

# Prevention of Money Laundering Act, 2002 – A Critical Analysis

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## 1. Introduction

Today, it is recognized that asset forfeiture is an important element of the national strategy of fighting crime. If the fruits of crime are denied to the criminals, it will prevent them from gaining strength and legitimacy. The enactment of the Prevention of Money Laundering Act (PMLA), 2002 and the Rules there under with effect from 1 July, 2005, therefore, has been a landmark event in the legal landscape in India<sup>1</sup>. It will be interesting to examine its possible impact on the crimes of bribery and corruption in India.

The PMLA was looked forward to, by the law enforcement fraternity in India to be a major weapon for incorporating into their fight against serious crimes. Among other serious crimes like terrorism and narcotics trade, this Act has rightly identified corruption and immoral trafficking in women and children for prostitution purposes, as sources which generate large amounts of unaccounted dirty money in the Indian economy. Section 2 of PMLA defines scheduled offences, as quoted below.

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(y) "scheduled offence" means -

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more;

Section 3 defines the offence of money laundering, as follows.

*3. 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 untainted property shall be guilty of offence of money laundering."*

It is thus apparent that PMLA provides the framework for dynamic identification of the offences requiring attention under the money laundering statute. Part A<sup>2</sup> of the Schedule contains certain offences under the Indian Penal Code (IPC), as well as offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. On the other hand, Part B of the Schedule includes specified offences under the IPC, offences under the Arms Act, 1959, offences under the Wild Life

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<sup>1</sup> <http://fiuindia.gov.in/pmla2002.htm>

<sup>2</sup> <http://fiuindia.gov.in/schedule-overview.htm>

(Protection) Act, 1972, offences under the Immoral Traffic (Prevention) Act, 1956 (ITP Act) and offences under the Prevention of Corruption (PC) Act, 1988.

In the present article, the authors wish to bring out that the sections currently included in the two parts of the Schedule are not adequate to cover the most common situations which arise during operation of the PC Act, the ITP Act and the IPC.

## 2. Offences under the Prevention of Corruption Act, 1988

It is universally acknowledged that corruption has a deleterious effect on development<sup>3</sup>. Most countries have enacted stringent laws to check the menace of bribery and corruption. A large chunk of the public funds spent on developmental projects in both urban and rural areas ends up as 'leakage' and does not reach the intended beneficiaries. The 'leaked' amount then reappears in the economy as unexplained assets of the public servants and their accomplices, through an intricate process of money laundering. Indeed, it is difficult to think of any other category of offences, which would fall in the ambit of money laundering as easily as corruption proceeds. It would therefore stand to reason that the legislature having recognized the importance of placing offences under the PC Act, would also look at the applicable sections.

The PC Act which deals with crimes of corruption has various sections dealing with different situations, the penal sections<sup>4</sup> being sections 7 to 15. Notable among these is section 13, which defines Criminal Misconduct by a Public Servant. Specifically, section 13(1)(e) of the PC Act deals with assets/ resources acquired by a public servant, which are disproportionate to his known sources of income. This is one of the most effective and stringent sections under the PC Act to tackle corruption, especially when a public servant has been consistently corrupt and has converted his illegal money into assets. Interestingly, there is a similar provision<sup>5</sup> in the Singapore anti-corruption statute, which is known for its effectiveness in keeping Singapore at a high ranking of 5 among 163 countries in the Transparency International Index for 2006<sup>6</sup>, as compared to India's ranking of 70.

The PMLA has, included the following four sections from the PC Act in the Schedule<sup>7</sup>.

7 *Public servant taking gratification other than legal remuneration in respect of an official act.*

8 *Taking gratification in order, by corrupt or illegal means to influence public servant.*

9 *Taking gratification for exercise of personal influence, with public servant.*

10 *Abetment by public servant of offences defined in section 8 or section 9 of the Prevention of Corruption Act, 1988*

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<sup>3</sup> <http://www.worldbank.org/fandd/english/0398/articles/020398.htm>

<sup>4</sup> [http://acbmaharashtra.org/legal\\_ch3.asp](http://acbmaharashtra.org/legal_ch3.asp)

