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CRITICAL ANALYSIS OF LAWS RELATING TO MONEY LAUNDERING IN INDIA WITH RESPECT TO OTHER DEVELOPED COUNTRIES

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ABSTRACT

Money laundering refers to the conversion of money that is illegally obtained, so as to make it appear to originate from a legitimate source. Article 1 of the EC Directive defines the term money laundering as "the conversion 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 assisting any person who is involved in the committing such an 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"

Keyword: *Analysis, law, money, developed, nation, Actus, financial, laundering*

1. ACTION AT THE INTERNATIONAL LEVEL TO COMBAT MONEY LAUNDERING

I. Financial Task Force

The Financial Action Task Force is an inter-governmental body which sets standards and develops and promotes policies to combat money laundering and terrorist financing. The main emphasis of anti-money laundering measures remains on securing documentation of financial flows, and critical analysis of this financial flow. The Force has provided forty Recommendations and Nine Special Recommendations that provide a complete set of counter measures against money laundering. They set out the principles for action and allow countries a measure of flexibility in implementing these principles according particular circumstances and constitutional frameworks. These Recommendations have been recognized, endorsed and adopted by many international bodies as the international standards for combating Money Laundering.

II. Basel Principles

In recognition of the vulnerability of the financial sector to misuse by criminals, the Basel Committee on Banking and Supervisory Practices issued a Statement of Principles (the 'Basel Principles') in December 1988. This was a significant step towards preventing the use of the banking sector for money laundering purposes, as it set out a number of principles that banking institutions should comply with like: customer identification, compliance with legislation, conformity with high ethical standards and local laws and regulations, full co-operation with national law enforcement authorities to the extent permitted without breaching customer confidentiality, etc.

III. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

This UN Convention was one of the historic conventions inasmuch as the parties to the Convention recognized the links between illicit drug traffic and other related organised criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States and that illicit drug trafficking is an international criminal activity that generates large profits and wealth, enabling transnational, criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial businesses and society at all levels.

IV. United Nations Convention against Corruption

The UNCAC is one of the most comprehensive anti-corruption instruments. It criminalizes money laundering thus making it one of the unique instruments that addresses both corruption and money laundering simultaneously. The scheme of the convention is premised on the fact that an effective anti-money laundering regime can make a significant contribution to the fight against corruption in at least two ways: it could help uncover evidence of criminal activity through identification of suspicious movements of financial assets, thus increasing the chances of a successful prosecution of the perpetrator of the crime.

2. ANTI-MONEY LAUNDERING LEGISLATIONS IN INDIA

I. Prevention of Money Laundering Act, 2002

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The Prevention of Money Laundering Act, 2002 was enacted on the 17th of June 2003 and came into effect from the 1sts of July 2005 with the aim of preventing money laundering and providing for the confiscation of property which had been derived from money laundering. The Act provides for the prosecution of individuals and legal entities indulging in money laundering, and for the confiscation and attachment of property obtained through money laundering.

II. The PMLA Amendment Bill, 2011

The PMLA Amendment Bill 2011 was introduced by Pranab Mukherjee in the Lok Sabha on December 27, 2011. The Bill toughens the stance on money laundering and introduces 10 key amendments to the Act. The Statement of Objects and Reasons states that the introduction of such an amendment was necessary since problem of money-laundering is no longer restricted to the geopolitical boundaries of any country, it is necessary to have a stricter enactment in place.

3. OTHER LEGISLATIONS DEALING WITH MONEY-LAUNDERING

I. The Foreign Exchange Management Act, 1999

It prescribes checks and limitations on certain foreign exchange remittances. Offences under the Foreign Exchange Management Act, 1999 are not scheduled offences under the PMLA. The rationale behind this is that only the most violent and important crimes have been mentioned under the PMLA since the PMLA gives massive powers of arrest to law enforcement agencies. An example of the offenders targeted under the PMLA would be the mafia dealing in murder, extortion, terrorism and prostitution who have immense liquid wealth that they want to launder. Since the powers under the PMLA are so over-reaching, the list of scheduled offences thereunder has deliberately been kept short, and FEMA offences have been excluded from their ambit. Even so, money-laundering is regarded as an egregious crime under the FEMA as well, a consideration that is especially important in the assessment of whether or not an offence can be compounded.

II. The Benami Transactions (Prohibition) Act

The Benami Transactions (Prohibition) Act, 1988, prohibits the purchase of property in the name of another person who does not pay for the property, and prescribes a punishment of up to three years for a person who commits this offence. However, the BTPA has been considered largely ineffective and is sought to be replaced by the Benami Transactions (Prohibition) Bill, 2011, which was introduced in the Lok Sabha last year. One of the major reasons cited for its inefficiency was that the manner in which it had been drafted made the formulation of rules thereunder impossible.

III. The Narcotic Drugs and Psychotropic Substances Act, 1985

The Act provides for confiscating sale proceeds from selling any narcotic drug or psychotropic substance, and for the seizure of any goods used to conceal such drugs, and also provides for the forfeiture of any illegally acquired property. Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 find a place in Paragraph 2 of Part I of the Schedule to the PMLA.

IV. The Unlawful Activities (Prevention) Act, 1967

Amended in 2008, the Act empowers the Central Government to seize and attach funds and other financial assets or economic resources held by engaged in or suspected to be engaged in terrorism and prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of these individuals under Section 51 A. As on March 2011, 11 out of the 1269 cases being investigated by the Enforcement Directorate in connection with money laundering fell under the Unlawful Activities (Prevention) Act, 1967.

