CHAPTER 2

ORIGIN, MEANING AND IMPACT OF MONEY LAUNDERING

2.1 Crime and Money Laundering

There are 315 international instruments elaborated mostly on ad hoc basis between 1815 and 1988 which cover 24 categories of offences.\textsuperscript{128} Beginning of the twentieth century saw international initiatives taken to control the use of drugs. Between 1912 and 1972 no less than 12 multilateral conventions were adopted with regard to the regulation of drugs. Therefore the fight against money laundering was not just a new strategy in the fight against crime, but also the fight against drug trafficking.\textsuperscript{129} Without oxygen most life on earth would not exist. Similarly without financial flows emerging from drug trafficking and other transnational organized crime activities, most transnational crime would not take place.\textsuperscript{130} Money laundering can be regarded as a multiplier of criminal activities as it gives economic power to criminals. Laundering makes crime worthwhile by permitting offenders make use of the proceeds of crime, which in turn would result in encouraged criminal behavior.\textsuperscript{131} Scope of money laundering issue is linked to the root of the originating crime. Therefore fighting money laundering without fighting organized crime is a waste of time and efforts. International fight against money laundering is to be complimented with measures to fight organized crime.\textsuperscript{132} Initially countries applied their AML laws only to those crimes

\textsuperscript{128} supra note 30; p111
\textsuperscript{129} supra note 70; page 10
\textsuperscript{131} supra note 69; p160
\textsuperscript{132} supra note 22; p37
which they believed would generate more profits on the belief that seizing such profits would materially reduce incidence of crime.\textsuperscript{133}

Money laundering as a separate offence begins where the intention to conceal the illicit money ends.\textsuperscript{134} The term ‘hot money’ refers to financial movements due to changes in social, economical and political considerations. In turn hot money may be ‘dirty money’ derived from criminal activity or ‘grey money’ associated with illegal activity, or it may be one not connected to either.\textsuperscript{135} Grey money refers to money associated with illegal activity, while dirty money refers to money associated with criminal activity. Together the two terms encompasses a continuum of unlawful activity. Hot money is most often used with capital flight which itself will be a combination of clean, grey and dirty money, depending on the circumstances.\textsuperscript{136}

Several discrete and interconnected factors contribute to the anxiety produced by the link between money and crime. Foremost the enormity of revenues derived from the crime diminishes the deterrence capacity of traditional criminal sanctions.\textsuperscript{137} Money laundering is connected to dealing with property derived from a criminal offence, and need not be restricted to money alone. Laundering is referred generally to offences which are motivated economically that is to say offences which generate profit. Of course not all offences fit in to this category, as murders and kidnapping may be carried out by criminal groups just to avenge vengeance or motivated by anger. The purpose of money laundering regulation is to restrict or rather prevent completely the offender from making a profit out of his offence.\textsuperscript{138} Main object behind an AML regime is to enable enforcement authorities follow the money trail and also simultaneously detect the underlying crime and criminal activities and to take steps in dismantling the criminal

\textsuperscript{134} supra note 69; p115
\textsuperscript{135} Savla, Sandeep (2001) ”Money Laundering & Financial Intermediaries” Kluwer Law International; p7
\textsuperscript{136} supra note 5; p12
\textsuperscript{137} supra 98; p3
groups if any. The criminals are vulnerable to detection once the money trail is followed dedicately and authorities exploit the vulnerabilities.139

Imagine a situation there is no drug trafficking, no corruption, no tax crime, and if so, there would be no money laundering. Given the intricate relationship between money laundering and the predicate crime, it would be difficult to separate the former from the underlying crime. Money laundering is an essential component of any profit making crime as without laundering crime does not pay.140 A drug trafficker, thief, businessman who offers kickbacks to procure contracts, and the corrupt politician, though come from a different social and economic background, have committed vastly different underlying offences. One common thing indeed is that all their crimes involve money. Therefore a substantial portion of criminal activity makes money consumes money or both.141 Cash of course is anonymous and provides no audit trail, so if criminally earned cash can be safely spent as cash, there is no need to launder.142 Money laundering is a follow up which is necessitate to hide the crime which generated the money. It is the restitution process with the inevitable recompense. Money laundering is invariably linked to criminals, especially big criminals. Conversely big crimes usually have a money laundering dimension. Laundering can be to simply put is like spraying chilli powder in a scene of crime, to mislead the investigators.143 Laundered money is invariably transient in nature. The money launderer is a criminal and if he is successful in attempts, will launch further attacks on the financial sector.144

