
THE VIJAY MADANLAL JUDGMENT OF INDIA: A NEW ERA FOR PMLA?

Tulip Tarun Bhatia, National Law University Odisha

ABSTRACT

The Vijay Madanlal Choudhary judgment of the Supreme Court has been one of the most prolific and debated upon decisions by legal professionals. In this judgment, the apex court has examined the scope and interpretation of various definitions covered under the Prevention of Money Laundering Act 2002. By awarding a wide range of powers to the Enforcement Directorate, the principles of general Criminal Law in India find themselves faced with a challenge. This paper questions the legitimacy of such powers in the hands of the Enforcement Directorate and highlights the inconsistencies with accepted provisions of the Code of Criminal Procedure. Further, there is a comparison of Indian Anti-Money Laundering Laws with various other countries with economies that can be compared with India's standing. The major question that is sought to answer is whether the means justify the ends in such cases of money laundering and whether Indian jurisprudence surrounding anti-money laundering laws is in consistency with its global counterparts.

Introduction

A. Background of the PMLA

The enactment of the “**Prevention of Money Laundering Act 2002**” (“PMLA”)¹ stemmed from a pressing need amongst countries across the globe to safeguard their financial systems from the plague of money laundering. However, despite it being a functioning law, there were contestations that the provisions of the PMLA were in contravention of the Constitution of India due to their arbitrary and disproportionate nature.

Subsequently, to provide an interpretation to the phrase “intention of the legislature” and other provisions of the PMLA, a Special Leave Petition before the Supreme Court of India adjudicated on investigative privileges of the Enforcement Directorate (“ED”), the stringent bail conditions, search and seizure under PMLA etc.

The background of the case rests on the erstwhile provisions wherein before the amendment made in 2018, the predicate offences had been categorized into two specific categories by law.² There was a separation made between crimes which had a term of imprisonment attached to them of three years or more from other offences. Previously, in “**Nikesh Tarachand Shah v. Union of India**”,³ it was ruled that this classification which is based upon the term of imprisonment is unreasonable and disproportionate by the court. The ratio behind this was that classification which is based on the term of imprisonment had no connection with the objective of the PMLA act. The objective of PMLA is to bring back the hefty amounts which have been illegally and through proceeds of criminal activity been taken away.⁴ Therefore, the parliament deleted this very classification and proceeded to impose by virtue of Section 45, twin conditions for all the crimes and offences which fell within the ambit of the PMLA.⁵ The main contention raised in the Vijay Madanlal Judgment by the Petitioners rested upon the inadequacy of the legislature to have gone on to amend a law which had been previously declared to be

¹ The Prevention of Money Laundering Act, 2002.

² Suhrith Parthasarathy, ‘PMLA Verdict, an Erosion of Constitutional Buffers’ *The Hindu* (31 July 2022) <<https://www.thehindu.com/opinion/lead/the-pmla-verdict-overlooks-constitutional-safeguards/article65707726.ece>> accessed 15 March 2023.

³ *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

⁴ *ibid.*

⁵ The Finance Act, 2018, Part XIV.

unconstitutional by the Supreme Court.⁶ Therefore, meaning that provision of bail could not have been reintroduced by the government into the act without them having to explicitly remove the twin conditions.

B. The Vijay Madanlal Judgment

The apex court, through the case of **Vijay Madanlal Choudhary v. Union of India**⁷ delivered a landmark verdict wherein the court upheld the provisions which have been enlisted in the PMLA. These specific provisions are related to the powers of the Enforcement Directorate concerning arrest of persons, seizure and search of parties and their related liabilities which are in question and the power of attaching property.⁸ The top court has left the question of whether or not the parliament was equipped to have passed amendments relating to the PMLA act by way of a Finance act outside the scope of the judgment. This question has referred to a larger 5 judge bench in the case of *Roger Matthew*.⁹ The apex court has enumerated upon the necessary need of the word “proceedings” as mentioned in clause (na) of Section 2(1)¹⁰ to be given an expansive meaning. They opined that the term is contextual and should ideally include the adjudicating authority, authorities of the ED and the Special courts inquiry procedure.¹¹ Furthermore, the court said that the term ‘investigation’ which again finds reference in clause (na) of section 2(1), is not and ought not be limited to only matter of investigations of offences which fall under the ambit of the Act rather it can be used interchangeably with the authorities function of conducting an ‘inquiry’. Additionally, the explanation which has been inserted to clause (u) of section 2(1) of the PMLA act should not be extensively ready outside the ambit provided under the main provision which predicates reaching up to and tracking the property which has been either derived or obtained directly or indirectly as a result of a penal offence in relation to a scheduled offence. Furthermore, Section 3 of the PMLA¹² act has an extremely wide and expansive ambit and therefore includes all processes and activities, direct or indirect when it comes to dealing with criminal offences. It is in no case limited to only the occurrence

