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Constraints by Judiciary: Reviewing Enforcement Directorate Role and its lessons for SDG 16

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ABSTRACT

This article will focus on Goal 16 of UN's Sustainable Development Goals (Peace, Justice and Strong Institutions)[1] and how Judicial Adjudication of Constitutional Courts in the Indian Context is intricately connected to achieve justice. This article analyses the working of criminal investigating agency of Directorate of Enforcement (hereinafter referred to as 'ED') and whether judicial intervention has made it more accountable. ED is a part of the executive arm of the State that also investigates offences under the central statute of Prevention of Money laundering Act, 2002 (hereinafter referred to as 'PMLA'). Hence, this article will; First, analyse the implication of ED exercising different powers in different states. Second, to analyse the situations of ED exercising its power in the absence of a scheduled offence. Third, evaluate the operations of ED beyond the definition of money laundering. Fourth, to outline the apex court intervention in curbing ED's power to make arbitrary arrest. It is argued that laying down of the correct legal position by Indian Constitutional Courts can be used as a highly effective tool for ensuring the creation and sustenance of strong democratic institutions in India. By way of Constitutional Interpretation and application of constitutional standards, the Judicial Branch can greatly curtail executive excesses and ensure fair & transparent governance, thereby protecting the interests of the citizens.

Keywords: Public Policy, Constitutional Governance, Criminal investigation, Enforcement Directorate, Money Laundering.

INTRODUCTION

The Enforcement Directorate (hereinafter referred to as 'ED') is a criminal investigating agency operating in India that investigates and exercises executive powers in respect of five different laws. The present article only focusses on issues pertaining to ED's exercise of powers of money laundering allegations under PMLA. The agency was set up on 01.05.1956 to initially intervene in matters of foreign exchange violations, though the jurisdiction was later increased by giving it investigation authorization under other laws. The agency works directly under the Central Government and is subject to administrative supervision of Centre's Finance Ministry.Though the ED works as a criminal investigating agency under multiple laws, the present paper only evaluates ED's functioning in the context of PMLA. Although there are important discussion regarding Enforcement Directorate (herein after will be referred to as ED) e.g., Tanna (2011)[2] has discussed the idea of the office of Independent Counsel being set up in India for the purpose of carrying out effective criminal investigations and consequently efficient criminal prosecutions[3]. This office of Independent Counsel would also deal with specialized offences like those under the PMLA and would be based on the existing American Model[4]. This idea of incorporating the office of an Independent Counsel in the Indian context is a novel suggestion but the ambiguities already persisting in connection with the ED have not been addressed[5].

[1] Website of United Nations Department of Economic and Social Affairs, available at https://sdgs.un.org/goals/goal16 (last accessed on April 30, 2024, at 03:55 pm).
[2] K. Tanna, Strengthening the Nation's Prosecutorial Abilities, (2011) 6 S.C.C. J-19, (2011).
[3] Supra note 2.
[4] Supra note 2.
[5] Supra note 2.

Although, the issue of assessing procedural amendments to increase efficacy of ED's criminal investigation is laudable[6], yet the author does not examine the operational ambiguity issues like the ED having different powers in two states despite the same statutory framework[7]. The work also does not examine the issue of ultra vires legislative amendments made to ED's power to conduct a search[8]. Pandey (2018)[9] has sought to analyse the efficacy of government's efforts in curbing the menace of black money in India. Although the Author does takes note of ED's actions in initiating criminal proceedings in connection with black money, there is no discussion of the legal ambiguities in ED's functioning and the effect of judicial intervention in respect of the same[10]. The Author's main effort has been to highlight how far the ED's functioning has been successful under the existing framework[11], but there is no discussion on whether ED's functioning is ambiguous or legally certain[12]. The Author also does not highlight how interpretational grey areas can hamper the ED's functioning or even the Indian criminal justice system at large[13]. Jha (2016)[14] has attempted to discuss some loopholes in the functioning of the ED regarding the investigation of money laundering offences and has also prescribed some suggestions to rectify the same[15]. But the loopholes addressed are not significant legal ambiguities, but instead general procedural suggestions are given for general procedural deficiencies- like greater funding, stricter implementation of KYC (know your customer norms) by banks and greater integration of different investigating agencies[16]. Mishra and Surana (2018)[17] deal with some of the major financial banking frauds that have taken place and proposed some steps to reduce the incidence of such fraudulent activities[18]. The main suggestion given qua ED is that in India all investigating agencies should now be authorised to investigate money laundering based offences[19]. The Authors propose that the above measure would increase the efficiency of money laundering investigations, and to augment this proposition, the American Model is relied on[20]. Detailed analysis in respect of grey areas regarding the functioning of ED in recent times is missing[21]. This paper adds to the ongoing discussion over the 'power' of ED. It makes an attempt to discuss in detail five areas of legal ambiguity concerning the operation of ED in India, and whether the said legal ambiguity has been addressed by the judicial branch or not. The effects of such judicial intervention or lack thereof (as the case may be) are assessed by way of a possible impact analysis. This paper employs the doctrinal research methodology.

