the main component of this methodology. These two components were as follows:-

a. Experiential data collected by the various statutes which falls under the ambit of money laundering.

b. Library research focusing mainly on earlier works about prevention of Money laundering Act and relevant issues.

The quantitative approach has been taken to know the view point of the people (if possible) and also general public regarding the same.

## TOOLS FOR DATA COLLECTION

### Survey using Questionnaire:-

This technique would be actually helpful in collecting data and viewpoint from the society about the severe replication on the economy through money laundering.

### Interview Technique:-

This technique would really help the researcher to ask the appropriate questions personally and observing the interviewee personally.

### Library:-

By taking this approach the researcher would allow herself to get the in-depth knowledge about the subject through literature review, journals, articles etc.

### E database:-

This can be used in particular to find out the present status of the problem in India and away as well as the statistics available.

## LIMITATION

The primary limitation in conducting the Research is:

1. There are limitations as to time and money.

2. The study is in relation to money laundering is related to effects on the economy, budget, taxation, banking, insurance, corporate and social sector in India. It will specifically focus on the provisions given in Prevention of Money Laundering Act along with the offences under the IPC.

This research being doctrinal in nature; will limit our resources to the materials in form of books, articles and law journals available in the Symbiosis Law School Library.

## DELIMITATION OF RESEARCH

To overcome the limitation of money for carrying out this research the researcher has approached the college to grant some support for conducting the research.

To overcome the limitation as to the availability of books in Symbiosis Law College the researcher is planning to visit other libraries if time permits.

To overcome the limitation as to the restrain on time the researcher is planning to take assistance of fellow mates.

## SCOPE OF FURTHER RESEARCH

Since the subject of this research has many magnitude and perspectives legally and socially. Thus the scope of the research is very wide for further future researches. The researcher has just focused upon the details on the legal aspects and has touched upon the Social aspects.

## SCHEME OF STUDY

The researcher is planning to visit other libraries for getting the answers for the research as well.

- On 13th February 2013 the Researcher is submitting the Literature Review.
- On 20th February 2013 the Researcher is intended to submit Chapter 1.
- On 28th February 2013 the Researcher is intended to submit Chapter 2.
- On 11trh March 2013 the Researcher is intended to submit Chapter 3 & 4.
- On 15th April 2013 the Researcher is intended to submit the First Draft.
- On 30th April 2013 the Researcher is intended to submit the Final draft.

## LITERATURE REVIEW

The researcher has read various books as well as articles based on Money laundering in which she has not found out the answers of the questions so formulated and thus she is conducting this research. The literature review is supposed to meet the two objectives, to have a wider knowledge of the subject and to analyse on the grey areas of the PLM Act and to focus on the literature closely related to the research topics.

1. **Chandan Mitra**[2] - The Author of the Book *"The Corrupt Society"*. Chanda Mitras detailed and incisive learning traces the history of corruption in the subcontinent, from the times of Kautilya to the Mughal era, the East India Company days and post Independence India. Discussing how dissatisfaction has become institutionalised the author delves into detail of the alleged Bofors kickbacks, the fodder and Bank securities scam and 'hawala' Money laundering, connecting these to covert government practices of using corruption as an instrument of State policy. Again describing the proliferation and legitimization of pretty corruption in everyday life, he presents a enthralling account of the blatant 'hafta', 'chai-pani', 'cut' and 'black'system of bribary that are prevalent today.

2. **Tim Bennett Tep**[3] – the Author of the Book *" A Practioners Guide To Money laundering Compliance"*. Following the preface of the proceeds of Crime Act 2002 & Money Laundering compliance has become a matter of primary importance throughout the financial services industry. A Practioners Guide to Money Laundering Compliance looks initially at the AML framework in the United Kingdom. The guide analyses the practical offences such as failure to disclose (regulated sector) and tipped-off. A range of other topics were also covered like Know Your Customer, Due Diligence, The International Context, the Regime for Asset Recovery & Forfeiture.

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2.Chandan Mitras "The Criminalisation Of India From Independence To The 1990s" 1st Published By Viking Penguine India P(Ltd) 1998, Printed At Rekha Printers Pvt Ltd New Delhi.

3.Tim Bennett Tep " A Practioners Guide To Money Laundering Compliance" Lexis Nexis Tolley Publication Uk 2004. Pp 43-48.

3. **Rajkumar S. Adukia**[4] - The Author of the Book *"Encyclopedia On Prevention Of Money laundering Act 2002"* dealing with the prevention of money laundering, Indian Initiative in money laundering, Record Keeping and Reporting, Identity of Clients, Notification and Guidelines issued by various authorities, International Organisations involved in the fight against Money Laundering and Anti money laundering Authorities.

4. **M. Michelle Gallant**[5] – The Author of the Book *"Money laundering And The Proceeds Of Crime"* dealing with the upcoming assault on criminal finances, a dramatic transformation is taking place. Increasingly states are choosing to implement their assault through civil proceedings. Rather than rely on traditional criminal legal processes, states are relying on civil proceedings. This revolution fuses crime control policy and civil legal processes. This work critically examines this fusion. Some investigates this transformation from the prospective of criminal law. This work broadens the inquiry.

5. **Raj Kumar Makkad** - The Author of the Article *"Money Laundering In India"* dealing with the two strands in the dispute on black money generated in the Indian economy. At one level, the dilemma is of weak pursuit of existing laws and, at the other point, where there are vested interests; those have shaped impressive firewalls to block investigation. Another is the exception that the trader class has extracted from the government in the value added tax.

6. **B. V. Kumar**[6] - (Member, Central Board of Excise & Customs and Additional Secretary to the Government of India (Reted) Author of the Article *"The Prevention of Money Laundering in India"* Outlines legislation in a country which was one of the first in the world to initiate anti-money laundering legislation, a wartime measure in 1939, with in a while foreign exchange control laws up to 1973;

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4. ADUKIA, '*ENCYCLOPAEDIA ON PREVENTION OF MONEY LAUNDERING ACT, 2002'*, BOOK CORPORATION, 2007, KOLKATA. PP 12-25.
5. GALLANT MICHELLE, '*MONEY LAUNDERING AND THE PROCEEDS OF CRIME: ECONOMIC CRIME AND CIVIL REMEDIES,*' EDWARD ELGAR PUBLISHING LIMITED, 2005[ ISBN 1-84376-951-4 UK.] P 109 AND 120.
6. B. V. Kumar, (2003) "The prevention of money laundering in India", Journal of Money Laundering Control, Vol. 7 Iss: 2, pp.158 - 169

More current laws include the Foreign Exchange Management Act 1999 and the Prevention of Money Laundering Act 2002. Summarises the provision of these two laws as they cover the offence of money laundering and its punishment; attachment, adjudication and confiscation; composition and powers of the adjudicating authorities; obligations of financial institutions and intermediaries, powers of summons and survey, search and seizure, the appellate tribunal, special courts, officers to assist in inquiry, and

mutual assistance between India and other countries over information exchange, investigation, confiscation of illegally acquired property etc.

7. **Jyoti Trehan**[7] **–** *"Crime and Money Laundering: The Indian Perspective"* The Author has divided this book in six parts. The first deals with 'big crimes- big money'. How money is laundered is dealt with in the second part. In the third part National Security and economic liberalisation dimensions vis-a-vis crime and money laundering are considered. Some of the important facets and recent developments related to the subject matter are covered in the fourth part. The laws and the role of international organizations in countering money laundering are the subject of the fifth. Part six is an important addition because it contains the select bibliography, other reference and the index.

8. **Jayasuriya Dayanath**[8]- *"Terrorism, Drug Trafficking and Corruption"*[2] the author is Attorney-at-law, Nawala, Sri Lanka and Vice President, Global Jurist Foundation, New Delhi. The author is focuses on hazardous fusion consisting terrorism, drug trafficking and corruption forming an explosive cock and also reflective of manifestation of wrong doings at global scale.

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7. Jyoit Trehan, "*Crime and Money Laundering; The Indian perspective"* Oxford University Press, New Delhi 2006.

8. Jayasuriya Dayanath, *'Terrorism Financing Through Money Laundering'- The Role of Capital mArket Regulator'* In terrorism Drug Trafficking And corruption, Ashoka Law House, 2004,[ISBN 81-85902-48-8 New Delhi]. P 92.

9. **Janet Utph**[9] **-** L.L.M (Cantab) L.L.M (Harvard) Solicitor, Senior Lecturer in Law at the University of Durhan ; Consultant Editor **Sir Michael Tugendhat** Judge of the High Court (Queens Bench Division) ; Contributed By **James Glister M. A** (Cantab), **M. Jur** (Durham) Lecturer in Law at the University of Durhan;*"Commercial Fraud"*- The author is focused on lack of liberty is no longer considered effective in preventing crime and punishing offenders. The money laundering legislation can be seen as a wider initiative by the Government to eliminate all incentives to commit unlawful activity.

10. **Tushar V. Shah**[10] - (Advocate, Solicitor & Notary) *"Commentaries on Prevention of Money Laundering Act, 2002"* [ as Amended by Prevention of Money Laundering (Amendment) Act 2005 (20 0f 2005)]- The Author has mentioned the Case Laws and statute Laws in the book.

11**. Alexander R**[11] **-** is the author of *"Insider Dealing and Money Laundering in the EU: Law and Regulation"*[3], further he determined criminal offences of insider dealing.

12. **Guy Stessens**[12] **-** highlights the investigate whether the set of legal rules that have been put in place on an international and domestic level to curb money laundering can indeed make an valuable contribution to the fight against money laundering and, if these rules prove to be inadequate, how deficiencies can be remedied.

13. **Koh Woong Kwang**[13] **"**S*uppressing Terrorist Financing and Money Laundering*" the author analyses the growth of international standards for countering terrorist financing from the perspective of international criminal law. He explained the anti money laundering policy following 9/11 attack and the terrorist financing.

14. **Padhy Prafullah**[14]**-** "*Organised Crime*"[4] the Author elaborated the comprehensive introduction to organised crime. He analyses various types of organised crime and their poor

9.JANET UTPH, "COMMERCIAL FRAUD" OXFORD UNIVERSITY PRESS 2006 PP 1-230

10. Tushar V. Shah - (Advocate, Solicitor & Notary) *"Commentaries on Prevention of Money Laundering Act, 2002"*Current Publications 2006, Mumbai.

11.ALEXANDER, '*INSIDER DEALING AND MONEY LAUNDERING IN THE EU: LAW AND REGULATION'* ASHGATE PUBLICATION LIMITED, 2007 [ISBN 0-7546-4926-1UK] PP 1-28.

12. GUY STESSENS, *'MONEY LAUNDERING- A NEW INTERNATIONAL LAW ENFORCEMENT MODEL'*, CAMBRIDGE UNIVERSITY PRESS, 2003 [ISBN 0 521 78104 3] PP 3-6

13. KOH MYONG JAE, '*SUPPRESSING TERRORIST FINANCING AND MONEY LAUNDERING'*, SPRINGER, 2006, [ISBN 3-540-32518-2 GERMANY] PP 119,143,152.

14.Padhy Prafullah , *'Organised Crime'*, ISHA Books, 2006 [ISBN 81-8205-348-X New Delhi], P 168, 222

15.Julian, Pillai And Sharma, '*Prevention Of Money Laundering –Legal And Financial Issues'* , Indian Law Institute, 2008 , New Delhi. Pp. 4-106

16.SHAH TUSHAR, '*COMMENTARIES ON PREVENTION OF MONEY LAUNDERING ACT, 2002'*, CURRENT PUBLICATIONS, 2006, MUMBAI. PP121-136.

impact of the society. The diverse legislative and law enforcement efforts to control organised crime are also discussed.

15. **Prevention of Money Laundering**[15]- *"Legal and Financial Issues"*[9] is the Journal book published by The Indian Law Institute, New Delhi. In this book the Professors and Legal Practitioners have published the Journal related Money Laundering in global scenario.

16. **Shah Tushar**[16]**-** is the Author of *"Commentaries on PMLA, 2002"*. He is a practicing Advocate and Solicitor in Mumbai. In his book he elaborates all the provisions related to PMLA, 2002 and made commentary on the various section of this Act and also mentioned the Amendment of this Act.

## CHAPTER II

## INTRODUCTION AND MEANING OF MONEY LAUNDERING

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## INTRODUCTION

**" There's no such thing as good money or bad money. There's just money."**
**- *Charles "Lucky" Luciano***

As an object with cost-effective value, money's fundamental function is to lubricate the cogs and wheels of the economy. Money is neither clean nor dirty *per se*, but becomes contaminated as it moves from the legal economy across the legal-illegal limits established by the law and into the unofficial subversive economy. It is the rationale, the decisions and the measures of the individuals with which money is worn makes the money tainted. Most alarming fact is that money laundering and terrorist financing has become an international threat.[17]

To some, money is devil's child and is responsible for many evils. Some people think that material goods can bring happiness in life but it is not so. Money is the origin cause of many evils like corruption, black marketing, smuggling, drug trafficking, tax evasion, sex tourism and human trafficking.[18]

Impact of globalization together with off-shore financial haven, bank secrecy, informal economy and high speed wire transfer and internet banking[19] is making the job of money launderer quite proactive and easy. Day is not far when people will be able to transfer their crime proceeds across the planet without it being traced. Every new terrorist attack that comes up is a manifestation of ill gotten, bloody money.[20]

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17. Birks, Peter, *Laundering and Tracing*, Claredon Press, Oxford, 1995.

18. Bartlett, Brent. L., *Economic Research Report: The Negative Effects of money Laundering on Economic Development*, The Asian Development Bank Regional Technical Assistance Project No.5967- Countering Money Laundering in the Asian and Pacific Region, May 2002.