⁶ ‘Bombay HC: Twin Bail Conditions under PMLA Stand Revived via 2018 Amendment to Act | Mumbai News - Times of India’ <<https://timesofindia.indiatimes.com/city/mumbai/bombay-hc-twin-bail-conditions-under-pmla-stand-revived-via-2018-amendment-to-act/articleshow/89370579.cms>> accessed 15 March 2023.

⁷ *Vijay Madanlal Choudhary v. Union of India*, 2021 SCC OnLine SC 3286

⁸ ‘Summary Of Supreme Court’s PMLA Judgement- Vijay Madanlal Choudhary Vs Union of India’ <<https://www.livelaw.in/top-stories/supreme-courts-pmla-judgement-vijay-madanlal-choudhary-vs-union-of-india-204937>> accessed 15 March 2023.

⁹ *Roger Matthew v. South Indian Banks Limited and Ors.*, Civil Appeal No. 8588 of 2019.

¹⁰ The Prevention of Money Laundering Act, 2002, s. 2(1).

¹¹ (n 2)

¹² The Prevention of Money Laundering Act, 2002, s. 3.

of the ultimate amalgamation of the property in question into the formal economy. Since, the explanation to section 3 has been added in view of it being only clarificatory in nature by the 2018 amendment; its veracity would not get affected even if it had been introduced by way of a finance act or otherwise. The court specifically outlines herein that the word ‘and’ in Section 3 must be read as ‘or’ in order to fully give effect to the provision which would then include every process which is indulged into by any person. The court upheld the constitutional validity of Section 5 of the PMLA act¹³ as it saw it as a “balancing arrangement” between securing the interest of the person while making sure that the proceeds of the crime are still available and dealt with in a manner prescribed by the act. Therefore, the court held that if the accused has been acquitted of his charge of committing a predicate offence, his charge under the PMLA is no longer maintainable. The court through its judgment not only upholds the twin conditions for bail by stating that they are not arbitrary but also validates the ability of the parliament to have amended a law which has already been ruled to be unconstitutional.¹⁴

Analysis of key issues discussed in the judgment

A. Scope of ‘investigation’ under Section 2 (na)

The first issue raised in the judgment which was also a center of intense discussion was about the scope and meaning of the term ‘investigation’¹⁵ which finds reference in section 2(na) of the PMLA. The definition according to the said section reads as given below:

“Investigation includes all the proceedings under this act conducted by the director or by an authority authorized by the central government under this act for the collection of evidence”.¹⁶

The petitioners in this case argued that the meaning of the term ‘investigation’ should be according to what has been provided in the “Code of Criminal Procedure” according to which, it is the collection of material evidence. Therefore, the statements which are made by a person covered under this act should definitively come under the avenue of the right to self-incrimination¹⁷ and the “right to life and personal liberty”¹⁸ of the Indian Constitution. The

¹³ The Prevention of Money Laundering Act, 2002, s. 5.

¹⁴ ‘Pratap Bhanu Mehta Writes: By Upholding PMLA, SC Puts Its Stamp on Kafka’s Law’ (*The Indian Express*, 28 July 2022) <<https://indianexpress.com/article/opinion/columns/pratap-bhanu-mehta-by-upholding-pmla-sc-puts-its-stamp-on-kafkas-law-8057249/>> accessed 15 March 2023.

¹⁵ (n 7).

¹⁶ The Prevention of Money Laundering Act, 2002, s. 2.

¹⁷ Art. 20(3), The Constitution of India, 1950.

