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CHALLENGES IN THE REGULATION OF MONEY LAUNDERING IN INDIA: AN ANALYSIS

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This article critically examines the challenges in regulating money laundering in India, focusing on the Prevention of Money Laundering Act, 2002 (PMLA). The article highlights interpretational shifts, procedural complexities, and the balance between effective enforcement and individual rights, offering a nuanced understanding of India's anti-money laundering framework.

1. INTRODUCTION

Money laundering undermines the financial and legal systems by legitimizing illicit proceeds derived from criminal activities, corruption, and terrorism. The Prevention of Money Laundering Act, 2002 (PMLA), was enacted to combat this issue and align with India's international commitments under the Vienna Convention, 1988, and the United Nations Convention against Transnational Organized Crime, 2000. Despite the comprehensive framework provided by the PMLA, its enforcement is fraught with challenges, including interpretational ambiguities, procedural complexities, and concerns over the balance between effective enforcement and the protection of individual rights. This analysis critically examines these challenges while highlighting the evolution of the PMLA through landmark judicial pronouncements and its impact on the regulation of money laundering in India.

2. OVERVIEW OF MONEY LAUNDERING IN INDIA

Money laundering is the process by which illicit funds obtained through illegal activities are disguised as legitimate income. This conversion of "black money" into "white money" involves several stages and channels. Typically, these funds are introduced into the financial system through *placement*, where the illegal money enters formal avenues such as banks. Next

comes *layering*, where the money undergoes multiple transactions to obscure its origin. Finally, during *integration*, the laundered money is reintroduced into the legitimate financial system, enabling its use without raising suspicion.¹⁸⁰⁵

Common methods of money laundering in India include the hawala system, bulk cash smuggling, fictional loans, cash-intensive businesses, and trade-based laundering. Other techniques like round-tripping, gambling, and fake invoicing further complicate detection and prevention efforts.

The operation often involves structured transactions like smurfing, where large amounts of illegal cash are split into smaller deposits across multiple accounts. Cash smuggling across borders. The use of shell companies, which exist solely on paper, is another method of obscuring the origin of illicit money. These strategies make detecting and preventing money laundering a significant challenge, undermining financial stability and facilitating organized crime.¹⁸⁰⁶

¹⁸⁰⁵ What is money laundering and how it is done?, available at: <https://www.jagranjosh.com/general-knowledge/meaning-of-money-laundering-1549620151-1> (Last visited on 07.01.2025).

¹⁸⁰⁶ What is money laundering? available at: <https://www.investopedia.com/terms/m/moneylaundering.asp> (Last visited on 07.01.2025).

3. LEGISLATION

• Prevention of Money Laundering Act 2002

The Prevention of Money laundering Act, 2002 was enacted to fulfill international obligations under Vienna convention 1988, and the United Nation Convention against Transnational organized crime 2000, aims to prevent money laundering and confiscate illicit proceeds.

Evolution of PMLA through Landmark Judgement.

➤ In the case of **Nikesh Tarachand Shah v. Union of India (2017)**¹⁸⁰⁷ the Supreme Court held that the Section 45 of the PMLA, which imposed onerous terms on bail, was ruled Unconstitutional; by bringing bail rules into compliance with ordinary criminal law, the ruling protected the assumption of innocence and the right to a fair trial. This ruling was a turning point in the PMLA's guarantee of procedural justice.

➤ **Vijay Madanlal Choudhary & Ors. V. Union of India (2022)**¹⁸⁰⁸: This historic case maintained the constitutionality of several important PMLA provisions, such as the reversal of the burden of proof under Section 24 and the ED's authority to make an arrest and conduct an investigation without a formal complaint. The Supreme Court emphasized accountability in the implementation of the PMLA while acknowledging its importance in the fight against money laundering.

➤ In the case of **ED v. Kapil Wadhawan**¹⁸⁰⁹, the Supreme Court upheld the Enforcement Directorate's (ED) powers under Section 5 of the PMLA to provisionally attach properties, even if such actions led to business disruptions. The judgment emphasized the preventive intent of the PMLA, aimed at safeguarding assets from dissipation during investigations.

➤ In the case of **Rohit Tandon v.**

Enforcement Directorate¹⁸¹⁰, The Delhi High Court ruled that a transaction may still be punished under the PMLA even if it is covered under the Benami Transactions (Prohibition) Act. By permitting prosecutions for overlapping financial violations, this decision broadened the scope of the PMLA.

4. CHALLENGES IN REGULATION

• **Expansive Definition of Money Laundering:** The Supreme Court expanded the scope of "money laundering" under Section 3 of the PMLA, interpreting the word "and" as "or." This allows prosecution even without an attempt to misrepresent "proceeds of crime" as "untainted," increasing the risk of overreach.