"Crime is universal but some countries export more of it than others"145 The acquisitive crimes are complex criminal activities that requires a highly technical know-

139 supra note 130; p130
140 supra note 33; p38
141 supra note 15; p324
143 supra note 52; p60
144 supra 21; p7
145 ibid
how and generate high or substantial amounts of ill-gotten assets, involving organized
criminal groups.\textsuperscript{146}

Launderers are easily attracted by jurisdictions where income, corporate,
inheritance taxes, exchange control laws, do not exist and where there is absolute
banking secrecy laws which prohibit even an enquiry into the ownership of bank
accounts and shell companies.\textsuperscript{147} In cases of money laundering no individual is directly
harmed or affected, as the financial system is used by the criminal for wicked reasons.
To give an example if large amount of ill-gotten wealth is split in smaller sums and
deposited into various bank accounts, neither the banker or the public is affected on the
face of such an action.\textsuperscript{148} A person may deposit his legitimate earnings into a bank
account in another country, which at this stage is legitimate. But if the said person fails
to declare this income in his tax return, the funds take the color of proceeds of crime,
and the bank though may be unaware of it, is used to launder the funds. The intention of
the person is not to convert his property but to disguise the fact that he is the owner of
the proceeds in the foreign country. Money laundering is therefore as much about
disguising the ownership of property as it is about converting or washing criminal
property.\textsuperscript{149} Interesting there is a strange contrast. While criminals over report their
earnings and pay more tax in order to legalize their ill-gotten wealth, the tax payers on
the other hand under report their earnings to avoid paying more tax than which is
regally due.\textsuperscript{150}

It is to be noted that proceeds of any crime not just drug proceeds, can be
laundered through stock exchanges. Indeed profit from insider trading and other stock
market manipulations are frequently invested in other presumably more secure
vehicles.\textsuperscript{151} Though the Financial service industry is making all attempts to club the

\textsuperscript{146} Durrieu, Roberto “Redefining Money Laundering & Financing of Terrorism”; p11
\textsuperscript{147} supra note 20; p45
\textsuperscript{148} Sienkiewics, Stanley (2007) “Pre-paid Cards- Vulnerability to Money Laundering” , ICFAI, India; p192
England; p2
\textsuperscript{150} supra note 20; p12
\textsuperscript{151} supra note 30; p195
potential loopholes available to launderers, hedge funds are closely monitored in the AML regime. Criminals invests their proceeds in companies and real estate, with an intention to make further profit, legal or illegal. At times the investments are in sectors that are familiar to the criminal such as bars, restaurants, prostitution, cars and transport. Tainted money is often moved under legitimate transactions by adopting false pricing, either with related or unrelated entities. The proceeds may be of criminal origin, or tax evasion or corruption money. The legal entity which is used as a toll gives a legitimate advantage. Falsification of international transactions is an easy mechanism of shifting proceeds from one country to another, without raising any suspicion.

While Hawala ensures confidentiality of the transactions, money laundering on the other hand ensures that such illegally obtained funds are eventually made to appear as legitimate ones. As the AML regime has proliferated internationally, the unregulated Hawala has become a blessing in disguise for money launderers across the globe. If Hawala is usually associated with dirty money, money laundering is the act of cleansing the dirt associated with such money. It is the Saint who removes the taint.

In many countries corruption is so rife that middlemen charge more money even to transfer legitimate money which is declared, forcing the sender to launder the same across borders which is much cheaper. Despite the reason money laundering is always a crime punishable under law. Tax evasion is considered a predicate crime of laundering in most nations. Bribery and corruption are acknowledged source of criminal proceeds which has to be laundered necessarily by the bribe receiver. FATF has strengthened its recommendations to be adopted for PEPs (Politically Exposed Persons)

---

154 supra note 52; p60
156 supra note 52; p58
157 ECOFIN Study Guide- London International Model UN (2014); p7
and their close family or associates.\textsuperscript{158} Proceeds of corruption if part of illicit financial flows can bring a risk of reputation to the recipient financial institutions, and may also result in potentially destabilizing the outflow for the source country.\textsuperscript{159} As the dirty money gets cleansed again and again, the financial system gets more contaminated. The more a criminal is taken for granted as a common man, the more the chances of the financial system getting dirty. Due to blurring of boundaries has led to a situation where transactions each day, as criminological writings have characterized as ‘criminogenic situation’.\textsuperscript{160}