¹⁸ Article 21, The Constitution of India, 1950.

exception to this stands to be if the proceedings are being held before an “adjudicating authority” or before a court of law.¹⁹

The observation of the court was however contrary to this contention. They were of the opinion that the term ‘investigation’ should be used interchangeably with the term ‘inquiry’ which is done by the authorities when they submit a piece of evidence to the court of law or the relevant body for deciding the case.²⁰ Thus, the comparative that the petitioners draw of the term ‘investigation’ having the same relevance and meaning as is provided in the “Code of Criminal Procedure” is unfounded. Continuing on the same lines therefore, the right to self-incrimination and the right to life and dignity would not be attracted when the case is being dealt with officers who have been authorized under the PMLA.

Critique:

This reverses the presumption of guilt imposing an onerous burden on the accused. Under this act, the Court will be under the presumption that all the proceeds generated from the crime were included in money laundering.²¹ Essentially, instead of the public prosecutor leading the role in proving why the accused is guilty, this role is reversed and it is actually the burden of the accused to prove that he is not guilty. While this is contrary to criminal jurisprudence, it is also extremely difficult for the person to prove that he is not involved in handling tainted property.

B. Twin Conditions of Bail

For a person to secure bail under the PMLA, they need to necessarily satisfy two conditions which have been laid down under Section 45 of the act which are; first, there must exist a reasonable ground for the court to believe that the person who is accused is actually not guilty and that he will not commit any offence while he is out on bail and Second, that the public

¹⁹ Sanjeev Sharma Jain Sanya Sud, and Siddharth, ‘Vijay Madanlal Chaudhry V. Union Of India - A Case Fit For Review?’ (6 September 2022) <<https://www.livelaw.in/law-firms/law-firm-articles-/vijay-madanlal-chaudhry-union-of-india-enforcement-case-information-report-review-petition-208499>> accessed 15 March 2023.

²⁰ Balaram Adhikari, ‘India - The Vijay Madanlal Judgment- A New Era For The PMLA?’ (Conventus Law, 5 September 2022) <<https://conventuslaw.com/report/india-the-vijay-madanlal-judgment-a-new-era-for-the-pmla/>> accessed 15 March 2023.

²¹ ‘Summary Of Supreme Court’s PMLA Judgement- Vijay Madanlal Choudhary Vs Union of India’ (n 8).

prosecutor must have been given a chance to have oppose the bail application.²²

The Petitioners contended that this requirement under the PMLA is violative of constitutional provisions of “right to equality” and the “right to life and dignity”. The rationale behind this argument is that the twin conditions impose an extremely high and irrebutable burden on the person who is accused.²³ The very act is framed in a way where securing bail is extremely hard and thus, when charges under this law are framed and the burden of doubt bends unreasonably against the accused, they lose the right to secure bail which is violative of one of the golden rules of criminal jurisprudence, jail is the exception and bail is the rule. Furthermore, this violates the right to life and liberty since there is an absolute bar on the ability of the person accused to secure bail for themselves. The rigor of bail under the PMLA is too extreme when compared with the statutory provision of bail under the CRPC.²⁴ There is also a violation of article 14 by this provision of section 45 since it institutes and applies distinct laws for the same act.

Previously, the Supreme Court in 2017, in the case of Nikesh Tarachand²⁵ had ruled that these twin conditions are in fact violates of the constitutional provisions of Article 14 and Article 21. Subsequently the central government had overruled this by amending Section 45 in 2018 which in essence reaffirmed the same twin conditions which the court had expressly overruled in the Nikesh Tarachand case.

The court on this point held that the twin conditions are not violative of the constitution. While they agreed that the requirement of bail under the PMLA is more restrictive and rigorous it still does not violate the right of an accused because there is no absolute restraint which is being levied by the statute. There is always the discretion which rests with the court and bail can be granted on application of the judicial mind and discretion which are merely being guided by what has been provided in Section 45 of the PMLA.

²² The Prevention of Money Laundering Act 2002, s. 45.

²³ ‘Explainer | Vijay Madanlal Choudhary And Others v. Union Of India And Others - Money Laundering - India’ <<https://www.mondaq.com/india/money-laundering/1262376/explainer-|vijay-madanlal-choudhary-and-others-v-union-of-india-and-others>> accessed 15 March 2023.

²⁴ GS Bajpai & Ankit Kaushik, ‘Explained | Has Bail under PMLA Become Near-Impossible?’ *The Hindu* (2 August 2022) <<https://www.thehindu.com/news/national/explained-has-bail-under-pmla-become-near-impossible/article65716004.ece>> accessed 15 March 2023.