• **Wide Powers of Search and Seizure:** Section 17 allows the ED to conduct searches and seizures based on a mere "reason to believe," without requiring an FIR for the predicate offence. This provision overrides the safeguards under the Criminal Procedure Code (CrPC).¹⁸¹¹

• **Stringent Arrest Powers:** Section 19 empowers the ED to arrest individuals at the inquiry stage without requiring a formal complaint, provided they record reasons for their belief. Critics argue this may lead to arbitrary use of power.

• **Reversal of Burden of Proof:** Section 24 shifts the burden of proof onto the accused, requiring them to prove innocence once the prosecution establishes a connection with the "proceeds of crime." This shift has been criticized as inconsistent with fundamental rights.

• **Stringent Bail Conditions:** Section 45 imposes twin bail conditions, including proving that the accused is not guilty. While these conditions were revised after Nikesh Tarachand Shah

v. Union of India, they remain more onerous than

¹⁸⁰⁷ *Nikesh Tarachand shah v. Union of India*, AIR 2017 SC 5500.

¹⁸⁰⁸ *Vijay Madanlal Choudhary & Ors. V. Union of India*, 2021 SCC OnLine SC 1048.

¹⁸⁰⁹ *ED v. Kapil Wadhawan*, 2021 SCC OnLine SC 3136.

¹⁸¹⁰ *Rohit Tandon v. Enforcement directorate*, 2017 SCC OnLine SC 1304.

¹⁸¹¹ Challenges to the prevention of money laundering act, 2002, available at: <https://www.scobserver.in/reports/challenges-to-the-prevention-of-money-laundering-act-pmla-judgement-summary/> (Last visited on 07.01.2025)

standard CrPC provisions.¹⁸¹²

- **Provisional Attachment of Property:** Section 5 permits the ED to attach properties believed to be connected to money laundering even before the conviction stage, with minimal safeguards against potential misuse.

- **Non-Disclosure of ECIR to Accused:** The ED is not obligated to furnish the Enforcement Case Information Report (ECIR) to the accused, limiting their ability to prepare a defense effectively. The Court upheld this practice, stating that an ECIR is merely an internal document.

- **Potential for Self-Incrimination:** Section 50 empowers the ED to summon individuals and record their statements under oath, even if they are not accused. This has been criticized for potentially violating the right against self-incrimination under Article 20(3).

- **Parliamentary Amendments Reducing Safeguards:** Amendments, such as the removal of magisterial oversight before searches or the mandate for an FIR before attachment or investigation, have diluted procedural safeguards.

- **Overriding Effect of PMLA:** Section 71 grants the PMLA an overriding effect over other laws, raising concerns about the bypassing of established legal safeguards under the CrPC and other statutes.¹⁸¹³

- **Cross-Border Transactions:** The global nature of money laundering makes it difficult to track illicit funds transferred across jurisdictions with differing laws and regulations.

- **Under-Reporting by Financial Institutions:** Despite regulatory mandates, some financial institutions may under-report suspicious transactions to avoid compliance costs or scrutiny.

- **Lack of Coordination Among Agencies:** Limited coordination between domestic and international enforcement agencies hampers effective action against complex laundering operations.¹⁸¹⁴

- **Limited Public Awareness:** Insufficient public understanding of money laundering's societal impact reduces vigilance and reporting of suspicious activities.

- **Politicization and Corruption:** In some cases, political interference or corrupt practices can undermine anti-money laundering efforts, shielding offenders from prosecution.

5. CONCLUSION

The Prevention of Money Laundering Act, 2002, is a cornerstone in India's legislative framework against financial crimes. However, the broad definitions, extensive enforcement powers, and procedural anomalies inherent in the Act have raised concerns about its potential misuse and implications for fundamental rights. Challenges such as inadequate inter-agency coordination, cross-border complexities, and insufficient public awareness exacerbate the issue. While judicial interventions have played a pivotal role in addressing procedural inconsistencies, the evolving nature of money laundering necessitates continuous legislative and administrative reforms. A balanced approach that strengthens safeguards, fosters international collaboration, and promotes transparency is essential to ensure effective regulation of money laundering while upholding the principles of justice and the rule of law.

¹⁸¹² Money Laundering, emerging trends and challenges, available at: <https://www.linkedin.com/pulse/money-laundering-emerging-trends-challenges-way-forward-kumar> (Last visited on 07.01.2025).

¹⁸¹³ Weaponizing the prevention of money laundering act, available at: <https://www.nextias.com/ca/editorial-analysis/01-07-2024/weaponizing-the-prevention-of-money-laundering-act> (Last visited on 07.01.2025).

¹⁸¹⁴ Unveiling the depths of money laundering, available at: <https://jotwani.com/unveiling-the-depths-of-money-laundering-exploring-legal-loop-holes-in-the-indian-context-by-aditi-sharma/> (Last visited on 07.01.2025)