5.1. Anti-Money Laundering Legislation in USA

5.1.1 Introduction

The approach of US and Switzerland to money laundering and their statutes are worth studying because many of the rules in money laundering originated in either of these two countries. Further England & Wales and Netherlands law on money laundering were selected because of detailed legislation. It would be incorrect to assume that nothing was done to prosecute or generally impede money launderers prior to the passing of 1986 Act in the United Kingdom. For instance ex-solicitor Michael Relton was charged under Sec.22 of the Theft Act 1968 which covers the offence of dishonestly handling stolen goods. In this case Relton was a participant in the laundering of proceeds of a robbery but was caught by the provision of the 1968 statute, because at various stages he handled goods which represented the original stolen property. The limitation on the use of this part of the 1968 was that it confined to laundering related to theft, that is the launderer must have either handled the original stolen property or goods which represented that property. Since its inception in the year 1919, CI with the help of financial investigations and tax laws has prosecuted and convicted several high ranking members of organized crime syndicate. Al Capone was one of the most notorious criminal to be prosecuted by the efforts of CI division in the year 1931. He was indicted for income tax evasion for the years from 1925 to 1929 and sentenced to 10 years in federal prison apart from imposed a sum of US$ 95310 towards

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587 supra note 70; p-xiv
588 supra note 142; p3
fine, taxes and other costs\textsuperscript{589}. On October 29, 1985 at the congressional hearing on money laundering legislation, David D. Queen (the Acting Assistant Secretary of Enforcement and Operations for the U.S. Treasury Department) stated\textsuperscript{590} “the increasing magnitude, complexity and diversity of money laundering schemes, indicates that money laundering has become indispensable to the success and profitability of large-scale organized crime ventures. If law enforcement authorities can strike directly at the conduits that enable organized crime to conceal its investments or disbursements of funds, they may be able to...cause irreparable damage to the operations of organized crime\textsuperscript{591}.

Since the U.S. economy is the largest in the world, it is reasonable to expect that its illicit sector generates significant proceeds\textsuperscript{592}. Factors such as size of the economy, sophisticated banking system, housing two world’s largest stock exchanges, all contribute to the global attention as well as for keeping a stringent AML system. The AML system in USA is famous for its rigorous and threatening long sentences, drastic forfeitures, stringent reporting standards, and complex regulatory system. The two major financial centers, USA and UK allocates much emphasis on early warning system, by recording/reporting every day retail banking transactions more particularly suspicious ones\textsuperscript{593}. USA was the first among nations to recognize the threat posed by money laundering. Congress introduced a currency reporting system to deter routine deposit of “shopping bagfuls” into banks. In the US the AML efforts have been the object of several legal efforts spanning more than three decades. For example after the induction of BSA and MLCA, in rapid succession the Anti-Drug Abuse Act of 1988, Section 2532 of the Crime Control Act of 1990 and the Annynzio-Wylie Anti Money

\textsuperscript{590} supra note 589; p16
\textsuperscript{591} ibid - Hearing of the Committee on the Judiciary US Senate 99th Congress Money Laundering Legislation (1985)
\textsuperscript{593} supra note 106; p26,30
Laundering Act of 1992\textsuperscript{594}. U.S. policy on tax havens has lacked clarity and purpose for decades. However in 1985 due to the complex nature of nexus between tax haven and money laundering prompted US policy attention to this issue.

Under the AML regime in USA the value transfer system in the country including money transfer and security transfer system should not be utilized by anonymous persons seeking to move value without attribution to themselves\textsuperscript{595}. Ever since the famous book about the Watergate scandal, \textit{All the President’s Men}, was written, it has become a mantra that, in order to solve a crime, one must “follow the money.” The government of USA emphasized a three pronged approach of prosecuting the underlying crime, follow the money trail through investigation and forfeit the proceeds and instrumentalities of crime\textsuperscript{596}. US has been fighting the money laundering problem with sustained legislative efforts as the country’s markets are subject to enormous inbound investments and also transmits illicit funds abroad. It is possible to perceive and understand the rationale of the US in adopting stringent anti-money laundering provisions\textsuperscript{597}.

The preventive approach of US law follows the paper trail from the other end, that is from the laundering stage of money to the predicate offence. In the international context, the U.S. government’s primary area of emphasis has always been the placement stage of money laundering, the stage at which the money launderer first seeks to enter the illicit proceeds into the financial system. Money laundering is the life blood of drug syndicates and traditional organized crime. Like cocaine, money laundering was once perceived as an exotic threat menacing the United States from abroad. Other statutes like Money Laundering Control Act, 1986 the Anti Drug Abuse Act, 1988, the Anti Money

\textsuperscript{594} supra note 27; p419-420
H Muller, et al., John Wiley & Sons Ltd; p111
\textsuperscript{597} supra note 135; p166
Laundering Act, 1992 and the Money Laundering Suppression Act, 1994 brought further changes to the reporting regime.598

Due to sustained efforts of past Republican and Democrats, U.S. anti-laundering laws are more comprehensive than those of most other countries. The U.S. counter-laundering regime subjects potentially "dirty" money to suspicion, surveillance, discipline and punishment.599 The AML initiatives in US has failed because they have forced launderers to migrate across borders given the transnational character of the crime. Given the increased regulation in US it is not surprising that the laundering activity has shifted to jurisdictions where risk of detection and criminal sanctions are lowest.

Money laundering in the recent legal concept whose initial internationalization is largely the result of strong US led campaign to enlist law enforcement agencies around the world for this new front, in the war on drugs. Although money laundering has been around for a long time, it wasn’t until 1970 that a meaningful legislation was enacted, known as Banking Secrecy Act, 1970 in the USA which mandated a series of reporting and recordkeeping requirements designed to help track money laundering activity and to penetrate the veil of secrecy surrounding off-shore bank accounts. As US security laws provide for transparency and honesty, investors have so much confidence in US markets.600 Contemporary strategy to combat money laundering in USA rested on three pillars which are money laundering laws, currency transaction reports and asset forfeiture provisions. During 70s and 80s these three pillars were put into place through the enactment of Organized Crime Control Act, 1970, BSA 1970, Comprehensive Drug Control Act, 1970, RICO 1970 and the MLCA. International pressure may take one of two forms. The first is directly expressed disapproval of powerful jurisdictions. The most common jurisdiction involved has been the US, and hence its money laundering legislation is looked as a model.

598 supra note 70; p98
599 supra note 227; p781
600 supra note 138; p18
5.1.2 Overview of Money Laundering legislation in USA

Three important statutes were passed in the USA during the year 1970. First BSA codified at 31 USC ss 5311-5322 required certain banks and other financial and NBFC to retain records and report certain financial transactions over $10,000. Secondly Congress passed the RICO statute which included both civil and criminal forfeiture provisions. Thirdly congress directed attention to major drug trafficking organizations by passing Continuing Criminal Enterprising Statute (CCE) codified at 21USC ss848 as part of Controlled Substances Act, 1970. In 1984 the BSA, RICO and CCE were amended by the Comprehensive Crime Control Act of 1984. In 1986 the Anti Drug Abuse Act 1986 was passed. Subtitle H was the MLCA 1986 incorporated as part of Chapter 53 of Title 31. MLCA made laundering of monetary instruments a crime (31 USC s 5316) and criminalized structuring of financial transactions so as to avoid the BSA reporting requirement (31 USC s 5324). In 1988 the MLCA was amended by addition of Section 5325 which compelled financial institutions to obtain identification from customers purchasing certain monetary instruments. In 1992 the Annunzio Wylie AML was passed, amending BSA to require financial institutions officers to report any suspicious transactions by way of SAR. In 1994 Money Laundering Suppression Act was passed easing some of the reporting requirements by expanding exempt business list, and Casinos became subject to stricter requirements. Along with criminal sanctions the BSA provides for civil penalties for non compliance. The first penalty of US$500000 was imposed on Ban of Boston in February 1985. As early as in 1996 the Treasury Department had imposed a total of 100 such civil penalties averaging just around US$ 300000 each. The constitutionality of BSA was upheld by US Supreme Curt in California Bankers Assn Vs Shultz (416 U.S.21 (1974) wherein the S.C rejected various arguments such as BSA violated constitutional due process, 4th amendment protection against unreasonable search and seizure and 5th amendment privilege against self-incrimination. RICO was passed in 1970 as title IX of OCCA. The RICO statute is codified at 18 USC as 1961-

601 supra note 62; p134
1968. Sec.1961 defines the critical terms including ‘racketeering activity’, its pattern and enterprise. Sec.1962 sets out the four prohibitions on conduct involving a RICO enterprise. Sec.1963 and 1964 describe criminal penalties and civil remedies for Section 1962 violations. A number of RICO violations are predicate offences for money laundering persecutions. Its provisions were commonly used for organized crime money laundering groups prior to enactment of MLCA.

MLCA was enacted as part of Anti Drug Abuse Act, 1986. This act contains three significant provisions for ML purposes. (1) subtitle H of Title I known as MLCA Act of 1986 (2) provisions relating to forfeiture of property involved in money laundering (3) allowing custom agents to freely stop and search outbound traffic to ensure that all monetary instruments beyond $10000 were declared. MLCA was passed by Congress as a result of the failure of the BSA to either compel financial institutions to report money laundering or to provide the necessary prosecutorial ‘teeth’ to prevent money laundering. The MLCA consists of two parts 18 USC 1956 – laundering of monetary instruments and 18 USC 1957 – Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity. Sec.1956 is directed at the criminals and conspirators who seek to hide the origins of tainted money to further their criminal operations. Sec.1957 casts a much broader net criminalizing the ‘knowing acceptance’ of tainted funds. Both apply extra-territorially to reach American and non-American citizens who are outside the US.