In the 2009 survey white collared crimes such as tax frauds, embezzlement, corporate crimes, IPR crimes along with drug related crimes accounted for major source of criminal proceeds. Taxation or Excise Duty evasion which is not part of the designated offence in FATF glossary, is also identified as a major source of illicit funds.\textsuperscript{161} Trade Transparency Units (TTUs) are formed to help and find out the disparities which exist in import/export documentation, and to indentify international TBML. Trade being common denominator in most of the world’s alternative remittance system, TTUs generate, initiate and support investigations of money laundering including terrorist financing. By sharing the data both the governments (of importer and exporter) are able to cross check the value transacted and to initiate action in the case of abnormalities.\textsuperscript{162} Fraud and money laundering differ in certain aspects. Fraud is likely to affect the financial statements while money laundering may not. Secondly fraudulent act results in loss or disappearance of revenue while the laundering activity generates proceeds which add to the system.\textsuperscript{163}

There are some academic arguments to the effect that money laundering enables criminals to come from the shadows and take part in the legitimate economy. Prof Barry

\begin{itemize}
  \item \textsuperscript{158} ICAEW (2010) “Business & Economic Crime in International Context” Market Foundation initiative http://www.icaew.com accessed 10\textsuperscript{th} September 2014
  \item \textsuperscript{159} supra note 2; p10
  \item \textsuperscript{160} Mitsilegas, Valsamis (2003) “Money Laundering Counter Measures in EU- A New Paradigm of Security Governance versus Fundamental legal Principles” Kluwer Law international; p34
  \item \textsuperscript{161} supra note 75; p8
  \item \textsuperscript{162} Money Laundering & Financial Crime- Vol-II (2012) International Narcotics Control Strategy Report; p5
  \item \textsuperscript{163} IFAC-International Federation of Accountants “ Anti Money Laundering” 2\textsuperscript{nd} Edition; p10
\end{itemize}
Rider and other have also pointed out that it may often be often beneficial to the state as well as to individuals, not only to keep the origin of certain funds secret but actually disguise their provenance. Money laundering is essentially concerned with the enabling of criminals and, on occasion, their associates to retain or recover the proceeds of their offences.\textsuperscript{164} Use of words ‘proceeds’ or ‘earnings’ distracts definition from the fact that those who engage in unlawful activity do not always make a profit. At times a person may disguise a loss and money laundering process will help facilitate this objective.\textsuperscript{165} Though three specific areas such as capital flight, evasion of financial embargoes, proceeds of corruption are present in a secure financial system only the last one is involved in money laundering. The capital flight though a serious issue and criminal offence in many countries, unless the proceeds are from a predicate crime, infusion in to the financial system would not amount to laundering.\textsuperscript{166} No statistics is available internationally to ascertain ‘dirty money’, ‘laundered proceeds’ or ‘capital flight’. As most illicit flows are disguised or invisible, hard data are nonexistent.\textsuperscript{167}

2.2 Impact of Money Laundering – Society & Economy

Two dimensions of transnational criminals are problematic to good governance and security of a nation. First the concentration of illegal power threatens the very rule of law and democratic institutions. Secondly the criminal activities which is a source of wealth and power for organized criminals, inflict considerable physical harm to individual and societies.\textsuperscript{168} If a balancing exercise is to take place between the presence of innocence and the interest of society in fighting a crime, the necessity for presumption is more irresistible in respect of serious offences such as organized crime, than in respect of minor crimes.\textsuperscript{169} According to the justification of a legislation in the German Parliament, the introduction of money laundering offence serves the task of