²⁵ (n 3).

Critique:

This is an extremely regressive view of the court on two grounds; first, one might argue that similar requirements exist in other statutes as well like TADA, UAPA etc however the gravity of these offences is significantly higher than money laundering as often most of these are related to acts of terror. Imposing the same metric for a crime of economic nature which carries a drastically lesser punishment is arbitrary.²⁶ Secondly, the court has gone on a limb and even applied this to anticipatory bails. Additionally, even in these other statutes there still remain certain protections which are guaranteed however here even those little reliefs have been taken away. So the accused is not liable to get the copy of the ECIR and he finds out about the reasons and grounds of his arrest as late as when he has actually been taken into custody.

C. 'And' must be read as 'Or' under Section 3

Section 3 of the act says, “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 the offence of money laundering”.²⁷

It was the petitioner’s contention that a person should be charged with the offence of money laundering only when the “property in question has been projected as untainted property”.

However, the Supreme Court held to the contrary and rejecting the argument of the petitioner said that the word ‘and’ given under section 3 of the PMLA act must be read as ‘or’. This is because the section has an expansive reach where it involves within it every activity which is either directly or indirectly related to the offence. Thus it is not only the final act of money laundering but all activity which is directly or indirectly related. Just having the proceeds of crime in your possession constitutes money laundering. The unauthorized acquisition of property as a result of criminal action committed in connection with a scheduled offence constitutes the offence under Section 3 of the 2002 Act. To be prosecuted, a scheduled offence must be reported to the jurisdictional police or the appropriate forum for the 2002 Act’s

²⁶ ‘Summary Of Supreme Court’s PMLA Judgement- Vijay Madanlal Choudhary Vs Union of India’ (n 8).

²⁷ (n 3).

authorities to act. They simply cannot act on a notional basis or on the premise that it has been committed.

Critique:

The interpretation which has been given to proceeds is extremely wide. The court had nullified the requirement of “projecting” or “claiming” with regards the proceeds of crime.²⁸ This is extremely detrimental since now, any person who is in possession of tainted property can be held liable under the act whether or not he had the knowledge or the intention is rendered immaterial. When looked in context of Section 24, this violates the tent of criminal law wherein a person is assumed to be innocent until his guilt has been proved.

Development of Jurisprudence of PMLA after Vijay Madanlal

The Vijay Madanlal judgment has upheld the constitutionality of the wide ambit of the ED’s powers and held them as adequate safeguards under the PMLA. These powers are at an apparent irregularity with the general conventions of criminal and constitutional laws in India, as has been discussed previously. By providing a powerful diversion from these laws, the Vijay Madanlal judgment serves as a powerful precedent to Courts across India to provide a leeway to exercise of a dangerously wide array of powers by the ED. Since its declaration in 2022, various courts across India have provided their opinions on the Vijay Madanlal judgment, as has been discussed below.

A. Judgments upholding the Vijay Madanlal Judgment

1. The Directorate of Enforcement v. M. Gopal Reddy & Anr.²⁹

Here, it was held that the conditions of bail which are stated in section 45 of the PMLA are in tandem with the conditions for anticipatory bail to be obtained, which find their mention in “section 438 of the Code of Criminal Procedure”. In doing so, the division bench of the Supreme Court overturned the contrary judgment of the High Court of Telangana. In giving

²⁸ ‘Explainer | Vijay Madanlal Choudhary And Others v. Union Of India And Others - Money Laundering - India’ (n 23).

²⁹ *The Directorate of Enforcement v. M. Gopal Reddy & Anr.*, CRIMINAL APPEAL NO. 534 OF 2023 (@SLP (CrI) No. 8260/2021)

this judgment, the Court placed reliance on the Vijay Madanlal judgment which held suit.³⁰

2. **M/s Prakash Industries Limited v. Union of India and Anr.**³¹

Here, the High Court of Delhi declared that the power of ED is limited to investigating offences pertaining to money laundering. The ED cannot assume the existence of a corollary offence from the evidence it gathers during investigation of the offence. The Court in the Vijay Madanlal judgment had held that the authorities did not have a leeway to assume the existence of a predicate offence merely on basis of certain material it found at the time of investigation.