<sup>5</sup> [http://statutes.agc.gov.sg/non\\_version/cgi-bin/cgi\\_retrieve.pl?actno=REVED-](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-)

241&doctitle=PREVENTION%20OF%20CORRUPTION%20ACT%0A&date=latest&method=part

<sup>6</sup> [http://www.transparency.org/content/download/10825/92857/version/1/file/CPI\\_2006\\_presskit\\_eng.pdf](http://www.transparency.org/content/download/10825/92857/version/1/file/CPI_2006_presskit_eng.pdf)

<sup>7</sup> <http://fiuindia.gov.in/schedule-prevention.htm>

PMLA, has curiously bypassed section 13 for tackling corruption related money laundering. It makes actionable the above four sections of PC Act, which are basically one-off instances of corrupt practices by government employees. In these sections, the tainted money involved is usually very little and not at all worthy of taking recourse to lengthy procedures of attachment/adjudication under the PMLA. The minimum limit of Rs 30 lakh applicable to the part B of the Schedule is extremely high and the authors, who have spent six and seven years respectively in enforcing the PC Act, have never come across such a large amount of bribe transaction. Further, most such cases are proactively launched by the enforcement agencies (CBI and the state ACBs) and the tainted amount is invariably seized on the spot at the outset of investigation. Further, the money involved in a case u/s 7 PC Act, is also money which actually belongs to the complainant of the case and is legally required to be returned to him after the trial is over. It would be unjust to attach this money under PMLA.

Money Laundering, as is generally understood, involves, besides placement, also layering and integration of the tainted money. In sections 7, 8, 9 and 10 of PC Act, the crime involved is, 'taking illegal gratification' and 'abetting the taking of illegal gratification'. The criminal charges under these sections are also limited to these acts alone and do not encompass the illegal wealth of the accused acquired by corrupt means, over the period of his or her service. Therefore, there is no question of money laundering in these solitary acts of taking the illegal gratifications. The aspect of laundering the proceeds of crime would come into play only when the offender pushes such money into the economy, by acquiring assets, i.e. integration, after pushing these ill-gotten gains through fictitious business enterprises or large cash-transacting enterprises i.e. layering. Hence, by no means can an offence of laundering money, be established in the crimes of taking or abetting the taking of illegal gratification.

Money laundering, as an offence, can only logically ride on the offences which originate from section 13 (1)(e) of PC Act. This section states as follows:

*A public servant is said to commit an offence of criminal misconduct if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.*

Under section 3 of PMLA, as mentioned above, the offence is said to be committed on fulfillment of any of the following three conditions: a) acquiring, owning, possessing or transferring proceeds of crime, b) knowingly entering into any transaction which is directly or indirectly related to proceeds of crime and c) concealing or aiding in the concealment of the proceeds of crime.

For cases of corruption to come under the umbrella of the existing pre-conditions in the PMLA, the underlying crime should be acceptance or abetting the acceptance of bribe money, which as, mentioned earlier, is an one-off incident involving small Bribe amount. Such a case needs to be chargesheeted in court before it is undertaken for enquiry under PMLA. Such cases are chargesheeted for the offence of demand and acceptance of bribe. The charge/investigation does not extend under the same FIR to a disproportionate assets case (section 13(1)(e)). If at all disproportionate assets are found, a separate case u/s 13(1)(e) is registered, investigated and chargesheeted.

Thus, to summarise, reporting a corrupt public servant to the Enforcement Directorate for the offence of money laundering of corruption tainted money is not possible under the present schedule of offences in PMLA since the underlying chargesheeted offence u/s 7, 8, 9 or 10 of PC Act, is for a minor amount of money, whereas the real applicable section (section 13) has been left out from the Schedule.

### 3. Offences under the Immoral Traffic (Prevention) Act, 1956

Trafficking of women for immoral purposes continues to be a problem in India, inviting opprobrium from the other countries<sup>8</sup>. A large number of victims generate huge amounts of illegal funds on an ongoing basis for the perpetrators. PMLA does recognize this sad reality and goes on to include the following four section of the ITP Act<sup>9</sup>.