I
THE CONTOURS OF ED FUNCTIONING: INTERPRETATIVE AMBIGUITY AND INADVERTENT CLARIFICATION

The ED is functioning under the PMLA in an erroneous manner. This has not been subject to proper examination by the Courts in some highlighted instances. ED's power to effect search, seizure and attachment of property (including freezing of bank accounts) is expressly governed by section 17 being read with section 65 of the PMLA[22]. Section 17 provides a very detailed mechanism to be followed by ED when carrying out the

[6] Supra note 2.
[7] Supra note 2.
[8] Supra note 2.
[9] T.N. Pandey, Government's Successes and Failures on the Black Money Front, (2018) 404 ITR (Jrn) 12, (2018).
[10] Supra note 9.
[11] Supra note 9.
[12] Supra note 9.
[13] Supra note 9.
[14] E. Jha, Money-Laundering: The Dirty Crime Eroding the Banking System, (2016) 2 HNLU SBJ 1, (2016).
[15] Supra note 14.
[16] Supra note 14.
[17] S. Mishra and Aishwarya Surana, Financial Crimes: Disturbing the Ease of Doing Business in India, 5.2 RFMLR (2018) 285, (2018).
[18] Supra note 17.
[19] Supra note 17.
[20] Supra note 17.
[21] Supra note 17.
[22] Sections 17 and 65 of The Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).
Relevant extract of section 17 of PMLA is quoted below: -
"17. Search and seizure. —(1) Where [the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section,] on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person—
(i) has committed any act which constitutes money-laundering, or
(ii) is in possession of any proceeds of crime involved in money-laundering, or
(iii) is in possession of any records relating to money-laundering, [or]
[(iv) is in possession of any property related to crime,]

search, seizure and attachment of property (including freezing of bank accounts) during the course of an active investigation into the suspected offence of money laundering[23]. The various steps to be followed by the ED for an executive action under section 17[24] are the following. First, the Director of ED/other authorized officer must formulate the 'reasons to believe' in writing that some element of offence relating to money laundering does in fact exist[25]. This 'reasons to believe' must be objectively based on information in possession of the above authorized officer[26]. This can be the belief that the suspected person has directly participated in committing the money laundering offence, possessing proceeds from money laundering, possessing records in connection with money laundering or possessing any property related to crime[27]. Second, the Director or another authorized person of ED can authorize any junior officer to carry out the search, seizure or attachment of property (including freezing of bank accounts), as the case may be[28]. But this would be subject to the various statutory rules that may be made in this regard. It is clarified here that a property would be subject to freezing orders by ED if the same cannot be practically seized, and would probably cover the instances of money being stored in bank accounts or shares, debentures in a depository participant account or some other method as the case may be[29]. Third, the ED shall immediately send a copy of 'written reasons to believe' to the PMLA Adjudicating Authority after the aforesaid search, seizure or freezing is carried out[30]. Lastly, the ED will file application to retain property/records before the PMLA Adjudicating Authority within 30 days of the actual

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then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—
(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;
(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;
(c) seize any record or property found as a result of such search;
(d) place marks of identification on such record or [property, if required or] make or cause to be made extracts or copies therefrom;
(e) make a note or an inventory of such record or property;
(f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:
[* *]*
[(1-A) Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:
Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of Section 8 or Section 58-B or sub-section (2-A) of Section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property.]
(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure [or upon issuance of a freezing order], forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.
(3) Where an authority, upon information obtained during survey under Section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence:
Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.
[(4) The authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1-A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1-A), before the Adjudicating Authority.]"
Relevant extract of section 65 of PMLA is quoted below: -
"65. Code of Criminal Procedure, 1973 to apply - The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act."
[23] Supra note 22 section 17.
[24] Supra note 22 section 17.
[25] Supra note 22 section 17.
[26] Supra note 22 section 17.
[27] Supra note 22 section 17.
[28] Supra note 22 section 17.
[29] Supra note 22 section 17.
[30] Supra note 22 section 17.

executive action of search/seizure/freezing[31]. At this stage we must also assess the wording of section 65 as well[32]. Section 65 mandates that Cr.P.C., 1973 would govern ED's powers of search, seizure, and attachment among other things, if they are not contrary to the PMLA[33]. This would mean that ED would have the powers and functions similar to that of regular police unless there is some different mandate given under the PMLA[34]. Hence, it is argued that any investigating agency in India cannot operate outside the scope of the statutory framework, which expressly confers authority on it. But, unfortunately, we see some cases where the ED has exercised its powers/functions even outside the statutory framework of PMLA, and the Courts have condoned the same. The Gujarat High Court in Bhanuben's Case endorsed ED's action of freezing of accounts to be valid under section 102 of Cr.P.C., 1973[35] that seemingly goes against the express statutory mandate of sections 17 & 65 of the PMLA Act[36]. Here the Gujarat High Court has allowed the ED to proceed with freezing of bank accounts under the general power of section 102 Cr.P.C., 1973 despite the fact that there is a separate procedure stipulated for the same under section 17 of PMLA and that the aspect of freezing of bank accounts would clearly be covered under section 17 (1A). Since a bank account cannot be practically seized, it would be clearly capable of being subject to a freezing order of ED thereby prohibiting any further transactions without the concurrence of the ED. Instead of delving into the question of whether the seizure of property and freezing of bank accounts can be legally sustained in light of express stipulated provisions under PMLA in this regard, the High Court has sought to justify its validity by placing reliance on its prior precedent[37].

Gujarat High Court has endorsed legal tenability of ED's actions of freezing bank accounts on several grounds[38] . Firstly, the ED has been given the option to freeze the bank accounts under the Special Law of PMLA or the General Law of Cr.P.C., 1973[39]. If the ED decides to proceed with freezing the bank accounts under the general law, then the threshold for legally justifying this much attachment is much lower than that under the special law. The reason for the lower threshold is that the general law only requires the formulation of some suspicion and not the existence of detailed 'reasons to believe'[40]. Secondly, ED's power to freeze accounts has been treated to be at par with other regular exercise of powers by police under the general law[41].Thirdly, the High Court has justified the ED's actions on the basis of a prior Apex Court precedent[42] that permitted the police to carry out freezing of bank accounts under the general power of police to seize property[43].