B. **Judgments dissenting the Vijay Madanlal Judgment**

1. **Rana Ayyub v. Directorate of Enforcement**³²

In this case, the Supreme Court provided a wide interpretation to the jurisdiction where a proceeding under the PMLA could commence. The petitioner in this case, referred to the Vijay Madanlal judgment where it was held that such offences fall in the immediate jurisdiction of the “regional special court” and in the rare event of offence which is committed being triable in an alternate court, both court “may proceed with the trial independently”³³ but strictly in the geographical location of the commission of the offence. However, in this case, the top court interpreted money laundering as an offence which is an amalgamation of multiplicity of events such as “concealment, possession, acquisition, use, projecting as untainted property, or claiming as untainted property”.³⁴ Thus, the offence was triable at any of these places where any such activity took place.³⁵

2. **Anitha R Radhakrishnan v The Directorate of Enforcement and another**³⁶

The High Court of Madras in this case deliberated upon the part of the judgment Vijay

³⁰ ‘Section 45 PMLA Conditions Applicable To Anticipatory Bail Applications For Money Laundering Offence : Supreme Court’ <<https://www.livelaw.in/top-stories/section-45-pmla-conditions-applicable-to-anticipatory-bail-applications-for-money-laundering-offence-supreme-court-222489>> accessed 15 March 2023.

³¹ *M/s Prakash Industries Limited v. Union of India & Anr.*, 2017 SCC OnLine Del 7406.

³² *Rana Ayyub v. Directorate of Enforcement*, Writ Petition (Criminal) No. 12 of 2023.

³³ (n 7).

³⁴ (n 32)

³⁵ ‘Jurisdiction To Try Money Laundering Offence Not Limited To PMLA Court At Place Where Proceeds Of Crime Are Found : Supreme Court’ <<https://www.livelaw.in/top-stories/jurisdiction-to-try-money-laundering-offence-not-limited-to-pmla-court-at-place-where-proceeds-of-crime-are-found-supreme-court-221009>> accessed 15 March 2023.

³⁶ *Anitha R Radhakrishnan v. The Directorate of Enforcement & Anr.*, WP No. 16467 of 2022.

Madanlal where it was held that “section 13(1)(e) of the Prevention of Corruption Act,1988” which is now a ground for prosecution under the PMLA could be applied retrospectively. However, the High Court of Madras deviated from the stance of the apex court and held that the “retrospective application” should be made on a selective basis and section 13(1)(e) by itself is not sufficient to levy a ground for prosecution.³⁷

Global Perspective on Money Laundering Laws

Globally, the “Financial Action Task Force (FATF)” has prescribed a list of guidelines which aim at combating the growing evil of money laundering and terrorism financing.³⁸ Several countries have adopted these 92 guidelines into their own domestic laws in order to stimulate the creation a financial environment which is safe from money laundering.³⁹

In the light of the Vijay Madanlal judgments, the authors shall examine the various Anti-Money Laundering regimes present globally and enquire into their parity with the criminal and constitutional laws of those respective jurisdictions.

A. USA

1. Laws governing money laundering

The USA, like India, has a separate set of regulations governing anti-money laundering laws. “The Department of Treasury” of the USA has a bureau named “Financial Crimes Enforcement Network [FinCEN]” which monitors domestic and foreign financial transactions and analyses the financial patterns that develop.⁴⁰ There is another statute named the “Bank Secrecy Act of 1970” plays an instrumental role at detecting any possible instance of money laundering and oversees compliance with the established laws.⁴¹

The USA has experienced the horrors of September 11, 2001 which was an aftermath of

³⁷ Upasana Sajeev, ‘Madras High Court Extends Interim Stay On ED Probe Against Tamil Nadu Minister Anitha Radhakrishnan’ (19 December 2022) <<https://www.livelaw.in/news-updates/madras-high-court-interim-stay-ed-probe-tamil-nadu-minister-anitha-radhakrishnan-217064>> accessed 15 March 2023.

³⁸ ‘Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT)’ <<https://www.imf.org/external/np/leg/amlcft/eng/>> accessed 15 March 2023.

³⁹ ‘A Complete Guide to AML Regulations around the World’ <<https://insights.namescan.io/a-complete-guide-to-aml-regulations-around-the-world/>> accessed 15 March 2023.

⁴⁰ ‘United States Department of the Treasury Financial Crimes Enforcement Network | FinCEN.Gov’ <<https://www.fincen.gov/>> accessed 15 March 2023.

