RESEARCH ARTICLE

Money Laundering: National and International Legal Regime

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Abstract

The international drive against money laundering has led to pressure for homogenization of substantive criminal law and enforcement mechanisms as among countries, and in doing so it helped recast relationship that existed between various nation-states. Sovereignty has no role for criminals, as they use borders to their advantage, knowing fully well that following the money trail is harder when several other countries are involved. The money launderers do not elect jurisdiction based on the return the illicit funds could fetch, but rather choose less regulated jurisdictions. Despite the fact that various countries have different criminal codes, it is important to find a common definition of money laundering.

Loopholes through which money launderers escape continue to persist as a result of the discrepancies in the present legal structures that exist between countries. The legal regime surrounding money-laundering, however, has developed without the sort of transparent and principled public analysis, which would have been essential for the provisions of substantive criminal law. Research reveals that legal measures are not harmonized worldwide. It is frequently taken for granted that if laundering were to be more difficult, there would be substantially fewer predicate offenses. This is by no means self-evident. Even if there were to be perfect enforcement of laundering offences, the profits to be made from drugs are such that there would still be ample incentives for dealers to simply hold the money in cash until they are ready to use it.

Despite existence of a sound Anti Money-Laundering legislative mechanism in India, there is constant need to amend the Anti Money Laundering laws to meet the needs of the dynamic society and to ensure that it is at par with the international standards. The Prevention of Money-Laundering Act, 2002, since its inception, has been amended over 10 times. This itself portrays that the laws needs to analysed in order to address the existing loopholes and to track the money trail in order to make it more effective. Thus, there is a need to review the basic legal requirements identified by the various International Institutions and to examine the legislative and institutional measures taken 10 by various International Organisations to combat money-laundering and nuances of money-laundering law in India.

Keywords: Money, Laundering, Loopholes.

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Introduction

"Capital as such is not evil; it is its wrong use that is evil, capital in some form or other will always be needed."

- Mahatma Gandhi

In the post-second world war era, most of the malefactor law systems in the world criminalized sundry acts which were conceived as victimless malefactions such as drugs malefactions, etc., which engendered astronomically immense profits to the offender.[1] These crimes were committed by organized criminal groups who indulged in crimes to generate huge profits. The criminals launder the profits generated out of such crimes in order to create a veil of legal cleanliness. Money generated by organized criminals who indulge in illegal activities like the smuggling of high-value commodities such as gold, silver, diamond, antiques and etc., is laundered. Similarly, corrupt public officials launder their ill-gotten bribes and kick-backs to give them the color of legitimacy. Money laundering can also be explained as a process that transforms illegal inputs into supposedly legitimate outputs. Illicit proceeds gained by criminals are made to look as if they were the fruits of honest hard labor—transformed, for instance, into legitimate-looking bank accounts, real estate, or luxury goods. This process sanctions malefactors to prosper from their malefactions and sanction them to lead a normal life with others without looking akin to malefactors.

If left unchecked, money-laundering can destabilize the financial system and undermine development efforts in emerging markets. It weakens the social fabric and collective ethical standards. Money laundering can adversely affect economies by making interest and exchange rates more volatile, changing the demand for cash by causing inflation in economies where criminals are engaged in business. The siphoning away of colossal volumes of mazuma from

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mundane economic magnification poses a genuine peril to the economies and affects the ecumenical market's stability.

Literature Review

A United Nations' report estimates the illicit money laundered globally in a year stands between US $ 500 billion to US $ 1 trillion.[2] The Amalgamated Nations Office of Drugs and Malefaction denotes that around 2-5 percent of ecumenical GDP is laundered ecumenically every year.[3] At the global level, initiatives were taken to sensitise the countries about the dangers of laundering of ill-gotten wealth. The Vienna Convention[4] was the first major international effort against the laundering of proceeds of malefaction engendered from illicit traffic in narcotic drugs and psychotropic substances. The Vienna convention requires each of the party to the convention to adopt such measures as may be compulsory to enable confiscation of proceeds of malefaction from drug offenses or property, the value of which corresponds to that of such proceeds.[5] the Palermo Convention6 followed this and established the Financial Action Task Force (FATF) by G-7 countries in their 15th Economic Summit held in Paris on 16 July 1989.