- 5 *Procuring, inducing or taking person for the sake of prostitution.*
- 6 *Detaining a person in premises where prostitution is carried on.*
- 8 *Seducing or soliciting for purpose of prostitution.*
- 9 *Seduction of a person in custody.*

These offences cover situations involving procuring a person for prostitution (agent), detaining such person in places where prostitution is carried on (musclemen), soliciting (by the prostitute or agent) and seducing a person for prostitution. All these acts of crime will concern chargesheeting persons who are employed as agents of trafficking for prostitution or the prostitutes themselves. Both these kinds of persons deal with comparatively small amounts of earnings. The main beneficiary of illicit trafficking for prostitution is the person who lives on the earning of prostitute. This offender is prosecuted u/s 4 of ITP Act, which reads as follows<sup>10</sup>.

**4. Punishment for living on the earnings of prostitution.** - (1) *Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of 1[any other person] shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both 2[and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years].*

This section is not covered for action under PMLA. In the entire gamut of offences in the trade of prostitution, the person who runs the brothel or controls the prostitution ring is the person who over the years accumulates illicit wealth from the proceeds of crime. The other players in the racket are usually temporary participants and would not be appropriate or eligible for enquiry & prosecution under PMLA.

### 4. Offences under the Indian Penal Code, 1860

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<sup>8</sup> <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=3378848c-969c-4350-b0d4-fcc6bc6b0cc8&ParentID=09212583-99e1-4ee5-abb4-67fec42ee947&>

<sup>9</sup> <http://fiuindia.gov.in/schedule-immoraltrafic.htm>

<sup>10</sup> <http://socialwelfare.delhigovt.nic.in/immoraltraffact1.htm>

Both parts of the Schedule carry offences from the IPC. Part A, where there is no minimum amount specified, includes offences under section 121, relating to waging war against the Government of India. On the other hand, Part B, where there is a floor value of Rs. 30 lakh, contains offences, *inter alia*, under sections 302 (Murder), 304 (Culpable homicide not amounting to murder), 307 (Attempt to murder), 308 (Attempt to commit culpable homicide), 327 (Voluntarily causing hurt to extort property), 364A (Kidnapping for ransom, etc.), 384 to 389 (Offences relating to extortion), 392 to 402 (Offences relating to robbery and dacoity), 467 (Forgery of a valuable security), 489A (Counterfeiting currency notes or bank notes) and 489B (Using as genuine, forged or counterfeit currency notes or bank notes).

The inclusion of the offences against body, such as murder and causing hurt is surprising, as most of these are offences of passion and there is hardly a situation when as large amount of money as Rs. 30 lakh may be involved. However, of more concern is the omission of the offence of cheating, as defined under section 415 of IPC, which is the mother crime when it comes to scams and large scale duping of gullible investors and ordinary people. Forgery and use of forged documents are ancillary offences, often used as instruments of the conspiracy to cheat. The famous stock market scam involving Ketan Parekh<sup>11</sup> is a clear example of this kind of *modus operandi* and indicative of the volume of illegal proceeds which can get generated.

## 5. Conclusion

It is clear that the intention of the legislature in including offences under the PC Act, the ITP Act and the IPC in PMLA has not been followed through in the Schedule. This needs an urgent re-thought if the law is to be effective against corruption and against women and child exploitation in the country. Section 13 of the PC Act, section 4 of the ITP Act and sections 417-420 of the IPC need to be included in the Schedule under the PMLA, lest the law remain a dead letter, due to faulty operation of its provisions.

Finally, if one looks at the major worldwide categories of crimes which generate large illegal proceeds of crime, these include tax evasion and activities of organized crime groups. Many of these are covered by local and special laws in India, the case in point being gambling and prohibition laws, which vary from state to state and carry only a token punishment. There is also no nation-wide law against control of organized crime, such as the Maharashtra (Control of Organised Crime) Act, which could have formed the fulcrum against the fight against organized crime. New offences like piracy of entertainment and software products are not covered in PMLA at all. These infirmities may make PMLA a toothless tiger, capable of a roar to impress the bystanders, but no bite when it comes to bringing the criminals to book.

***(Note: Views expressed are personal and do not reflect the views of the employer organizations.)***

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<sup>11</sup> <http://www.rediff.com/money/2001/mar/31dalal.htm>