\begin{itemize}
  \item \textsuperscript{164} supra note 138; p22
  \item \textsuperscript{165} supra note 5; p15
  \item \textsuperscript{166} supra note 138;
  \item \textsuperscript{167} supra note 153; p162
  \item \textsuperscript{168} supra note 107; p113
  \item \textsuperscript{169} supra note 70; p70
\end{itemize}
maintaining the rule of law in the state by eliminating the commission of crimes. This is supported by the rationale of the evolution of money laundering counter-measures, which serve as a means of depriving criminals of their profits, and thereby providing a major disincentive for the commission for the primary offence. Such a treatment of the money laundering offence serves to protect the interest of society in the maintenance of law and order.\textsuperscript{170} Masciandro argues that laundering has pollutant effect. Once laundering takes place in a system, more property will become tainted. This is true and particularly true if tax evasion is to be treated like other forms of ‘criminal conduct’ for the purpose of money laundering.\textsuperscript{171} If an enterprise is allowed to use more dirty money in legal market, the more competitive it would become. Therefore there is a great concern on adverse effect of these profits in licit markets and the penetration of criminal groups in the legitimate economy. A strong legislative action is required to curb the negative impact of illicit funds in the financial sector.\textsuperscript{172} Gresham’s law that ‘bad money drives out good money’ appears to have application in money laundering also. Money launderers often tend to outbid potential purchasers due to availability of huge funds. Launderers’ interest in an asset does not stem from its actual value, as their intention is to conceal the ill-gotten wealth, they will be always willing to pay more than the actual value of asset. This will artificially drive the price and would deter honest buyers.\textsuperscript{173} Financial secrecy is harmful to society as it facilitates informal economic activity, and tax revenues meant to fund welfare programs are lost. It supports the growth of organized crime which debases the laws upon which society is constructed. It shelters abusive corporate practices, aids terrorist organizations who challenge the very legitimate existence of a State.\textsuperscript{174} As regards the view that insider trading is a victimless crime, it is argued that it is the market which is a victim as it has suffered. This is countered by another view that when law condemns a number of

\textsuperscript{170} supra note 160
\textsuperscript{172} supra note 58; p6
\textsuperscript{173} Masciandro, Donato et al. (2008) “Black Finance – The Economics of Money Laundering” Edward Elgar; p157
\textsuperscript{174} supra note 5; p107
offences committed against community such as treason, which has no victim but is against the State as a whole.\textsuperscript{175} Possession and ownership of luxurious and high value assets by criminals, which honest citizens are unable to afford, is inequitable, leading to social stratification and fuel social tension. Businessmen engaged in selling goods to criminals may amass huge profits again creating economic distortion.\textsuperscript{176}

Informal economy can be divided into two segments, the first illegal sector which encompasses economic activity associated with grey money. Secondly the criminal sector is associated with dirty money. The two sectors may at times overlap. Narcotics trade which is part of criminal sector, its proceeds are part of dirty money. In contrast tax evasion is treated as grey money as it takes place in between formal and informal economies. The intention to escape or circumvent any obstacle, legal or otherwise, unites both the illegal and criminal sector.\textsuperscript{177} It is important to mention that most forms of money laundering eventually result in the pumping of ‘dirty money’ into the legal economy.\textsuperscript{178} When the financial crisis in US started due to sub-prime loans, it affected banks and financial sector worldwide. When the banks were in need of liquidity criminals offered their ill gotten gains to save the banks from crisis. The criminals are no Robin Hood to save banks, but did this with the sole intention of laundering proceeds of crime. An observer with UNODC reported that an amount of 238 billion Euro of drug money was laundered during financial crisis. Laundering of wealth leads to capital flow, and such inflow of capital can foster economic growth in the West, while the crime hampers the growth of rest of the world.\textsuperscript{179} The assets at the control and disposal of criminal organizations is so large that its transfer from one jurisdiction to other may have important economic consequences. Huge amounts of laundered capital may bring instability to the world market.\textsuperscript{180} Money Laundering is an autonomous criminal economic activity whose essential economic function lies in the transformation of liquidity of funds of illicit origin. It can be regarded as an act of

\textsuperscript{175} supra note 138; p2
\textsuperscript{176} supra note 75; p41
\textsuperscript{177} supra note 5; p71
\textsuperscript{178} supra note 70; p6
\textsuperscript{179} supra note 17; p9
\textsuperscript{180} supra note 12; p306
changing ‘potential purchasing power’, into ‘actual purchasing power’ usable for consumption, investment, saving or reinvestment. When a purchasing power cannot be directly put into use for consumption/investment due to its illegal accumulation, it is transformed into actual purchasing power, resulting in money laundering. Viewed from the perspective of OECD member countries, harmful tax competitions can lead to fiscal degeneration and economic inefficiencies in their countries.