In India, before the enactment of the Prevention of Money Laundering Act 2002, various statutes addressed scantily the measures to tackle money-laundering namely, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; the Income Tax Act, 1961; the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973; the Benami Transactions (Prohibition) Act, 1988; the Narcotic Drugs and Psychotropic Substances Act, 1985. However, these were not sufficient with the growth of varied areas of generating illegal money by selling antiques, rare animal flesh and skin, human organ, and many such varied new areas of generating illicit money/ wealth. Money-laundering is an effective way to launder black money in order to make it white. The international initiatives as discussed above to obviate the threat to financial systems and the integrity and sovereignty of the nations and the emerging Hawala episodes in India trigger the desideratum for an Anti-Money-Laundering law.

Origins of Money Laundering

More than 3000 years ago, merchants of China obnubilated their assets and profits of trade, fearing forfeiture of the same from the Rulers The traders did so by converting their profits into yealy movable assets, moved cash to outside jurisdictions, and did trade at an inflated price to expatriate mazuma.[7] These techniques are even now followed by sophisticated money launderers. The logic behind chasing money trail is that the drug sales mostly in cash has to be converted into utilizable financial resources appearing to have legitimate origin.[8] Money laundering is an innate characteristic of organized malefaction because without money laundering, there would be no organized malefaction.[9] Money Laundering is as old as old as money itself, though prior to 1970s none looked it as a crime as such. Nation States were only bothered about the underlying malefaction which engendered the proceeds of malefaction, than the malefaction of mazuma laundering. It is reported that during the period of Enjoinment in USA, especially during 1920-1933, colossal sums of money were laundered. Incidentally Al capone the notorious gangster of USA who was indicted for the first time in 1931 on a enjoinment charge (conveyance of beverages with more than 0.5% alcohol content) rather than numerous committed by him his gang. It was a time when law enforcement (US Attorney) came more proximate to indicting one for the first time in money laundering offense. It was a time when police forces with guns illimitably chased these malefactor gangs without prosperity, the people behind desks without guns who were prosperous in getting the gangsters designated and charged.[10] The 80s were often called decennium of 'total greed', and 90s the decennium of 'clearing up', while the new millennium has really emerged cleaning up the financial world.[11] Clean money is worthy than dirty money, as untainted money can be invested in remuneratively lucrative and legitimate activities, conspicuously without risk of recrimination.[12] If drug dealers even cerebrate of retaining property value whether or not cognate to malefaction, they would be unable to justify it by declaring officially earned income, more so in civil forfeiture regimes.[13] It is perhaps profoundly arduous to ascertain the inception of illicit money that is licitly not accounted for, as in most instances, it is camouflaged in propagating and nurturing ecumenical malefactor activities.[14]

The concept of criminal finance is much broader as it centres around profiting from or financing criminal activity.[15] Far from a byzantine mystery, criminal laundering is an open secret.[16] When a criminal has abundant wealth without an apparently legal source, it easily raises a suspicion. Therefore the criminals are compelled to launder their wealth to make ill-gotten gains appear legally earned. The most important aspect of money laundering is disguising the link between the money and its (illegal) source.[17]

Money per se has to be laundered for two reasons. Firstly the money trail itself can become evidence against the perpetrators of offense and secondly, illicit money with criminals can be the target of investigation and action.[18] The sophisticated money launderer is like water running downhill; both seek out the line of least resistance.[19] Money laundering is as old as money-generating crime itself. Successful criminals from age immemorial always have to find out a way to make their proceeds from crime look like legally obtained money.[20]

The Initiatives Under the AEGIS of United Nations

In order to combat the problem of money-laundering, several measures have been taken by the United Nations

and its various organs. The measures were initially focused on the laundering of the proceeds of illicit trafficking in narcotic drugs and psychotropic substances; however, the efforts presently are on combating the problem of money-laundering in general. The United Nations Convention, 1988, the Terrorist Financing Convention, 1999; the United Nation Convention against Transnational Organised Crime, 2000 and the United Nations Convention against Corruption, 2003 comprises specific provisions imposing numerous obligations on member countries to implement anti-money-laundering measures. These conventions urge countries to implement certain standards and enact legislation in order to counter the problem of money- laundering.

INTER-GOVERNMENTAL INITIATIVES

Bank of International Settlements

The Bank of International Settlements was established in the year 1973 with a permanent secretariat at Basel, Switzerland. It includes forty-nine central banks. It is an international institution that fosters cooperation among central banks and other agencies in pursuit of monetary and financial stability.

The Basel Committee

The Basel Committee initially named the Committee on Banking Regulations and supervisory practices, was formed in 1974 by central bank governors of Group of 10 countries.[21] Individual countries are represented by their central bank or by the authority responsible for the banking sector's overall supervision in the absence of a central bank. Basel standards and guidelines are adopted with the expectation that relevant authorities within each jurisdiction take all steps to implement the suggested measures. Three of the committee's supervisory measures concern money laundering and they are

Statement on Principles in Money Laundering Core Principles for Banking and

Customer Due Diligence. In the year 1988, the Basel Committee issued its

Statement on prevention i.e., Statement on Prevention of Criminal Use of the Banking System for Money Laundering.

