

NEXT IAS

**DAILY EDITORIAL
ANALYSIS**

TOPIC

**Weaponizing the Prevention
of Money Laundering Act**

www.nextias.com

WEAPONIZING THE PREVENTION OF MONEY LAUNDERING ACT

Context

- The recent grant of bail to the former Jharkhand Chief Minister has brought attention to the questionable practice of the **Enforcement Directorate (ED) and PMLA's provisions** like **'Bail is granted only if the court records a negative finding'** against political opponents can have serious consequences for personal liberty.

Need of the Money Laundering Act (Global Concerns and Background)

- Since the mid-1980s, there has been global concern about the proceeds of criminal activities (such as drug trafficking) being laundered and used to finance terrorism.
- The **UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)** called upon nations to adopt domestic laws to combat drug trafficking and prohibit the conversion or transfer of illicitly gained property.
- The **Financial Action Task Force (FATF)** was established in 1989 to address money laundering, making recommendations to strengthen laws worldwide.
- In 1990, the **United Nations General Assembly** adopted a resolution, namely, the **Political Declaration and Global Programme of Action** which called upon all member-countries to enact suitable pieces of legislation to effectively prevent the laundering of drug money.
- The **UN Convention against Transnational Organized Crime (2000)** specifically called for criminalising the laundering of proceeds of crime.
- Article 253** empowers the Indian Parliament to make laws for implementing the international conventions, and the PMLA was enacted to implement the **United Nations' Resolutions** on combating money laundering.

The Prevention of Money-Laundering Act (PMLA)

- It was enacted by Parliament of India under **Article 253** of Constitution in 2002 to **prevent money laundering** and provide for the **confiscation of property** derived from or **involved in money laundering**.
- PMLA and the Rules notified there under came into force with effect from 2005, and it was further **amended in 2009 and in 2012**.
- Director, **FIU-IND** and **Director (Enforcement)** have been conferred with exclusive and concurrent powers under relevant sections of the Act to implement the provisions of the Act.
- The **offence under the PMLA** mainly involves money laundering obtained through criminal activities (e.g., drug trafficking, terrorism, corruption).
 - The Act provides a **three-part schedule of offences** (or 'predicate offences') that give rise to tainted money.

Definitions in PMLA (2002)

- Money Laundering:** The process of making illegally obtained proceeds appear legitimate.
- Adjudicating Authority:** Appointed under the Act to adjudicate cases related to attachment and confiscation of property.
- Appellate Tribunal:** Established to hear appeals against orders passed by the Adjudicating Authority.
- Financial Institution:** Includes banks, chit fund companies, co-operative banks, housing finance institutions, and non-banking financial companies.
- Intermediary:** Refers to entities associated with the securities market (e.g., stock-brokers, investment advisers).

Key Concerns Related to PMLA

- Broad Scope of Offences:** The PMLA includes a wide range of offences beyond its original purpose of combating money laundering. These offences are appended to the Act as a schedule.

- ◆ While the Act should ideally focus on grave offences like terrorism, narcotics smuggling, corruption, and tax evasion, it also covers routine offences such as fraud, forgery, cheating, kidnapping, and even copyright and trademark infringements.
- **Selective Enforcement:** The Enforcement Directorate (ED) has been selective in initiating money-laundering probes. This discretion renders any citizen vulnerable to search, seizure, and arrest at the executive's whim.
 - ◆ Lack of clear guidelines for initiating investigations raises concerns about due process and individual rights.
- **Testimonial Compulsion:** The provision that compels individuals summoned by the ED to disclose and submit documents, under the threat of prosecution, raises constitutional concerns.
 - ◆ The Court did not find this provision violating the bar on testimonial compulsion, despite its coercive nature.
- **Lack of Judicial Oversight:** Search and seizure provisions lack adequate judicial oversight and are solely driven by ED officers.
 - ◆ The absence of checks and balances undermines individual liberties.
- **Prosecution Without Scheduled Offence:** The Act allows prosecution for money laundering even without establishing the scheduled offence.
 - ◆ This departure from standard criminal procedure raises questions about fairness and proportionality.
 - ◆ A fundamental principle of Anglo-Saxon jurisprudence is that a person is presumed innocent until proven guilty. PMLA turns this principle upside down.
- **Lack of Transparency:** The absence of a procedure to commence investigation and summoning, while the accused was not made aware of the contents of the **Enforcement Case Information Report (ECIR)**.
- **Bail Provision (Section 45 of PMLA Act):** It was held unconstitutional by a two-judge Bench of the Supreme Court of India in *Nikesh Tarachand Shah vs Union of India (2018)* as **violating Article 14 and Article 21**.

Enforcement Directorate (ED)

- It is a specialised financial law enforcement and economic intelligence agency of India.
- It functions under the administrative control of the **Department of Revenue** in the **Union Ministry of Finance**, Government of India.
- The primary mandate of the ED is to enforce economic laws and combat economic crimes, particularly those related to money laundering and violations of foreign exchange laws.

Functions

- **Statutory Functions:** To enforce the provisions of the Foreign Exchange Management Act (FEMA), the **Prevention of Money Laundering Act (PMLA)**, the Fugitive Economic Offenders Act (FEOA), and **sponsoring agency** under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA).
- To work closely with other enforcement agencies like the Central Bureau of Investigation (CBI), Income Tax Department, and Customs Department.

Observations of Supreme Court of India

- The **Supreme Court (in 2022)** upheld the validity of various provisions of the PMLA which empowers ED to make arrests, conduct search and seizures and attach proceeds of crime.
 - ◆ The court emphasised the need to deal sternly with the scourge of money laundering recognized worldwide.
 - ◆ The PMLA provisions were considered valid and necessary to combat money laundering.
- The Supreme Court's decision in **Pankaj Bansal vs Union of India** is a significant step towards enhancing transparency, accountability, and fairness in the arrest procedures under PMLA.
 - ◆ It delved into an important point of law — how is the enforcement directorate (ED) **required to 'inform' persons** arrested under the PMLA of the grounds of their arrest.

- In **Tarsem Lal vs Directorate of Enforcement (2024)**, the Supreme Court clarified that the ED cannot arrest an individual after a Special Court has taken cognizance of the case.
 - ◆ Custody is meant for effective investigation, not punishment for an undertrial.
 - ◆ The court's decision creates a small but meaningful check on the ED's powers.

Conclusion and Way Forward

- India as a signatory to the treaties and an important participant in the international process and the fight against money laundering, is bound legally and morally, to adopt the global best practices and respond to the changing needs of the times .
 - ◆ But legal and constitutional safeguards must be kept in mind in this context .
- While the PMLA provisions have faced scrutiny, the Supreme Court has consistently upheld their validity, emphasising the need to combat money laundering effectively. The balance between law enforcement powers and individual rights remains a critical aspect of this legal framework.

Mains Practice Question

[Q] Discuss the impact of the Prevention of Money Laundering Act (PMLA) on combating money laundering. Explore the potential challenges or unintended consequences that may arise from its implementation.