As launderers’ intention is to conceal their proceeds and disguise their origin, they are willing to pay more for a particular asset that its actual worth, and also end up amassing otherwise unappealing properties or enterprises simply to increase their share in the market and gain foothold in an economy. This may result in artificial price increase in certain sectors. The problem of criminal money is an universal phenomenon. Arlacchi has analysed the money streams between countries and has found that when put together all countries have considerable net surplus in balance of payments. This only suggests that structurally there is more money coming into a country than leaving a country. According to him annually there is a money stream of around US$ 100 billion. This is the money that remains underground until it emerges in the legal economy after having passed through various cycle of money laundering process. However due to lack of sufficiently empirically tested material, knowledge and insight, we are unable to establish the total criminal money available in economy. Except some crude assessments of money flow nothing concrete can be done.

Though money laundering is rampant in all countries, it has significant economic and social consequences for developing nations. Markets in developing countries tend to be small and are therefore susceptible to disruption from criminal or terrorist influences. Countries with fragile financial system are affected leading to economic and social consequences, as they are again susceptible to such influences. A country having reputation of money laundering haven could cause adverse

181 supra note 173; p2
182 ibid; p4
183 supra note 5; p248
184 supra note 173; p156
185 supra note 22; p36
186 supra note 1; p-II-1
consequences in its development, as foreign financial institutions would limit their transactions with such havens, and would also subject transactions with those countries with extra scrutiny leading to extra expenses and a termination of lending relationship altogether at a later date.\textsuperscript{187} The world's largest and wealthiest economies also act as hosts to money launderers, as these jurisdictions have great demand for illegal drugs which is primarily linked to laundering activity. Further the launderers also look for more sophisticated financial service sector to launder their proceeds, and hence choose these jurisdictions.\textsuperscript{188} Illicit money flows brings in billions of dollars from non-western to Western countries, and lodged permanently in the form of deposits, properties and market investments particularly in the Europe and United States. Some would feel that this money flow would indeed benefit West, maximize the private profit and reduce the role of Government, which is a dubious argument.\textsuperscript{189} The richest countries are the biggest promoters of lawlessness in international trade and finance. In a process that parades as agreeable enterprise, illegal money in the trillions of dollars flows effortlessly.\textsuperscript{190} More than sixty sovereign nations sell their laws to criminal and commercial buyers, and over a million dummy entities exist for the sole purpose of subterfuge and evasion. Much of the world money indeed pass through a system which is designed to handle illicit proceeds.\textsuperscript{191}

2.3 **Rationale behind Anti-Money laundering fight- legal, socio-economic, civil and human rights perspectives**

The influence of money laundering to economics is a very controversial issue due to lack of literature available on the macro economic effects of money laundering.\textsuperscript{192} Economics of crime point out that like every other business, a portion of criminal revenue is reinvested in criminal business cycle, while a portion is taken as

\textsuperscript{187} ibid; p-II-3
\textsuperscript{188} supra note 163; p4
\textsuperscript{189} supra note 153; p202
\textsuperscript{190} ibid; p338
\textsuperscript{191} ibid; p339
\textsuperscript{192} supra note 9; p32
profits. This distribution of profit between various individuals allow purchase of consumer goods or to prove legal income to tax authorities.\textsuperscript{193} Macroeconomic approach assumes that any revenue which has not suffered tax either legal income or illegal, has to be laundered in some form or other.\textsuperscript{194} The micro economic approach on the other hand estimates the income attributable to each type of crime. These estimates normally do not include the formal economy or activities that, though legal, are not reported in order to evade taxes. The problems associated with the micro economic approach basically involve the paucity and unreliability of the data.\textsuperscript{195} Threat to macro economic performance and financial stability is linked to money laundering, and to terrorist financing in certain cases. Laundering destabilize the global inflows and outflows. In many cases, threats also arise from the predicate crime themselves.\textsuperscript{196} Money laundering associated with tax frauds would undermine financial or macro economic activity. Tax crimes significantly affect government’s revenue stream to a point where the fiscal balance is severely undermined\textsuperscript{197}

Apart from the political and economic aspects, the sheer volume of profits made by organized crime, necessitates the pressing need to launder these profits. Without sophisticated money laundering, the amounts of profits generated in organized crime would in itself be an indication of their illegal origin.\textsuperscript{198} Much of the emphasis of the politics of international anti-money laundering is to deprive criminals, of the fruits of their crimes and the means of their committing more crimes. Another goal is to allocate the seized proceeds to governments and law enforcement. The economics and politics of anti-money laundering are to redistribute the economics and power of crime.\textsuperscript{199}

The traditional approach of privacy rights are based on the protection of private individuals, and to protect their private affairs from unwarranted their party scrutiny.