But the above interpretation and justification of the Gujarat High Court[44] is arguably erroneous. Firstly, the High Court has not appreciated the fact that if the specially stipulated procedure for freezing of accounts under Section 17 of PMLA is ignored in favour of general law of Cr.P.C., then the express provisions of PMLA essentially become redundant. Secondly, this leads to another problematic consequence that the ED can choose to act in defiance of its parent statute by simply taking the plea that it has chosen to comply with the lower threshold of the general law i.e., Cr.P.C., 1973. But no investigating agency should be authorised to act in ignorance of its parent statute for the sake of greater convenience or executive necessity. Thirdly, the interpretation leads to a clear ambiguity on when the Court will judge the legality of ED's actions from the standards laid down under the parent statute of PMLA, and when the Court will judge ED's actions from the standards under the general law of Cr.P.C.. It is argued that a uniform assessment standard must be followed for judging the legality of ED's actions, which must be specifically in respect of the established legal standards under the parent statute of PMLA. Fourthly, the reliance on the prior Apex Court precedent[45] is clearly misplaced, because the said precedent is from the time when the PMLA was not even in existence. Since the PMLA had not come into existence at the time of the precedent, the Supreme Court would not be having the opportunity of differentiating between the powers of the ordinary police and the powers of the ED with a separate parent statute of PMLA.

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[31] Supra note 22 section 17.
[32] Supra note 22 section 65.
[33] Supra note 22 section 65.
[34] Supra note 22 section 65.
[35] Section 102 of Code of Criminal Procedure, 1973 as amended up to Act 34 of 2019, No. 2, Act of Parliament, 1973 (India). Section 102 of Cr.P.C., 1973 provides for seizing of property by a police officer of property which may be suspected to be involved in the commission of an offence.
[36] Bhanuben v. State of Gujarat, 2017 S.C.C. OnLine Guj 2517 (Gujarat High Court Single Judge).
[37] Judgment dated 15.06.2015 in Special Criminal Application No. 150 of 2015 in the case of Paresha G. Shah v. State of Gujarat: 2015 S.C.C. OnLine Guj 6582 (Gujarat High Court Single Judge).
[38] Supra note 37 para 15.
[39] Supra note 37 para 15.
[40] Supra note 37 para 15.
[41] Supra note 37 para 15.
[42] State of Maharashtra v. Tapas D. Neogy, (1999) 7 S.C.C. 685. The Supreme Court held that the police would be empowered under section 102 Cr.P.C., 1973 to freeze a bank account suspected to be involved in the commission of an offence.
[43] Supra note 37 para 15.
[44] Supra note 37 para 15.
[45] Supra note 42.

But there has been some course correction in recent time. The Delhi High Court arguably put forward the correct view in Balsharaf's case-I [46] by holding that the ED cannot be permitted to make use of section 102 Cr.P.C., 1973, to freeze an account on mere suspicion when express power of freezing any account is stipulated in Section 17 of the PMLA Act along with the accompanying legal safeguards[47]. The relevant findings in this regard are discussed hereinafter. The Court states at para 57 that the ED is empowered to freeze accounts exclusively under section 17(1A) of PMLA[48]. The Court notes at paras 61, 62 & 63 that the scheme of passing seizure orders under the general law is of completely different nature which justifies such orders on basis of mere suspicion of police alone, which is completely different from the basis of passing a freezing order necessitating 'written reasons to believe' being based on the foundation of 'material on record' before ED[49]. Therefore, the statutory scheme of ED's freezing power under the special law is different and contrary to the statutory scheme of police seizure orders under the general law[50]. Building on the above reasoning, the High Court rightly states that Section 65 of PMLA would make it clear that ED can freeze accounts only under section 17(1A) of PMLA and concomitantly the ED will have no power to freeze any account under general law[51].

It should be noted that the aforesaid Balsharaf's case-I was challenged by the ED before the same High Court's Division Bench in Balsharaf's case-II[52]. The Division Bench countenanced the impugned decision but laid down some essential propositions of law which need to be analysed. Firstly, the main legal question formulated before the Division Bench was whether the ED will have the power to freeze bank accounts by making use of section 102 Cr.P.C.,1973 when the same is dealt with expressly in sections 17 & 65 of the PMLA?[53] The Court then formulates the essential question of whether the ED can seize property on suspicion alone without the basis of written reasons to believe as mandated by PMLA?[54] Secondly, the Division Bench rightly places reliance on section 71 of PMLA to state that the PMLA overrides other laws in operational effect. Therefore, the provisions of PMLA have to prevail over anything contrary prescribed in another law, and this covers the Cr.P.C.[55] . Third, even the Cr.P.C. 1973 itself contains an enabling provision in the form of section 5 which permits the exclusion of Cr.P.C. to criminal proceedings being carried out under a special law, and the Court takes note of PMLA being a special law in the domain of money laundering[56]. Fourthly, the combined effect of sections 65 & 71 of the PMLA read with section 5 of Cr.P.C. would be that general law is applicable to powers of arrest, search, seizure, attachment, etc. only if the same has not been expressly dealt with under the PMLA itself[57]. Therefore, the Court concludes that the ED can exercise powers under the Cr.P.C. when the PMLA contains no express stipulation on that specified subject matter[58]. Fifthly, the Division Bench has rightly diverged from Gujarat High Court's erroneous Single Judge decision[59] that countenanced ED's approach to freeze bank accounts under the general law[60]. The Division Bench has given the main reason for such divergence to be based on the express stipulation of procedure for seizure and attachment of property/documents being already covered under section 17 of PMLA with a higher standard of legal justification of such actions being based on written reasons to believe derived from information/material in possession of ED[61]. This is in fact higher than mere suspicion alone as mandated for seizure under section 102 Cr.P.C[62]. The Division Bench has even referred to a Supreme Court precedent[63] that the term 'reason to believe' as defined under section 26 of IPC would mean that 'reason to believe' rightfully exists only if a reasonable man in similar circumstances would come with up with the same reasoning or inference for something[64]. Sixthly, the most important finding is that the principle of Nazir Ahmad's case[65] laid down by the Privy Council must