19. Available at: http://www.businessweek.com/stories/2006-11-06/policing-online-money-launderingbusinessweek-business-news-stock-market-and-financial-advice(last visited on 13th Feb 2013)

20. Available at: http://www.academia.edu/319875/Underground_Banking_-_Money_Laundering_over_the_internet(last visited on 16th April 2013)

## MONEY LAUNDERING - THE CONCEPT

Money Laundering, the metaphorical "cleaning of money" with regard to appearance in law, is the practice of engaging in specific financial transactions in order to conceal the identity, source and/or destination of money and is a main operation of underground economy. Thus money laundering is a process by which large amounts of illegally obtained money (from drug trafficking, terrorist activities or other serious crimes) is given an appearance of having originated from a legitimated source.[21]

In the earlier period, the term "money laundering" was applied only to financial transaction related to organized crime. Today its definition is often explained by government regulators (such as United States office of the Comptroller of the currency)[22], to encompass any financial transaction which generates an asset or a value as a result of an illegal act, which may involve actions such as tax evasion or false accounting. As a result the illegal activity of money laundering is now known as potentially practiced by individuals, small and large business, corrupt officials, members of organized crime( such as drug dealers or the mafia) or of cults, or even corrupt states or intelligence agencies, through a complex network of shell companies based in off shore tax havens.[23]

## DEFINITION OF MONEY LAUNDERING

While there are several definitions for Money laundering, one that is commonly used is the definition by FATF. Given below are the various definitions

- The Financial Action task force on Money laundering (FATF) defines money laundering as "the processing of criminal proceeds to disguise their illegal origin" in order to "legitimize" the "ill-gotten gains of crime."

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21. Adukia Rajkumar S. *"Encyclopedia on Prevention Of Money Laundering Act 2002"* 6th Edn, Published By K.G Maheshwari-Kolkata. Pg 2

22. The first reported lighting of the term "money laundering" in a legal context was not until 1984 (see United States vs. $4,255,625.39,et seq., 551 F.

23.Available at: http://www.unodc.org/unodc/money_laundering_10_laws.html, as on 16.09.2004(last visited on 10th January 2013)

- Article 1 of the Draft European Communities (EC) Directive of march 1990 defines it as the conversion or transfer of property knowing that such property is derived from serious crime, for the purpose of concealing or disguising the illicit origin of the property or of the property or of assisting any person who is involved in committing such as offence or offences to evade the legal consequences of his action, and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from serious crime.[24]

- The UN defines it as "Money laundering is a process which disguises illegal profits without compromising the criminals who wish to benefit from the proceeds. It is a dynamic three stage process that requires: first, moving the funds from direct association with the crime; second disguising the trail to foil pursuit: and third, making the money available to the criminal once again with the occupational and geographic origins hidden from view".

- In the Indian context, Section 3 of the Prevention of Money Laundering Act, 2002 defines offences of money laundering as under: "whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untained property shall be guilty of offence of money laundering."[25]

## HISTORY OF MONEY LAUNDERING

The term "money laundering" is often said to have originated from Mafia ownership of Laundromats, at the time of the famous American gangsterism that arose originally out of Prohibition- the banning of alcoholic drinks. Several mechanisms were used to disguise the origins of the large amounts of money generated by the import and sale of alcohol and other "rackets" such as gambling, some of which was illegal.[26]

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24. Scott, Hal. S. and Philip. A. Wellons, *International Finance: Transaction, Policy and Regulation*, 9th Ed., Foundation Press, New York, 2002.

25. Shah, Vinod. K., *Prevention of Money Laundering*, (2002) PL Web Jour 7. also see, http://www.ebc-India.com/lawyer/articles612_1.htm

26.See Supra note 21. Pg 3-6.

Ironically one of the methods of concealing the source of the money was legal gambling. The major headache that the gangsters faced was that the money was in cash, often in small denomination of coins. If the coins were put into the bank questions would be asked. But the storage of large amount of money in low value coins is a storage nightmare. So they created businesses, one of which was slot machines, and another of which was laundries so it is said that the term "Money laundry" was born.

But whilst the term "money laundering" was invented in the 20th Century, the principles of money laundering have been around for far longer. Sterling Seagrave in his excellent book "Lords of the Rim" conducts a roundup of the history of the Overseas Chinese. He explains how the abuse of merchants and others by rulers led them to find ways to hide their wealth including ways of moving it around without it being identified and confisticated. Money laundering in this scene was prevalent 4000 years before Christ.[27]

Money Laundering is called what it is because that perfectly describes what takes place – illegal or dirty, money is put through a cycle of transactions, or washed, so that it comes out the other end as legal, or legal, or clean, through a succession of transfers and deals in order-that those same funds can eventually be made to appear as legitimate income.

In 'Money Laundering' as an expression is one of fairly recent origin. The original sighting was in the news papers reporting the Watergate scandal in 1973. The expression first appeared in a judicial or legal context in 1982 in American[28]. Since then the term has been widely accepted as it is popular usage through the world.

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27. See Supra note 21, pg 4

28. In the case "US v. $4,255,625.39(1982)551 F Supp 314

Money laundering means different things in different places .This is because only proceeds of crime (or criminal conduct) can be laundered. Also many countries have restricted the classifications of crimes that are regarded as underlying crime for money laundering purposes. So, in some countries any conduct which, if a person were convicted would lead to a sentence of imprisonment will be regarded as a predicate crime, whilst in others only offences described in a list are to be regarded as creating "dirty money" a further twist is that some countries will allow a person to be prosecuted for laundering the proceeds of criminal conduct overseas, provided the conduct would have been criminal conduct in both countries.[29]

In most countries that have counter money laundering laws, a person can be guilty of the offence of laundering the proceeds of someone else's criminal conduct.[30]

Many countries have laws that mean that laundering is a continuing offence and the date of the predicate crime is irrelevant.[31]

Also, many countries have changed the law recently in two important ways the first is to include a provision for a person to be guilty of laundering if there was "reasonable cause for suspicion". That means that a Court can find that the person knew or ought to have known that the money was, or was likely to have been, the proceeds of criminal conduct.[32]

The second is to include a provision that it is an offence to be involved in laundering type transactions where the money is intended by someone else to be used in the preparation for or execution of a crime.[33]

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29. See Supra note 21. Pg 4.

30. Ali, A.S., "A Gateway for Money Laundering? Financial Liberalisation in Developing and Transnational Economies." Journal of Money Laundering Control, Vol. 1, No. 4. April 1998.

31. International Monetary Fund. Money Laundering and the International Financial System. Working Paper presented by V. Tanzi, May 1996.

32. Jayasuriya, D.C. "Money Laundering: The Role of Legislation in Developing Economies." Journal of Money Laundering Control, Vol.1, No. 3, January 1998.

33. Knetch, Frederick J. "Extraterritorial Jurisdiction and the Federal Money Laundering Offense." Stanford Journal of International Law, Fall 1986; 389-420.

## PROCESS, TECHNIQUES, AND TYPOLOGIES OF MONEY LAUNDERING

**MODUS OPERANDI** (process):

The modus operandi followed to launder money is a web of complex transactions to legitimize the proceeds of crime. The money that moves from national jurisdiction to the international circuit may come back to the national jurisdiction. Another tendency is that money that has gone from national jurisdiction to the international circuit need never return to the original national jurisdiction. The money laundering circuit, include the three fundamental stages of money laundering, i.e., placement, layering & integration.
The money laundering circuit can be framed in different ways to suit particular method or typology or circuit or classification of money laundering.

It is very significant for the financial entities that the gate keepers to know how money is laundered. This helps them to train themselves better to handle money launderers and their tricks. Essentially Money laundering is a compound chain of activities whereby vast amount of cash generated from illegitimate activities viz. selling of narcotic drugs, extortion, gambling, illicit liquor trade etc is put all the way through a series process so that it comes out at the other end as clean and legal money.

The modus operandi pursued in money laundering circuit are **placement, layering & integration** has been briefly explained:

**Stage 1:**

**Placement:** Introduction or placement of illegal money in the money laundering circuit is the most vital & vulnerable step. Placement involves transforming the crime proceeds into a more convenient & less suspicion form, then getting those proceeds into mainstream financial system. It is the most complicated step as the crime proceeds generates profits in the form of cash, cash is bulky, & difficult to conceal, & in large amounts, very noticeable to the average bank teller, casino employee, etc. Placement requires finding a solution to the problem of how to move the masses of cash generated from the illegal activity into a more convenient form for introduction into the economic stream.[34]

34. See Supra note 21. Pg 5.

**Stage 2:**

**Layering:** Layering (disguising) involves making a series of financial transactions that in their frequency, complexity, and dimensions often resemble legitimate financial activity. Layering involves the wire transfer or movement of resources into financial or banking system by proper origin. Money is passed through shell companies, shell banks, shell corporations, offshore trusts and offshore jurisdictions. While disguising the money trail, money could also be made to move through legitimate businesses and genuine banks in the financial system. In the layering process, electronic transfer of money is very helpful because it enables movement of money through a variety of entities and several jurisdictions in a matter of hours. Another notable trend is that the money laundered move from unstable financial havens through intermediate financial circuit to safe and sound financial havens.[35]

**Stage 3:**

**Integration (legitimization):** The third stage involves the amalgamation of layered crime proceeds into the mainstream financial system. Once the funds are layered, they are then integrated into the financial system by way of investments in legitimate commercial enterprises and financial instruments, (such as letters of credit, bonds, securities, bank notes, bills of lading, cashier's cheque, and guarantees), is made to show legitimate. With these legitimate marketable enterprises, the money can be repatriated to the home country, as legitimate earnings. Money from these legitimate business enterprises in use abroad can also be shown as a advance to the money launderer in the home country; and of course, the money launderer can always default on the loan, and even if he repays it a cycle has been recognized to launder money. In addition, money from the legitimate enterprises or bank accounts abroad need not come back to the home country, and can be further utilized in a foreign country for legal or illegal activities. When integration (legitimization) of crime proceeds fails then the sanctioned repercussion is seizure of account/accounts & confiscation.[36]

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35. See Supra note 21. Pg 5

36. Ibid

## METHODS / TYPOLOGIES AND TOOLS

The various techniques used to launder money are referred as methods/typologies and tools. The methods of money laundering are likely to be different from country to country because of various factors unique to every country, including its economy, complexity of financial markets, AML regime, enforcement effort and international cooperation. In addition to this, the methods of money laundering are dynamic and constantly evolving process.

Money laundering techniques having national orientation has been discussed below:

**(i) Retail business:** In these businesses mere fabricated sales could be exposed in books of accounts. The degree to which the sales are fabricated is the degree to which money can be laundered and eventually shown as legitimate sales proceeds of trade. Retail businesses such as fast food restaurants, fashion designer's outlets, jewelers shop, travel agencies, are another suitable standard for money laundering.

**(ii) Wholesale trade:** Similar to the retail trade, wholesale trade by and large shows invented sales in books of accounts to launder money within national boundaries.

**(iii) Manufacturing units:** A shell-manufacturing unit would have a building and a billboard representing a plant. By projecting sales through such a bogus manufacturing unit, money is laundered to the degree that bogus sales are affected. Authentic manufacturing units can be used to launder money, at an inflated invoices and the extent to which the rate has been inflated is the extent to which money can be laundered.

**(iv) Charity shows:** Organizing charity/entertainment shows are another way to launder money. In this modus operandi, falsified sale of tickets can be resorted to, because a person buying a ticket is not beneath an obligation to be present at the show. The extent to which fake tickets have been sold is the scope to which money can be laundered. However, there is a cost to be paid for this type of money laundering in the form of entertainment tax.

**(v) Lottery tickets**: Lottery tickets are big trade in several countries, especially India. Money launderers buy lottery tickets from authentic winners at a premium with their illegal acquired proceeds. Encashment of lottery tickets results in money being legitimized by these criminals.

**(vi) Racecourses:** Like the buying of lottery tickets, the buying of winning tickets at racecourses is another way to launder money.

**(vii) Casinos:** Casinos are another opportune way to launder money. Money launderers take their proceeds to these casinos, buy a large number of chips and do little or practically no gambling. At the end of the day, the launderer encashes his chips by passing them off as genuine winning. For the money laundering operation to be really effective in casinos, money launderers in the form of cheques drawn on banks do encashment of chips.

**(viii) Large numbers of bank accounts**: A large number of accounts with small sums of money, in an individual's own name or in fictitious names, in bank branches scattered all over, is another way to avoid arousing suspicion as to the origins of illicit money.

**(ix) Property:** In the property business, the sale of worthless houses at highly inflated prices is also resorted to in order to launder money: the extent to which the price has been inflated in these property deals is the extent to which criminal proceeds can be laundered. Of course, there is a price to be paid in this *modus operandi* in the form of higher registration fees for the sale of property. By floating a property finance company and taking a loan from it, the criminal could launder the money to the extent that a loan has been taken. In such a *modus operandi* the property company could be a front and its assets the illicit proceeds of crimes.

**(x) Inheritance laws**: In India the use of inheritance laws pertaining to jewellery is another way to launder money. According to inheritance law, any married women can have Rs. 500,000 worth of jeweler. To this extent each family can launder illegal money. 'Stree Dhan' given to women in India at the time of the marriage. Illegal proceeds can also be passed off as legal, by projecting these as the 'Stree Dhan' which the woman received at the time of her marriage.

**(xi) Commodities market**: Commodities markets, which deal in future contracts in commodities, are also a very useful medium for laundering money. Illegal proceeds can easily be passed off as fabricated or inflated gains on futures trading in commodities.

**(xii) Securities market**: The capitalization of markets, raising capital from the general public or financial institutions is one of the primary ways to mobilize funds for fiscal growth. The markets so capitalized are also known as securities markets or stock exchanges. In the stock

market, capital raised is in two forms; one is equity capital, which denotes ownership in the form of company shares; the other from of capital is an interest-bearing bond, which are debt instruments issued to the general public or financial institutions. When the stock market share price index is moving down, the 'Bears' make money, and when it is going up, the 'Bulls' make money. In the securities market, profits can easily be recorded on paper to launder the illegal proceeds. Losses on paper can also be recorded in the securities market to save on income tax. Although quite a few securities markets ask for detection from customers, money launderers are able to get around that by having aliases or false identities.

**(xiii) Insurance sector**: Money launderers to legitimize their proceeds also frequently use Insurance companies. Insurance companies commonly offer life insurance and other forms of general insurance, including health and property insurance. Money launderers generally take out very expensive insurance policies and after paying a few premiums, apply for premature encashment of policies at a discounted rate. The cheques paid out by the insurance companies for premature surrender of policies is generally passed of legitimate money.

**(xiv) Agricultural sector in India**: In India the agricultural sector is exempt from tax in order to give a boost to agriculture and relief to farmers who are engaged in an occupation that is otherwise not very remunerative. Money launderers buy up land in such a situation and show highly inflated gains from agriculture, purportedly through the use of advanced and sophisticated agricultural techniques. Another advantage of laundering money through the agricultural sector is that one also saves on income tax.

Extension services in the agriculture sector, such as dairy farming and poultry, which are also exempt from income tax, are also utilized to launder money.