Sec.1956 of MLCA contains ten separate money laundering crimes based on the defendant’s knowledge and intent, and is divided into three broad categories (a) four transaction offence (b) three transportation offence (c) three crimes involving law enforcement sting operations. Each of the three categories of prohibited money laundering contains several common elements that the government must show to establish a violation. They are (1) the funds involved were derived from a particular group – approx 200 specified unlawful activities or in the case of sting operation were

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602 ibid; p135
603 supra note 62; p136
represented to be from unlawful activities by law enforcement officers (2) the defendant knew or ought to have known or was willfully blind to the fact of the fund’s illicit origin (3) the defendant either executed or attempted to execute the prohibited conduct.\footnote{ibid; p137}

AML law regime in specific. Since September 11, 2001 anyone who has flown or entered a government premises understand the reasons behind it. It is now common for airlines, customs, to undertaken a thorough search.\footnote{Robert S.Palsey (2011), “Privacy Rights Vs Anti Money Laundering Enforcement”} The BSA, MLCA and RICO combined together provide a powerful set of interlocking legal mechanism to fight money laundering and organized crime. While the BSA enables collection of information which is acted upon by enforcement agencies to identify, investigate and reconstruct paper trail associated with laundering, MLCA creates an opportunity for successful prosecution. RICO ensures that criminals and criminal organization with be deprived of instruments used to execute and the profits generated by pursuit of a particular course of unlawful activity.\footnote{supra note 5; p221} Space constraints militate against a thorough and systematic analysis of provisions of BSA, MLCA, RICO and USAPATRIOT Acts.

5.1.3 Banking Secrecy Act – BSA

Until the year 1960 the annual income return was the only source of information for American authorities about the citizens. In 1970 BSA was enacted which in spite of its name is a disclosure law defining the circumstances that allow the lifting of banking secrecy rules. Title I of the Act provides for number of record keeping duties and for an obligation to ask for the customers fiscal identification number. The most important feature of the Act is however contained in Title II which authorizes the secretary of the Treasury to lay down reporting duties. American financial institutions should file CTRs every time they carry out transaction above US$ 10,000 (31USC 5313). These threshold

\footnote{ibid; p137}  
\footnote{Robert S.Palsey (2011), “Privacy Rights Vs Anti Money Laundering Enforcement”}  
\footnote{supra note 5; p221}
based reports should be filed with the FinCEN\textsuperscript{607}. BSA the first AML in USA created financial reporting requirements to broad group of entities including banks, life issuers, money service business, security brokers, credit card firms etc. It put in place paper trail regime for law enforcement officials\textsuperscript{608}. The Currency and Foreign Transaction Reporting Act of 1970 which is known as Banking Secrecy Act (BSA) attempted to curtail money laundering efforts by introducing a concept called ‘Currency Transaction Reports’ (CTR). However criminals found out an easier way to avoid detection through CTR by paying off bank officials\textsuperscript{609}. The irony of the name (BSA 1970) as frequently noted, the statute was intended to limit rather than protect bank secrecy. Banks acquired an affirmative duty to provide transaction details to Treasury. With a thrust towards regulation BSA only criminalized failure to report, and not the providision of services to facilitate criminal act\textsuperscript{610}. Though the BSA did not directly criminalize the act of money laundering, it rather sought to use the records to prosecute the underlying criminal activity inherent in money laundering. BSA has been amended continuously since its enactment. Even after more than four decades of its enactment, and revised a number of times, the BSA still provides one of the most commonly used tool in fighting money laundering, that is imposition of still penalties for failure to follow regulations\textsuperscript{611}.

BSA focuses its attention at the placement stage of money laundering process on the assumption that at this stage only the taint associated with illegal money is strongest. The legislation helps investigations to reconstruct a paper trail and to map the movement of funds associated with illegal activity. It operates as a potential warning system alerting the investigation and enforcement agencies about suspicious transactions requiring investigation. BSA does not create a money laundering offence in

\textsuperscript{607} supra note 70; p97
\textsuperscript{608} Asheesh Goel, et al. “International AML Enforcement Trends & Developments”, Ropes and Gray
\textsuperscript{610} supra note 370; p296

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its own right\textsuperscript{612}. BSA is aimed at creating and conserving documentary evidence and establishes flow of financial information from financial institutions to law enforcement authorities. The BSA also prohibited structuring transactions of more than US$ 10000 to avoid reporting requirements to target “smurfs” hired by launderers to make multiple deposits or purchase of cashiers cheque in amounts below the US$10000 threshold\textsuperscript{613}. The Bank Secrecy Act originally did not include laws that were targeted to prevent terrorist financing by way of money laundering which was overcome after passing of USAPATRIOT Act 2001 The act included provisions on counterfeiting, information gathering and sharing, victims, and bribery of a public official. This law also made laundering money through a foreign bank a criminal offence\textsuperscript{614}. Although noncompliance with the duties imposed under BSA can be criminally and civilly enforced (31 USC 5321, 5322) merely transacting or transporting monies is not incriminating as such\textsuperscript{615}.

Section 5311 of the BSA states that its purpose is to require certain reports or records where they have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings. This report in an IRS Form 4789 currently known as CTR. Banks with more than $1billion in assets are examined biannually while for others it is done randomly to make sure that the law is being upheld. In terms of BSA banks are to furnish Currency and Monetary Instruments Reports (CMIR) and Foreign Bank Account Reports (FBAR). While CMIR are similar to the CTR but also record transactions of any coins, foreign currency, travelers checks, securities, bearer bonds, negotiable instruments, FBAR take care of deposits of more than US$ 10000 in to a foreign bank. In 1982 BSA was amended to include financial institutions such as insurance agencies, money exchanges, auto dealership and wire transfers to file CTRs. In 1984 it was amended by Comprehensive Crime Control Act which amended Section 5323 of BSA that provided awards for persons who provide information about cases of

\footnotesize{\textsuperscript{612} supra note 5; p181
\textsuperscript{614} supra note 445; p27
\textsuperscript{615} supra note 70; p98}
money laundering where the recovery would be more than US$50000 to government\textsuperscript{616}. From 1996 financial institutions are also required to file SAR under BSA, and a safe harbor provisions protecting financial institutions against any unlawful disclosure contained in its reports, also exists\textsuperscript{617}.

The BSA has been subject to challenges and criticism also. First the compliance cost it brings with it. Second it infringes on Fourth Amendment protection of US Constitution against unreasonable search and seizure, and the Fifth Amendment protection against self-incrimination. During the early years of existence of BSA it was largely ignored, as it contained a loophole known as structured transaction or ‘smurfing’ loophole which enabled launderers to easily bypass the legislation. Further some financial institutions were willing to accept cash deposits from clients, and gradually deposited the same later in to clients accounts\textsuperscript{618}.

5.1.4 The Racketeering Influenced and Corrupt Organization Act 1970 –(RICO)

The Racketeering Influences and Corrupt Organization Act (RICO) was one of the first instruments through which US sought to tackle the financial elements of crime. The purpose of RICO is twofold. First it sought to limit the expansion of existing criminal trades by preventing the reinvestment of revenue into the underlying trade or into any other trade whether lawful or unlawful. Secondly the Statute sought to capture significant players, namely the kingpins of crime. It was one of the first US statutes to resurrect criminal forfeiture, a doctrine banished from American criminal law almost a century earlier\textsuperscript{619}. It is one of the most important legal weapon in America’s hand to fight organized crime and money laundering.RICO makes four types of activity unlawful. First, to use income derived from racketeering activity to acquire an interest in, or to establish an enterprise engaged in interstate commerce. Second to acquire any

\textsuperscript{616} supra note 445; p98-99
\textsuperscript{617} supra note 5; p184
\textsuperscript{618} supra note 5; p192
\textsuperscript{619} supra note 98; p77
enterprise involved in interstate commerce through a pattern of racketeering activity. Third to operate any enterprise engaged in interstate commerce through a pattern of racketeering activity. Fourth to conspire to violate any of the above provisions. The statute is both civil and criminal in nature and has four main sections. Section 1961 defines ‘racketeering’ concerning money laundering predicate offences, ‘enterprise’, ‘racketeering activity’ and ‘pattern’. This Act like MLCA provides that at least one of the specified predicate offences must have been committed before a racketeering charge is brought. Sec.1962 defines prohibited activities. The predicate offences are listed in Section 1961 (1) and two substantive offences are created under Sec.1962 (a) and Section 1962 (b). Use of the word ‘unlawful’ highlights the fact that the statute has both civil and criminal consequences. Most of the cases are brought under purview of Section 1962 (c) which makes it a criminal offence not only to acquire but also to conduct the affairs of an enterprise in a manner that involves a pattern of racketeering activity. In support of RICO the Comprehensive Forfeiture Act, 1984 was introduced to expand the scope of civil and criminal forfeiture. It was accompanied by inserting Sec.1963 (a) (B-20/P-215). The important aspect in ROCI is forfeiture involves civil procedures and standards of proof, and hence safeguards exist to protect the rights of defendants as the same are less rigorous than a criminal law. From a law enforcement perspective the RICO is a disappointment in the first 10 years as between 1971 to 1981 on an average only 30 cases of RICO indictments were filed each year. Certainly for some law enforcement agencies RICO has been seen as a tool to generate money, support their budget and help them achieve their statistics and targets.

5.1.5 Money Laundering Control Act, 1986 – MLCA

Driven in large part by the explosive growth of the international drug trade in the 1980’s, efforts to combat the problem generally expanded proportionately. For example, the United States passed the Money Laundering Control Act of 1986.
amendments and expansions of the provisions of the Money Laundering Control Act followed in 1990, 1992, 1994 and 1996. In the USA during 70s a shift I strategy occurred as focus was on how to deprive the criminals and their organizations, the tools of trade. Forfeiture was therefore used to seize instruments of crime. For the narcotic smugglers not only the raw materials but also the equipment used to manufacture and transport drugs were subject to seizure. During 80s the shift was on the profits generated by crime. To quote Senator Joseph Biden Jr when he introduced MLCA 1986 “Regrettably every dollar laundered means another dollar available in support of new supplies of cocaine and heroin on the streets of the country”. The government must prove four elements to obtain a conviction under the Act: (i) knowledge, (ii) the existence of proceeds derived from a specified unlawful activity, (iii) the existence of a financial transaction, and (iv) intent.