\begin{flushleft}
\textsuperscript{193} Brien, Nicolas & et al. (2011) “A Bilateral Study on Money Laundering in the US & Mexico” Global Financial Integrity & Columbia SIPA; p28 \\
\textsuperscript{194} supra note 59; p327 \\
\textsuperscript{195} ibid.; p329 \\
\textsuperscript{196} supra note 2; p35 \\
\textsuperscript{197} IMF (2012) “AML & CFT Guidance Note”; p10 \\
\textsuperscript{198} supra note 70; p8 \\
\textsuperscript{199} Zagaris, Bruce (2001) “Trends in International Money Laundering in US Perspective” International Lawyer Vol-35 No-2; p840
\end{flushleft}
The confidentiality is only to protect one from unwarranted examination, and does not on the contrary permit one from pursuing activities which are harmful to others. The right to deploy one’s financial resources as one deems appropriate should be protected from unwarranted third party scrutiny so long as the particular activity pursued is legal. The evolution of AML regime depended on the relative weight policy makers put on the harms stemming from ML and their preferences for maintaining privacy. Expanding role of AML has raised concerns especially with civil liberties organizations who have questioned the scrutiny of individual’s financial affairs which the government has authorized. There is no doubt that “enhanced due diligence,” “enhanced scrutiny” and related guidelines for strengthening and further promulgating Know Your Customer (KYC) principles, and suspicious activity reporting (SAR) are, through coordinated intergovernmental efforts, spreading across the globe in the forms of hard and “soft” law and leading practices. Meanwhile, however, privacy rights initiatives have also continued to gain momentum. As the former serve to foster transparency and the latter may easily serve to deter it, there is a fundamental disparity between these two important objectives. In order to effectively detect assets derived from crime, some interference with confidentiality of relationship is necessitated and in fact warranted. Privacy laws in US and Europe center fundamentally around consumer protection, which run counter to AML legislation. This is due to the reason that FATF regulations mandate business entities to report information about consumers especially suspicious activities. New privacy laws on the other hand requires elaborate disclosure about how and what information about customers are collected and maintained, while limiting the institution’s ability to share the information. Privacy by its very nature, is at odds with transparency. Financial secrecy laws must not come in the way of implementation of AML measures and should not consist measures in excess of

200 supra note 5; p287
201 supra note 173; p201
202 supra note 40; p80
203 supra note 163; p5
205 supra note 163; p11
Legitimate data protection and privacy concerns, as per Recommendation 4 of FATF.\textsuperscript{206} As banker’s discretion can be linked to the customers right to privacy the question arises is whether the measures imposed by AML do not transgress the limits of right to privacy which is not only guaranteed under municipal law, but also by Art 8 of the 1950 European Convention on Human Rights, Art 17 of the 1966 ICCPR.\textsuperscript{207} In the interest of justice privacy rights must succumb to the higher public interest inherent in the prevention and detection of a crime, or criminals will carry out their illicit behavior with impunity by using privacy as a mask against discovery\textsuperscript{208}

There are several human rights issues involved in the enforcement of money laundering laws. Some are of the view that the disclosure requirements under AML laws affect one’s right to privacy. Disclosing information on financial transactions to foreign countries also involve violation of constitutional guarantee.\textsuperscript{209} The concern relating to data protection and wider human rights issues emanating from powers vested with investigators are manifold. Notwithstanding the attempt in EU member states to provide FIU with a solid legal basis, many of their function remains unregulated, giving concerns of human right violations.\textsuperscript{210} It had become clear during the negotiations preceding the Vienna Convention that it was difficult to devise a form of words that would be acceptable to every state. It was therefore necessary for legislators in countries whose prosecuting system operate on legality principle, to provide measures to safeguard from prosecuting innocent people\textsuperscript{211} Privacy consideration are not the only ones at stake in the money laundering information exchange. Further concerns are raised in the context of the European Convention on Human Rights, with regard to the right of fair trial, established by Art.6. A facet of this right lies in the interrelated principles of the presumption of innocence and defense rights. Issue of presumption of innocence assume significance in the back drop of investigating suspicious transactions,