**(xv) Amnesty schemes**: To Bring black money into the open, governments often introduce amnesty schemes, whereby people can declare their illegally acquired proceeds or black money to government on payment of a certain amount of tax; in these amnesty schemes, no questions are asked about the source of the money and after payment of tax it becomes legitimate money which can be used openly in the economy. These amnesty schemes reward the criminal elements at the expense of honest taxpayers.

**(xvi) <u>Indira Vikas Patras: bearer certificates with no identification requirement</u>**: In order to give legitimacy to the black money, the government introduced bearer certificates, also known as 'Indira Vikas Patras'; anyone could buy any number of bearer certificates of high denomination issued by the post offices without any questions being asked. With these bearer certificates, offering a good rate of interest, one could double one's money in six years. Moreover, these bearer certificates, having no identification, could easily be traded and the holder could encash the same on maturity. A number of criminals and tax evaders invested their money in Indira Vikas Patras and doubled it in six years. Even if half of this black economy component was invested in the Indira Vikas Patras, they substantially illegally proceeds to the extent of INR 3,995.25 billion were being processed through them[37]. The Indira Vikas Patras were remarkable in many respects:

37. The Indira Vikas Patras scheme was discontinued three years ago; hence, the GDP and related figure for the year 1998-99 have been indicated.

(i) They enabled black money to be channeled through post offices for more productive utilization.

(ii) They offered a convenient way for criminals to earn handsome returns on their illicit gains.

(iii) The criminals could also use them to launder their money through various ingenious schemes.

**(xvii) Use of gold/diamonds/precious gems** : Criminals can also buy gold, diamonds and precious gems and use them to launder money. For instance, in India, there is a great demand for gold; India is also the largest center in the world for the cutting and polishing of diamonds. Before the Gold Control Order was abolished, the amount of gold smuggled into the country was established to be in the region of 500-700 tons, worth roughly US$5-7 billion. The diamond trade today runs to US$8 billion. With their illicit proceeds, the criminals buy gold and diamonds.

**(xviii) Use of false identities to launder money**: False or stolen identities are also useful for money launderers, who could utilize false and stolen identities in the various operations in the national sphere described above; in such cases the investigation would generally come to a dead end. False or stolen identities are also very useful for introducing money into the international money Laundering circuit and its subsequent legitimization.

**(xix) Role of facilitators**: In the money Laundering exercise in the national sphere, financial experts, accountants and auditors play a very important role in advising the criminals. There is also complicity of various financial institutions such as banks, insurance companies and brokerage houses in the securities and commodities markets in laundering the money. However, money Laundering carried out at the national level is highly vulnerable to investigation and even the most perfect of the schemes can be opened once adequate intelligence is available and the political and bureaucratic will is there to see this Money Laundering investigation through to their logical conclusions.

## WHY CRIMINALS WANT TO "LAUNDER" PROCEEDS?

a) To increase profits

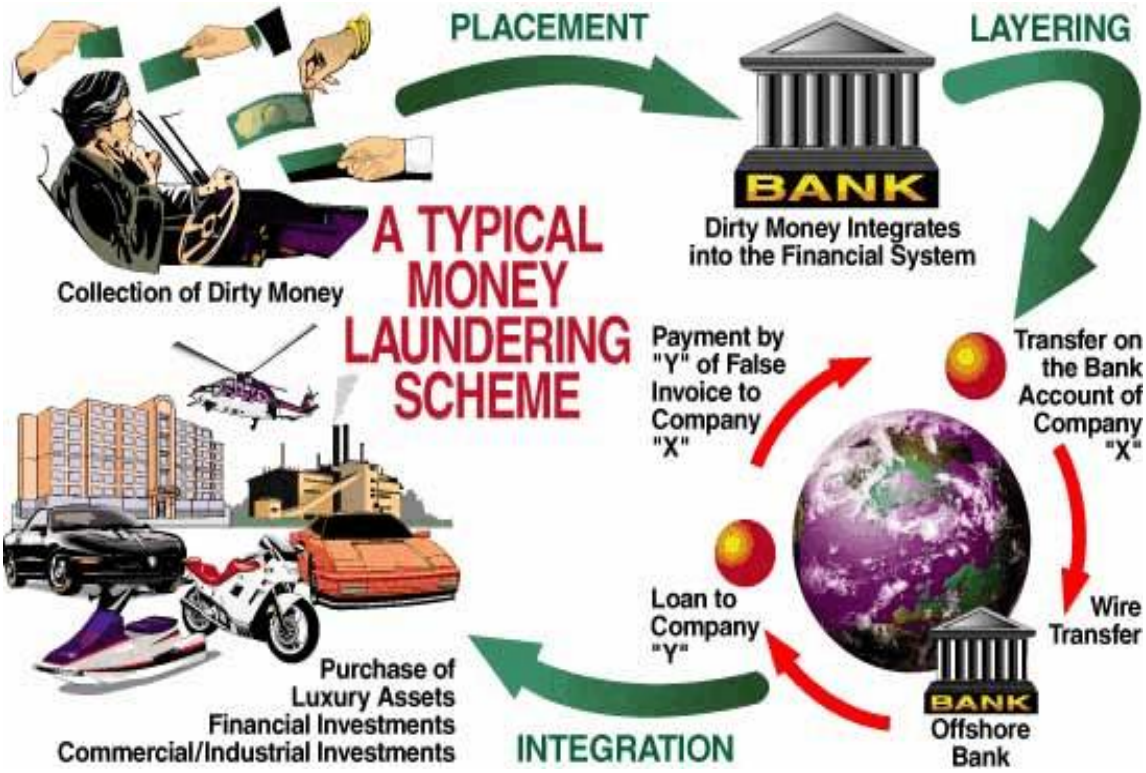
b) To appear legitimate

c) To evade taxes

d) To avoid prosecution

e) To avoid seizure of accumulate wealth.[38]

Fig. 1




38. See Supra Note 21, pg 5

The principal objective of money laundering is to convert cash into some other form of asset in order to conceal its illegal origins. A criminal group's effort to launder the proceeds from their crimes may come to your attention at any stage of its placement, layering or integration into the financial system.

## IMPACT OF MONEY LAUNDERING ON SOCIETY AND ECONOMY

Money laundering has a corrosive effect on a countries economy, government and social wellbeing. The practice distorts business decisions, increases the risk of bank failures, takes control of economic policy away from the government, harms a countries reputation, and exposes its people to drug trafficking, smuggling, and other criminal activities.[39]

## THE ECONOMIC EFFECT OF MONEY LAUNDERING

**a) Undermining the Legislative private Sector:**

One of the most serious microeconomic effects of money laundering is felt in the private sector. Money laundering often use front companies, which comingle the process of illicit activity with legitimate funds, to hide the ill-gotten gains. In the United States for example organized crime has used pizza parlours to launder proceeds from heroin trafficking.

These front companies have access to substantial illicit funds, allowing them to subsidise front company products and services at levels well below market rates.[40]

In some cases front companies are able to offer products at prices below what is costs the manufacturers to produce. Thus, front companies have a competitive advantage over legitimate firms that draw capital funds from financial markets. This makes it difficult, if not impossible for legitimate business to compete against front companies with subsidized funding, a situation that can result in the crowding out of private sector business by criminal organizations.[41]

Clearly, the management principles of these criminal enterprises are not consistent with traditional free market principles of legitimate business, which results in further negative macroeconomic effects.

39. See Supra Note 21. Pg 8

40. See Supra Note 21. Pg 9

41. Available at: http://www.slideshare.net/AlexanderDecker/11money-laundering-concept-significance-and-its-impact(last visited on 12th feb 2013)

b) **Undermining the integrity of financial markets:**

Financial institutions that rely on the proceeds of crime have additionally challenged in adequately managing their assets, liabilities and operations. For example large sums of Laundered money may arrive at financial institution but then disappear suddenly, without notice through wire transfers in response to non-market factors, such as law enforcement operations. This can result in liquidity problems and runs at banks.[42]

**c) Loss of control of Economic Policy:**

Money laundering has also adversely affect currencies and interests rates as launderers reinvest funds where their schemes are less likely to be detected, rather than where rates of return are higher. And money laundering can increase the threat of monetary instability due to the misallocation of resources from artificial distortions in asset and commodity prices.[43]

In short money laundering and financial crimes may result in inexplicable changes in money demand and increased vitality of international capital flows, interests and exchange rates. The unpredictable nature of money laundering, coupled with attendant loss of policy control, may make sound economic policy difficult to achieve.[44]

**d) Economic Distortion and Instability:**

Money Launderers are not as interested in profit generation from their investments as much as in protecting their proceeds. Thus they "invest" their funds in activities that are not necessarily economically beneficial to the country where the funds are located. Furthermore, to the extent that money laundering and financial crime redirect funds from sound investment to low quality investments that hide their proceeds, economic growth can suffer. In some countries, for example, some industries, such as construction and hotels, have been financed not because of actual demand, but because of the short term interest of money launderers. When these industries no longer suit the money launderers, they abandon causing a collapse of these sectors and immense damage to economies that could ill afford this losses.[45]

42. See Supra Note 21. Pg 10

43. Ibid

44. Available at: http://www.unafei.or.jp/english/pdf/RS_No67/No67_26RC_Group2.pdf(last visited on 23rd March 2013)

45. Ibid

**e) Loss of Revenue:**

Money laundering diminishes government tax revenues and therefore indirectly harms honest tax payers. It also makes government tax collection more difficult. This loss of revenue generally means higher tax rates than would normally be the case if the untaxed proceeds of crime were legitimate.[46]

**f) Risks to Privatisation Efforts:**

Money laundering threatens the efforts of many states to introduce reforms into their economies through privatization. Criminal organizations have the financial wherewithal to outbid legitimate purchasers for formerly state- owned enterprises. Furthermore, while privatization initiatives are often economically beneficial, they can also serve as a vehicle to launder funds. In the past criminals have been able to purchase marinas, resorts, casinos, and banks to hide their illicit proceeds and further their criminal activities.[47]

**g) Reputation Risk:**

Nations cannot to affort to have their reputations and financial institutions tarnished by an association with money laundering, especially in today's global economy. Confidence in markets and in the signaling role of profits is eroded by money laundering and financial crimes such as the laundering of criminal proceeds, widespread financial fraud, insider trading of securities , diminishes legitimate global opportunities and sustainable growth while attracting international criminal organizations with undesirable reputations and short terms goals.[48] This can result in diminished development and economic growth. Furthermore, once a country's financial reputation is damaged, reviving it is very difficult and requires significant government resources to rectify a problem that could be prevented with proper anti-money laundering controls.[49]

46. See Supra Note 21. Pg 11

47. Ibid

48. Ibid

49. Available at: http://www.streetdirectory.com/etoday/money-laundering-in-india-pouljl.html(last visited on 2nd January 2013)

**h) Social Costs:**

There are significant social costs and risks associated with money laundering. Money laundering is a process vital to making crime worthwhile. It allows drug traffickers, smugglers, and other criminals to expand their operations. This drives up the cost of government due to the need of increased law enforcement and health care expenditures (for example, treatment of drug addicts) to combat the serious consequences that result. Among the other negative socio economic effects, money laundering transfers economic power from the market, government and citizens to criminals. In short, it turns the old adage that crime doesn't pay to its head.

Furthermore, the sheer magnitude of the economic power that accrues to criminals from money laundering has a corrupting effect on all element of society. In extreme cases, it can lead to the virtual takeover of legitimate government.[50]

50. See Supra Note, pg 11.

## CHAPTER III

## PREVENTION OF MONEY LAUNDERING ACT, 2002 AND PREVENTION OF MONEY LAUNDERING (AMENDMENT) BILL 2011 - A COMPARITIVE STUDY

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## PREVENTION OF MONEY LAUNDERING ACT, 2002

The Parliament has enacted the Prevention of Money Laundering Act, 2002 to give outcome to the formal express of opinion adopted by the General Assembly of the United Nations on the Political Declaration and Global Program of Action in February 1990 which provide the member States to enact money laundering legislation and programmes.[51]

In 1996 Ministry of Finance, Government of India, appointed an Inter-Ministerial Committee to look into all features of money laundering and to recommend appropriate legislation, if necessary. The Committee in its statement recommended enactment of a inclusive legislation to deal with this setback.

Consequently, the Prevention of Money- Laundering Bill, 1998 was introduced in the 12th Lok Sabha on the 4th August 1998. The Bill was referred by the Hon'ble Speaker to the Department allied Parliamentary Standing Committee of Finance on the 5th August 1998 for inspection and statement. The Standing Committee in its report dated the 28th January 1999 suggested certain adaptation in the Bill and before the revised Bill could be submitted for contemplation, the 12th Lok Sabha was dissolved and the Bill failed.

Thus, a new Bill incorporating the proposal of the Parliamentary Standing Committee was introduced in the 13th Lok Sabha on the 29th October 1999. After the Bill was conceded by the Lok Sabha on the 2nd December 1999, the Bill was referred by the Chairman of the Rajya Sabha to a select committee of the Rajya Sabha on the 8th December 1999 for its assessment. The Select Committee presented its report on the 24th July 2000 and the present Act came to be enacted to in 2002.

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51. SHAH TUSHAR, *'COMMENTARIES ON PREVENTION OF MONEY LAUNDERING ACT, 2002'*, CURRENT PUBLICATIONS, 2006, MUMBAI. PP121-136.

## SALIENT FEATURES OF THE PMLA ACT 2002

The salient features of the Act, which came into force on the 1st July 2005, are as follows:-

The notion of Money Laundering cannot be cabined in the customary criminal law theory, the Prevention of Money Laundering Act 2002 cannot fit in the structure of an standard status. Till recently money laundering could take consign in our culture without anybody's praying eyes on it. There have been jurisdiction, which did not believe money laundering as something disagreeable. On the divergent, techniques of money laundering used to be referred to as possessions organization structures or tax beneficial operations. They were never measured unusual. Nor did they draw the consideration of the Government as they were treated usual. It is the method of homogenization of laws through a variety of international events that has brought weight on these jurisdictions to match to the standards desired by the international community. It is appealing and imperative to see that the present legislation is the result of suggestions from the U.N.[52]

It is to be firm that, Money Laundering harmlessly affects the competent process of markets. It results in absorption of capital in the hands of criminals.[53] It encourages perpetrators of offense to replicate offences so as to make additional capital and impersonate as powerful individuals demeaning the society. It is done with the clandestine motives of pocketing money securely and furtively. The cautious nature of its operations attached with the feeling in some quarters that it is not unlawful makes it a versatile trend to be tackled by a multipronged approach.[54]

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52.Available at : http://economictimes.indiatimes.com/articleshow/1156901.cms(last visited on 13th February 2013)

53.Available at: http://fiuindia.gov.in/pmla2002.htm(last visited on 8th April 2013)

54."Prevention of Money Laundering Act, 2002". Financial Intelligence Unit (FIU-IND), Ministry of Finance, India. Retrieved 10 October 2012.