4. THE INDIAN SUPREME COURT'S DECISIONS ON ANTI-MONEY LAUNDERING MEASURES IN INDIA

I. Centre for PIL v. Union of India

This case dealt with investigation in the 2G spectrum scam. This issue that came up before the Court was the appointment of a Special Public Prosecutor, to conduct the prosecution on behalf of the CBI and the Enforcement Directorate ("ED") under the PMLA. In conclusion, the Court held that Article 136, read with Article 142 empowered the Court to make the appointment of Mr Lalit, and that the said appointment was valid.

II. Binod Kumar v. State of Jharkhand

There were allegations that vast amounts of money had been amassed by certain politicians, including former Chief Minister Madhu Koda but there were no specific allegations of money laundering. The scam ran into hundreds of crores (reports suggest Koda and his associates laundered up to INR 3536 crores). The basic issue that arose before the Court whether the High Court

was empowered to make such an order, since the ED under the PMLA was already provided for as an investigating agency. The Court however felt that it was unnecessary to deal with the question at all. The crux of its reasoning was that money laundering is not a stand-alone crime.

III. Pareena Swarup v. Union of India

The constitutionality of several provisions of the PMLA dealing with the Adjudicating Authorities and the Appellate Tribunal were challenged by way of this case. The Court rightly pointed out that money laundering sometimes required the kind of expertise that judicial officers did not necessarily have, so it was more plausible to have a body of experts (as provided under the PMLA) as the adjudicating authority. They further pointed out that the exercise of adjudicatory functions by executive agencies was not unheard of even within our constitutional scheme.

5. ANALYSIS OF THE RAM JETHMALANI PIL

Ram Jethmalani v. Union of India

This landmark case in the area of money laundering law marks the only real attempt of the Supreme Court to actively curb money laundering, by mandating efficacious measures.

The Petition

The petitioners had contended that the Union of India had faltered on several levels:

A. Both Hassan Ali and Tapuria were in India and hence falling within the jurisdiction of Indian Courts and investigative authorities
B. Union of India, despite repeated RTI applications, was not divulging information regarding the Indian accountholders in Swiss Banks
C. The Swiss Bank, UBS, Zurich, one of the biggest wealth management companies in the world, had in particular, fallen in bad light with the Indian authorities as it was involved in several untoward scams earlier in the decade.

Issues

A. Whether the Supreme Court must constitute a Special Investigation Team (SIT) under a former Supreme Court Judge to monitor investigations cases of black money
B. Whether the Court must mandate that the Union must endeavour to first obtain and then disclose the list of Indian bank account holders in banks in Liechtenstein.

Arguments of the Petitioners

The petitioners argued that an SIT ought to be constituted under the supervision of former Supreme Court judges to continually monitor investigation and prosecution of black money cases and disclosure of bank account information in banks in Liechtenstein.

Arguments of the Respondents

In context of SIT they submitted that there was already a High-Level Committee constituted under the Dept. of Revenue in the Ministry of Finance, which was a body that was capable of exercising all the functions and powers sought to be entrusted to the SIT proposed by the Petitioners. With regards to disclosure, they submitted that the disclosure of the names of all the accountholders would be in gross violation of the right of privacy of individuals who were using these Swiss Bank accounts for legitimately earned money, thus falling outside the purview of a potential investigation or prosecution for money laundering.

Judgment

With regards to the constitution of SIT the Court held that the Union of India ought to constitute an SIT with very broad powers of investigation and prosecution of black money cases. The SIT would be required to constantly report developments to the Supreme Court. Moreover, the in context of disclosure of bank account information in banks in Liechtenstein it stated that the State tax authorities cannot be mandated to disclose account details of all account holders, even in the absence of investigation to reveal that the account holders are suspected offenders under the PMLA.

Government's Response to the Judgment

The establishment of the SIT with unprecedented powers to investigate in this case was not reacted to positively by the Centre, and specifically, the Finance Ministry.

Critique and Conclusion

A very important area of law where constitutional values frequently come in friction with each other is that of 'court directed investigations. This has picked up pace in the recent years as evidenced by the Court's ordering of a C.B.I investigation (Nandigram firing incident for instance), appointing an S.I.T (Gujarat fake encounter case) as well as constituting an SIT in the Jethmalani PIL. Ordering an investigation and supervising it are primarily executive functions and not judicial functions, as 'investigation' comes under 'Police' which is a state subject under 'law and order' (Entry 2, List II) of the Seventh Schedule of the Indian Constitution. Where the court decides to direct or supervise an investigation

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through the constitution of an SIT, it takes up the mantle of the executive, which may prima facie be a violation of the principle of separation of powers.

6. THE RESERVE BANK OF INDIA AND ANTI-MONEY LAUNDERING MEASURES

The Reserve Bank of India has introduced guidelines, taking from powers sourced to the Section 35A of the Banking Regulation Act, 1949 and Rule 7 of the Prevention of Money Laundering ((Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005 to reduce financial frauds and identify money-laundering transactions.

7. CONCLUSION

While it is clear that money laundering has been a major issue both nationally and internationally, the success of money laundering measures globally seems to have been rather high – perhaps indicative of the priority which this project has been given. The national scenario However, larger questions have been asked recently – that of whether focusing on money laundering as an end in itself is sufficient, and whether it is performing its task of coming close to ending terrorist funding or any other aims it is suspected to be channelled into. The problem is exacerbated by the difficulty of adequately assessing the incidence of money laundering – by its nature, since it exists outside the boundaries of the law, any assessment is necessarily vague. Newer modalities of laundering money are being uncovered every day, and the innovativeness of the schemes only is enhanced.

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