\textsuperscript{207} supra note 70; p144
\textsuperscript{210} supra note 160; p183
\textsuperscript{211} Stewart P “International War on Drugs p393 cited in supra note 70; p116
through various channels of communication Recognizing the danger of exchange of information on the basis of suspicion, and the probability of such information being used in a criminal investigation in another EU country, the Committee of Citizen Rights of the European Parliament has suggested for insertion of a separate provision guaranteeing the protection of fundamental rights through effective remedies of judicial nature. 212 The reversal of burden of proof, and non conviction based civil court proceedings in confiscation of properties and assets are two most controversial human rights issue in the field of law enforcement of laundering. These two issues are subject to constant litigation. Experts opine that these two issues in fact violate constitutional rights of fair trial (civil proceedings) and the privilege to property without subjecting to reverse burden of proof. This has spurred a very complex legal debate where the key dispute concerns private rights versus public interests and punitive versus preventive actions. 213 Confiscation of proceeds of crime is a profitable one to many jurisdictions, especially in USA where the same is used as a source of funding cost of law enforcement. This is termed as ‘profit oriented approach to criminal justice’ and is subject to severe criticism, as scholars feel that investigating with a focus of profit to government is fundamentally wrong. Such a motive would influence the performance of law enforcement officers as they would always be concentrating on income from confiscated proceeds leading to a bias. 214

There is a moral dimension that crime should not pay, which is simply not acceptable to the society that a person who does wrong should benefit as a result. Further ensuring that the crime does not pay would act as a deterrent. But this argument goes if the crime is economically motivated as in the absence of any profit, there would be no point in committing the crime in first place215

It is not possible to segregate or identify the funds which come from legitimate business and funds which are ill gotten gains, especially when the legitimate assets are

212 supra note 160; p182
213 Jensson, Armar (2011) “Crime should not pay- Iceland and the International developments of criminal asset recovery” Haskoli Islands; p25
214 supra note 70
215 supra note 138; p24
blended with illegitimate operations unwittingly.\footnote{Hank J Brightman (2009) “Today’s White Collar Crime- Legal, investigative & Theoretical Perspective” Rutledge; p283} However it is estimated that about a third of global cross-border flows of dirty money are related to funds generated from criminal activities and about two thirds from funds related to commercial activities mostly linked to tax evasion attempts.\footnote{supra note 130; p34} In the absence of a comprehensive estimate of money laundering at international level and judging the need of financial sector to have data, private consultancy firms around the globe are at times involved in collecting data. Celent one such research and consultancy firm estimated that during the period 2002-2005 over US$ 0.9 trillion (2% of GDP in 2005) has been laundered which is figuring at the lower end of IMF consensus range of estimates. According the toe firm money laundering is wide spread in America at 38%, Asia Pacific Region 31% and Europe 26%, while Africa and middle east account for a just 5%.\footnote{ibid; p32} A review of existing literature does not give any picture about the proportion or volume of crime proceeds which are laundered, but rather reveals assumption of several authors.\footnote{ibid; p36} The average range of estimates for the amounts available for laundering out of crime is general 2.1% to 4% of GDP fall within IMFs original consensus range of 2% to 5% of GDP. With the above estimates, tax and customs related money laundering activities are included, results would move towards the upper end of the IMF consensus range.\footnote{ibid; p42} Comparing FATF model with the UNODC 2003 estimates on total drug proceeds would result in an estimate of money laundering equivalent to 2.4% of GDP or US$ 1.4 trillion in 2009 which would be slightly higher than the initial estimate of FATF extrapolated in 2009, which would be around US$ 1.2 trillion.\footnote{supra note 130;p3} When results of various groups are combined there is indeed a convergence irrespective of divergence within each group. The overall best estimate of criminal proceeds laundered fluctuate around 3.6% of GDP which is equivalent to US$ 2.1 Trillion in the year 2009.\footnote{ibid} FATF defector estimated that

\footnote{supra note 130; p3}
between two thirds and 70% of the total profits were being laundered. In February 2011 Global Financial Integrity published a report on transnational crime in the developed world. Analyzing existing estimates of the proceeds of transnational crime in 12 key categories GFI arrived at a total estimate of US$ 650 billion of such crime proceeds per year. Research has indicated that the amounts of money laundered tend to prompt additional crime proceeds of between 6% and 10% of the original crime proceeds. Even if the predicate crime did not take place in the laundered jurisdiction, it is likely that criminal groups would use their financial power, at least for corruption, which will have a negative impact on those jurisdictions. All these guesstimates are always uncertain, as it is simply impossible to determine the size of illicit traffic or of the financial benefits reaped from it. It is therefore useful to keep in mind the warning contained in 1990 report of Canadian Solicitor General “there is no visible method for determining the size of the illicit economy. Estimated figures in this area of illicit proceeds, however carefully calculated are only guesses. Once stated they take on a reality they do not deserve”. According to Michael Levi the UN Counter Laundering Consultant, the paradox of laundering is that for centuries onshore and offshore bankers were tolerantly laundering proceeds of crime from many countries, without any obvious harm to them or their economies.