[46] Abdullah Ali Balsharaf v. Directorate of Enforcement, 2019 S.C.C. OnLine Del 6428 at paras 57, 61, 62, 63, 65 & 74 (Delhi High Court Single Judge).
[47] Supra note 46.
[48] Supra note 46 para 57.
[49] Supra note 46 paras 61, 62 & 63.
[50] Supra note 46 paras 61, 62 & 63.
[51] Supra note 46 paras 65 & 74.
[52] Directorate of Enforcement v. Abdullah Ali Balsharaf, 2019 . OnLine Del 7942 at paras 11, 18, 20, 24, 25, 30, 31, 32, 37, 38 & 39 (Delhi High Court – Division Bench).
[53] Supra note 52 para 11.
[54] Supra note 52 para 18.
[55] Supra note 52 para 20.
[56] Supra note 52 paras 24 & 25.
[57] Supra note 52 para 25.
[58] Supra note 52 para 25.
[59] Supra note 37.
[60] Supra note 52 para 30.
[61] Supra note 52 paras 30 & 31.
[62] Supra note 52 paras 30 & 31.
[63] Joti Parshad v. State of Haryana, 1993 Supp (2) S.C.C. 497 at para 5.
[64] Supra note 52 para 32.
[65] Nazir Ahmad v. Emperor, AIR 1936 PC 253 (Privy Council – 5 Judge Bench). Relevant extract of para 18 is quoted below: -

be followed to the letter in PMLA cases[66]. This means that if the procedure to be followed has been stated in law, then such procedure must be followed strictly to the letter for it to be valid, and necessarily all other procedures or methods are forbidden[67]. In the context of PMLA this would mean that when the procedures to be followed by ED are expressly stipulated, then the ED is bound to follow them to the letter and cannot seek to devise a procedure being any different from the same[68]. If the ED does decide to devise and practice a procedure different from the PMLA, then such actions of ED will be illegal[69]. Finally, the Division Bench rightly concludes that the ED cannot freeze bank accounts with the aid of general law when express mechanism & authorization for such action is clearly stipulated in section 17 of PMLA[70].

The correct position of law recognized by the Delhi High Court's Division Bench has been subsequently followed in Rajiv Chakraborty's Case[71]. The Court rightly invalidated ED's freezing orders (of bank accounts) issued under the general law[72]. Hence, we can see that there exists a situation of interpretational ambiguity wherein the ED can exercise different powers in different states, and in doing so comply with completely different legal standards. In Gujarat the ED will have the option of freezing bank accounts under general law by employing a lower legal threshold, but the same action will be completely illegal in another state of Delhi. This will mean that the legality of ED's actions now depend on the State where it is exercising its powers. But there has been a course correction due to the authoritative pronouncement of the Supreme Court's Three Judge Bench in the Opto Circuit Ruling[73]. Here the Three Judge Bench has affirmed the settled proposition that when the statute mandates for some action to be carried out by a specified procedure, then all other procedures will be prohibited by necessary implication[74]. This would mean that if the concerned investigating authority tries to devise a procedure distinct from the expressly stipulated procedure in the statute, such devising and enforcement of divergent procedure will be illegal and thereby invalid. Here it has held in very clear terms that the requisite procedure mandated by the parent statute of PMLA will have to be complied with by ED for ED's actions/orders to be legally sustainable[75]. If the ED has not complied strictly with the statutory requirements under the parent statute of PMLA, then such non-compliant actions/orders of ED will be invalidated by the Court[76]. But such invalidation will not be otherwise considering the actual materials/documents justifying the ED's action or the actual merits of the ED action on other grounds[77]. Therefore, the Three Judge Bench concludes that if the ED's freezing order is not complying with the statutory particulars of section 17 of the PMLA, then ED's action will be illegal and unjustified in law[78].

Therefore, we can conclude that till the Supreme Court's authoritative determination in Opto Circuit case in 2021[79], the ED could exercise different powers under the same law in different states despite the applicability of the same laws.

II
THE 'AUTHORITY' OF ED IN THE ABSENCE OF SCHEDULED OFFENCE

This section will discuss the effect of Proviso to Section 17(1) and Proviso to Section 18(1) of PMLA and how the deletion of these provisions in the PMLA[80] should be considered invalid for conferring powers on ED to

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"18... The rule which applies is a different and not less well recognised rule, namely, that where a power is given to a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. ... On the matter of construction Ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted that which is laid down with such minute particularity in the sections themselves."

[66] Supra note 52 para 37.

[67] Supra note 52 para 37.

[68] Supra note 52 para 37.

[69] Supra note 52 para 37.

[70] Supra note 52 paras 38 & 39.

[71] Rajiv Chakraborty v. Directorate of Enforcement, 2019 S.C.C. OnLine Del 12393 at paras 5 & 6 (Delhi High Court Single Judge).

[72] Supra note 71.

[73] Opto Circuit India Limited v. Axis Bank, (2021) 6 S.C.C. 707 at para 14 (Supreme Court- Three Judge Bench).

[74] Supra note 73 para 14.

[75] Supra note 73 para 14.

[76] Supra note 73 para 14.

[77] Supra note 73 para 14.

[78] Supra note 73 para 14.

[79] Supra note 73.

[80] Proviso to section 17(1) and proviso to section 18(1) of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).

It should be noted that both the provisos have been deleted by Act 23 of 2019, S. 197 (w.e.f. 1-8-2019) and Act 23 of 2019, S. 198 (w.e.f. 1-8-2019).