The analysis has necessary to be intrusive. Investigative authorities have to be attentive in keeping the balance between communal interest and the individuals' civil liberties. The organization of money laundering with serious offences relating drug trafficking, terrorism etc. with international magnitude and with potential for employing prevention and preventive measures by the enforcement agencies make this crime more composite and difficult in terms of enforcement.[55]

The enforcement agencies have to be vested with managerial and adjudicative powers not like in the case of other criminal statutes. Inquiry may have to be quasi judicial. Logically the need for protecting the rights of accused may have to be taken heed of. This is possible only if appellate authorities have been allotted to oversee investigation. The current enactment rightly incorporates provisions defending the interests mentioned above.

The rule for attaching the proportion firstly and then in case of adverse funding to seize them is to be exercised cautiously. This is subject to appeal to the High Courts, Special courts have also been envisaged to be in place along with the investigative and appellate authorities. Thus the Act presents the portrait of a widespread enactment with multipronged provisions. [56]

55. Available at :http://220.227.161.86/19404sm_cal_finalnew_cp21.pdf(last visited on 30th March 2013)
56. Available at :http://fiuindia.govt.in/pmla2002.htm(last visited on 10th April 2013)

## THE PREVENTION OF MONEY LAUNDERING (AMENDMENT) BILL 2011

## INTRODUCTION

Mr. Yashwant Sinha, the Chairman of the Standing Committee on Finance, have been approved by the Committee, to present the Fifty-sixth Report on the Prevention of Money Laundering (Amendment) Bill, 2011. The Prevention of Money Laundering (Amendment) Bill, 2011 introduced in Lok Sabha on 27 December, 2011, was referred to the Committee on 5 January, 2012 for examination and report thereon, by the Speaker, Lok Sabha under rule 331E of the Rules of Procedure and Conduct of Business in Lok Sabha. [57]

The Committee obtained written information on a range of provisions contained in the aforesaid Bill from the Ministry of Finance (Department of Revenue). Written views/memorandum were received from the Indian Banks‟ Association (IBA), Securities and Exchange Board of India (SEBI), Reserve Bank of India (RBI) and Federation of Indian Chamber of Commerce and Industry (FICCI). The Committee, at their sitting held on 9 April, 2012 took evidence of the representatives of the Ministry of Finance (Department of Revenue). The Committee, at their sitting held on 08 May, 2012 measured and adopted the draft report and sanctioned the Chairman to settle the same and present it to the Parliament.

Both the Houses of the parliament has finally passed the Bill and now it is called as Prevention of Money laundering (Amendment) Bill 2012. It was passed by the Lok Sabha on 29th November 2012 and Rajya Sabha 17th December 2012

## SALIENT FEATURES OF THE AMENDMENT BILL

1. **Amendments and insertions in the definition:** Certain novel definitions have been proposed to be included in section 2 of the Act, provisions connecting to which have been made in the Bill. They are namely-“beneficial owner”, “client”, “dealer”, “precious metal”, “precious stone”, and “real estate agent”.[58]

57. Available:http://www.prsindia.org/uploads/media/Money%20Laundering/SCR%20Prevention%20of%20Money%20Laundering%20Bill%202011.pdf(last visited on 16th March 2013)
58. Ibid

2. **Changing the definition of offence of money-laundering:** : During Mutual Evaluation of India, it was pointed out by FATF that concealment, possession, acquisition and use of the proceeds of crime are not criminalized by PMLA.[59] Article 6 of Palermo Convention requires that such activities should also to be criminalized. Hence Section 3 of PMLA has been proposed to include these activities under offence of money-laundering. [60]
3. **Punishment for money-laundering:** FATF Recommendation requires that "legal persons" also (and not just "natural persons") should be subject to effective, in proportion and dissuasive criminal, civil or administrative sanctions for money laundering. In PMLA the punishment prescribed in section 4 is rigorous imprisonment not less than 3 years but which may extend to 7 years and also fine which may extend to Rs 5 lakh. This amount appears disproportionately low, given the gravity of the offence of money laundering.[61] It has therefore been proposed to amend Section 4 so as to provide for imposition of fine proportionate to the severity of the offence which will be determined by the court. The limit of Rs.5 lakh is therefore proposed to be deleted in total. Further an justification has been inserted in Section 70 that the trial or conviction of any legal juridical person shall not be reliant on the prosecution or conviction of any individual.[62]
4. **Amendment in provisions implemented by FIU:**

Sec 12 prescribes obligation of banks, Financial Institutions and intermediaries for authentication of identity of clients, safeguarding of records of transactions and identity and furnishing STRs, CTRs etc to the Financial Intelligence Unit-India (FIU-IND). The proposed legislation includes the following latest reporting entities: Department of Posts, Commodity Exchanges and brokers, Stock Exchanges, Entities registered with PFRDA, entities who can be included when notified by the Government Real estate agents, sub-registrars (registering property), dealers in valuable metals/stones, high value goods and safe and sound deposit keepers.[63]

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59.See Supra Note 57.

60.Availabkle at: http://socialissuesindia.wordpress.com/2011/09/08/anti-money-laundering-framework(last visited on 6th March 2013)

61.Ibid

62. Available at: http://www.halfmantr.com/persons-and-places-in-news/1171-amendments-in-money-laundering-act(last visited om 13th April 2013)

63.Ibid

Director, FIU-IND is proposed to be empowered by inclusion of a new Section 12A in the PMLA so that he may call for records of transactions or any added information that may be required for the purposes of the PMLA and also the power to make investigation for non-compliance of reporting entities to the obligations cast upon them. Strengthening of KYC and reporting obligation: [64]

• Know Your Customer (KYC) obligations – In the proposed legislation the reporting entity has to recognize "beneficial owner" during KYC. [65]

• Reporting obligations- It is proposed in the legislation that reporting entity has to report even an attempted transaction.[66]

• Reference to "integrally connected transactions" is deleted

The proposed changes will be reflected in the amended Section 12 (1).

**Record keeping obligation:** KYC documents to be maintained for 10 years after "the business relationship has ended" [proposed sec 12(4)] instead of "after cessation of transactions", as at present. "Account files and business correspondence" also needs to be retained for 10 years [proposed sec 12(3)], information about "attempted transactions" reported to FIU also needs to be retained.[67]

An exemption clause has also been proposed to exempt any class of reporting entities from any of the obligations to categorize clients, maintain records and send reports to FIU.[68]

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64. See Supra Note: 57

65.Available at:http://fiuindia.gov.in/identity-knowcustomer.htm(last visited on 13th April 2013)

66Available at:.http://rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=7361(last visited on 16th April 2013)

67. See Supra Note: 57

68. See Supra Note: 57

**Measures for effective compliance:**

(a) In the proposed legislation Director, FIU-IND can refer special audit of a reporting entity with regard to their obligations [sec 13(1A)]. Operating expense of such audit can be improved from the reporting entity [sec 13(1B)].

(b) Graded penalty is proposed for failures. Such as written warning, directions to comply, directions to send reports and finally, fine [sec 13(2)]

(c) Penalty can also be imposed on "designated director on the Board" and "employees" of reporting entities, in place of only "officers" at present.[69]

**5. Amendment in provisions implemented by Enforcement Directorate:**

(i) **Attachment of property**: The present Act in Sec 5 stipulates that the person from whom property is attached must "have been charged of having committed a scheduled offence". It is proposed to be deleted as property may come to rest with someone, who has nothing to do with the listed offence or even the money-laundering offence. Method for attachment is at present done as provided in the Second Schedule to the Income Tax Act, 196. Now it is proposed in section 5(1) that the process will be prescribed separately. Time for Adjudicating Authority to confirm attachment of property by ED has been projected to be augmented from 150 days to 180 days.[70]

(ii) **Freezing of property**: At present PMLA provides for attachment of property after charge sheet u/s 173 CrPC has been filed in scheduled offence case and seizure of property after FIR u/s 157 CrPC has been filed in scheduled 11 offence case. However, in a variety of situations it may not be practicable to seize a record or property. In such cases, there has to be a provision for freezing such property, so that it can be seized or attached and confiscated later.

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69. See Supra Note 57.

70. Ibid

The new **sub-section 17(1A)** is proposed to be added for this purpose. Consequential changes are also proposed in a number of places in the Act, where "seizure" under section 17 or 18 is referred to. At present under PMLA search & seizure can be done only after FIR u/s 157 CrPC has been forwarded to a Magistrate (in scheduled offence cases where FIRs are required). However, in cases where FIR is not required (e.g. Forest Act violation, Copyrights Act violation), search & seizure can take place only after charge sheet is filed. This may happen after a extended gap and chances of fading of proceeds of crime cannot be ruled out. To prevent this problem it is now proposed in the proviso to section 17(1) to undertake search & seizure in such cases (where there is no requirement to file FIR) after the investigating officer files a report (similar to FIR) to a superior officer. [71]

(iii) **Making confiscation independent of conviction:** At present attachment of property becomes final under section 8(3) "after the guilt of the person is proved in the trial court and order of such trial court becomes final". Tribulations are faced in such cases where money-laundering has been done by a person who has not committed the scheduled offence or where property has come to take a break with someone who has not committed any offence. Therefore it is proposed to amend sec 8(5) to provide for attachment and confiscation of the proceeds of the crime, even if there is no assurance as long as it proved that predicate offence and money laundering offence has taken place and the property in question (i.e proceeds of crime) is concerned in money laundering.[72]

(iv)**Amendment relating to the procedure of confiscation**: PMLA provides for confiscation of attached property to be ordered by Adjudicating Authority, after conviction in the scheduled offence case. Appeals to such orders lie with Appellate Authority, then High Court and Supreme Court, which implies that there can be an additional set of appeals after confiscation. [73]

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71. See Supra Note 57

72. Ibid

73. Ibid

To restructure the process power to confiscate attached property is proposed to be given to the Special Court, who shall pass the order to confiscating or let go the attached property, along with judgment in the predicate offence/money-laundering case new sub section 7 is proposed to be inserted in section 8 to address confiscation or release of property by the Special Court when a trial cannot take place in a case on account of death or accused being stated proclaimed offender or for any other reason. A new sub-section 60 (2A) has been added to address the issue when trial takes place outside India or the case initiated abroad is closed and the property is to be confiscated.

**Retention and presumption provisions:** In the existing Act, section 20 relates to retention of "property" and section 21 to "records". It is now proposed to combine these 2 sections to cover up retention of both property and records. Further the time limit for retention is proposed to be increased from 3 months to 6 months, that is, 180 days in line with the extension of time limit for attachment.[74]

**Presumption that records or property** (sec 22) found in possession of person who is searched or surveyed that it belongs to the person, contents are factual, signature is right, etc. is proposed to be extended when such record or property is produced by a person before an investigating officer, or has been resumed or seized from the custody of a person by LEA in course of investigation in the predicate offence under the provisions of any other Act. [75]

**6. Burden of Proof:** The existing provision in section 24 reads as-"When a person is accused of having committed the offence under Section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused". There can be situations where the accused may cleverly pass off the property to someone to evade confiscation. To take care of these eventualities section 24 is proposed to be amended as below-

**Section 24:** In any proceedings relating to proceeds of crime under this Act, unless the contrary is proved, it shall be assumed that such proceeds of crime is drawn in money-laundering. [76]

74. See Supra Note 57.

75. Ibid

76. Ibid

**7. Committing of cases to Special Court:** Presently PMLA requires under sec 43(1) & 44(1) that trial for both the predicate offence and the money-laundering offence to take place in the Special Court (Sessions court). When ED files a charge sheet under money-laundering case, the court where the scheduled offence trial is taking place has to commit that case to the Special Court and to obviate any problem it is particularly mentioned that the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.[77]

**8. Officers empowered and required to assist:** New officers are being added to sec 54, who are empowered and required to assist authorities in enforcement of the Act.[78]

**9. Appeal against the order of Appellate Tribunal to lie in the Supreme Court:** Under the existing provision in section 42, an appeal against the order of the Appellate Tribunal lies before High Court within the jurisdiction of which the aggrieved party resides or carries on its commerce. Since the attached properties may be situated in different parts of the country in a particular case, the appeals can be filed in various High Courts in the country in the same case. Hence, such provision is likely to guide a situation where order of Money Laundering Tribunal might be overturned by one High Court and upheld by another High Court. In order to prevent this difficulty, it is proposed in section 42 that the appeal may lie before the Supreme Court. At the same time as it is also proposed in section 28 to raise the status of the Appellate Tribunal on the lines of the Appellate Tribunals under the SEBI Act. [79]

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77. See Supra note 57

78. Ibid

79. Ibid

**10. Removing monetary threshold for investigating the offence of money laundering:** Under the current provisions the offences specified in Part A of the Schedule do not prescribe any monetary verge. However the offences specified in Part B of the Schedule are considered Offence of Money laundering only if the total value involved in such offences is thirty lakhs rupees or more. The FATF standards do not envisage monetary threshold for investigating the offence of money laundering. To conform to the FATF standards it has been proposed to move the offences listed in Part B of the Schedule to Part A.[80]

## ISSUES RELATING TO AMENDMENT BILL

A number of relatable issues relating to the Amendment Bill were raised by the Committee and discussed with the representatives of Ministry of Finance (Department of Revenue). These included recommendations received from organizations / institutions such as IBA, RBI, SEBI and FICCI. Written information / replies were also obtained from the Ministry.[81]

## TRAILING THE FLOW OF MONEY

### (a) Multi-layered transactions and round-tripping

During the verbal evidence tendered by the representatives of the Department of Revenue, the Committee preferred to know whether there was a way the layering transactions across several countries be narrowed so that it was easier to trail the flow of money and whether the FATF could be sensitized of the several layers through which transactions were routed so that a standard in this view could be formulated by it.[82]

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80. See Supra note 57.