As the Congress felt that BSA has not been effective in controlling money laundering, it enacted MLCA as part of Anti-Drug Abuse Act 1986. MLCA went one step further by actually criminalizing the act of money laundering. MLCA brought in safe harbor provisions by protecting financial institutions from civil liability for providing information to government. Before the Money Laundering Act 1986 came into force the defendants have to be prosecuted under respective Statutes for the ‘underlying unlawful activity’ which has resulted in money laundering, such as fraud, bribery, tax evasion, conspiracy etc. From a monetary perspective life for alleged violators gets nasty when the forfeiture laws are applied. Under the Civil Asset Forfeiture Reform Act of 2000, the U.S. government to seize assets, must show probable cause that the property is from criminal activity. For civil forfeiture case has to be proved by preponderance of evidence, and for criminal forfeiture the case has to be proved beyond reasonable doubt. Forfeited assets may be shared with all law enforcement agencies involved in obtaining a conviction, a policy that has been

622 supra note 516; p282
623 supra note 5; p169
625 supra note 611; p1373
particularly effective in obtaining cooperation from some foreign law enforcement agencies. Under its sentencing guidelines, money laundering is punished more severely than the underlying offence. Congress wanted it to have extra territorial effect. The MLCA broadly criminalizes all types of transactions involving any item of value and any movement/concealment of funds if the item of value stems from criminal offences specified. The Act gives prosecutors a tool to reach public/private conduct anywhere in the world, when a person is suspected of entering into monetary transactions knowing well that the funds were derived from unlawful activity. Specific provisions of money laundering Act are structured in to three parts namely, transaction clause, transportation clause, and the sting clause. The first two clauses forms part of the crime, while the third clause – sting clause allows for prosecution of a case where government official only represent the items to be proceeds of relevant predicate crimes. The Act is framed broadly, criminalizing all types of transactions involving any item of value, generally movement or concealment of funds, where the item of value stems from any one of a wide range of criminal offences. Although the process of laundering money involves multiple steps, the government needs to show sufficient evidence regarding only one of these steps to prove the crime of money laundering under the Money Laundering Act. In other words, while the process of laundering the money may occur in multiple steps, the crime of money laundering is committed by involvement or participation in any one of the steps. To put it simply a single step of laundering is enough to press for a conviction.

The money laundering process though involve the traditional three stages/steps or even multiple steps, government need to show evidence only with regard to any one of the step to prove the offence of money laundering under Money Laundering Act. In other words, while the process of laundering the money may occur in multiple steps, the crime of money laundering is committed when it is proved that involvement or

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626 supra note 613; p21
627 supra note 22; p114
628 supra note 608; pp11
629 supra note 608; p11-16
participation is there in a single one of these steps. The MLA contains a list of specified offences and incorporates a range of State, Federal and foreign criminal Statutes by reference. The list of offences covered under the definition ‘specified unlawful activity’ include violent crimes such as murder, kidnapping, extortion, financial & property crimes such as fraud, bribery, embezzlement of public funds, and range of crimes linked to money laundering such as smuggling, drug trafficking and terrorist activities. The incorporation by reference provisions include any offence that would require extradition or prosecution under a multilateral treaty. The plain language of the statute permits a broad jurisdictional hook, as it can reach a US citizen anywhere in the world or any conduct by a non-US citizen, (if at least part of the conduct takes place in the US) so long as the transaction or transactions involves property of value exceeding US$10,000. Prior to inception of MLCA in 1986 there was no method to prosecute criminals for this offence. The Act brought in force a fine of not more than US$ 500,000 or twice the value of property involved, whichever is greater, and imprisonment of not more than 20 years for any one who participates or attempts to participate in money laundering operation knowing that the property is derived from illegal activity.

The Money Laundering Control Act consists of two sections: 18 U.S.C. § 1956 addresses prohibited financial transactions, prohibited financial transportation, and authorizes government sting operations, while 18 U.S.C. § 1957 covers transactions involving property exceeding $10,000 derived from the specified unlawful activities. MLCA creates three substantive money laundering offence namely a financial transaction, a monetary instrument and an international transportation offence. Now financial instutions may be subjected to a fine of either US$ 5,00,00 or twice the sum of the money laundered, whichever is greater, while relevant individuals at the financial institution implicated in the money laundering scandal confront a prison term upto 20

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630 supra note 608; 17-21
631 supra note 609; p5
632 supra note 624; p933
years. The American Wyle Anti-Money Laundering Act, 1992 introduced the death penalty for banks convicted of either an MLCA or BSA violation\textsuperscript{633}.

Section 1956 (a) (1) – A transaction offence is any attempt to make a financial transaction using the proceeds of any illegal activity. In this sub-section the prohibited action is conducting a ‘financial transaction’. To establish a violation of the first of the three categories of money laundering, the government must first show that the funds involved in the laundering were derived from a ‘specified unlawful activity’ defined as one of over 200 criminal offences. Most common offences are drug trafficking, fraud, espionage, environmental crimes, taxation etc. The second element ‘knowledge’ can be inferred from circumstantial evidence that the accused knew or was willfully blind to the fact that he involved himself in a financial transactions that was designed to launder, in some fashion, the proceeds from some criminal activity. The third element ‘prohibited conduct’ is that the defendant conducted or attempted to conduct a ‘financial transaction’ with funds he knew were derived from an unlawful activity and were in fact derived from an unlawful activity. The fourth element ‘intent’ is satisfied by proving that the offender acted with one of four specific intents (thus creating four separate crimes). First that he conducted a financial transaction with an intent to promote the carrying on one of the SUA. Second that he engaged in a transaction with the intent of evading taxation or fraudulently concealing assets from taxation by filing false tax documents. Third he acted with the intent to conceal or disguise the nature, location, source ownership or control of the proceeds of SUA. Fourth he attempted to conduct a transaction intending to avoid a transaction reporting requirement under State or Federal law\textsuperscript{634}.

MLCA- Section 1956 (a)(2) - A transportation offence is any attempt to transfer money across the border when the money was obtained illegally or will be used for illegal purposes. The first two elements ‘origin’ and ‘knowledge’ are the same as those for the transaction offences. The third element ‘prohibited conduct’ requires a showing

\textsuperscript{633} supra note 5; p193
\textsuperscript{634} supra note 62; p137
that the defendant attempted or did transport, transmit or transfer a monetary instrument across US borders. The fourth element ‘intent’ is satisfied by proving that the offender acted with one of three specific intents – creating three crimes (i) he conducted a financial transaction with an intent to promote the carrying on of one of the SUA 9ii) he acted with an intent to conceal or disguise the nature, location, source, ownership or control of the proceeds of SUA (iii) he attempted to conduct a transaction intending to avoid a transaction reporting requirement under state or federal law 635.

MLCA Section 1956 (a) (3) - Sting operations are the third category, and the elements of sting operation duplicate those of first category (financial transaction offence) with two exceptions. First the proceeds need not be ‘actually’ derived from a SUA so long as the law enforcement officer represents and the offender reasonably believes that the object of the transaction is derived from those activities. Secondly this section does not criminalize transactions conducted with funds represented by law enforcement as derived from a criminal activity in case where the intent of the launderer is to evade or conceal assets from taxation.

MLCA Section 1956 (c) (7) - Underlying Offences – This sub-section lists approx 200 offences for which the handling of proceeds derived from the offence will be punishable as money laundering. The list of prohibited offences change constantly as new crimes are created in other federal statutes 636.

MLCA Section 1957 – Engaging in property derived from unlawful activity – where sub section 1956 specifies ten potential crimes, subsection 1957 specifies only one. This sub section goes beyond subsection 1956 by covering situations in which the defendant’s only bad act is having accepted funds valued in excess of $10000 which he knows are tainted. The government does not have to prove any of the impermissible intentions found in Sec.1956, it need only to prove that the defendant knowingly

635 supra note 62; p139
636 Ibid ; p139-140
engaged or attempted to engage in a monetary transaction in criminally derived property that are of value greater than $10000 and that was derived from SUA 637.

Under MLCA the *actus rea* of money laundering offence is the subsequent movement of money derived from a criminal act. The predicate offence, or specified unlawful act that gives rise to the original criminal charge cannot form the basis of both the original criminal charge and money laundering offence. The statute adopts two step process. The first step is that a predicate offence is committed and completed. The second step however is completed only when steps are taken by offender to deal with proceeds derived from the SUA. To given an example if money is derived from sale of narcotics, the SUA is committed when money is given in exchange for narcotics, but the money laundering offence is not committed till the money is deposited in bank and then transferred to a secrecy jurisdiction. In other words when the money laundering process begins, the proceeds must already be tainted 638. USA was the first country to designate money laundering as criminal offence, by introduction of MLCA 1986. This act aims to prevent transactional offences and transportation offences. Firstly, ‘transactional offences’ is defined as the conducting or attempted conducting of financial transactions involving the proceeds of ‘specified unlawful activity’ with the intention of promoting the unlawful activity, or with the knowledge that the transaction was designed to conceal the proceeds of unlawful activity or to avoid a transaction reporting requirement. As regards ‘transportation offences’ it also prohibited the transportation, transmission or transference of a monetary instrument into or out of the USA with the intent to promote some ‘specified unlawful activity’, or with the knowledge that they are the proceeds of unlawful activity or that the transportation is designed to conceal the proceeds or avoid a reporting requirement 639. The word ‘transaction’ is defined to include virtually anything which can be done with money and hence most transfers of property may fall under this category. It would cover even the simplest form of transfer of having a small value between two persons, and include ownership interests such as

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637 supra note 62; p140
638 supra note 5; p195
639 supra note 537; p29
stock or deed of property. The word ‘transportation’ is also broad to cover any transmission or transfer of funds including wire transfers of electronic transfers or even attempt to transfer funds. These terms are worded in such a manner to capture any funds which comes into or goes out, or at any point passes through USA. With regard to the mental state of the participants, the law requires that, at the time the financial transaction occurred, the money launderer knew that the property involved in the transaction was the proceeds of “some form” of unlawful activity. The launderer or individual charged need not have knowledge about the specific unlawful activity or details about the same.