Proviso to section 17(1) prior to the omission by Act 23 of 2019, S. 197 (w.e.f. 1-8-2019) is quoted below: -

exercise powers even in the absence of a scheduled offence. Both provisos mandated that the ED could exercise its power of search qua a person/premises only if the following perquisites are fulfilled: (a) The police have submitted a report in respect of commission of an offence under section 157 of Cr.P.C., 1973 before the competent criminal court[81]; or (b) Complaint has been filed before appropriate criminal court so as to take cognizance of a PMLA scheduled offence[82]; or (c) an authorized police official has submitted a specific report containing details of occurrence of scheduled offence/s to an official of minimum position of Additional Secretary (at central level) or equivalent designation[83]. There seems to be only one distinction between the two provisos- being that while the proviso to section 17(1) deals with ED's power to search the property or premises in particular, the proviso to section 18(1) deals with ED's power to search a person and his belongings. The object of the above two provisos seems to be that the ED gains legal authorisation to search the person/premises only if there is the pre-existence of an allegation of a scheduled offence under the PMLA which would necessitate the search to investigate the allegations of money laundering effectively. Section 2(1)(u) of PMLA defines the term 'proceeds of crime' to be any property that has come to a person due to his direct/indirect involvement in committing a PMLA scheduled offence[84]. It therefore becomes clear that the ED would have been permitted to proceed with the search of a person or premises only if there was a pre-existing documentary initiation of criminal process either in the form of a complaint, FIR or direct cognizance by the concerned court.

The deletion of the two provisos is argued to lead to the consequence of conferring arbitrary and reasonable powers on the ED on account of the following reasons. First, money laundering offence begins only someone has committed scheduled offence within section 3[85]. If scheduled offence is not existing, then there cannot be justifiable initiation of criminal proceedings on money laundering charges. It is therefore clear that ED should exercise its power of search only when there is some pre-existing allegation of commission of scheduled offence. Second, if there is no pre-existing allegation a scheduled offence being committed then the ED cannot form a reasonable belief of the person being somehow involved in money laundering. If there is no reasonable belief as discussed before, then the consequent search would be arguably malafide and arbitrary, thereby making it unconstitutional under Arts. 14 & 21 of the Constitution. It is well settled that any procedure which is arbitrary and unreasonable would have to be deemed unconstitutional under Arts. 14 & 21 of the Constitution and thereby cannot be given effect to in any capacity[86]. Third, this leads to existence of complete contrary standards within the PMLA in regard to ED exercising different statutory powers. While ED's power of attachment and freezing under sections 5 & 17 of the PMLA requires the existence of 'written reasons to believe', ED's power to carry out a search under sections 17(1) & 18(1) does not even require the allegation of commission of a scheduled offence. The 'written reasons to believe' will necessarily follow a pre-existing allegation This means that the ED could essentially carry out a search without even meeting the minimum threshold of valid suspicion. This means that while ED's powers (of seizure, attachment, freezing, etc.) would need pre-existing allegations in writing followed by 'written reasons to believe' that the suspected person is

"Provided that no search shall be conducted unless, in relation to the Scheduled offence, a report has been forwarded to a Magistrate under Section 157 of the Code of Criminal Procedure, 1973 (2 of 1974) or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose."

Proviso to section 18(1) prior to the omission by Act 23 of 2019, S. 198 (w.e.f. 1-8-2019) is quoted below: -

"Provided that no search of any person shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 157 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose."

[81] Supra note 80.

[82] Supra note 80.

[83] Supra note 80.

[84] Section 2 (1)(u) of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).

[85] Section 3 of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).

[86] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 [Constitution Bench- 7 Judges].

somehow involved in dealing with the tainted money generated after committing the scheduled offence, on the other hand the ED can search anyone or anyplace without any justifying basis whatsoever. Fourth, it is difficult to understand that when even the basic ingredient of commission of scheduled offence is missing (that would resultantly lead to a possible prosecution for money laundering), the ED could still carry out a search in any capacity. Fifth, the above interpretation leads to an absurd situation where the ED is being permitted to abuse its powers with impunity without any accompanying adverse consequences. Let us illustrate this with a thought experiment of a hypothetical situation. Let's say that the investigating agency wants to build a false case using the powers at its disposal. The said agency decides to carry out a search of the target person and his premises without having any objective material to support it. Since there is no requirement of a presence of a pre-existing allegation of a scheduled offence, the agency does not have to give any justifiable reasons at all. At this stage the investigating agency can simply create a false search memo to indicate the presence of incriminating materials. These incriminating materials would not even be available initially to the accused person as the same is sent in sealed cover to the PMLA's adjudicating authority as per mandate of section 8 of PMLA[87]. Now this wrongly created search memo can be used to proceed with unlawful seizure and freezing of assets of the target person as now the required 'written reasons to believe' become available.

It is therefore argued that the ED should not have any power to search a person or some premises unless there is some pre-existing allegation in writing of the commission of a scheduled offence, as otherwise there would be no reasonable basis for suspicion to justify such a search in the first place. Accordingly it is argued that the deletion of the two provisos should be declared unconstitutional by the Supreme Court on the ground of ED being conferred arbitrary power to carry out a search in the absence of a justifiable basis. This can be done on account of the accepted principle that even legislative enactments which are deemed arbitrary will be declared unconstitutional under arts. 14 & 21 of the Constitution[88].

III
CONTRARY TO THE DEFINITION OF MONEY LAUNDERING

This section analyses Supreme Court's Judgment in Padmanabhan's case[89], which has wrongly interpreted the definition of money-laundering contained in section 3 of PMLA[90]. The main question of law that arose before

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[87] Section 8 of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).

[88] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 S.C.C. 722 at para 16 [Supreme Court Constitution Bench – 5 Judges].