81. Ibid

82. Ibid

The Ministry has inter-alia submit in this regard that the FATF has issued suggestions that takes into relation the risk posed by such multi-jurisdictional entities and have recommended measures to mitigate the risk in their revised recommendations issued in Feb.2012. The Committee further preferred to know about the method to detect the round tripping of black money from India through the Foreign Investment and whether the new Amendment would help in that regard?

The Ministry enclose replied as below: "As per the scheme of the PMLA, the Directorate of Enforcement initiates investigations on registration of FIR for a scheduled offence by the apprehensive law enforcement agency. However, evasion of income tax, which leads to generation of black money, is not a scheduled offence under PMLA. It may be mentioned that in certain cases where charge sheets have been filed by CBI concerning scheduled offences under IPC and Prevention of Corruption Act, the Directorate of Enforcement is performing investigations under PMLA".

The Committee, while expressing their grave concern over multi-layering of transactions across countries including the round-tripping of unaccounted money to generate from India, would recommend that the Government should take solid steps to mitigate the risks posed by such multi-jurisdictional entities and their dealings. The enforcement mechanism require to be sensitized for this purpose. In this context, the Committee note that Clause 58 A of the Bill provides that where on termination of trial in a criminal court outside India under the corresponding law of any other country, such court find that the offence of money-laundering has not taken place or the property in India is not involved in money-laundering, the designated Special Court shall on an application moved by the concerned official, order release of such property. It has been pointed out that the above provision is drafted in such a mode as to make it obligatory on the part of the Special Court to release the property, in case the person is acquit by the corresponding law of any other country. This amounts to abridgement of powers of local court. The Committee would recommend that Clause 58A may be suitably re-drafted so as to reinstate the power of the local court in India to decide matters on its virtues, even when the person is acquitted by an overseas court. [83]

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83. See Supra note 57.

**(b) Participatory Notes and Stock Markets: Role of SEBI** The Committee during the oral proof also enquired as to what steps SEBI was taking to stop production of Black Money through Participatory Notes. The Ministry in their post-evidence reply have been elaborated.[84]

The Committee has been informed that the Participatory Notes (PNs) being issued by FIIs are being regulated by SEBI and that the PNs can be issued to regulate entities only. However, the Committee is surprised to learn that other reserves in the stock market together with foreign currency flows by both individual and institutional investors are not being monitored by SEBI. The Committee would like the SEBI to set up a harmonization mechanism in this regard with RBI so that funds flow into the domestic stock / securities markets is appropriately monitored. [85]

In the Committee's view, analysis of fund flows into the markets cannot be left to individual banks, as tainted money flowing into markets remains a separate possibility. Suitable amendments may thus be made in the Bill to monitor and curtail possible money laundering taking place through stock / securities markets. All the regulatory and intelligence agencies including the RBI, SEBI, FIU (IND), the Enforcement Directorate, the Directorate of Revenue Intelligence and Investigation Wing of Income Tax Department ought to set up a monitoring / coordination mechanism for this purpose, while remaining aware to such financial flows.[86]

**TRADE-BASED MONEY-LAUNDERING**

The Committee required to know as to how many cases were registered connecting Trade Based Money Laundering (TBML) and as to how PMLA would compact with trade-based money laundering. In their post-evidence submission, the Ministry stated as mentioned [87]

84. See ANNEXURE "A", Pg 90

85. See Supra note 57

86. Ibid

87. See ANNEXURE "B", Pg 91

The Committee would like the Department of Revenue to take into calculation and incorporate occurrence of trade-based money laundering, which has not been notable so far as a money-laundering offence. The Department also requires to keep a comprehensive data-base in this regard, which will allow them to tap trade-based offences. [88]

**ONUS OF PROOF-DISTINCTION BETWEEN BONAFIDE AND MALAFIDE TRANSACTION**

The Committee expressed their anxiety that the onus of proof that the property is not proceeds of crime being on the accused was rather rigid. The Ministry clarified their position. [89]

In this context, the Committee desired a definite clarification as to whether this Act can distinguish between bonafide and malafide transactions of property so that innocent persons, who end up with any property, are not penalized. The Ministry have sought to clarify that: "Section 8 of PMLA adequately safeguards the interests of persons who are not found to be involved in the offence of money laundering**".** The Committee recommends that the prescribed onus of proof that the property in question is not out of proceeds of money-laundering crime, being not only on the accused but also on anyone who is in possession of the proceeds of crime, be supposed to be subject to adequate safeguards to protect the naive. [90]

**BENEFICIAL OWNERSHIP Clause 2 (i)(fa) reads as :** "Beneficial Owner" means an individual who eventually owns or controls a client of a reporting entity or the person on whose behalf a operation is being conducted and includes a person who exercises crucial effective control over a juridical person. The proposed amendment contemplates that recognition of the beneficial owners is to be done by the reporting entity in respect of such clients as may be prescribed.[91]

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88. See Supra Note 57

89. See ANNEXURE "C" Pg 92

90. See Supra Note 57

91. Ibid

The Central Government will state the categories of customers in respect of whom banks will be required to confirm the beneficial owner. It has been pointed out that even if such condition may be limited to certain specified clients, ascertaining beneficial owners will be extremely complicated task for the banks. On this issue, the Ministry has stated their position as below: "PMLA in present form imposes obligation on the reporting entities and does not impose commitment on clients. This is in compliance with the FATF standards which do not enforce any direct obligation on clients to assert beneficial ownership while undertaking transaction with the bank". [92]

**PERSONS CARRYING ON DESIGNATED BUSINESS OR PROFESSION Clause 2 (ii)(ha) reads as :** "Client" means a person who is engaged in a monetary transaction or activity with a reporting entity and includes a person on whose behalf the person who engaged in the transaction or activity, is acting. It has been recommended that in the definition of "reporting entities", travel agents, vehicle sellers who deal in large value cash transactions, may also be integrated. The Ministry have however submitted that the Government does not agree with the suggestion. The Committee would recommend that the definition of "reporting entities" may be widened so as to comprise categories such as travel agents, vehicle sellers / dealers etc., who deal in large value money transactions. [93]

**IMPOSITION OF FINE Clause 4 reads as:**

"In section 4 of the principal Act, the words "which may extend to five lakh rupees" shall be omitted". It has been suggested that there may be an upper limit for the fine. Moreover, a percentage of the amount of money laundered may be measured as the fine. It has also been suggested that as the proposed amendment to impose fine on the entity does not make any difference between Directors who are in charge of and liable to the company for the conduct of its business and other Directors like Independent Directors, Nominee Directors, etc., it would be pleasing to limit the ambit of the clause only to Directors and employees entrusted with the day-to-day conduct of business. The Ministry has submitted their comments as mentioned [94]

92. See Supra Note 57.

93. Ibid94.

94. See ANNEXURE "D," pg 93

The proposed amendments look for to authorize the authorities to give directions / warnings and impose fines on the directors and employees of the reporting entities. The Committee, however, find that this does not make any peculiarity between Directors who are in charge of and responsible to the company for the conduct of its business and other Directors (Independent Directors, Nominee Directors etc.) It would thus be desirable to limit the ambit to Directors and employees who are responsible and entrusted with the conduct of the day-to-day business of the reporting entity and who are entrusted with the duty of complying with the provisions of PMLA.[95]

**MAINTENANCE OF RECORDS Clause 9 (sub-clause 3 and 4) reads as**

"(*3*) The records referred to in clause (*a*) of sub-section (*1*) shall be maintained for a period of ten years from the date of transaction between a client and the reporting entity. (*4*) The records referred to in clause (*e*) of sub-section (*1*) shall be maintained for a period of ten years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later". [96]

It has been pointed out that from the proposed amendments it appears that even credentials related to transactions would have to be maintained till ten years from the date of termination of business relationship or the closing of the account, whichever is later. This imply that if the customer in case of banking account does not close his account, such documents will become permanent documents and have to be maintained forever. The Ministry's submission on this issue[97]

95. See Supra Note 57

96. Ibid

97. See ANNEXURE "E", Pg 94

The Committee wishes that it may not be necessary to maintain all kinds of records for a period of ten years from the date of transaction between a client and the reporting entity. If the business rapport between a client and the reporting entity has finished or the account has been closed, the period for maintenance of records may be reduced to five years. Clause 9 may be clarified / modified accordingly.[98]

## ELECTRONIC VERIFICATION OF IDENTITY

It has been recommended that inclusion of Electronic verification of identity would offer suppleness for the banks and financial institutions in ensuring KYC compliance, which may otherwise become more and more time-consuming. The Ministry has submitted that: "The procedure and manner of verification and list of officially valid documents is specified in the PML Rules and circulars of the regulators. This suggestion can be examined and considered while amending the PML Rules. The Government, therefore, does not consider that any amendment in PMLA will be required for this purpose. The proposed section 12(1)(c) already uses words, "as may be prescribed". The Committee would recommend that provision for electronic verification of identity may be made in the Rules, as it would help the banks and financial institutions in ensuring KYC compliance.[99]

## ADEQUACY OF MANPOWER AND TRAINING REQUIREMENTS

The Committee during the oral evidence articulated their concern as to whether the Law Enforcement Agencies and banks are properly prepared with manpower and requisite information technology to handle the additional tasks brought about by the amending PMLA. The Ministry in their post-evidence reply stated[100]

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98. See Supra Note 57

99. Ibid

100. See ANNEXURE "F", pg 95

On being enquired as to whether there were enough personnel in the Enforcement Directorate to effectively implement the PMLA. The Ministry in a written note has submitted that the sanctioned strength of the officers and staff at several levels in the Directorate of Enforcement has been recently increased from 745 to 2064 in order to enhance its operational effectiveness having regard to the enhance in work relating to PMLA. [101]

Recruitment has been undertaken in three phases. The Committee desired to know the Ministers view on the desirability of large training budget for the organizations for training of their personnel in overseas crime enforcement agencies. The Ministry have expressed their view as under: "The suggestion of the Committee is well taken. While the officers at various levels are already being sent on training to other countries for upgrading of their skills in fiscal crimes, capacity building in investigating money laundering offences etc., the Dept. will take further steps to augment training in related areas".[102]

The Committee finds although the sanctioned power of the nodal enforcement agency under the PMLA, namely the Enforcement Directorate has been considerably improved; their effective strength still remains insufficient. The Committee are therefore of the view that all the agencies entrusted with key responsibilities under PMLA, especially the FIU-IND and the Enforcement Directorate should be adequately staffed with requisite skills to meet their operational necessities. They should also be provided professional training in line with international standards. The Committee would like to highlight that the operational effectiveness of enforcement agencies should not suffer for want of staff and training. [103]

## MANAGEABILITY OF FINANCIAL DATA

On the issue of manageability, the Committee specifically enquired about decrease in the capacity of financial data received under the PMLA reporting framework so that attention is focused on larger cases The Ministry's reply in this regard is re-produced[104]

101. See Supra Note 57

102. Ibid

103. Ibid

104. See ANNEXURE "G", pg 96

The Committee considers that the volume of financial data required under PMLA may become very cumbersome and hence unmanageable. It would also require large number of staff which Government may not be able to supply. The Committee would, therefore, propose that certain parameters / thresholds may be predetermined so that all kinds of data are not processed. The proposed framework should thus focus on larger cases and laundering-prone categories / sectors. In this context, the Committee would advocate that a comprehensive data-base would be useful to analyze the complex inter-relationship among the transactions and entities and their style and outline over time**.** [105]

## FAST-TRACKING OF CASES

On the issue of expediting the cases, the Committee desired to know whether this law bring about fast-tracking of cases and speed in investigation. The Ministry have explained that: "With the sanction of additional manpower to the Directorate of Enforcement, the investigations under PMLA are expected to be conducted expeditiously. Secrecy in concerned matters is being maintained. Further, section 43 of PMLA provides for designating Courts of Session as Special Courts for trial of the offence of money laundering punishable under section 4".[106]

The Committee would not like the enquiries under PMLA to become open-ended without any real outcomes. It is, consequently, necessary that time-lines are prescribed for completing the investigative process. If productive action has to be taken against money-laundering, it is important that cases are fast-tracked, the culprits punished and the proceeds confiscated without any delay. [107]

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105. See Supra Note 57

106. Ibid

107. Ibid

Special courts, being set up to decide cases of money-laundering should be geared up to help achieve this objective without any hindrance. With the modifications and amendments suggested by the Committee, it is expected that the PMLA would substantially conform to the global standards and help in amplification and coordinate efforts of both national and international intelligence, investigation and enforcement agencies in fighting money laundering and terror-financing. In this context, the Committee would like to once again call attention to, that the anti-money laundering law should seek to tighten any laxity in the existing enforcement mechanism and secure speedier convictions in a stipulated time-frame.[108]

108. See Supra Note 57.

## CHAPTER IV

## INTERNATIONAL STANDARD SETTERS

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## INTRODUCTION

Money laundering is a justly global phenomenon. The rising integration of the world's financial system, as technology has enhanced and barriers to the free movement of resources have been reduced, has meant that money launderers can make use of this scheme to hide their ill-gotten gains[109]. They are capable to quickly move their criminally derived cash proceeds between national jurisdictions, complicating the job of tracing and confiscating these assets. The International dimension of money laundering was apparent in a study of Canadian money laundering police files. They revealed that over 80 percent of all laundering schemes had an international aspect. The various international organizations viewed as the international standard setters are discussed below. Additional describes the documents and instrumentalities that have been developed for anti-money laundering (AML) and combating the financing of terrorism (CFT) purposes.

**The United Nations**: The United Nations (UN) was the first international organization to embark on considerable action to fight money laundering on a truly worldwide basis. [110] The UN is important in this regard for various reasons. First, it is the international organization with the broadest variety of membership. Founded in October of 1945, there are currently 191 member states of the UN throughout the world. Second, the UN actively operates a program to fight money laundering; the Global Programmee against Money Laundering (GPML), which is headquartered in Vienna, Austria, is part of the UN Office of Drugs and Crime (ODC). Third, and possibly most importantly,

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109. Dr. Agarwal J.D "International Money Laundering in Banking Sector" http://www.iif.edu/ visited on 16th December 2012.

110. There were other international efforts, e.g, " Measures Against the Transfer and Safekeeping of Funds of Criminal Origin, " adopted by the Committee of the Council of Europe on June 27, 1980. It is beyond the purpose of this Reference Guide, however, to discuss in detail the history of the international effort to fight money laundering.

the UN has the ability to adopt international treaties or conventions that have the result of law in a country once that country has signed, ratified and implemented the convention, depending upon the country's constitution and legal framework. In certain cases, the UN Security Council has the power to bind all member countries through a Security Council Resolution, in spite of of other action on the part of an individual country.