5.1.6 United States Code – USC

Federal Criminal AML statutes punish concealing the proceeds of old offences as well as financing new ones. The offences punishable are transactions (a) involving more than US$10,000 derived from list of specified underlying crime (18 USC 1957 OR (b) intended to promote any of the designated offence OR (c) intended to evade taxes OR (d) designed to conceal proceeds generated by any of the predicate offences OR (e) crafted to avoid transaction reporting requirements (18USC 1956). The complex structure of the basic offences in 18 USC 1956 and 1957 introduced by the MLCA 1986 can be compared to a blueprint of 1988 UN Convention. It contains separate provisions for domestic and international money laundering, apart from criminalizing money laundering by means of a government conducted sting operation. The predicate offences are referred to as ‘specified unlawful activities’ (SUA). The main difference between domestic and international money laundering is that a mere intent to promote carrying on SUA would amount to an offence in the case of international transactions, even if the defendant proves that he has no knowledge of illicit origin of funds. 18 U.S.C Section 1956 prohibits individuals from concealing

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640 supra note 608; p14-15
641 Ropes & Gray, “International Anti-Money Laundering Enforcement Trends & Development”; p20
643 supra note 108; p26
the nature of illicit funds or from using such funds to further criminal activity. Section 1956 divides the crime of money laundering into three general categories. Where money is laundered through one or a series of financial transactions Section 1956 imposes a fine of up to the greater of US$5,000,000 or twice the value of the property involved in the transaction. Section 1956 (a) (2) imposes identical penalties where monetary instruments are used to launder money across US borders, while Section 1956 (a) (3) pertains to law enforcement sting operations. Current AML law in USA is found in Section 1956 and 1957 of the United States Code (USC) as enhanced by the USAPATRIOT Act, as these three pieces provide statutory framework to combat money laundering. Sec.1956 provides that assets in question must be proceeds of 'specified unlawful activity' (SUA) and that the offender must have known that the proceeds were of SUA. Sec.1956 also states that willful blindness does not mitigate the 'knowing' mens rea. It further provides that the offender must conduct a financial transaction intending to promote the SUA or conceal the nature or source or ownership or control of the proceeds to evade taxes or avoid reporting requirements. Offenses under § 1956(a)(1) are commonly known as "transaction money laundering" offenses because the prohibited act is the financial transaction itself. The four prohibited financial transactions are: (i) transactions conducted with the intent to promote specified unlawful activity; (ii) transactions conducted with the intent to engage in 26 U.S.C. §§ 7201 and tax evasion or violations; (iii) transactions designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity; and (iv) transactions designed to avoid a state or federal reporting requirement. Section 1956(a)(2) specifies three separate offenses associated with the transportation, transmission, or transfer of criminally derived proceeds into or out of the United States. The three offenses are: (i) "the intent to promote the carrying on of specified unlawful activity,' (ii) the transportation of a monetary instrument that represents the proceeds of some form of unlawful activity designed to conceal or disguise that instrument, and (iii) the transportation of the monetary instrument that represents the proceeds of some form

644 supra note 155; p2044
645 supra note 642; p50
of unlawful activity designed to avoid a state or federal transaction reporting requirement. Section 1957 also prohibits knowingly engaging, or attempting to engage, in monetary transactions involving criminally derived property having a value of more than US$ 10,000 and derived from a SUA. Section 1957 Potentially criminalizes seemingly innocent acts or commercial transactions, as the Congress intended to dissuade people from engaging in normal commercial transactions with others suspected of involvement in criminal activity. Under §1957, "criminally derived property" is equivalent to "proceeds." Congress initially did not define the term "proceeds" and for years it was unclear as to whether the term referred to gross or net income of the SUA. However in response to *Santos Case*. Congress amended §§1956 and 1957, defining proceeds as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." Every person who physically transports, mails or ships currency or other monetary instruments in excess of US$ 10,000 to a place outside the USA or into the USA from anywhere outside is to file a Currency and Monetary Instruments Report CMIR with US customs service (31 USC 5316). Money laundering was criminalized in the US in 1986 as a result of toils of President’s Commission or Organized Crime. MLCA 1986 not only envisages persons who launder the proceeds from their crimes but also third parties, notably financial institutions who launder these proceeds. It enacted two federal crimes, the crime of money laundering (18USC 1956) and crime of monetary transaction (18 USC 1957). 18 USC 1956 prohibits domestic money laundering in essence by incriminating financial transactions concerning criminally derived profits when they are carried out (i) with the intent of promoting certain kinds of criminal activity (or) (ii) with the intent to avoid paying taxes on proceeds involved. Persons who conduct financial transactions with criminally derived proceeds are also criminally liable when (iii) they know that the transactions is designed to conceal or disguise their nature, the location, the source of ownership or control of

646 supra note 624; p934-935
648 supra note 62’ p939
the proceeds or to avoid transaction reporting requirement under State or Federal law. The definition of ‘financial transaction’ is wide as to encompass almost any exchange of money between two persons (18 USC 1956(c)(4)). 18 USC 1957 incriminates engaging in a monetary transaction in property derived from specified unlawful activity of a value in excess of US$ 10000. This provision has a very wide application field as it concerns not only financial transactions but also any transaction involving monetary instrument\textsuperscript{649}.

5.1.7 Anti Drug Abuse Act-1988

The efforts to combat money laundering and tax evasion continued in 1988 with the introduction of Anti-Drug Abuse Act which impacted USC 1956 of the MLCA by expanding the definition of ‘financial institutions’. The joint task force that was created between the IRS & US Customs in 1980 called Operation Greenback became a part of Florida Caribbean Organized Crime Task Force (FCOCTF) in 1989. The main responsibility of the task force was to investigate drug money laundering activity\textsuperscript{650}. Among other things, this statute amended the MLCA 1986 by authorizing the use of government sting operations to expose money laundering.

5.1.8 Annnunzio Wylie Money Laundering Act – 1992

The Annnunzio Wylie Anti Money Laundering Act, 1992 was passed to clear the inflexibility in the existing AML scheme, and for the reasons that the launderers were getting sophisticated. The Act created Suspicious Activity Report (SAR) and shifted the burden to banking community in determining which transaction to be reported. It barred the institution from notifying the subject that SAR has been filed\textsuperscript{651}. In 1992 with the passing of the Anti-Money Laundering Act (referred to as the

\textsuperscript{649} supra note 70; p100
\textsuperscript{650} supra note 609; p17
\textsuperscript{651} supra note 611; p1376
Annuzio-Wylie Money Laundering Act) stricter regulation was possible through the existing MLCA of 1986. Sec.1517 of the Act (AMLA) required financial institutions to report any suspicious transactions relevant to possible violations of law or regulations. This section included ‘safe harbor’ provision to protect banks against client and or third party complaint about being reported as suspicious when they haven’t actually violated any law or regulations. The Annunzio Wylie AMLA 1992 is a supplement to previous AML legislation in USA, which came into force to respond to the BCCI scandal, these statutes allow for cancellation of a bank’s licence or charter to do business in USA if it is charged and convicted of money laundering violation. While a branch office of US bank may be shut down, a domestic bank may face termination/revocation of its deposit insurance. The Annunzio-Wylie Anti-Money Laundering Act (1992) enlarged the BSA’s definition of “financial transactions,” added a conspiracy provision, and outlawed the operation of “illegal money transmitting businesses.” Annunzio-Wylie is best known for establishing what has become known as the “death penalty,” which provides that if a bank is convicted of money laundering, the appropriate federal bank supervisor must begin a proceeding to either terminate its charter or revoke its insurance, depending on the bank’s primary supervisor.

Wire transfers are regulated under Annunzio Wylie Act 1994. The originating bank accepting payment order, before wire transfer must verify and retain records of individual submitting payment order. Similarly the bank obtaining the transfer needs to keep record of the recipient. BSA was amended in several respects notably (1) to compel any financial institutions and its officers to report any suspicious transactions relevant to a possible violation of law protected from civil liability for doing so by certain ‘safe harbor provisions’. (2) provide for termination of banker’s charter, insurance or licence to conduct business in US if convicted of money laundering. It also amended the civil forfeiture statute to allow forfeiture of money in a bank account even

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652 supra note 609; p22
653 supra note 155; p2050
654 supra note 445; p21
when that money is not directly traceable to money laundering so long as the account previously contained funds involved in or traceable to illegal activity\textsuperscript{655}.

5.1.9 The Money Laundering and Financial Crimes Act, 1998

This Act required the Secretary of the Treasury to consult with the Attorney General and develop an annual National Money Laundering Strategy (NMLS). This Act was probably the most forward looking response to organized crime and money laundering in 90\textsuperscript{656}. The Money Laundering and Financial Crimes Strategy Act in 1998 created the High Intensity Money Laundering and Related Financial Crime Area (HIFCA) Task Forces to concentrate law enforcement efforts at the federal, state and local levels in zones where money laundering is a problem\textsuperscript{657}.

5.1.10 Money Laundering Suppression Act – MLSA-1994

The Money Laundering Suppression Act, 1994 required that all firms involved in transmitting funds into, out of, or within the US be licensed to transmit funds and they must comply with government report filings, such as CTR and CMIR. The Money Laundering & Financial Crimes Act, 1998 required the Secretary of the Treasury to consult with Attorney General and develop annual National Money Laundering Strategy (NMLS)\textsuperscript{658}. The Money Laundering Suppression Act of 1994 required that all firms involved in transmitting funds into, out of, or within the U.S. be licensed to transmit funds and they must comply with government report filings, such as CTRs and CMIRs\textsuperscript{659}. MLSA is primary legislative tool to regulate NBFC. The statute was passed by Congress in response to \textit{Ratzlaf Vs United States} (114 S.Ct 655 (1994) where the

\textsuperscript{655} supra note 62; p142
\textsuperscript{656} supra note 589; p23
\textsuperscript{657} supra note 445; p26
\textsuperscript{658} supra note 609; p23
\textsuperscript{659} supra note 589; p22
SC overturned the convictions of defendants who deliberately structured a cash transaction of $100000 used to pay a gambling debt at a Casino to avoid triggering BSA reporting requirement\textsuperscript{660}.

5.1.11 Bulk Cash Smuggling Act BCSA-1999

By enacting the \textbf{Bulk Cash Smuggling Act, 1999} a loop hole which abused the lack of powers of customs to search outgoing mail was plugged. Prior to this Statute coming in force a parcel sent as letter-class-mail or international mail (upto 4 Pounds) and mail to Canada (upto 60 Pounds) was exempt from customs purview. A pound letter can hold approx US$ 1,90,000, helped criminals to use postal mail to send money abroad. By enacting BCSA, the Congress was able to harmonize powers to search incoming and outgoing mail\textsuperscript{661}.