Relevant extract of para 16 of the judgment is quoted below: -

"16. … It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. … Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

[89] Judgment dated 31.10.2022 in SLP (Crl.) No. 2668 of 2022 in the case of Directorate of Enforcement v. Padmanabhan Kishore (Supreme Court – 2 Judges).

[90] Section 3 of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).

Relevant extract of section 3 is quoted below: -

"3. Offence of money-laundering.- 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 including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.

[Explanation. —For the removal of doubts, it is hereby clarified that, —

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,

in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.]"

the Supreme Court was whether a person who has given a bribe to a public servant can be prosecuted for the offence of money laundering under section 3 if the PMLA, if the bribe giver has not taken any further action after the giving of such bribe?[91] The right answer to the above question is- no. The bribe giver who has done nothing further to be involved with the proceeds of crime can only be prosecuted under the Prevention of Corruption Act[92] but cannot justify a prosecution under the PMLA. First, we analyse the substantive legal provisions to understand why the simple act of giving of bribe to a public servant without any further handling of the proceeds of crime cannot tantamount to the offence of money laundering. Section 2 (1)(u) of PMLA defines 'proceeds of crime' to mean property that is derived directly or indirectly as a result of commission of a scheduled offence[93]. The Explanation to section 2(1)(v) of PMLA defines the term 'property' to mean property that is used in the commission of a scheduled offence under PMLA or a PMLA offence itself[94]. Now we focus on the term "property of any kind used in the commission of an offence under this Act or any of the scheduled offences"[95]. It is clear from the express wording of Explanation to section 2(1)(v) that property will include only that property which has been used for the commission of the offence[96]. It means that firstly the said offence has to be committed, and only then will property associated with it would assume the nature of proceeds of crime. Therefore, a property would be deemed to be property under section 2(1)(v) for the purposes of committing the offence of money laundering only if the offence under section 3 of money laundering is already complete. But section 3 of PMLA states that simply dealing with the proceeds of crime in itself is not an offence of money laundering[97]. Section 3 states that a person involved in any process connected with the proceeds of crime will be deemed to have committed the offence of money laundering only if he further projects or claims such proceeds of crime to be untainted property[98]. Therefore there are 2 stages that have to be complete for the offence under section 3 to be made out – firstly to be involved in the process of creation of criminal proceeds, and secondly to show such proceeds as legitimate earnings[99]. But the aforesaid statutory definition is extremely vague which necessitated the insertion of a statutory explanation to clarify what is actually covered within the offence of money laundering[100]. It is this explanation which clarifies on what is the precise ambit of the offence contained in section 3[101]. A person commits money laundering only if any of the following actions in regard to the criminal proceeds are evident – 'concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property'[102]. Therefore, it can be safely said that section 3 money laundering offence is made out if two following essential ingredients/conditions are met: First, there is the commission of the scheduled offence which has given rise to the creation of the proceeds of crime. For the purposes of this discussion this is being classified as stage 1; Second, the proceeds of crime as generated above has been dealt with further in any of the six ways described in the Explanation (i) to section 3. For the purposes of this discussion this is being classified as stage 2. Therefore section 3 money laundering offence is established only if both stage 1 and stage 2 are completed. But we unfortunately see that Supreme Court's interpretation in Padmanabhan's case has made stage 1 itself to be the completion of offence of money laundering without the completion of stage 2 as mandated by the Explanation (i) to section 3[103].

Now we come to the facts of the case in question[104]. The bribe giver handed over the bribe to the public servant and the CBI recovered the said tainted money from the car of the public servant[105]. It is nowhere alleged[106] that the bribe giver had himself acquired the money through criminal activity prior to handing over the same as bribe to the public servant. The money becomes proceeds of crime (or tainted money) only when it is handed over to public servant, at which stage the offence of giving/taking of bribe under Prevention of Corruption Act (hereinafter referred to as PC Act) is deemed to be committed. Now if someone deals with this

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[91] Supra note 89.
[92] Prevention of Corruption Act, 1988 as amended up to Act 34 of 2019, No. 49, Act of Parliament, 1988 (India).
[93] Section 2 (1)(u) of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).
[94] Explanation to section 2 (1)(v) of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).
The relevant extract of the Explanation to section 2(1)(v) is quoted below: -
"Explanation.- For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences;"
[95] Supra note 94.
[96] Supra note 94.
[97] Supra note 90.
[98] Supra note 90.
[99] Supra note 90.
[100] Explanation to section 3 of PMLA inserted by Act 23 of 2019, S. 193.
[101] Supra note 90.
[102] Supra note 90.
[103] Supra note 89.
[104] Supra note 89.
[105] Supra note 89.
[106] Supra note 89.

money (in any of the six ways prescribed under Explanation (i) to section 3) after it has come to the possession of the public servant as a bribe, then one can say that he has dealt with the tainted money. But in this case[107] the bribe giver allegedly handed over the money to the public servant, and did not deal with the money further after it came into possession of the public servant as a bribe. Therefore, it can be concluded that the bribe giver could very well have been prosecuted for offences under PC Act but should not be subjected to prosecution under PMLA. Therefore, the Supreme Court's conclusion at paras 16 & 17 that the act of giving bribe to a public servant in itself tantamount to money laundering[108] is clearly erroneous and needs to be reconsidered by a Larger Bench.