There are four principles contained in the statement viz. (a) proper customer identification (b) high ethical standards and compliance with statutes (c) cooperation with law enforcement agencies (d) policies and procedures to adhere to the statement. The statement cautions that banks may be unwittingly used by criminals.[22]

In 1997, the Basel Committee issued its "Core Principles for Effective Banking Supervision," also known as the Core Principles which provides a comprehensive blueprint for an effective banking supervisory system. Of the total 23 core principles, the core principle 15 deal with laundering, which reads as "Banking supervisors must ensure that the banks have adequate policies, practices and procedures in place, including strict "Know Your Customer - KYC" rules, that promote high professional and ethical standards in the financial sector and prevent the bank from being intentionally or unintentionally used by the criminals." In the year 1999, the committee and the above also issued "Core Principle methodology" which comprises eleven specific criteria and five additional criteria to help in the assessment of the KYC policy. The important point is that these additional criteria refer to the FATF 40 recommendations. In October 2001, the committee issued an extensive paper on KYC titled "Customer Due Diligence for Banks" These KYC standards are intended to benefit banks beyond their fight against money laundering by protecting the safety and soundness of the banks and the integrity of the banking system as a whole.[23]

Global Regime in Preventing Money Laundering

With International Organizations and intergovernmental bodies' efforts, a global regime in preventing Money-Laundering has developed over a period of time, which comprises a code of conduct to be followed by the financial institutions and the development of a mechanism to ensure compliance with the code. The Code of Conduct comprises of three precautionary measures, which are as follows:

- customer due diligence;
- keeping of certain minimum records; and
- suspicious transaction reporting.

The financial institutions are required to perform certain additional measures in respect of "Politically Exposed Persons." The Financial Institutions have to apply customer diligence measures on a risk-sensitive basis depending upon the type of customer, transaction, etc.

The banks are required to carry on monitoring of accounts and transactions and risk management procedures containing a description of the type of customer likely to pose higher than average risk to the bank. In the context of advancements in information technology, financial institutions are to exercise special attention in respect of transactions of special nature or which have a connection with certain jurisdictions.

Anti Money-Laundering Laws in the USA

Since the US economy is the largest globally, it is reasonable to expect that significant proceeds are generated through its illicit sector. The USA was the first amongst the nations to recognize the threat posed by money-laundering. The USA Congress introduced a currency reporting system to deter the routine deposit of "shopping bagfuls" into the banks. In the USA the Anti-Money-Laundering efforts have been the object of several legal efforts spanning over more than three decades. For example, after the induction of the Banking Secrecy Act, 1970 and the Money Laundering Control Act, 1986, in rapid succession the Anti-Drug Abuse Act of

1988, Section 2532 of the Crime Control Act of 1990 and the Annunzio-Wylie Anti-Money Laundering Act of 1992.[24] The USA policy on tax havens has lacked the requisite clarity and purpose for decades. However, in 1985, the attention of the USA policymakers was prompted to this issue due to the complex nature of nexus between tax haven and money-laundering.

The preventive approach of the law in the USA follows the paper trail from the other end, which is from the laundering stage of money to the predicate offense. In the International context, the primary area of emphasis of the USA Government has always been the placement stage of money-laundering i.e., the step at which the money launderer primarily seeks to penetrate the illicit proceeds into the financial system. The lifeblood of drug syndicates and traditional organized crime is money-laundering. Money-laundering was once perceived as an exotic threat from abroad like cocaine that was menacing the whole of USA. Other statutes like Money Laundering Control Act, 1986, the Anti-Drug Abuse Act, 1988, the Anti Money Laundering Act, 1992 and the Money Laundering Suppression Act, 1994 brought further changes to the reporting regime.[25]

Although money laundering has been around for a long time, it was not until 1970 that meaningful legislation was enacted, known as the Banking Secrecy Act, 1970 in the USA which mandated a series of reporting and recordkeeping requirements designed to help track money laundering activity and to penetrate the veil of secrecy surrounding off-shore bank accounts. As the USA's security laws provide for transparency and honesty, investors have so much confidence in the USA markets. Contemporary strategy to combat money laundering in the USA rested on three pillars: money laundering laws, currency transaction reports, and asset forfeiture provisions. During the 70s and 80s, these three pillars were put into place through the enactment of the Organized Crime Control Act, 1970, the Banking Secrecy Act, 1970, the Comprehensive Drug Control Act, 1970, the Racketeering Influenced and Corrupt Organization Act, 1970, and the Money Laundering Control Act, 1986. International pressure may take one of two forms. The first is directly expressed disapproval of powerful jurisdictions. The USA's money-laundering legislation is seen as a model because it is the most common jurisdiction involved.