## CONVENTIONS AND DIRECTIVES TO COUNTER MONEY LAUNDERING:

**United Nations Convention against Transnational Organized Crime**: The United Nations Convention against Organized Crime, adopted by the General Assembly in 2000, also recognizes money laundering as one of the most serious trans-national crimes. It defines money laundering as;

(i) The conversion of transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;[111]

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime. [112]

Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing at the instance of receipt, that such property is the proceeds of crime;

(ii) Participation in, relationship with or conspiracy to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with the convention.[113]

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111. "List of Member States," www.un.org/Overview/unmember.html.

112. See http://www.imolin.org/imoli/gpml.html.(last visited on 10th April 2013)

113. The UNDCP was renamed the Office of Drug Control and Crime Prevention (ODCCP) in 1997, and renamed the Office of Drugs and Crime (ODC) in October of 2002.

Among the measures to combat money laundering are;

(a) A regulatory and supervisory regime for banks and financial institutions, which entails customer identification, record keeping and reporting of suspicious transactions;

(b) Co-operation and exchange of information amongst administrative, regulatory, law enforcement and other authorities dedicated to money laundering both at the national and international level;

(c) Monitoring of cash and other negotiable instruments across border; and

(d) Global, regional, sub-regional and bilateral co-operation.

**European Council directives and other initiatives on money laundering.**

The Council of Europe issued a directive in June 1991 on the 'prevention of use of financial systems for the purpose of money laundering'. This directive was further amended in 1999 to cover 'proceeds of crime and money laundering offences'. The Council of Europe has also taken the initiative regarding the 'identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime' and improving mutual assistance in criminal matters, in particular, in the area of 'combating organized crime, laundering of the proceeds from crime and financial crime'.

**The Financial Action Task Force on Money Laundering:**

Formed in 1989 by the G-7 countries, the Financial Action Task Force on Money Laundering (FATF) is an intergovernmental body whose purpose is to develop and promote an international response to combat money laundering.[114]. In October of 2001, FATF[115] expanded its mission to include combating the financing of terrorism.

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114. See http://www.un.org/sc/ctc. The G-7 countries are Canada, France, Germany, Italy, Japan, United Kingdom, and United States.(last visited on 13th March 2013)

115. About FATF, and Terrorist Financing at http://www.fatf-gafi.org/ at Terrorist Financing.(last visited on 12th February 2013)

FATF is a policy-making body, which brings together legal, financial and law enforcement experts to achieve national legislation and regulatory AML and CFT reforms. FATF's three primary functions with regard to money laundering are;

1. Monitoring members' progress in implementing anti-money laundering measures;
2. Reviewing and reporting on laundering trends, techniques and countermeasures; and
3. Promoting the adoption and implementation of FATF anti-money laundering standards globally.

**The Basel Committee on Banking Supervision:**

The Basel Committee on Banking Supervision (Basel Committee) was formed in 1974[116] by the central bank governors of the Group of 10 countries. [117] It formulates broad supervisory standards and guidelines and recommends statements of best practices on a wide range of bank supervisory issues.

**Statement of Principles on Money Laundering:**

In 1988, the Basel Committee issued its Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering. (Statement on Prevention).[118] There are essentially four principles contained in the Statement on Prevention:

- Proper customer identification;
- High ethical standards and compliance with laws;
- Cooperation with law enforcement authorities; and
- Policies and procedures to adhere to the statement.

116. Available at:http://www.bis.org/index.html.(last visited on 13th April 2013)

117. The Group of 10 countries is a misnomer, since there are actually 13 member countries. The Basel Committee members, (as well as the Group of 10) are: Belgium, Canada, France, Germany, Italy, Japan, Luxemburg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States.

118. Available at: http://www.bis.org/publ/bcbsc137.pdf.(last visited on 16th March 2013)

**International Association of Insurance Supervisors:**

The International Association of Insurance Supervisors (IAIS), established in 1994, is an organization of insurance supervisors from more than 100 different countries and jurisdictions.[119] Its primary objectives are to:

- Promote cooperation among insurance regulators,
- Set international standards for insurance supervision,
- Provide training to members, and
- Coordinate work with regulators in the other financial sectors and international financial institutions.

The AML Guidance Note contains four principles for insurance entities:

- Comply with anti-money laundering laws,
- Have" know your customer" procedures,
- Cooperate with all law enforcement authorities, and
- Have internal AML policies, procedures and training programs for employees.

**International Organization of Securities Commissioners:**

The International Organization of Securities Commissioners (IOSCO) [120] is an organization of securities commissioners and administrators that have day-to-day responsibilities for securities regulation and the administration of securities laws in their respective countries.

IOSCO has three core objectives for securities regulation:

- The protection of investors;
- Ensuring that markets are fair, efficient and transparent; and
- The reduction of systematic risk. [121]

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119. For a list of member countries and jurisdictions, see members at http;//www.iaisweb.org/132_176_ENU_HTML.asp. The listing of members contains hyperlinks to individual member websites.

120. IAIS, at Home page.

121. Available at:http://www.iosco.org/iosco.html.(last visited on 27th March 2013)

**The Egmont Group of Financial Intelligence Units:**

To fight money laundering, governments have created agencies to analyze information submitted by covered entities and persons pursuant to money laundering reporting requirements. Such agencies are commonly referred to as financial intelligence units (FIUs). These units serve as the focal point for national AML programs, because they provide for the exchange of information between financial institutions and law enforcement.[122]

**Asia- Pacific Group on Money Laundering(APG)**

The Asia / Pacific Group on Money Laundering (APG) is an international organization consisting of 38 member countries / jurisdictions and a number of inter regional observers including the United Nations, IMF and World Bank. The APG is closely affiliated with the FATF based in the OECD Headquarter at Paris, France. All APG members commit to effectively the FATF's international standards for anti-money laundering and combating financing of terrorism referred to the 40 + 9 Recommendation. [123]

Part of this commitment includes implementing measures against terrorist listed by the United Nations in the 1267 Consolidated List functions of APG is to assess APG members compliance with the global AML / CFT standards through mutual evaluations, Coordinate technical assistance and training with donor agencies and APG jurisdictions to improve compliance with the AML /CFT standards, CO-operate with the international AML / CFT network, conduct research into money laundering and terrorist financing methods, trends, risks and vulnerabilities, contributes to the global AML / CFT policy development by active Association Membership of FATF. [124]

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122.Available at: http://www.egmontgroup.org/(last visited on 25th April 2013)

123.Available at: http://www.apgml.org/(last visited on 16th March 2013)

124. Available at: http://www.apgml.org/about/history.aspx(last visited on 10th April 2013)

Thus one can see the complete and impressive arrangement of efforts taken by the international community to fight the menace of money laundering. As the financial systems of the world grow increasingly interconnected, international cooperation has been, and must continues to be, fundamental in curtailing the growing influence on national economics of drug trafficking, financial fraud, other serious transnational organized crime, and the laundering of proceeds of such crimes.[125]

The international efforts to develop and implement effective anti-money laundering controls has been marked by the persistent, ever present need to balance, on the one hand the interests of government in access to financial records and even affirmative disclosure of suspicious activity, against, on the other hand, the interests of financial institutions in being free unduly burdensome regulation, along with the interests o their customers in maintaining an appropriate degree of financial privacy.[126]

Further the international community is responding, trans-governmental groups made up of financial, regularity and judiciary specialist are working in a variety of ways to share information and expertise to fight money laundering, and the fight against it, are both relatively recent phenomenon, and work remains to be done.[127]

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125. Available at: http://www.apgml.org/apg-members/(last visited on 27th February 2013)

126. Available at: http://en.wikipedia.org/wiki/Asia/Pacific_Group_on_Money_Laundering(last visited on 16th April 2013)

127. Available at: http://www.eurasiangroup.org/apg.php(last visited on 1st March 2013)

# CHAPTER V

## CRITICAL APPRAISAL OF CASES RELATED TO MONEY LAUNDERING ACT AND COMPARISON WITH FOREIGN MONEY LAUNDERING LEGISLATIONS

**INTRODUCTION**

In the following two case studies it has been shown how the judgment of each case would have differed if the Amendment Bill of PML 2012 had been passed earlier. Both the cases have been decided upon the Prevention of Money laundering Act 2002.

**CASE 1:**

**Pareena Swarup……Petitioner(s)**

**Versus**

**Union Of India……Respondent(s)**

**30 September, 2008**

**Bench: K.G. Balakrishnan, Lokeshwar Singh Panta, P. Sathasivam**[128]

Ms. Pareena Swarup, member of the Bar, has filed a writ petition under Art. 32 of the Constitution of India by means of Public Interest Litigation in quest of to declare various sections of the Prevention of Money Laundering Act, 2002 [129] as ultra vires of Arts. 14, 19 (1) (g), 21, 50, 323B of the Constitution of India. It is also pleaded that these provisions are in breach of scheme of the Constitutional provisions and power of judiciary.

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128. Available at: http://www.indiankanoon.org/doc/132042/(last visited on 13th April 2013)

129. See ANNEXURE "H", Pg 97

**The Facts Are:**

The Prevention of Money Laundering Act, 2002 came into force for providing penalty for offence of Money Laundering. The Act as well as provides measures of prevention of money laundering. The purpose sought to be achieved is by provisional attachment of the proceeds of crime, which are likely to be concealed, transferred or dealt with in any mode which may result in provoking any proceedings relating to confiscation of such proceeds under the Act. The Act also casts obligations on banking companies, financial institutions and intermediaries to maintain record of the transactions and to furnish information of such transactions within the given time.[130]

In exercise of powers conferred by clause (s) of sub-section (2) of Section 73 read with Section 30 of the Prevention of Money Laundering Act, 2002 (15 of 2003), the Central Government framed rules regulating the appointment and conditions of service of persons appointed as Chairperson and Members of the Appellate Tribunal. These rules are the Prevention of Money-Laundering (Appointment and Conditions of Service of Chairperson and Members of Appellate Tribunal) Rules, 2007. The Central Government has also framed rules called the Prevention of Money Laundering (Appointment and Conditions of Service of Chairperson and Members of Adjudicating Authorities) Rules, 2007.[131]

It is highlighted that the provisions of the Act are so provided that there may not be independent judiciary to decide the cases under the Act, but the Members and the Chairperson are to be selected by the Selection Committee headed by the Revenue Secretary. It is further pointed out that the Constitutional guarantee of a free and independent judiciary and the constitutional scheme of separation of powers can be simply and acutely diluted, if the legislatures were to divest the regular Courts of their jurisdiction in all matters, entrust the same to the newly created Tribunals.[132]

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130. See Supra Note 128

131. Ibid

132. Ibid

According to the petitioner, the Act and Rules, relating to constitution of Adjudicating Authority and Appellate Tribunal are violative of basic constitutional guarantee of free and independent judiciary, thus, beyond the legislative capability of the Parliament. The freedom from control and possible domination of the executive are essential pre-conditions for the independence. With these and several other grounds, the petitioner has filed this public interest litigation seeking to issue a writ of certiorari for quashing the above said provisions which are inconsistent with the separation of power and interference with the judicial functioning of the Tribunal as ultra virus of the Constitution of India.[133]

The respondent-Union of India has filed a counter affidavit repudiating the claim of the petitioner. The Department highlighted that the impugned Act has not ousted the jurisdiction of any courts and sufficient safeguards are provided in the appointment of officers of the Adjudicating Authorities, Members and Chairperson of the Appellate Tribunal.[134]

The petitioner has highlighted the following defects in the PMLA Act 2002:-

1. Rule 32(2) of PMLA which provides for removal of Chairperson/Members of Tribunal under PMLA does not provide adequate safety to the tenure of the Chairperson/Members of the Tribunal.

2. Section 28(1) of PMLA, which allows a person who under The Prevention of Money Laundering Act 2002, is qualified to be a judge of the High Court under the said Act to be the Chairperson of the Tribunal, should be either deleted or the Rules may be amended to provide that the Chief Justice of India shall nominate a person for appointment as Chairperson of Appellate Tribunal under PMLA & who is or has been a Judge of the Supreme Court or a High Court & failing which a person who & the PLMA Act qualified to be a judge of the High Court.[135]

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133. See Supra note 128

134. Ibid

135. Ibid

3. The qualifications for Legal Member of the Adjudicating Authority should exclude those who are qualified to be a District Judge and only serving or retired District Judges should be appointed. The Chairperson of the Adjudicating Authority should be the Legal member.[136]

As regards the above defects in the rules, as observed earlier, on the request of this Court, Mr. K.K. Venugopal, learned senior counsel, Mr. Gopal Subramaniam, learned ASG as well as Ms. Pareena Swarup who has filed this PIL suggested certain amendments in the line of the constitutional provisions.[137]

It is essential that the Court may draw a line which the executive may not cross in their imprudent desire to take over bit by bit and judicial functions and powers of the State exercised by the duly constituted Courts. While creating new avenue of judicial forums, it is the responsibility of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of the judicial function. The provisions of Prevention of the Money Laundering Act are so provided that there may not be independent judiciary to decide the cases under the Act but the Members and the Chairperson to be selected by the Selection Committee headed by Revenue Secretary. [138]

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136. See Supra Note 128

137. Ibid

138. Ibid

PMLA is a specialized and new Act and District Judges may not be available with experience in related issues whereas Advocates or officers of Indian Legal Service, who are eligible to be District Judges, may often have wider knowledge of its provisions and functioning.[139]

Inasmuch as the amended/proposed provisions, are in refrain with the scheme of the Constitution as well as the principles laid down by this Court, the Petitoner approve the same and direct the respondent-Union of India to implement the above provisions, if not so far amended as recommended, as expeditiously as possible but not later than six months from the date of receipt of copy of the judgment.[140]

**Critical Appraisal of the case:**

In the above case Prevention of Money Laundering Act, 2002 Section 6, 25, 27, 28, 32 and 40 have been declared ultra-vires. The independence of Judiciary and the Separation of Powers of has been challenged in this case and hence it has been declared unconstitutional. The Prevention of Money Laundering (Bill) 2011 has been passed in the year 2012 and certain amendments have been made in the said bill after the judgment of this case. Would it have been passed earlier certain areas of judgment would have differed like as under:

In the said case Section 28(1) of PMLA 2002 reads as follows: "A person shall not be qualified for appointment as Chairperson unless he is or has been a Judge of the Supreme Court or of a [High Court or is qualified to be a Judge of the High Court]."