If the aforesaid interpretation of commission of scheduled offence itself amounting to offence of money laundering[109] is accepted, then this leads to the following erroneous results: First, the ED now obtains the power to investigate all the scheduled offences and thereby displace the jurisdiction of the investigating agencies who are otherwise empowered to investigate such offences. The offences under the IPC[110] are generally investigated by the state police, but now ED can simply sideline the police with a mere allegation of money laundering and take over the entire investigation and prosecution for itself. Similarly the scheduled offences stated at paragraph 4[111] are the offences under the UAPA[112]. The specialised agency empowered to investigate offences under the UAPA is the National Investigation Agency (NIA)[113]. In similar fashion the ED could completely take over a case by levelling money laundering allegations in a corruption case in respect of scheduled offences under paragraph 8[114], when corruption allegations are usually investigated by the specialised agency of CBI i.e., Central Bureau of Investigation[115]. If the mere allegation of money laundering can empower the ED to completely take over investigations of another specialised agency (NIA or CBI), then this could lead to a situation of ED subsuming jurisdiction of investigation in cases of its discretion by cutting down the jurisdiction of other specialised agencies. Should all other investigating agencies simply give up their jurisdictions and accord preference to ED on mere allegation of money laundering by the ED? What is the test for determination of investigation and prosecution preference when the ED decides to act on a money laundering allegation but another investigating agency is otherwise empowered to investigate the scheduled offence under PMLA? These questions need to answered authoritatively by the Supreme Court so that ED does not obtain arbitrary and unbridled powers. The second result is that of an aberration in criminal law. If the commission of a scheduled offence is itself an offence of money laundering as well, then it would be arbitrary to punish a man for the same action twice. If the same action is an offence under two different laws, he should be prosecuted and consequently punished for either of the two. There is a statutory basis for the same as well under section 26 of the General Clauses Act, 1897[116]. Section 26 of General Clauses Act makes it clear that when the same act amounts to an offence under two or more different statutes, then the accused person should be subject to prosecution and accompanying punishment under any one of the applicable statutes[117]. If for example the act of giving bribe itself is an offence under PC Act and PMLA, then the accused person can be prosecuted and concomitantly punished either under the PC Act or the PMLA, but not both. This leads to a further problem – which statute will then take preference for investigation and consequent prosecution?

IV
CURTAILING ED'S ARBITRARY POWER TO ARREST

An analysis of Apex Court's recently decided Tarsem Lal's case[118] raises several concerns regarding the alleged bias shown by the ED when exercising its power to make arrests in pursuance of section 19 of PMLA. There

[107] Supra note 89.
[108] Supra note 89 paras 16 & 17.
[109] Supra note 89 paras 16 & 17.
[110] Indian Penal Code, 1860 as amended up to Act 34 of 2019, No. 45, Act of Parliament, 1860 (India).
[111] Paragraph 4 of the Schedule of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).
[112] Unlawful Activities (Prevention) Act, 1967 as amended up to Act 28 of 2019 and S.O. 1120(E) dated 7-2-2024, No. 37, Act of Parliament, 1967 (India).
[113] Supra note 112.
[114] Paragraph 8 of the Schedule of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).
[115] Prevention of Corruption Act, 1988 as amended up to Act 34 of 2019, No. 49, Act of Parliament, 1988 (India).
[116] Section 26 of General Clauses Act, 1897, No. 10, Acts of Parliament, 1897 (India).
Relevant extract of section 26 is quoted below: -
"26. Provision as to offences punishable under two or more enactments.—Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."
[117] Supra note 116.
[118] Judgment dated 16.05.2024 in Criminal Appeal No. 2608 of 2024 (Arising out of Special Leave Petition (Crl.) No. 121 of 2024) in the case of Tarsem Lal v. Directorate of Enforcement (Supreme Court – 2 Judges).

were many instances wherein ED would choose to arrest an accused person after investigation being completed on submission of charge-sheet. This was alleged to be questionable by many as there seemed to be no reasonable basis to arrest an accused person after completion of investigation, when his custody was not otherwise required during the course of the investigation. Section 19 of PMLA does prescribe two safeguards before ED can arrest someone in pursuance of an investigation into the offence of money laundering[119]- Firstly, the ED official must have some material in his possession that gives rise to the inference that the person (sought to be arrested) has committed a PMLA offence[120]; and Secondly, the ED official will have to formulate 'written reasons to believe' that the person (sought to be arrested) has committed a PMLA offence, wherein such reasons would then be provided at the time of arrest[121]. But it should be noted that these safeguards by themselves did not curb arbitrary arrests by ED. The Supreme Court in the recently decided Tarsem Lal's case has given a laudable judgment by curtailing the abuse of ED's powers in the domain of making arbitrary arrests[122]. The pertinent findings are; First, if the ED has carried out its investigation and come to the conclusion that offences under the PMLA are made out, it must file a complaint before the Special Court to enable the said Court in taking cognizance of PMLA offences[123]. Once the PMLA Special Court has decided to take cognizance of PMLA offences on ED's application, then ED can no longer arrest the accused person so described in the complaint in pursuance of section 19 of PMLA[124]. Second, if ED still desires to arrest a person (accused of PMLA offence) after having submitted a complaint against him before the Special Court, then it will have to follow an extensive procedure to justify such a requirement for arrest[125]. Firstly, the ED will be compelled to submit an application in the PMLA Special Court detailing the reasons on why the accused needs to be arrested post the submission of complaint to the Special Court, wherein reasons will have to be given by ED to justify his custodial interrogation[126]. Secondly, the Special Court will have to mandatorily hear the side of the accused person sought to be arrested before deciding conclusively on the application of the ED[127]. This means that the person (accused of PMLA offence and consequently sought to be arrested) has been granted the opportunity to make his case on why his arrest is not required by ED, and thereby have an opportunity to submit his reply as well as his written submissions. Thirdly, the Special Court will at the very least have to give brief reasons for its decision on ED's aforementioned application[128]. Fourthly, the Special Court will only allow the ED's application if it is certain that the accused person's custodial interrogation is indeed required at that stage of legal proceedings[129]. ED's power to make arbitrary arrests have been greatly curtailed due to the above findings. Some of the positive effects can be; first, it is the correct view to eliminate the ED's power to arrest an accused person after investigation against such accused person is complete, and in pursuance thereto the ED has submitted complaint to the court for taking cognizance[130]. If ED did not require the accused person's custody during the course of investigation into money laundering offences, then ED should not require custody any further when