Anti Money-Laundering Laws IN the UK

The UK was ahead in money- laundering legislation just as it had put in place legislation prohibiting insider trading.184 In the UK, the law on prevention of money-laundering has now been consolidated into the POCA, 2002, the Terrorism Act, 2000 as amended and the Money Laundering Regulations, 2003.185 The Criminal Justice Act, 1988 and the Drug Trafficking Offenses Act, 1986 each separately established the criminal offense of money- laundering. Since then, the Money Laundering Regulations, 1993 and the POCA, 2002 have developed out of a change in the UK government policy which sought to extend the scope of regulation to activities such as money services.

Over the years, the legislation in the UK, such as the Money Laundering Regulations, 1993 started to implement the 1st EU Directive to cover more and more offenses. The result was a patchwork of legislation with some inconsistencies leading to confusion as to who was covered and who were not. Later the UK consolidated the laws on the subject matter by passing the Terrorism Act, 2000. In September 2001, the Terrorist Act in the USA prompted it to pass the Anti-Terrorism, Crime and Security Act 2001. The act, however, also contains matters unrelated to terrorism and perhaps one of the most important from the UK's point of view, money laundering and crime in general.

The next major and most significant change and enhancement were the Proceeds of Crime Act, 2002. The act effectively repeals all previous anti-money laundering legislation and consolidates into part 7 of the act, and the exception is that money laundering provision relating to the financing of terrorism, which remain part of the Terrorism Act, 2000 as amended by Anti-Terrorism, Crime and Security Act, 2001.

Anti-Money-Laundering Legislations in India

India was the first country after Industrialisation to pass Anti-Money-Laundering laws. In India, the first law was the Criminal Law Amendment Ordinance, 1944. It came into force on 23 August, 1944. It provides for attachment of money or other property of the person who has committed a scheduled offense and the same is believed to have been procured by means of the offense by moving the District Judge.[26] If such property, for any reason cannot be attached, any other property of the person of value as nearly as may be equivalent to that of the said money shall be attached.[27] The Scheduled offenses for the purpose were Section 406, 408, 409, 411, 414, 417 0r 420 of the Indian Penal Code, 1860, an offense punishable under the Prevention of Corruption Act, 1988, and any conspiracy to commit or any abetment of any of the offenses specified.[28]

It was followed by the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 provides for forfeiture of the illegally acquired property of smugglers and foreign exchange manipulators.[29] In 1988, the Benami Transactions (Prohibition) Act, 1988 came into force. It has been provided for acquisition of all such properties held benami by such authority and in such manner as prescribed by the act.[30] The Act further provided for punishment with imprisonment for term which could extend to three years or with fine or both.[64] In 1987, the Terrorist and Disruptive Activities (Prevention) Act, 1987 was passed and it provided

for forfeiture of property of the person who had been convicted for an offense under the act or the rules framed thereunder.[31] In 2002, the Prevention of Terrorism Act, 2002 was enacted, which provided for forfeiture of property that constituted proceeds of crime.[32]

The Narcotic Drugs and Psychotropic Substances Act, 1985, as amended by Act 2 of 1989 also provides for forfeiture of illegally acquired property. The act was further amended,[33] provisions were added to prohibit transfer or conversion of property derived from an offense committed under the act or under any corresponding law of any other country pertaining to disguising or concealing the illicit origin of the property or assisting any person in the commission of such offense or to evade its consequences; concealing or disguising the true nature, source, location or disposition of any property knowing that such property is derived from an offense committed under the Act.[34]

The Code of Criminal Procedure (Amendment) Act, 1993 added a new chapter, namely, Chapter VIIA to the Code of Criminal Procedure, 1973 titled "Reciprocal Arrangements for assistance in certain Matters and Procedure of Attachment and Forfeiture of Property," which provides for assistance in securing the transfer of persons, assistance in relation to orders of attachment or forfeiture of property, identifying unlawfully acquired property, seizure or attachment of property, management of properties seized or forfeited, forfeiture of illegally acquired property, imposition of fine in lieu of forfeiture, etc.

The preventive detention laws such as the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, and the Prevention of Illcit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, and the Income Tax Act, 1961 are such other laws that indirectly address the issue of forfeiture of property.