5.1.12 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 - USAPATRIOT Act, 2001

After the 11\textsuperscript{th} September 2001 attacks the government was able to overrule industry concerns and introduce elementary requirements of identification of beneficial owners especially the source of funds\textsuperscript{662}. Some of the provisions enacted in the AML legislation were pending considerations for quite a long time, and after the 9/11 attacks US Congress speedily enacted a tough new law. Even before new regime came into force the President of US used the International Emergency Powers Act to block all property controlled by foreign persons, ad groups linked to terrorism\textsuperscript{663}. USA Patriot Act is an extremely wide ranging act which include provisions on criminal laws,

\textsuperscript{660} supra note 62; p143
\textsuperscript{661} supra note 5; p174
\textsuperscript{662} supra note 106; p28
\textsuperscript{663} supra note 496; p600
transporting hazardous materials, money laundering and counterfeiting, investigations and information sharing, federal grants, victims, immigration and US domestic security.\textsuperscript{664} USAPATRIOT Act made around 52 amendments to the existing BSA 1970, touching every financial institutions and business in the US as well as around the world. In a matter of weeks after the September 11 attacks virtually all the proposals of AML legislation under debate for months and years were passed as part of the The Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, otherwise known as the USAPatriot Act. \textsuperscript{665} It also clears up the confusion as to whether laundering money through a foreign bank is an offence. Section 318 makes it a crime to launder money through foreign banks by expanding the MLCA to include financial transactions conducted through foreign banks. It does this by expanding the definition of ‘financial institution’ to include ‘any foreign bank’, as defined in Section 1 of the International Banking Act of 1978. This, of course, means that it is now an offence under US law to launder money exclusively through a foreign bank.\textsuperscript{665}.

The USA in terms of Sec.311 of USA PATRIOT Act is empowered to designate a foreign jurisdiction, institution, class of transaction or type of account to be treated as ‘primary money laundering concern’ and impose special measures to those jurisdictions or institutions as the case may be. In coordination with other FATF countries this provision allows USA to apply pressure on non-cooperation jurisdictions.\textsuperscript{666}

The law has included in its ambit a number of new money laundering crimes, like Sec.315 adds several crimes to federal money laundering predicate offence list of 18 USC 1956. The new offences also include crimes violating laws of other countries, when the proceeds of such crimes are involved in financial transactions in the US, like offences including public corruption, violence, smuggling etc. Additional federal crimes

\textsuperscript{664} supra note 21; p33
\textsuperscript{665} supra note 537; p30
are (1) false classification of goods - 18 U.S.C 541 (2) unlawful import of firearms - 18 U.S.C 922 (1) (3) firearms trafficking - 18 U.S.C 924 (n) and (4) fraud and abuse – 18 U.S.C -1030667.

One of the most contentious parts of this Act is Section 317, which gives US Federal Courts jurisdiction over any foreign bank that maintains a bank account at US financial institution. Under this provision even if the transaction was carried out entirely outside USA, since the foreign institution holds a bank account at US financial institution, it would be subject to jurisdiction of US Federal courts. This Section 317 is clearly an effort by US government to put pressure on foreign financial institutions seeking access to US financial systems and markets to enhance their AML policies and to reduce the risks that may arise if their funds with the US financial institutions are seized668.

Section 319 of the USA PATRIOT Act permit US authorities to seize a foreign banks inter bank account to reach tainted money deposited in the foreign bank outside the jurisdiction of USA. This provision is helpful in countries who do not have treaty with USA or do not extend cooperation. Further the authorities in US are not required to show that the funds in any inter bank account are related to the tainted funds at issue, to enforce Section 319. Although a powerful tool, this provision has raised diplomatic controversies with countries whose banks have been affected669. According to Sec.329 it is a federal crime to engage in corruption while administering the AML scheme, and offenders are liable for imprisonment upto 15 years and fine not exceeding more than 3 times of the value of bribe670.

In an effort to stalk the flow of illicit money to terrorists, Sec.371 of the Patriot Act make bulk cash smuggling a serious criminal offence. It specifically forbids concealing more than US$ 10000 in currency or other monetary instruments and

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667 supra note 642; p35
668 supra note 537; p32,34
669 supra note 666; p512
670 supra note 642; p36
transporting it out of or into the USA with the intent to evade relevant reporting requirements. Violators are subject to five years in prison and forfeiture of any property involved in offence. Under previous federal law, 18 USC 1960 those who operated unlicensed money transmitting business were entitled to rely on the affirmative defense that they had no knowledge of applicable state licensing requirements, and can therefore escape from liability. Some of these unfettered businesses such as “hawala” have siphoned extensive amount of money to terrorist groups. However Section 373 of the USA Patriot Act amended federal law by eliminating this loophole, bringing in a provision that the defendant must know about state licensing requirements. The provision also broadening the statute to make it illegal for a person to transmit or transport funds that are proceeds of criminal activity or funds that are intended to be used for criminal activity.

As per Section 1006, (U.S.C 1182 (a) (2) (I)) aliens who are suspected to be engaged in money laundering may not enter the soil of US, and it empowers the Secretary of State to maintain watch list to ensure such persons are not admitted into USA (8 U.S.C 1182).

Title III of the USA PATRIOT Act amended the Bank Secrecy Act (BSA) to require certain financial institutions to establish proactive AML programs, through regulations issued by the Financial Crimes Enforcement Network (FinCEN), the financial intelligence unit of the U.S. An overview of Title III of Patriot Act would reveal the following measures (1) tighten and clarify laws in the US Criminal Code (USC) that deal with money laundering and terrorism (2) increase the powers of law enforcement, regulatory and intelligence agencies to pursue terrorists (3) broadening the scope of reporting obligations of financial institutions by amending provisions of BSA.

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671 supra note 25; p58
672 ibid; p57
673 supra note 642; p36
674 supra note 193; p6
and other relevant legislation. The Patriot Act in its breadth and scope expand the powers available to law enforcement and regulatory agencies to combat money laundering and financing of terrorism.\(^{675}\)

By inserting supplemental sections into both \(\S\)1956 and \(\S\)1957, Title 3 of the PATRIOT ACT empowers the federal District Courts jurisdiction over any foreign person, including foreign financial institutions, against whom an action is brought, provided that service of process be made under either relevant U.S. procedural law, or the law of the country in which the service of process takes place.\(^{676}\) While offshore funds are subject to security laws and regulations in which they are domiciled, domestic funds would come under the purview of PATRIOT. Many of the offshore jurisdictions have lax AML regulatory mechanism, though they are urged to follow sound international practices.\(^{677}\) The Act is 342 pages long and contains over a hundred separate provisions many of which are written in complicated legal language that is hard for the average American to understand.\(^{678}\)

Commercial tax evasion is not included in SUA either in the US or in most of other countries, as many lawmakers do not take the issue of tax evasion especially by corporations seriously and hesitate to bring a legislation.\(^{679}\) Domestic or foreign tax evasion (other than failure to remit taxes on proceeds of crime in USA) is not a predicate offence in USA. While the US prosecutors feel that it is not an impediment, the lack of predicate offence provision is often cited as impeding international cooperation.\(^{680}\) Americans value their financial privacy almost more than any other area. The concern over financial privacy is well-founded since an analysis of a person’s bank account can reveal much about the individual. When somebody pays his gardener for illegal work and the gardener in turn spends his ill gotten proceeds in the

\(^{675}\) supra note 5; p418
\(^{677}\) supra note 152; p2
\(^{679}\) supra note 153; p344
\(^{680}\) supra note 370; p334
supermarket, is the gardener or supermarket laundering money? Whether the gardener or supermarket is a launderer or not depends on the definition of what money laundering is precisely. Under the US law, the gardener is definitely a launderer if he is an illegal immigrant, since the US money laundering definition lists work from illegal immigrants as a predicate crime for laundering. Even after insider dealing had been criminalized in a number of European jurisdiction, the perception, notably in the United States, was that it was still not viewed particularly serious there. Using a baseline application of the Walker model, there is a conservative estimate of about US$196 billion generated from organized crime in the U.S. in the year 2008, of which about US$182 billion was likely to be laundered in the global financial system. In Mexico, in the same year, an estimated US$ 39 billion in criminal revenues was generated, of which about US$ 14.5 billion was likely to be laundered. These estimates appears to be consistent with 2.5% of world GDP estimate. US has adopted a more de-centralized structure in AML regulation, with more delegation of authority at state level. While a centralized structure would demonstrate more coherent and unified politics, a de-centralized structure allows States with more discretion to adopt policies to meet specific risk it faces. Statistics of conviction show that in the last few years over 1000 defendants were convicted for money laundering offence each year. The Department of Justice (DOJ) has since 1986 on an average prosecuted more than 2000 defendants every year for money laundering, and have obtained more than 5900 convictions or guilty plea. The FBI has jurisdiction over 133 out of 160 predicate crimes. Trade Transparency Units (TTUs) are designed to identify disparities in import and export trade particularly in documentation, and also to indicate anomalies in cross border trade including money laundering. TTUs generate, initiate and support investigations and prosecutions relate to trade based money laundering, illegal movement of criminal

681 supra note 173; p106
682 supra note 138; p1
683 supra note 193; p4,7
684 supra note 5; p170
proceeds across borders, abuse of alternate remittance systems. USA has established a TTU within DHS/HSI for domestic and international investigation\textsuperscript{685}.

Civil liberties protagonists are not reassured by the claims that the Patriot Act thwarts terrorists. They argue that secret surveillance Warrants were often issued without probable cause, constituting a violation of privacy laws\textsuperscript{686}. The US Patriot Act became law in less than a month, without any hearings. Now we really have known that it was passed under false pretenses\textsuperscript{687}. Raymond Baker is of the view that PATRIOT Act is very restricted for the crimes committed outside US, while the definition of ‘specified unlawful activity’ is very extensive for those crimes committed in US. For example tax evasion in foreign countries and handling of its proceeds is not a specified unlawful activity\textsuperscript{688}.