Allows a person who is qualified to be a judge of the High Court under the said Act to be the Chairperson of the Tribunal, should be either deleted or the Rules may be amended to provide that the Chief Justice of India shall nominate a person for appointment as Chairperson of Appellate Tribunal under PMLA & who is or has been a Judge of the Supreme Court or a High Court & failing which a person who & the PLMA Act qualified to be a judge of the High Court.

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139. See Supra Note 128

140. Ibid

Amendment Bill of 2011 of PMLA

**Appeal against the order of Appellate Tribunal to lie in the Supreme Court:** Under the existing provision in section 42, an appeal against the order of the Appellate Tribunal lies before High Court within the jurisdiction of which the aggrieved party resides or carries on its business. Since the attached properties may be located in different parts of the country in a particular case, the appeals can be filed in various High Courts in the country in the same case. Hence, such provision is likely to lead a situation where order of Money Laundering Tribunal might be reversed by one High Court and upheld by another High Court. In order to obviate this difficulty, it is proposed in section 42 that the appeal may lie before the Supreme Court. Concurrently it is also proposed in section 28 to raise the status of the Appellate Tribunal on the lines of the Appellate Tribunals under the SEBI Act. Hence, the PMLA bill 2011 proposed to raise the status of the Appellate tribunal. [141]

Section 28 talks only about the qualification for appointment of the Appellate Tribunal. In the above PIL it has been pleaded that this rule should either be deleted or amended and the Chief Justice of India shall nominate a person for appointment as Chairperson of Appellate Tribunal under PMLA & who is or has been a Judge of the Supreme Court or a High Court & failing which a person who & the PLMA Act qualified to be a judge of the High Court. This pleading has not been amended whereas, in the proposed bill of 2011 PMLA it has been said in Sec 42 that an appeal of the Appellate Tribunal lie before the Supreme Court. If a judge of the Supreme Court is appointed as the Chairperson of Appellate Tribunal then it is not possible to take an appeal of the Appellate Tribunal to the Supreme Court. So the concept of “appeal” would not be there which would result as a big lacuna to the tribunal.

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141. As mention in chapter III, Pg

Moreover another grey area of Money laundering Act which could be identified from the above case is that powers in the hands of the Executive should be restricted only to identifying the crimes. Judiciary is that branch of government that interprets laws, punishes their breach and thereby protects individual's liberties and rights against violation by fellow individuals and by state officials and organs. The Judiciary should be the only body responsible for interpretation of the law.

**CASE 2:**

IN THE HIGH COURT OF JHARKHAND AT RANCHI

**Anos Ekka .....Petitioner in both cases**

**Versus**

**The State of Jhrkhand .....Opposite Party in both the cases**[142]

4TH February 2011.

**Brief facts of the Case:**

Earlier petition of Bail of the petitioner was rejected on 18.11.2009. The petitioner appealed to the Hon'ble Supreme Court, but the said Special Leave to Appeal was also dismissed on 4.12.2009.

This bail application arose out of the Enforcement Case Information Report being alleging offences under section 3 read with section 4 of the Prevention of Money Laundering Act, 2002.

Both the bail applications filed by the petitioner were heard together by the High Court and the Supreme Court and were rejected/dismissed by common order.[143]

142. Available at: http://www.indiankanoon.org/doc/156276885/(last visited on 17th April 2013)

143. Ibid

Mr. Kanhaiya Prasad Singh, learned senior counsel appearing for the petitioner in both the cases made common submissions as follows:

The prayer for bail of the petitioner was rejected by the Supreme Court on 4.12.2009 when the petitioner remained in custody only for 3 and ½ months, and when the investigation was ongoing, but then he remained in jail for more than 17 months. The main purpose of bail is to make sure that petitioner returns for trial and that the reason is not to punish him by keeping behind bars. [144]

The petitioner has roots in the society and he is still a M.L.A. and there is no risk of his not attending trial. He relied on the judgments reported in Hussainara Khatoon & Others Vs. Home, Secretary, State of Bihar, Patna[145] and Bhagirathsinh Judega Vs. State of Gujrat.[146]

Mr. A.K. Das, learned counsel appearing for the Directorate of Enforcement and Mr. Mokhtar Khan, learned counsel appearing for the C.B.I. referring to the records and their respective counter affidavits opposed the prayer for bail and submitted as follows:

In the year 2005, at the time of contesting election the petitioner declared his assets along with his wife to the tune of Rs.10.50 lacs and earned about Rs.15.40 lacs by way of salary as M.L.A./Minister during March, 2005 to June, 2008.

After he became Minister, he had a construction Company-"Ekka Construction" in the name of his wife and other relatives and got the same registered in the Department, in which he was Minister. He also got the work orders awarded from several Departments in favour of the said Company by virtue of his authority. The value of the inconsistent assets was assessed at about Rs.6.88 crores and it is still increasing.[147]

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144. See Supra Note 142

145. AIR 1979 S.C. 1360

146. AIR 1984 SC 372

147. See Supra Note 142

The petitioner tampered with the evidence even when he was in judicial custody by getting 11 affidavits dated 17.2.2009 filed alongside with his earlier bail petition alleged to have been sworn by different vendors to show that petitioner's wife had bought certain lands from them and the petitioner after institution of an FIR, never contacted them, or there was any kind of threat by the petitioner; whereas during inquiry the said vendors have said otherwise that it is the petitioner who gave the money and purchased the land in his name and in the name of his wife and other relatives. He is so authoritative and influential that he won M.L.A. election even while he was in prison.[148]

At the given address it was found there was no existence of any Company like "Ekka Construction". There are around 108 sale deeds, under which huge properties have been acquired by the petitioner in his name and in the name of his wife and relatives and also in the name of the said Company.[149]

Referring to the order-sheet of ECIR Case, it was submitted that at his sweet will, the petitioner fell ill and within a short time, he prayed for allowing him to take oath as an M.L.A./or for participating in election for Rajya Sabha.[150]

Under the Money Laundering Act, a complaint Case which is like a charge sheet has been filed. Under section 24 of the said Act, the burden of proof is on the petitioner to prove that proceeds of crime are untainted property, and as per section 45, bail can be granted only if the Court believes that there are reasonable grounds for believing that petitioner is not guilty and that is not likely to commit offence while on bail.[151]

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148. See Supra Note 142

149. Ibid

150. Ibid

151. Ibid

The petitioner did not allow the trial in Money Laundering Case to proceed as he realized that his guilt would be proven. He adopted several measures in order to avoid the receipt of prosecution documents, for about 5 months. Ultimately, it was received on 28th October, 2010, only when this delaying tactics was mentioned in the counter affidavit filed in 2010. [152]

The case was fixed for charge, but adjournments were being taken on behalf of the petitioner; on insubstantial grounds. Thus, the petitioner had been obstructing the progress of the cases. He should not complain of delay in conclusion of trial as he himself is solely responsible for the same. He managed to stay for a substantial period at the hospitals i.e. about four months out of his judicial custody of 17 months; and avoided his appearance in the court, on flimsy grounds. It was also submitted that physical possession of the attached properties could not be taken till date.[153]

Petitioner's prayer for bail in both the cases were earlier rejected by this Court on 18.11.2009 after considering the submissions made by the parties in detail. They were then rejected by the Hon'ble Supreme Court on 4.12.2009. It is true that petitioner has remained in judicial custody for about 17 months ( including about 4 months in Hospitals) but the allegations are very serious.[154]

In vigilance case, charge sheet was submitted against the petitioner. However, under the orders of this Court CBI has taken over further investigation recently in August, 2010. Such investigation is to be made in different parts of this Country and other countries also.[155]

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152. See Supra Note 142

153. Ibid

154. Ibid

155. Ibid

In Money Laundering Case, Complaint (charge sheet) has been filed against the petitioner. Provisions of Sections 24 and 45 of this Act are severe. The burden was on the petitioner to prove that he was not guilty, and while considering the prayer for bail, the Court is required to be satisfied that there are reasonable grounds for believing that accused is not guilty, and he is not likely to commit offence of Money Laundering while on bail.[156]

Prima facie there are sufficient materials against the petitioner in both the cases. It has come on record that the petitioner purchased 108 huge properties in his name and in the name of others connected with him. The rate of disproportionate assets, is still going higher during investigation. It has also come on the record that petitioner has tried to tamper with and influence witnesses, even while he was in prison.[157]

Prima facie, it is a case of loot and laundering of huge public money, by the petitioner who claims himself to be a people's representative. The petitioner has also abused the process of law and making mockery of justice delivery system, as noticed above. After hearing the parties in detail and considering the entire matter carefully, the petitioner does not deserve bail in these cases. Accordingly, these bail applications were rejected.[158]

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156. See Supra Note 142

157. Ibid

158. Ibid

**Critical Analysis of the Case:**

The delay in the trial of the above mentioned case would not have taken place if the amended Bill has passed earlier. It is presumed that such proceeds of crime are involved in Money Laundering under section 24.

THE PREVENTION OF MONEY-LAUNDERING (AMENDMENT) BILL, 2012

(AS PASSED BY THE HOUSES OF PARLIAMENT)

For section 24 of the principal Act, the following section shall be substituted, namely:—

" In any proceeding relating to proceeds of crime under this Act,—

(a) In the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) In the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.".

Earlier in the PMLA 2002, under section 24 the burden of proving the proceeds of crime of untained property shall be on the accused.

Though the Bail application in both the Courts were rejected, but the undue delay could have been avoided and the petitioner would have been directly been accused of Money Laundering crime without burden of proving.

## COMPARISON WITH FOREIGN MONEY LAUNDERING LEGISLATIONS:

## COMPARISON WITH UK 'THE PROCEEDS OF CRIME ACT 2002'

In India, the Anti-Money laundering provisions apply only to drug offences and specified series offences and the new Bill does not extend the remit of the provisions to encompass all crimes, as is presently the case in UK. The proceeds of Crime Act 2002(POCA) is the principal anti-money laundering legislation in the UK along with the Money Laundering regulations 2007. The regulations impose additional anti-money laundering administrative requirements on organizations undertaking specified regulated activities. The statutory criminal law is obtained within part 7 of the POCA and the money laundering provisions apply to all crimes committed on or after 24th February 2003, not simply drug trafficking, terrorism and serious crime.[159]

While the new Indian Bill does expand the definition of money laundering offences to include activities like concealment, acquisition, possession and use of proceeds of crime, it must still be proved that an accused has knowledge that property represents 'criminal property'. The scope of the UK principal money laundering offence remains comparatively broad; mere suspicion that property represents 'criminal property' would suffice.[160]

Furthermore, the Bill does not introduce offences for failing to report a knowledge or suspicion of money laundering or offences of "tipping off", namely making a disclosure likely to prejudice a money laundering investigation. In the UK , section 330, 331 and 332 of POCA 2002 create offences of failure to disclose possible money laundering activities. The maximum penalty on conviction for such offence is 5 years imprisonment and/or a fine and the prosecution need only prove that the accused has 'reasonable grounds' for suspicion.[161]

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159. Lex Witness: Vol IV; Issue 8; March 2013, pg 13-15

160. Ibid

161. Ibid

In terms of requirements to put in place appropriate anti-money laundering controls, the Bill broadens the definition of reporting entity to include banks, financial institutions, intermediaries or a professional, including persons engaged in real estate business and/or jewellery business. The Bill also increase the power of directors to call for records and conduct inquiries and direct audits in cases of non compliance of obligations. However it does not propose to introduce offences for failure to comply with these requirements. The UK takes a far more draconian approach and failure to comply with its Money Laundering regulations can amount to a criminal offence, which can be prosecuted by the Crown Prosecution Service or the FSA, with a maximum penalty of two years imprisonment and/or a fine.[162]

In terms of punishment, the Indian Bill removes the upper limit fine of INR 5 lakh. However the maximum period of imprisonment remains 7 years (10 years for specified offences). The maximum period of imprisonment in the UK , for example is more severe, namely 14 years.[163]

The Indian Bill proposes to provide for attachment and confiscation of the proceeds of crime, even if there is no confiscation, provided that the property in question (i.e. the proceeds of crime) is involved in money laundering. This appears to go further than the UK, for example, where confiscation orders can only be made following the confiscation or absolute discharge of an accused, who can be shown to have benefitted from criminal conduct(Sec 92 POCA 2002).[164]

However, pursuant to Sec 41 of POCA 2002, the UK courts can make restraints order to prohibit dealing with property obtained through unlawful conduct. A restraint order has the effect of freezing property that may be liable to confiscation order. The new Indian Bill does not make any mention of similar restraint order provisions. However a new presumption has been introduced by the Bill so that in the proceedings relating to money laundering, the funds shall be presumed to be involved in the offence, unless proven otherwise.[165]

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162. See Supra Note 159.