⁴¹ ‘A Complete Guide to AML Regulations around the World’ (n 39).

unregulated terror financing and thus, the lawmakers are cognisant of the importance of anti-money laundering laws. However, despite several jurists emphasising on the importance of such laws, there have been concerns regarding breach of privacy under the “Fourth Amendment” raised in the USA.⁴²

2. Constitutionality of the anti-money laundering laws

In **Olmstead v United States**⁴³ the police had violated the right to privacy under the Fourth Amendment and illegally wiretapped several phones belonging to the plaintiffs over a period of five months. There was no search warrant sanctioning the same. Despite acknowledging the irregularity in process, the Court held that obtaining evidence via illegal means could be admitted for the proceedings. Similar to Vijay Madanlal, the Court allows performance of an apparent illegal act violative of the fundamental right to privacy. Further in the case of **United States v Miller**⁴⁴ it was explicitly stated that the Fourth Amendment was not applicable with regards to bank records since the BSA required banks to keep a track of any dubious transaction that was taking place.

Further, in the case of **Stark v Connally**⁴⁵, the constitutionality of the BSA itself was challenged. The court in this case while deliberating upon the constitutionality took into account three components; “record keeping of transactions, reporting of foreign financial transactions and reporting of domestic financial transactions”. The court while relying on Miller held without delving into the same substantially that record keeping of transactions was constitutional. The Courts also upheld the constitutionality of reporting of foreign financial transactions. In justifying the same, the Court held that movement of monetary instruments exceeding the value of \$5,000 was constitutional since involvement of foreign powers renders the same constitutional according to various domestic laws. However, reporting of domestic financial transactions was held illegal since unrestricted reported of banking transactions of citizens was a violation on the Bill of Rights and right to privacy of its citizens.⁴⁶

⁴² ‘- TERRORIST FINANCING SINCE 9/11: ASSESSING AN EVOLVING AL-QAEDA AND STATE SPONSORS OF TERRORISM’ 11 <<https://www.govinfo.gov/content/pkg/CHRG-112hhr78153/html/CHRG-112hhr78153.htm>> accessed 15 March 2023.

⁴³ *Olmstead v United States*, 277 U.S. 438 (1928).

⁴⁴ *United States v Miller*, 425 U.S. 435,442-43

⁴⁵ *Stark v Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972).

⁴⁶ ‘United States Department of the Treasury Financial Crimes Enforcement Network | FinCEN.Gov’ (n 40).

Overall, in declaring that the activities of BSA conformed with the Constitution, the Court held its excess intervention as legitimate due to high risk of illicit financing and taxation frauds and criminal financial activities tend to have a manifold impact on the citizens. This judgment was critiqued for failing to draw a balance between rights of citizens and powers of BSA.⁴⁷

B. United Kingdom

1. Laws governing money laundering

The United Kingdom (“UK”) has a broad list of directives to tackle money laundering titled “EC Money Laundering Directives”. There are four pillars which regulate the money laundering regimes in the UK.⁴⁸

- i. “Money Laundering Regulations 2003” mandate any business which conducts what the statute deems as “relevant financial business” to maintain records of all transactions and train and report in order to detect any degree of suspicious activity.⁴⁹
- ii. Principles implemented by the “Financial Service Authority” which is the supreme regulator in the UK for the financial sector and imposes a system to tackle the growing evil of money laundering. It is a statutory body and has power to amend the regulations and provide guidelines for their enforcement.⁵⁰
- iii. “Proceeds of Crime Act 2002” creates a social obligation on all sectors across industries to report any dubious financial activities involving large sums of money in public interest.⁵¹
- iv. “Terrorism Act 2002” is focused specifically on combating terrorist financing. It does the sole job of detecting any large sum transactions which might be linked to terrorist activities.⁵²

⁴⁷ Robert S Palsey, ‘Privacy Rights v. Anti-Money Laundering Enforcement’ (2002) 6 North Carolina Banking Institute.

⁴⁸ Wouther H Muller, Christian H Kalin and John G Goldsworth, *Anti Money Laundering International Law and Practice* (John Willey & Sons Ltd 2007).

⁴⁹ The Money Laundering Regulations [2003] (UK Statutory Instruments 2003 No. 3075).

⁵⁰ ‘FCA’ (*FCA*) <<https://www.fca.org.uk/>> accessed 15 March 2023.