5.1.13 Comparative Analysis and Conclusion

Money laundering was reported to be first criminalized in the USA as a ‘ancillary offence’. They are identified by conduct involved in commission of substantive offence or which resulted in the aftermath of a primary harm crime (Abrahams-1989-2) In view of this there can be no money laundering offence without a predicate offence\textsuperscript{689} It is useful to think of the regime as having two basic pillars, prevention and enforcement is present. The prevention pillar deters criminals from using the financial institutions to launder proceeds of crime, and by also putting in place sufficient transparency to deter the willingness of institutions to launder. If despite the preventive efforts if the criminals have laundered successfully, then the enforcement pillar takes steps to punish them. The prevention pillar has four key elements, CDD, Reporting, Regulation & Supervision, Sanctioning. The enforcement pillar similarly has four elements predicate crime, investigation, prosecution & punishment and

\textsuperscript{685} supra note 162; p5
\textsuperscript{686} supra note 25; p16
\textsuperscript{687} ibid; p43
\textsuperscript{688} Kannan Srinivasan, Money Laundering and Capital Flight; E mail dated 28/4/2005 to author by Baker
\textsuperscript{689} supra note 235; p1
confiscation\textsuperscript{690}. Due to emergence of increasingly complex, inter-reliance criminal syndicates in 90s a time had come for committed response from government. With a gap of every 2 years, a combination of new task forces, laws, and agencies were formed. The FinCEN was established to co-ordinate the efforts to detect financial crimes in US by using the existing laws. Though FinCEN was initially formed as a research wing, its responsibilities were expanded to receive and analyze all CTR, CMIR and FBAR and also to develop new tools to ensure compliance with AML laws\textsuperscript{691}. Until 1986 drug dealers, when apprehended, were able to retain the proceeds of their crimes, and perhaps were also able to enjoy its fruits, after return from the prisons. Now not only are they not allowed to keep the proceeds, but attacks are being made upon all of the principal mechanism by which they conceal their links to the money\textsuperscript{692}.

Section 373 of PATRIOT prescribes a federal penalty of upto five years imprisonment, criminal fines, and authorizes civil forfeiture of property involved in the offence. Sec.374 increase penalties under other counterfeiting statutes to 20 years imprisonment – Section 18 USC 471 (obligation or securities of USA) Section 18 USC 473 (dealing in counterfeiting obligations or securities) 18USC 474 (using plates or stones for counterfeiting)\textsuperscript{693}. An individual who manufacture or utters foreign financial institution notes could be sentenced upto 20 years in prison\textsuperscript{694}.

USA as reported earlier, is among the foremost in the world to enact a legal regime toward combating money laundering, the term which incidentally was also coined in the context of USA. Starting in 70s it is the only country in the world which periodically updates and revises its AML regime in response to global changes. In the last decade or so it has brought in a number of statutory amendments and structural changes. In 90s itself he USA has brought in a strong FIU network. Though the AML regime was initially governed through various Acts like the UK, the induction of PATRIOT Act brought out stringent measures to support the US Code, Banking

\textsuperscript{690} supra note59; 297-298
\textsuperscript{691} supra note 589; p21
\textsuperscript{692} supra note 102; p1
\textsuperscript{693} Ewing, Alphonse B (2005), “The USA PATRIOT Act, reader” Nova Science Publishers; p45
Secrecy law, and strengthened the efforts of law enforcement in prevention of terrorist financing. PATRIOT Act also brought in hefty civil and criminal penalties, apart from change in imprisonment for laundering related offences. On the whole the USA has put in place a strong and well structured AML system in terms of both men and material, and experts agree that on the whole the implementation process of Treaties and Conventions in USA is very high, when compared to other jurisdictions. In contrast in India the AML legislation is a sui-generis one, the Prevention of Money Laundering Act, 2002, which came into force on 1st July 2005. Unlike the USA regime, India follows a predicate crime based laundering offences, which forms part of the Schedule to the Act. takes into account the offences committed under 28 different enactments. In other words if the predicate crime is one which is covered under the Schedule to PMLA, or in the sense it is an offence in terms of the provisions relating to the said 28 statutes, and if a person is alleged to be engaged in laundering the proceeds of such offence, then he is liable under the PMLA. The predicate offences under PMLA are not broader unlike the USA which covers all the 20 designated categories of offences listed by FATF, and follows a all crimes approach, while in India several offences are yet to be included. As far as fines and penalties are concerned they are negligible in India, when compared to stringent penalties, and needs improvement. The term of imprisonment though not high in India as compared to the USA, considering other criminal enactment, and the law being in nascent stage, and the offences one of economic nature, the terms prescribed appears to be satisfactory.

5.2. Anti-Money Laundering Legislation in UK

5.2.1 Introduction

Many factors including the volume of legitimate transactions taking place in financial sector daily in UK, makes it attractive for those who are engaged in concealing illegal origin of funds. UKs connection with Commonwealth countries and off-shore centres, are important reasons for the country to take a lead position in acting
against dirty money\textsuperscript{695}. The policy of UK towards AML are dictated by three basic objectives. (a) to deter – through enforceable safeguards and supervision (b) to detect - using financial intelligence by identifying and targeting launderers and (c) to disrupt- by maximizing the use of available penalties such as prosecution or asset seizures\textsuperscript{696}. Internationally UK was an active participant and driving force behind Vienna Convention and FATF, while at the domestic level self regulation was the order of the day and intervention by supervisors were virtually unheard of. The prevention and punishment of money laundering in UK is based on a three-tier system. First there is a criminal law, which is now in the shape of Proceeds of Crimes Act, 2002 and laws on terrorism. Secondly there are money laundering Regulations from 1993 to 2001, currently replaced by Regulations in June 2003, followed by 2007 etc. Thirdly there is a regulatory regime developed and implemented by Financial Services Authority whose rules runs parallel to criminal laws\textsuperscript{697}. England was the first country to action based on recommendations of Hodgson Committee, by enacting DTOA 1986 (later replaced by DTA 1994) to confiscate proceeds of drug trafficking\textsuperscript{698}.

UK’s AML legislation is made up of statutes, rules, regulations and industry guidance and some of which are part of EU laws. It is important to bear in mind that UK anti-money laundering legislation does not operate in isolation, not least given the international nature of the activities concerned. EU seeks to coordinate AML laws within the Union, by ensuring consistency between EU member states to avoid in consistencies between states which may undermine AML controls\textsuperscript{699}. UK was ahead in money laundering legislation just as it had put in place legislation prohibiting insider trading\textsuperscript{700}. In UK the law on prevention of money laundering has now been consolidated into the following (a) POCA 2002, (b) Terrorism Act, 2000 as amended

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\textsuperscript{695} Transparency International (2009) UK, “\textit{Combating Money Laundering & Recovery Looted Gains - Raising the UK’s Game}”; p40
\textsuperscript{696} ibid; p16
\textsuperscript{697} supra note 106 ;p22
\textsuperscript{698} supra note 70; p5
\textsuperscript{699} supra note 641; p40
\textsuperscript{700} supra note 138; p156
}
and (c) Money Laundering Regulations 2003. The Criminal Justice Act 1988 and the Drug Trafficking Offences Act 1986 each separately established the criminal offence of money laundering. Since then, the Money Laundering Regulations 1993 and POCA have developed out of a change in UK government policy which sought to extend the scope of regulation to activities such as money services. Over the years the legislation in UK such as Money Laundering Regulations 1993 started to implement the 1st EU Directive to cover more and more offences. The result was a patchwork of legislation with some inconsistencies leading to a confusion as to who were covered and who were not. Later UK consolidated the laws on the subject matter by passing Terrorism Act, 2000. The terrorist act in USA in Sep 2001 prompted it to pass Anti-terrorism, Crime and Security Act, 2001. The act however also contains matters unrelated to terrorism and perhaps one of the most important from the UKs point of view, money laundering and crime in general. The next major and most significant change and enhancement was the Proceeds of Crime Act, 2002. The act effectively repeals all previous anti money laundering legislation and consolidates into part 7 of the Act, and the exception is that money laundering provision relating to financing of terrorism which remain part of Terrorism Act, 2000 as amended by Anti-Terrorism, Crime and Security Act, 2001.

5.2.2 Drug Trafficking Offence Act, 1986 - DTOA 1986

Though DTOA 1986 was restricted to drug related money laundering, it was the first time in UK when financial institutions are required to report when they suspect drug trafficking or have knowledge about the same. A situation may arise that a financial institution may be genuinely suspicious about a transaction or a customer, but may not have enough information or knowledge to come to a conclusion that the funds are from drug trafficking. The DTOA 1986 is considered as a landmark piece of

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701 supra note 149; p37
702 supra note 641; p38
703 supra note 149; p35,36
704 supra note 149; p35&36
legislation. It contained provisions to strip drug traffickers of proceeds of crime through confiscation orders. In conjunction with Criminal Justice (International Cooperation) Act 1990 the Act created five money laundering offences, strengthened by Part of Criminal Justice Act, 1993. Though there has been specific AML obligation in UK since passing of DTOA 1986, there has been no attempt to regulate money laundering in financial services sector. Historically the financial services industry is littered with scandals of money laundering. Financial regulatory bodies have not been given sufficient enforcement powers or a clear legislative mandate to tackle money laundering. Whilst the offences in the DTOA could be committed by any person, the legislation's greatest impact was on the banking sector as this segment was the first port of call for drug traffickers.

5.2.3 Drug Trafficking Offence Act, 1994 - DTOA 1994

The 1986 Act has subsequently been replaced by the DTA 1994. Further anti-money laundering provisions appeared in a range of legislation, including the Criminal Justice Act, 1993 which took account of the Council Directive 91/308/EEC. A person is deemed to have violated DTOA when suspecting or knowing someone else is a drug trafficker, either holds or controls the illicit proceeds or provides the trafficker with any assistance in investing the funds. Sec.24 of the Act creates a criminal offence out of assisting a drug trafficker in retaining proceeds of the crime. Similar to Sec.24 of DTOA, under Sec.50 of DTA 1994 any one who enters into an arrangement to facilitate another’s retention of drug money, and who knows or suspects that the individual is someone benefiting from drug trafficking is guilty of an offence. Sec.51 of the DTA 1994 establishes the offence of knowingly acquiring or possessing property derived

706 supra note 48; p638
707 supra note 282; p10
708 supra note 18; p70
709 supra note 155; p2055, 2056
from drug trafficking. As a result criminal liability is extended to those who know that a particular person is involved in drug trafficking and acquires or uses property which represents the proceeds of the drug trafficking. Under Sec.52 (1) the mere knowledge that an individual is or may be involved in laundering the proceeds of drug trafficking in certain cases is a criminal offence.