163. Ibid

164. Ibid

165. Ibid

The Bill also adds multiple persons/entities including members of ICAI, ICWAI, ICSI to assist the authorities in the enforcement of the Act. Similarly, in the UK, the Money Laundering Regulations establish supervisory authorities to monitor and ensure compliance with the regulations.[166]

## COMPARISON WITH GERMAN'S 'STRAFGESETBUCH-STGB' AND 'GELDWASCHEGESETZ-GWG:

In Germany, money laundering is codified in the Criminal Code (Strafgesetbuch-StGB') as well as in money laundering Act ( Geldwaschegesetz-GwG). Money laundering is punishable by 3 months to 5 years in prison, if acting with criminal intend. Additionally, Section 261 (5) of the criminal Code expands the scope of application. Hereafter, acting recklessly unaware that an asset is derived from an unlawful act can be punished by upto 2 years in prison or a fine.[167]

Besides the Criminal Code, the Money laundering Act requires particular attention. Due to efforts to prevent money laundering, the financing of terrorism and organized crime, the European Union constantly intensified the requirements of money laundering regulations in the member states over the last 20 years.[168]

While in the past money laundering Act was mainly directed at the financial sector. Now it covers others professions e.g. the insurance sector, the legal profession, real estate brokers and commercial traders. As one fundamental principle to compat money laundering is to identify the persons background of a business relationship. Section 11 of the Money Laundering Act lays down an obligation to immediately report suspicious transactions to the law enforcement authorities and the Federal Criminal police Office ('Bundeskrimanalamt'), where a Financial Intelligence Unit (FIU) has been established.[169]

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166. See Supra Note 159

167. Ibid

168. Ibid

169. Ibid

A violition of this rule can be filed by upto EUR 100,000,00 (Rs.72 lakh). Contrary to Section 261 of the Criminal Code, neither criminal intent nor thoughtless non-recognition is needed, pure suspicion is sufficient. Further in order to ensure transparency in business relationships and financial transactions, the Money Laundering Act states certain obligations to prevent money laundering offences, especially the 'know your customer'- principle. As a result of this legislation the awareness of the importance of anti-money laundering compliance has increased significantly in Germany.[170]

Compared to the German anti-money laundering regulations, the prevention of Money laundering (Amendment) Bill of 2011 demonstrates considerable deficits. It is one step in the right direction though, but in times of an inter-dependent global economy a stricter legislation is indispensible.[171]

The Prevention of Money laundering (Amendment) Bill of 2011 is most definitely a step in the right direction, but should not be the only step taken by the legislature to strengthen the anti-money laundering framework in the country. As is evidence from the comparison drawn above, the law still has sufficient lacunae and is yet to really drive home the point hard.[172]

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170. See Supra Note 159

171. Ibid

172. Ibid

## CHAPTER VI

## CONCLUSION AND RECOMMENDATION

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## CONCLUSION AND RECOMMENDATIONS

From the above analysis the Researcher has come to the following conclusion:

Money Laundering laws enacted by various countries can be a very effective tool to counter it if these laws are properly conceived and enacted in the first instance. Often it has been the experience that since money laundering is carried on in connection with other crimes, some substantive laws need to be enacted with regard to more serious crimes in order to deal with them effectively and thereby stem the flow of funds from these serious crimes continues unabated, the substantive law so enacted to deal with them should be linked to the money laundering statutes. For instance, substantive laws to deal with organized crime, drug trafficking, terrorism, corruption, economic scams, etc.., could be incorporated in the schedule of offence of the Indian Law on money laundering. By bringing these offences into the schedule of offences, money laundering provisions automatically becomes part of these crimes.

In the 1st Chapter the researcher mentioned about the research questions and have finally satisfactorily drawn the answers of those objectives.[1] Hereafter various suggestions will be given to curb the activities of money laundering. In chapter three of this research paper it has been mentioned how the recent Amendment Bill has filled the gap of the 2002 PMLA Act. Curbing of the activities and following the Anti-money Laundering provisions will automatically help improve the Indian economy. Various Literature's have been review in this research paper. The literature review is supposed to meet the two objectives, to have a wider knowledge of the subject and the understanding of the main issues under debate and to focus on the literature closely related to the research topics.

In the 2nd Chapter the researcher mentioned about what is money laundering, the historical background, the proceeds, techniques and typologies of money laundering. This gave a wide picture of in depth study and meaning of money laundering and how the proceeds of crime is actually rooted and used. The researcher has also mentioned about the effects on the Indian economy due to money laundering.

In the 3rd Chapter the researcher has conducted a comparative study between the Prevention of Money Laundering Act 2002 and the Amendment Bill of Money Laundering 2012. [2] The lacunas of the PMLA 2002 has been described and how the new Bill brings about various changes in prevention of money laundering has also been mentioned. Various amendments made in the Bill which has been now passed by the House of the Parliament in the year 2012, is going to be very useful to counter the measures of combating money laundering.

In the 4th Chapter the regulations of money laundering, the International prospective has been mentioned.

In the 5th Chapter the researcher has done a case study on two Supreme Court cases dealing with money laundering. The researcher through these cases brought about the loop holes of the PMLA Act 2002. It has also been mentioned in this chapter how if the new Bill would have been amended earlier then there would have been difference in the judgment. Again a comparative analysis with foreign money laundering legislation has been made in this chapter. It has been clearly shown how UK and Germany have adopted various means to counter the problem of money laundering in their countries which could be advised or recommended in India as well.

Finally, through this research paper, the researcher has tried to analyze the facilitating factors of money laundering & various tools used in the illegal process. Using the facilitating factors & various tools of money laundering, the illicit crime proceeds are pumped into mainstream financial system making the whole economy sick.

According to Interpol Intelligence sources," the size of the 'hawala' in India could be nearly 40% of India's Gross Domestic Product. The researcher has thrown some light on both sides of money laundering but stresses on curbing the menace of money laundering as it multiplies criminal organizations, promotes social disintegration through terrorism & corruption & adds to social evil.

The research paper shows that under the new technology, full prove statute protection and justice delivery system becomes extremely important & our other implementing agencies should keep up the same speed as new technology development & the inexhaustible, creative schemes available to criminals and money launderers.

Hence, to counter the virus of money laundering in an era of automated banking with virtual banks, the deterrent has to be strict laws with effective enforcement agencies.

The researcher feels the following changes will improve the Prevention of Money Laundering in India:

**RECOMMENDATIONS:**

1. The Prevention of Money laundering Bill 2012 does not extend the remit of the provisions to encompass all crimes. In India the Anti- Money laundering provisions apply only to drug offences, terrorism and specific series of offences. Hence, it is recommended that it should be applied to all crimes committed to cover a wider prospective of money laundering.[173]

   For e.g Income-tax offences could come under its anti-money laundering law, which would make prosecution, rigorous imprisonment, fines and shifting onus on the accused to prove he is not guilty a lot more easier. The offences will include concealment of income, failure to deposit tax deducted at source and false evidence. Recommendations could be placed before Parliament and changes could be made to the Prevention of Money Laundering (Amendment) Bill, 2012. Many countries have incorporated these offences in their Money Laundering laws. If the changes take place, the trial in these cases will be faster as offences under PMLA are tried in special courts and the onus to prove innocence lies on the accused.[174]
2. The scope of the principal of Money laundering offence should remain comparatively broad. The new Bill does not expand the definition of Money laundering offence to include activities like concealment, acquisition, possession and use of proceeds of crime, it must still be proved that an accused has knowledge that property represents 'criminal property'.[175]

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173. As Mentioned in Chapter V, under the heading "COMPARISON WITH FOREIGN MONEY LAUNDERING LEGISLATIONS"

174. Available at:http://jayakathju.blogspot.in/2012/05/tax-crimes-under-money-laundering-law.html (last visited on 27th April 2013)

175. See Supra Note 173.

3. In terms of requirements to put in place appropriate anti-money laundering controls, the Bill broadens the definition of reporting entity to include banks, financial institutions, intermediaries or a professional, including persons engaged in real estate business and/or jewellery business. The Bill also increase the power of directors to call for records and conduct inquiries and direct audits in cases of non compliance of obligations. However it does not propose to introduce offences for failure to comply with these requirements. Hence, it is recommended to introduce such offences.[176]

4. In terms of punishment, the Indian Bill removes the upper limit fine of INR 5 lakh. However the maximum period of imprisonment remains 7 years (10 years for specified offences). Whereas in UK the maximum period of imprisonment is 14 years. And also under section 121 of IPC whosoever wagers war against the Government of India or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine. Hence, it is recommended to increase the upper limit of fine of offences under Money Laundering and also the maximum period of imprisonment.[177]

5. In India offences related to Jewellery and Real estate is punishable with fine of Rs.10,000 whereas such offences are of great damage and hence the rate of punishment should go higher and even to imprisonment. Hence, recommended.[178]

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176. See Supra Note 173

177. Ibid

178. Ibid

6. It is recommended to make restraints order to prohibit dealing with property obtained through unlawful conduct. A restraint order has the effect of freezing property that may be liable to confiscation order. The new Bill does not make any mention of similar restraint order provisions. However a new presumption has been introduced by the Bill so that in the proceeds relating to money laundering, the funds shall be presumed to be involved in the offence, unless proven otherwise.[179] The liability should be extended, under CPC there is a provision of Attachment before Judgment, similar provision the court should be empowered to attach such property with suspicion and such property should be immediately confisticated.

7. It is recommended to cover Money laundering provisions to other professions for e.g. the insurance sector, the legal profession, real estate brokers and commercial traders.

8. Disclosure of integrity standards for financial and Non-financial Institutions is also recommended to be included under the prevention of Money Laundering Act.

9. Even with the passage of the PMLA amendments, observers and law enforcement professionals express concern about effective implementation of the current laws. As of December 2012, the GOI had not successfully won any court cases involving money laundering or confiscations. Law enforcement agencies typically open substantive criminal investigations proactively and seldom initiate proactive analysis and long term investigations.[180]

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179. See Supra Note 173

180. Available at :http://www.knowyourcountry.com/india1111.html(last visited on 27th April 2013)

10. The GOI is taking steps to increase financial inclusion through "small [banking] accounts", but should consider further facilitating the development and expansion of alternative money transfer services in the financial sector, including mobile banking, domestic fund transfer, and foreign remittance. Such an increase in lawful, accessible services would allow broader financial inclusion of legitimate individuals and entitles and reduce overall AML/CFT vulnerabilities by shrinking the informal network, particularly in the rural sector. India's current safe harbor provision is too limited and only protects principal officers/compliance officers of institutions who file STRs in good faith. The GOI should extend its safe harbor provision to all the employees across the board. [181] India does not have a law to protect whistleblowers. There have been multiple instances of threatening, harassment and even murder of various whistleblowers. Hence the whistle blower Act should be passed.[182]

11. It is recommended that the special unit dealing with money laundering activities should be formed on the line of Economic Intelligence Council (EIC) exclusively dealing with research and devolvement of AML. This Special unit should have access and it should be able to share and exchange information about these types of offences with INTERPOL and other international organizations dealing with AML.

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181. See Supra note 180.

182. Available at: http://en.wikipedia.org/wiki/Whistleblower_protection_in_India(last visited on 27th April 2013)

12. Money-laundering seems to be a victimless crime to most of the persons, however, in view of the harmful effects of the crime discussed in the earlier part of the discussion is need of the day to educate people about such crime and inculcate a sense of vigilance towards the instances of money laundering. Once the problem is visible to the eyes of people, it would contribute towards better law enforcement as it would be subject to the public examination.

## SCOPE OF FURTHER RESEARCH

This research is doctrinal which relied more on books, journals, reports and material available on internet. The findings of this study may be revisited and rechecked by empirical data through non doctrinal research. Money laundering stems from various origins. It takes place through diverse methods and is related to almost transnational and organized criminal activities. Various countermeasures such as criminalization, reforms in financial (banking institutions), improvement in technology and international cooperation are to be employed simultaneously to fight the problem. One could go into considerable details do further research.

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## ANNEXURE A

“With a view to regulate issuance of Participatory Notes (PNs) with Indian underlying securities, the SEBI (FII) Regulations, 1995 was amended in January, 2004 by inserting Regulation 15A, which requires that PNs can be issued only to those entities which are regulated by the relevant regulatory authority in the countries of their incorporation and are subject to compliance of "Know Your Client" norms.

## ANNEXURE B

“Trade based money laundering has not been distinguished from other forms of money laundering as a distinct offence. Hence, no separate data is available showing the number of TBML cases. Whenever proceeds of crime generated out of offences listed in the Schedule to PMLA are laundered through trade, the necessary action of attachment of such proceeds and further legal proceedings under PMLA are initiated. In addition, offences under section 135 of the Customs Act, 1962 is also a scheduled offence under PMLA. As and when the Customs Department launches prosecution in cases of evasion of customs duties, the Directorate of Enforcement takes up investigation in such cases under PMLA”.

## ANNEXURE C

"As per existing section 24 of PMLA, already there is a provision that when a person is accused of having committed the offence of money laundering under section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused. This section is being amended to provide that in any proceedings relating to proceeds of crime under PMLA, unless the contrary is proved, it shall be presumed that such proceeds of crime is involved in money laundering. By virtue of this amendment, the burden of proof would not only be on the accused but on anyone who is in possession of the proceeds of crime"

## ANNEXURE D

"Recommendation 17 of FATF prescribes that countries should ensure that effective, proportionate and dissuasive sanctions on natural or legal persons who fail to comply with anti-money laundering or terrorist financing requirements, is imposed. As per the existing provisions in section 4, the fine cannot exceed Rs. 5 lakh. This amount appears disproportionately low, given the gravity of the offence of money laundering and particularly so for a legal person. It has therefore been proposed to amend section 4 so as to provide for imposition of fine proportionate to the gravity of the offence which will be determined by the court. It needs to be left to judgment of the court to decide the quantum of fine".

## ANNEXURE E

“FATF standards require maintenance of records of transactions for at least five years. In case of records obtained through CDD measures etc., they have to be maintained for at least five years after the business relationship has ended. This period under PMLA is ten years. The assumption that even documents related to transactions would have to be maintained till ten years from the date of cessation of business relationship‟ is not factually correct as obligation under PMLA is to maintain record of all transactions for a period of ten years from the date of transaction”.

## ANNEXURE F

"The Directorate of Enforcement has been sanctioned additional manpower which will be adequate to effectively deal with the cases of money laundering under PMLA. The process of induction of the sanctioned additional manpower is already underway by direct recruitment, promotion and deputation. The Directorate of Enforcement is also enhancing its technological capabilities through the NIC for greater application of IT in its work processes. The proposed amendments to Section 12 and 13 of the PML Act do not place any additional obligations on the banks as compared to the present requirements. It may be mentioned that after introduction of Core Banking Solutions (CBS) by banks maintenance and retrieval of records is no longer manpower intensive".

## ANNEXURE G

"Under the FATF standards, two kinds of reports are required to be filed with FIU- (1) STRs, which are irrespective of any monetary value and (2) threshold based report e.g. Cash Transaction Reports (CTRs). In terms of numbers, CTRs constitute the bulk of financial information received in FIU. In some major countries the reporting threshold for CTR is at the level of $10,000. In India, this threshold is Rs.10 lakh, which is substantially higher than $10,000 and therefore raising it further only to reduce the volume of financial data may not be desirable. FIU-IND is in advanced stage of rolling out Project FINnet which has been designed with the objective to adopt industry best practice and appropriate technology to collect, analyse and disseminate financial information. Project FINnet would harness data mining and business intelligence tools for identifying actionable cases from the financial data received from the reporting entities".

## ANNEXURE H

Section 6 which deals with adjudicating authorities, composition, powers etc., Section 25 which deals with the establishment of Appellate Tribunal, Section 27 which deals with composition etc. of the Appellate Tribunal, Section 28 which deals with qualifications for appointment of Chairperson and Members of the Appellate Tribunal, Section 32 which deals with resignation and removal, Section 40 which deals with members etc.