⁵¹ Proceeds of Crime Act [2002] (2002 c. 29).

⁵² The Terrorism Act 2000 and Proceeds of Crime Act 2002 (Business in the Regulated Sector) (No.2) Order 2012.

C. Constitutionality of the anti-money laundering laws

The constitutional validity of the anti-money laundering laws in the UK were primarily deliberated upon in the 2017-2019 session of the Select Committee on the Constitution of the House of Lords.⁵³ While deliberating upon the “Sanctions and Anti-Money Laundering Bill”, there was a clause-wise discussion on the constitutionality of the same. Clause 1 was deemed a “Henry VIII power” which authorised law makers to make “supplemental, incidental, consequential, transitional or saving provision,” including “provision amending, repealing or revoking enactments (whenever passed or made)”. In this deliberation it was concluded that the ministers had rather broad powers with respect to making laws and the same was deemed as “constitutionally inappropriate” by the committee.

Further clauses 2-7 authorises ministers to impose sanctions on “designated persons”. The criteria for qualifying as “designated persons” too lay with the same ministers. However, it was clearly specified that this power is not unrestricted and there would be a balance of proportionality that would be stricken between the rights of individuals and imposition of sanctions.⁵⁴

2. Criminal validity of money laundering laws

Clause 16 of the bills makes provision for enforcement of sanctions. This regulation-making power extends to imposition of prohibitions and punishments in case of contravention of the same. It authorises lawmakers to create offences punishable for up to 10 years of imprisonment. This was deemed as “Constitutionally unacceptable” since “The power in clause 16 may be utilised to create an offence for which a penalty of up to 10 years in prison may be imposed, and ministerial regulation governs the regulations of the evidence to prove the case is proved and defences to such accusations”.⁵⁵

UK has taken a much liberal and people-oriented approach in adjudging the constitutional and criminal validity of its money laundering laws unlike India and the USA. UK has a separate set of laws like the previous two countries, apart from its money laundering laws with respect to

⁵³ Select Committee on the Constitution, ‘Sanctions and Anti-Money Laundering Bill [HL] 8th Report of Session’ (2019 2017).

⁵⁴ Muller, Kalin and Goldsworth (n 48).

⁵⁵ ‘Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT)’ (n 38).

money laundering.

C. China

China has been an epicentre of money laundering activities for the longest time. The total worth of money laundered in China has been detected to be an approximate of RMB 200-300 billion by the International Monetary Fund.

1. Laws governing anti-money laundering

Article 191 of the “Criminal Law of the PRC 1997” makes provisions for the offence of money laundering. Eventually, the scope of the Act was expanded to include terrorist financing in its ambit in December 2001. Additionally, there exist administrative rules in China titled “Provisions on the Real Name of Individual Deposit Account” prior to which any person was authorised to start a bank account under a counterfeit identity without any legal ramifications.⁵⁶

Later in January 2003, the “People’s Bank of China” (“PBOC”) promulgated a set of three regulations on anti-money laundering titled “Regulations for Anti-Money Laundering by Financial Institutions”, “Administrative Measures for the Reporting of Large Value and Suspicious RMB Payment Transactions” and “Administrative Measures for the Reporting by Financial Institutions of Large Value and Suspicious Foreign Exchange Transactions”. These regulations prevent money laundering through regulating high value cash transactions, foreign exchange transactions, or the transfer of funds beyond the PRC, as well as account management and internal control systems.⁵⁷

2. Constitutionality of money laundering laws

Chinese lawmakers have acknowledged the criminality of the nature of money laundering despite having a common governing statute. However, they have stated that the punishment for imprisonment by 10 years is in consonance with the other penal provisions of China and hence, the punishment prescribed is not arbitrary in nature.⁵⁸

⁵⁶ Criminal Law of the People's Republic of China [], 1 October 1997.

⁵⁷ Muller, Kalin and Goldsworth (n 48).

⁵⁸ Yu Guiying, ‘The Offence of Money Laundering and Its Constitutive Characteristics in China’ Association Internationale De Droit Penal.