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Relevant extract of para 23 i) of the judgment is quoted below: -
"i) After cognizance is taken of the offence punishable under Section 4 of the PMLA based on a complaint under Section 44 (1)(b) , the ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint; and"
Relevant extract of para 23 j) of the judgment is quoted below: -
"j) If the ED wants custody of the accused who appears after service of summons for conducting further investigation in the same offence, the ED will have to seek custody of the accused by applying to the Special Court. After hearing the accused, the Special Court must pass an order on the application by recording brief reasons. While hearing such an application, the Court may permit custody only if it is satisfied that custodial interrogation at that stage is required, even though the accused was never arrested under Section 19. However, when the ED wants to conduct a further investigation concerning the same offence, it may arrest a person not shown as an accused in the complaint already filed under Section 44(1)(b), provided the requirements of Section 19 are fulfilled."
Relevant extract of para 24 is quoted below: -
"24. We are making it clear that we are dealing with a fact situation where the accused shown in the complaint under Section 44(1)(b) of the PMLA was not arrested by the ED by the exercise of power under Section 19 of the PMLA till the complaint was filed."
[119] Section 19 of the Prevention of Money Laundering Act, 2002 as amended up to Act 18 of 2023, No. 15, Act of Parliament, 2003 (India).
[120] Supra note 119.
[121] Supra note 119.
[122] Supra note 118.
[123] Supra note 118 para 23 i).
[124] Supra note 118 para 23 i).
[125] Supra note 118 para 23 j).
[126] Supra note 118 para 23 j).
[127] Supra note 118 para 23 j).
[128] Supra note 118 para 23 j).
[129] Supra note 118 para 23 j).
[130] Supra note 118.

the investigation is complete and the said person is set to face trial on the relevant PMLA charges. Second, when the accused person has diligently appeared before the Special Court in pursuance of summons issued to him, then he should not be arrested by the ED[131]. If an accused person regularly appears before the Special Court and is willing to face the entire trial without making an attempt to flee the court's jurisdiction, then such an accused should not be subject to arrest at ED's whim. An arrest by ED would be justified if the accused person has attempted to run away or destroy the evidence. But when the accused person has made regular appearances before PMLA Special Court for further proceedings and the evidence collected during investigation has already been submitted to the court in the complaint, then there seems no justifiable basis to arrest such an accused person at all. Third, the mandate of the strict procedure to be followed for the purpose of taking custody of an accused person[132] will ensure that the ED is not able to arrest any accused person for flimsy reasons. Due to the strict procedure, the ED will have to make out a strong case before the Special Court for requiring custodial interrogation of the accused person despite the investigation against him being otherwise complete. The Supreme Court's finding that the accused person (sought to be arrested) will be heard by the Special Court before passing order on his custody[133] would ensure that the principles of natural justice stand complied with. Since the accused person is allowed to make his case before the PMLA Special Court and the PMLA Special Court is also obligated to give reasons for deciding ED's application on grant of custody[134], it is clear that this ensures a fair trial procedure for the accused person. If the reasons given by the Special Court are irrelevant or otherwise not justifiable, the accused person gets the opportunity to make use of the appellate mechanism to fight for his personal liberty. This mechanism will curtail the practice of mechanical passing of orders by the Special Court without due application of mind.

In conclusion, the Apex Court has given a very laudable judgment in deciding to curtail ED's actions in making arbitrary arrests, and further issued positive directions that a fair & reasonable procedure is followed prior to restraining a personal liberty of a person.

CONCLUSION: JUDICIAL INTERVENTION MATTERS FOR SDG 16

It can therefore be seen that judicial interpretation by Indian constitutional courts in India have played an immense role in making the criminal investigating agencies (who form a part of the executive branch) more accountable. If the democratic institutions are to be strengthened, then the criminal investigating agencies must be made more accountable to ensure that such agencies work towards providing justice to the people and keep the criminal justice system fair & neutral, rather than such investigating agencies being used in furtherance of other questionable objectives. Such task of making the criminal investigating agencies accountable is being done more effectively through judicial intervention instead of the route of legislative intervention. But, though such judicial intervention has been commendable and indeed appreciated, yet many instances of ED's misuse of powers remain. The first sub-topic highlighted the interpretational conflict of ED's power to freeze bank accounts, wherein ED had to comply with a lower legal threshold in Gujarat while complying with a higher legal threshold in Delhi. Such discordant situation continued till the final determination of this question of law by the Supreme Court. The second sub-topic shows the problematic amendment of the PMLA wherein two provisos regulating the ED's power to search persons/premises were deleted. This amendment essentially conferred power on ED to make arbitrary searches even when there was no reasonable basis for suspicion of money laundering-based offences. Unfortunately, the constitutional courts have not taken cognizance of this issue. The third sub-topic deals with the erroneous interpretation of classifying a PMLA scheduled offence as money laundering offence itself. Such erroneous explanation has been given on an incorrect reading of section 3 of PMLA by completely ignoring the clarificatory explanation to section 3 among other reasons. The fourth sub-topic deals with the commendable judgment recently delivered by the Supreme Court in laying down directions to ensure that the ED did not misuse its powers to make arrests in pursuance of section 19 of PMLA. Therefore, it becomes clear that great hope is now with the Indian Constitutional Courts to make use of appropriate legal and constitutional standards to make criminal investigating agencies more accountable, as legislative intervention in this domain seems to be lacking. Here it can be stated that judicial intervention attempted to bring forward transparency, accountability and facilitate din the establishment of the rule of law. The action of judiciary contributed to the discussion on SDG 16 i.e., peace. justice and strong institution.

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[131] Supra note 118.
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