The DTA, 1994 was passed which consolidated all the existing laws pertaining to drug trafficking offences previously held within the Drug Traffic Offences Act, 1986 the Criminal Justice (International cooperation) Act 1990, and the Criminal Justice Act, 1990\textsuperscript{710}.

5.2.4 Criminal Justice Act, 1993 - CJA 1988/1993

The CJA 1988 is designed to act against all serious crimes, except drug trafficking or terrorism which are subject matters of other legislation, and it applies to such crimes have a significant organized element in their commission. However no money laundering offences were introduced by the 1988 Act with regard to ‘relevant criminal conduct’.

These were later introduced through CJA 1993\textsuperscript{711}. The UK government after some time recognized that distinguishing drugs from non-drugs proceeds was artificial, which resulted in new offences introduced into the CJA 1988 by the CJA 1993 which applied to the proceeds of indictable non drug offences Separate offences relating to terrorist money laundering were created by Prevention of Terrorism (Temporary Provisions) Act 1989. The offences in each Act were broadly similar though they contained important differences\textsuperscript{712}.

\textsuperscript{710} supra note 705; p4
\textsuperscript{711} supra note 142; p5
\textsuperscript{712} supra note 286; p11
5.2.5 Terrorism Act, 2000

Terrorism Act, 2000 which came into force on 19th February 2001 is second of two pieces of primary legislation in UK relating to money laundering. To understand the money laundering requirements of this Act it is necessary to understand the meaning of terrorism and terrorist property.

“Terrorism” is defined as threat of serious violence designed to influence the government or intimidate a section of public for the purpose of advancing a political, religious or ideological cause. “Terrorist Property” is defined as money or other property which is either likely to be used for the purpose of terrorism or the proceeds of an act carried out for the purpose of terrorism. The offences under the Act are wide ranging like POCA 2002 there are many ways for the unwary to commit an offence.\(^{713}\)

5.2.6 The Financial Services and Markets Act 2000 - (FSMA)

FSMA establishes the framework for financial regulation in the UK. The Financial Services Authority (“FSA”) is the regulatory body responsible for overseeing UK financial services firms, which includes banks, broker-dealers, asset managers, investment advisers, and one of its overarching statutory objectives is the reduction of financial crime.

The Authority is empowered both by the FSMA and the MLR to implement rules relating to the prevention and detection of money laundering and to prosecute money laundering offences, and FSA has powers to investigate and take enforcement actions both under FSMA and MLR.\(^{714}\)

\(^{713}\) supra note 537; p 82
\(^{714}\) supra note 608; p55&56
5.2.7 Anti-terrorism, Crime and Security Act 2001

Part 12 of the Act is one of the most important from UKs point of view as it deals with bribery and corruption and in particular bribery of a foreign officer or commission of bribery or corruption outside UK.

5.2.8 Proceeds of Crime Act 2002- (POCA)

Despite the provisions empowering criminal confiscation under the DTA 1994 and the CJA, it was still possible for organized criminal gangs to benefit from ill-gotten gains, even after conviction of serious crimes. In June 2000 a Cabinet Office report suggested for consolidation of existing money laundering and confiscation laws into a single piece of legislation, known as POCA, which eventually broadened the scope of legislation relating to seizure of cash by adopting an all crimes approach. It also increased the investigative agencies’ powers of restraint and simplified the confiscation procedure. POCA contains detailed procedures for the recovery of the proceeds of crime in the UK after a criminal conviction. Confiscation according to the Act not only relate to benefits from specific crime for which conviction has been secured, but also of other assets if it is established that the defendant has ‘criminal lifestyle’, which of course is presumed under certain circumstances, including the offence of money laundering.. Confiscation proceedings are carried out with civil standard proof715. The Proceeds of Crime Act, 2002 which came into force in February 2003 consolidates the existing confiscation provisions relating to drug-trafficking and other criminal offences and creates new powers of civil forfeiture without conviction716. The Act also introduces specific coercive powers to assist with investigations in money laundering. These powers are more intrusive than were previously available in an investigation into the proceeds of crime and have been justified on the ground that the government is committed not only to prosecuting crime but also to confiscating proceeds of crime. Part 1 of the Proceeds of Crime Act, 2002 deals with creation of Asset Recovery Agency

715 supra note 695; p34,37
716 supra note 18; p70-71
which is a major innovation in UK laws. Money laundering is criminalised in the United Kingdom by virtue of the Proceeds of Crime Act 2002 (POCA 2002) as amended by the Serious Organised Crime and Police Act 2005 (UK). Under POCA a person is deemed to have committed an offence by concealing, disguising, transferring or converting criminal property or by removing criminal property from UK. Under the Act it is an offence for entering into, or becoming concerned with an arrangement known or suspected to facilitate acquisition use, retention or control of criminal property. The UK through Proceeds of Crime Act, 2002 introduced an ‘all crimes’ approach to predicate offences to money laundering. POCA marked a decisive shift away from viewing money laundering as an ancillary offence to other crimes and to recognize it as a complex crime in its own right. The all crimes approach in the Act is supported by Terrorism Act, 2000. The English courts, in their interpretation and application of POCA have further refined and clarified the scope of the civil and criminal offences. The widening of the scope of legislation to apply to the proceeds of all criminal activity marked a key point in the development of the UK anti-money laundering regime. The implementation of the Proceeds of Crime Act 2002 (“POCA”) as the first UK statute to deal with money laundering specifically marked a decisive shift away from viewing money laundering as an ancillary offence to other crimes, to recognizing it as a complex crime in its own right. The “all crimes” approach of POCA is further supported by the Terrorism Act 2000 which tackles money laundering in the context of terrorism. The introduction of the TA illustrates how UK legislators will adapt and respond to new money laundering threats. POCA widens the previously existing money laundering offences. PCA expresses the money laundering offences in very simple terms. As per Section 340 (11) of PCA it is an act which (i) constitutes an offence under PCA Sec.327, 328 or Sec.329 (ii) constitute an attempt, conspiracy or incitement to commit one of those offences (iii) constitutes aiding, abetting, counseling or procuring the commission of one of those offences (iv) would constitute any of the

717 supra note 40; p20
718 supra note 608; p38
719 supra note 641; p34
above offence if done in UK. The POCA money laundering provisions are also
directed towards detecting criminal proceeds through three types of individuals. First
types is those who ‘benefit’ from ‘property’ which is derived from ‘criminal conduct’. Second
ones are those who ‘use’ and the third category is those persons who come into possession of ‘property’ which is derived from ‘criminal conduct’. These terms are defined in the Act in similar terms, particularly in the context of criminal confiscation
and civil recovery.

Part 7 of the POCA 2002, that is Section 327 to Section 340 contains provisions
to tackle the government’s will to fight organized crime. The definition of ‘criminal
property’ is sufficiently wide enough to include the merest of transgressions. The Act
focuses on seeking to disrupt the ease with which it is possible to clean tainted funds,
through three pronged strategy. First the Act penalizes those who attempt to assist,
agree to assist, or do in fact assist in laundering criminal property. Secondly the act
enforces disclosure regime for those in the ‘regulated sector’ who come across
suspicious transactions in the course of their business or professional activities. Thirdly
the Act assists the investigation by penalizing those who warn the money launderers of
any proposed investigation by the agencies. The POCA consolidates the money
laundering offense in an attempt to simplify the framework by creating three principal
offense of ‘concealing criminal property’ u/s 327, ‘facilitating the retention or control of
criminal property’ u/s 328 and ‘possessing criminal property’ u/s 329 punishable by
14 years imprisonment. In addition two ancillary offences are created of ‘failure to
disclose regulated sector’ u/s 330 and ‘tipping off’ u/s 333 both punishable by 5 years
imprisonment on conviction on indictment. The offences under POCA are, money
laundering, which may be committed by (a) (i) concealing, disguising, converting or
transferring criminal property, or removing criminal property from the UK (See
Sec.327) (a) (ii) entering into or becoming concerned with an arrangement and knowing

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720 supra note 282; p35
722 ibid; p129
or suspecting that the arrangement facilitates (by whatever means) the acquisition, retention, use or control of criminal property, by or on behalf of another person (See Sec.328) and (a) (iii) acquiring, using, or possessing criminal property (See Sec.329) It also covers (b) failing to disclose money laundering to the authorities, (c) tipping-off a third party that a disclosure has been made to the authorities, or making a disclosure that is likely to prejudice an investigation. Falsifying concealing or destroying evidence will also constitute an offence.\textsuperscript{723}

Before taking a detailed look at the offences, three key definitions relating to criminal conduct, criminal property and money laundering are to be studied. Sec.340 (2) states that

\textit{Criminal conduct is conduct which}

\begin{itemize}
\item [a)] Constitutes an offence in any \textbf{part of the UK}, or
\item [b)] Would constitute an offence in any \textbf{part of the UK} if it occurred there
\end{itemize}

The definition of “criminal conduct” also appears relatively straightforward and is deliberately drafted sufficiently broad to include all crimes. This “all crimes approach” makes the UK AML more flexible. There is, however, an added complexity as conduct will not only be criminal if it constitutes an offence in any part of the UK, but also if it would constitute an offence in any part of the UK even if it did not occur there.\textsuperscript{724}

The definition, the way it is worded, gives lead to number of potential dangers like how a summary-only offence might result in money laundering. The absence of a \textit{de minimis} limit also gives cause for concern, as some felt that it may be an oversight, which is not so. The issues were debated at some length in the Parliament and the

\begin{flushright}
\text{\textsuperscript{723} supra note 641; p41} \\
\text{\textsuperscript{724} supra note 608; p50}
\end{flushright}
government made it clear that it did not favor a *de minimis* provision. Criminal property is defined in Sec.340(3) as follows

*Property is criminal property if*

- It constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or in part, and whether directly or indirectly) and
- The alleged offender knows or suspects that it constitutes or represents such benefit

If money laundering offence is to be established, the offender must have known or suspected that the property represented proceeds of crime. The term property is wide and includes all property situated in UK or abroad and includes money, real/personal property, heritable or movable property, things in action, intangible property, interest in land, or a right in relation to property other than land. To understand this definition it is vital to understand the principal money laundering offence. In order to attract the principal money laundering offence the alleged offender must know or suspect that the property represents the proceeds of crime. These two important definitions must be read not only together but also with Sections 340(4) and 340(5). These definitions of criminal property and criminal conduct are important while considering requirements under the Act, along with the third definition, that of money laundering.