3. Criminal validity of money laundering laws

The money laundering laws in China are regulated across various government offices due to their universal nature. There is still discussion to increase the purview of anti-money laundering laws in China. Various legislators, academicians and jurists have formed the following common three opinions:

- i. i. According to Paragraph 1 of Article 6 “of the "United Nations Conventions against Transnational Organized Crime," which specifies that the prerequisite for committing a money laundering crime is “knowing clearly that certain assets or property is obtained from crime,” the stated that it is incumbent to broaden the scope offence of money laundering to include a multitude of offences.
- ii. In addition to current offences, “the predicate offences for money laundering should also include embezzlement, tax fraud, and foreign exchange fraud in export.”
- iii. The predicate offences for money laundering may not be increased until additional crimes are required to be added to reflect real-world circumstances.⁵⁹

As is evident from the analysis above, the money laundering laws in China are at a nascent stage and there are still various deliberations on going as to expand their scope. As compared to India, where there is a wide ambit of powers to the ED to combat money laundering which was legalised in the Vijay Madanlal judgement, China is not at the forefront of testing the validity of its money laundering laws. If eventually the opinions as stated above are implemented and the avenues of the anti-money laundering laws in widened, there may be constitutional challenges to the same. Since the PRC observes excess control with the state, it is likely that restrictive and controlling nature of the laws will be further highlighted in such an event.

Conclusion and Suggestions

In its ruling in the Vijay Madanlal case, the Supreme Court virtually gave the Enforcement Directorate total control. The terms of bail and the expanded definition of money laundering appear to have taken the largest harm. With little options available to the accused under the

⁵⁹ *ibid.*

PMLA, this would unquestionably result in a heightened sense of scrutiny that the ED Authorities can perform.

A. Status of the Vijay Madanlal Judgment

The Vijay Madanlal judgment, with all its controversies, will be ascertained for its finality in the case of “**Rojer Mathew v. South Indian Bank Ltd. & Ors.**” before a 5-judge bench. The PMLA journey will be intriguing to follow because the ED is currently scooping up more businesses and people in India than ever before.

B. Suggested Interpretation of the PMLA

The PMLA has been at a disparity with the constitutional and criminal laws as has been established above.

1. Conformity with Article 300A of the Constitution

The Adjudicating Authority's approval is all that is required for the ED to decide to attach property; after that, it will remain attached for the duration of the trial. Yet, to detach the property at the judicial level poses greater impediments to the accused, since at this stage, the “burden of proof” to establish the non-relation of the mentioned property with the proceeds generated from the crime lies on the accused. These trials continue for long periods of time and the property of the accused continues to remain attached for the duration. It is incumbent to fix a time period for which the property can be attached.

2. Conformity with Article 21 of the Constitution

The PMLA does not make express provisions to safeguard the right to life and liberty of the accused. The Court deemed maintenance of ECIR as non-mandatory which is in contravention to conventionally followed procedural laws mandating recording by the investigative agency. This heightens the inconvenience in obtainment of bail. The ECIR requirement must be deemed mandatory since bail is a quintessential part of right to freedom.

3. Conformity with Article 20

The ED's power to carry out inquiry without appropriate grounds and present statements made by the accused during investigation as admissible evidence in contravention to the process of

law. It has been widely argued by jurists, including the petitioners in the present case, that this provision contravenes “right against self-incrimination” of Article 20. The criminal law convention of deeming statements made to police as inadmissible must be strictly implemented even in money laundering cases.

C. Parity with International Laws

When comparing with leading economies such as the USA and the UK, India finds a similarity of its nature of laws and interpretation with the USA while observing drastic deviation from the UK anti-money laundering regime.

1. USA

India like the USA has a separate set of legislation while dealing with money laundering offences and other criminal offences. The interpretation of both such set of laws has been strict with wide power to the investigative agencies. The breach of constitutional provisions to attain the goal of anti-money laundering has been deemed legitimate by the apex court of both the countries.

2. UK

UK, like India, has a separate set of legislations pertaining to money laundering laws. However, unlike India, the UK has provided a sizeable restraint on exercise of arbitrary power by the lawmakers and provided a higher status to the rights of the citizens. Further, the punishment for breach of sanctions has been made in conformity with the existing criminal laws of UK. This is unlike India, where in the Vijay Madanlal judgment, the Court has allowed a deviation from the generally accepted principles of criminal law.

3. China

China has its money laundering laws inscribed in the criminal laws of the state. This is unlike India where the PMLA which provides for money laundering offences is separate from the IPC. Further, the Chinese money laundering laws are at a relatively newer stage and there is scope of expansion in these laws in the future.