Prevention of Money Laundering Act, 2002: Overview and Critical Assessment

Government of India appointed an inter-ministerial committee, Ministry of Finance, in the year 1996 to look into various aspects of money-laundering and suggest suitable legislative interventions. The enactment of comprehensive legislation to combat money-laundering menace was the major suggestion made by the said committee. As a follow-up of the committee's suggestion, the Prevention of Money-laundering Bill was introduced on 4 August 1998, in the Lok Sabha. The Standing Committee of Finance to which the Bill was referred submitted its report on 28 January 1999. The Standing Committee of Finance suggested certain changes in the Bill. However, the 12th Lok Sabha, in the meanwhile, was dissolved and the Prevention of Money-laundering Bill lapsed.

A new Bill incorporating the Standing Committee of Finance suggestions was introduced in the 13th Lok Sabha on 29 October 1999, and the Bill was passed by Lok Sabha on 2 December 1999. The Bill was then referred by the Chairman, Rajya Sabha to a Select Committee for examination and the Select Committee presented its report on 24 July 2000. After considering the Select Committee report, the Bill was reintroduced and passed by both the Houses of Parliament.

The Prevention of Money-Laundering Act, 2002, which was enacted in January 2003, has been amended several times so far. The act came into force on 1 July 2005. The first amendment of the act was by the Prevention of Money-laundering (Amendment) Act, 2005 (20 of 2005), the second amendment by the Prevention of Money-laundering (Amendment) Act, 2009 (21 of 2009), and the third in the year 2013 by the Prevention of Money-laundering (Amendment) Act, 2012 (2 of 2013).

The Prevention of Money-laundering (Amendment) Act, 2012 has incorporated substantial changes in the Prevention of Money-laundering Act, 2002. The offense of money-laundering has been elaborated so as to cover concealment, possession, acquisition or use of proceeds of crime. The offense in addition to covering projecting the proceeds of crime as the untainted property, also covers claiming the proceeds of crime as untainted property.[71] The Prevention of Money-laundering (Amendment) Act, 2012 also removes the upper limit of fine, conferring power to impose unlimited fine.

Conclusion

It is indeed a matter of concern to observe most jurisdictions' tendency to overlook white-collar crimes compared to other felonies. The dirty money generated by a criminal organization has seen new heights, resulting in huge financial flows from formal to informal. Money is neither clear nor dirty per se but becomes tainted as it moves from the legal economy across the legal-illegal boundary into the underground economy. What of course motivates and directs this movement are the decisions made by individuals. Criminals are not the only group of people contributing to the massive flow of dirty money into the economy. For that matter, every individual who has reasons to fear that his or her illicit wealth or assets might be frozen or confiscated, will try to conceal the true origin of its source or the identity of its beneficial owner as most crime is motivated by profit, the pursuit for recovery of the proceeds of crime can make a significant contribution to crime reduction and the creation of a safe and just society.

Though the menace of money laundering is there for more than four decades, there is no authentic data or knowledge about the size and development of money laundering or organized crime, as no serious attempt is made by international organizations, regional groupings, enforcement agencies, expert groups, intelligence units, Neither the FATF, the US administration nor the FIU have

invested their mite to analyze information about money laundering and organized crime, and to come out with a proven scientific data.

There appears to be a disjunction between the legal construction of money laundering, which includes modest acts such as placing of proceeds of crime in a bank account in one's name, and the analytical construct of laundering wherein the proceeds of crime are sanitized so that it can be spent as though acquired legitimately. Invariably one must vary of the political, philosophical, moral, ethical and other arguments advanced by academics, jurists and legislators, as the principles enunciated today may change tomorrow as the law needs to constantly adapt to social change.

Money launderers escape due to discrepancies in the legal structure that exist between countries. Countries with strong regulatory capabilities and resources take control of the crime, while countries with less regulation and resources view compliance issues with less zeal, allowing launderers to take advantage. Therefore the application field of the incrimination of money laundering should include as many predicate offenses as possible. Much emphasis on powers of enforcement and is in favor of criminalization of offenses, better confiscation rules and increased international cooperation, as powerful enforcement is essential to curtail money laundering. Many countries have not criminalized feeder activities to money laundering as an offense.

Although legislation varies between countries, it is important to find a common definition of money laundering. For measuring money laundering, one needs a clear definition that includes or covers all predicate crimes. The FATF has indeed made great efforts to define the term clearly. However, these efforts which have been aimed at achieving an international standard, nevertheless conceals the existence of national variations in legal definitions. It seems important to have an international and interdisciplinary debate on what money laundering is, what it includes and what it excludes.

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