*Section 340 (4) it is immaterial*

- Who carried out the conduct
- Who benefited from it
- Whether the conduct occurred before or after the passing of the Act

*Section 340 (5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.*

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725 supra note 149; p42
726 supra note 149; p44
727 supra note 537; p43
Sec.340 (11) of the Act, defines money laundering as follows

Money Laundering is an act which:

a) Constitutes an offence under Sec.327,328, or 329
b) Constitutes an attempt, conspiracy or indictment to commit and offence specified in paragraph (a)
c) Constitutes aiding, abetting, counseling or procuring the commission of an offence specified in paragraph (a), or
d) Would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom

The definition of criminal property is directly linked to the criminal conduct and it includes any activity committed abroad, which would have been an offence if carried out in UK. This lead to certain quirky situations such as a UK citizen working in Spain as a bull fighter (legal activity in Spain) which is prohibited under UK law, and his professional proceeds are brought to UK an offence is committed in UK. This sort of problems is however solved by insertion of a provision to Sec.102 of Serious Organized Crime and Police Act, 2005.

Section 413 (1) refers to ‘any offence’ including summary offences, and therefore criminal conduct includes minor as well as serious offences. This also leads to some potential dangers because of the wording of law, as a simple offence in respect of a parking fine would fall under this category. The question often which raised often is does all criminal offences in the UK come under the ambit of ‘criminal conduct’ if it results in some form of benefit, more particular due to absence of de minimis provision, it covers all benefit or profit irrespective of the fact how small or minor the crime is. If a national of UK or a body incorporated in UK is involved in any form of bribery or corruption outside UK, then it constitutes a criminal offence in the UK, and reportable under Proceeds of Crime Act, 2002. Bribery and Corruption is not actually part of

\[728 \text{ supra note 149; p44} \]
\[729 \text{ supra note 537; 42,44} \]
Proceeds of Crime Act, but is contained in Part 12 of the Anti-terrorism, Crime and Security Act 2001.\textsuperscript{730}

The Criminal Justice Act 1988 and the Drug Trafficking Offences Act 1986 each separately established the criminal offence of money laundering. Since then, the Money Laundering Regulations 1993 and POCA have developed out of a change in UK government policy which sought to extend the scope of regulation to activities such as money services. POCA consolidated and replaced previous anti-money laundering legislation and its broad application reflects the shift in attention from drug money to a broader focus on the proceeds of crime more generally. POCA consolidated a number of the offences which apply to individuals previously contained in the Criminal Justice Act 1993 and a raft of drug trafficking legislation. POCA is therefore the primary piece of legislation that imposes criminal liability for money laundering on individuals in the UK.\textsuperscript{731}

POCA also created money laundering offences that cover the laundering of funds obtained from all crimes, with exception of terrorist financing which is taken care by Terrorism Act, 2000. The offences under POCA are:

(a) money laundering, which may be committed by:

(i) concealing, disguising, converting or transferring criminal property, or removing criminal property from the UK;

(ii) entering into or becoming concerned with an arrangement and knowing or suspecting that the arrangement facilitates (by whatever means) the acquisition, retention, use or control of criminal property, by or on behalf of another person; and

(iii) acquiring, using, or possessing criminal property.

(b) failing to disclose money laundering to the authorities; and

\textsuperscript{730} ibid; p80
\textsuperscript{731} supra note 608; p38-40
(c) tipping-off a third party that a disclosure has been made to the authorities, or making a disclosure that is likely to prejudice an investigation. Falsifying, Concealing or destroying evidence will also constitute an offence.

The money laundering offences above are committed where a person deals in “criminal property”. This is defined as property which:

(a) constitutes a person’s benefit in whole or in part (including pecuniary and proprietary benefit) from criminal conduct; or

(b) represents such a benefit directly or indirectly, in whole or in part; and

(c) the alleged offender knows or suspects that it constitutes or represents such a benefit.

While it must be proven that the property involved is within the definition of criminal property, it is not necessary for a prosecutor to prove the actual crime that generated the benefit gained. It is sufficient if it is proved that the property is derived from a criminal origin. Further, liability attaches irrespective of who committed the criminal conduct, who benefited from it or when it occurred. Under POCA a person is said to have benefited from the conduct if he obtains property as a result of, or in connection with, the conduct concerned. The definition of criminal property is therefore potentially quite broad.\(^\text{732}\)

POCA’s definition of criminal property has been subject to debates in English Courts. Though potentially broad in scope, various decisions have demonstrated that there are limits to the ML offences set out in POCA. For criminal liability to arise, the proceeds, benefit or gain must be derived from a criminal property. The criminal property includes but is not limited to proceeds of tax evasion, benefit obtained through bribery & corruption, benefit obtained or income received through operation of criminal cartel, and any cost saving which arises due to non compliance of regulatory requirement. It is somewhat of a distortion to portray the power in UK to tax criminal

\(^{732}\) supra note 608; p40-42, 48
earnings as an exercise in crime control. In this regard the inclusion of the taxation powers in the present Act is a perfectly legitimate exercise of taxation powers rather than an exercise in crime control The concept of sin taxes often referred to as levying higher taxes on alcohol and tobacco.\textsuperscript{733}

Both natural and legal persons may be prosecuted for breaches of anti-money laundering legislation. However, to prosecute a corporate entity in England and Wales it is necessary to establish that a “directing mind” of the company (i.e. an individual director or member of senior management) had the appropriate knowledge of the offence to be found responsible for committing it.\textsuperscript{734}

5.2.9 Money Laundering Regulations (MLR)

It is worth to emphasize that money laundering regulations (MLR) are secondary legislation and have the force of law. FSA rules are also enforceable as breach of any of the rules may attract sanctions.\textsuperscript{735} The Money Laundering Regulations 2003, came into effect on 1 March 2004 to implement the Second EU Money Laundering Directive. They also replaced, consolidated and updated the Regulations of 1993 and 2001. It was laid before Parliament on 28 November 2003, implement into UK law the requirements of the Second EU Money Laundering Directive, and came operational from 1\textsuperscript{st} March 2004. The law and regulations, coupled with rules issued by regulators, are complex, to say the least, and in some ways termed as contradictory. These laws or regulations insist that one should comply without any guidance about compliance. However this is improved by guidelines of JMSLG (Joint Money Laundering Steering Group). JMSLG guidance notes which has been approved by HM Treasury have a tremendous influence on AML procedures as they have not only been used in UK but in other countries as blueprint for their guidance notes.\textsuperscript{736} The MLR grants the FSA power to impose civil

\textsuperscript{733} supra note 98; p113  
\textsuperscript{734} supra note 608; p43  
\textsuperscript{735} supra note 695; p20  
\textsuperscript{736} supra note 537; p83-84
penalties against authorized firms, authorized individuals. It may impose fines in amounts it considers appropriate\textsuperscript{737}. In UK the 3\textsuperscript{rd} Money Laundering Directive is implemented party through Money Laundering Regulations 2007 (MLR 2007) as far as relating to CDD and record keeping, and party through Part VII of POCA 2002, and Part III of Terrorism Act, 2000). It has gone beyond the minimums imposed by the directive in two ways. First, by adopting an all-crimes approach instead of referring merely to the proceeds of "serious crimes", and secondly, by imposing criminal liability for failure to comply with the AML requirements\textsuperscript{738}.

The Money Laundering Regulations 2007 (MLR 2007) implement the provisions of the money laundering directive into UK law. The Money Laundering Regulations 2007 require firms to apply customer due diligence measures on a risk-sensitive basis. The Money Laundering Regulations (MLR) place a general obligation on firms within its scope to establish adequate and appropriate policies and procedures to prevent money laundering. Failure to comply with this obligation risks a prison term of up to two years and/or a fine.

The UK money laundering regime can be divided into two areas namely, substantive offences, administrative & regulatory requirements. The administrative requirements are set out in, Money Laundering Regulations, (MLR) and MLR 2007 apply only to the firms in regulated sector In addition financial institutions are also subject to regulation by Financial Services Authority (FSA) The substantive offences some of whom apply to regulated sector, while some apply to all persons is set out in Part VII of POCA 2002.\textsuperscript{739}

\textsuperscript{737} supra note 608; p60
\textsuperscript{739}http://www.slaughterandmay.com/media/559043/an_introduction_to_the_uk_anti_money_laundering_regime.pdf accessed on 10th December 2014
5.2.10 Comparative Analysis & Conclusions

Though USA was first among the nations to bring out a law in the AML regime, UK also followed suit by passing Drug Trafficking Offence Act, 1986 later replaced by an Act of 1994. In UK the criminal law as regards laundering offence is taken care by the Proceeds of Crime Act, 2002 and Terrorism Act, 2000 (which exclusively deal with terrorism related offences) Over passage of time the provisions under Criminal Justice Act, 1988 and 1993 were brought under a single umbrella legislation POCA 2002. Part VII of POCA consolidates all legislation relating to money laundering, except terrorism which is governed by Terrorism Act, 2000. The provisions of POCA are compliant as regards to international conventions and FATF standards. The regulatory and administrative part of money laundering activity is governed by Money Laundering Regulations which also imposes stiff penalties. Similar to the UK pattern India has enacted a sui-generis law, namely the PMLA, and for terrorism the Unlawful Activities Prevention Act, 1967 (UAPA) is in force. However in India there is no set of rules for administrative and regulation point of view, like the MLR in UK as the PMLA and the rules framed there under takes care of these aspects.