2.4 Predicate Crimes/Predicate Offences

From the legal perception we speak of ‘predicate offences’, it is forbidden to perform acts that support a crime after it has been committed. A predicate offence is the underlying crime that produces the proceeds that are the subject of money

---

223 ibid; p40  
224 ibid; p34  
225 ibid; p130  
226 Schneider, Beare “Tracing of Illicit Funds” Cited in supra note 70 by author  
228 supra note 22; p63
To put it simply, a predicate offense for money laundering is the underlying criminal activity that generates proceeds that, when “laundered” would eventually lead to the offense of money laundering. There would be no offence of money laundering without a predicate offense of underlying crime. Designating certain criminal activities as predicate offenses for money laundering is necessary to comply with international standards. Vienna Convention when it was drafted to control drug related offences, considered only drug related laundering. However subsequent instruments though went with the language of the Vienna Convention, expanded the scope of predicate offence to include other profit generating crimes also. In 1998, under the auspices of the UN Office for Drug Control and Crime Prevention, the report Financial Havens, Banking Secrecy and Money Laundering was published. Under the header ‘issues for consideration’, this report addresses 'predicate offences' The report observed that “The time may have come to end the artificial division of criminal money into categories depending on the nature of the crime. ... One possible approach would be to have member countries agree that any funds that are derived through criminal activity are funds that can give rise to a charge of money-laundering.”

Art.1.1.2-Use of Terms:

(f) the term ‘predicate offence’ means any criminal offence, even if committed abroad, enabling its perpetrator to obtain proceeds as defined herein

Art.1.3 (c) “predicate offence” shall mean any offence, which generates proceeds of crime.

---

229 supra note 1;p-III-1
231 supra note 1; p-V
233 The term “Predicate offence” as per Art 1 (3) of the Vienna Convention is used to designate the crime that generated the property that the laundering seeks to present as legitimate In the early days of AML, it was necessary to differentiate between predicate offences that did and those that did not trigger the AML regime. With the widening of the ambit of AML, this distinction is less important
Taking into account the transnational nature of predicate crimes and the offence of money laundering, the scope of predicate offence has been extended beyond national jurisdictions. Article 6(2)(c) of the Palermo Convention and art 23(2)(c) of UNCAC stipulate that ‘predicate offences shall include offence committed both within and outside the jurisdiction of the State Party into question’. FATF recommendations are specific to the effect national legislation to include predicate offence committed elsewhere.

Money laundering is a derivative offence, which cannot be committed unless the predicate offence has been accomplished. The gap in terms of time between the predicate offence and the money laundering offence, gives a retrospective dimension to money laundering. Money laundering is a derivative offence and its criminality is a function of the predicate crime. If there is no consensus on the harmfulness of the predicate crime, there is little incentive to view laundering related to that predicate crime as a pressing national interest. As predicate crimes are more often financial crimes, the laundered proceeds may not only be in the form of cash, but other financial instruments. While the predicate crime is harmful, the harm is more concentrated in the jurisdiction where it is committed. But on the contrary money laundering in itself is not harmful, as it brings revenue to the laundering jurisdiction. Therefore countries do face an externality, that it is worth turning a blind eye to money laundering linked to offences committed elsewhere. In other words countries do have an incentive ceteris paribus to allow laundering monies linked to predicate crimes committed elsewhere. When countries act on such narrow self-interest it tremendously eases international AML efforts.

---

236 ESSAAMLG (2009), “An assessment of the links between the corruption & the implementation of anti-money laundering strategies and measures in the ESSAAMLG region”; May 2009; p30
237 Pena, Joyce D – “Exporting Criminality – Money Laundering in Domestic & International Context “
238 supra note 133; p7
239 supra note 173; p226
A study showed that if money laundering was separated from the predicate crime the money laundering related coefficients turned positive\textsuperscript{240}. Unger’s study showed that if money laundering was separated from the predicate crime for example by only looking at the recipient countries (of crime proceeds) with an assumption that such laundering would not bring in any further crime in recipient countries, the results show an expected economic growth of between 0.6% to 0.14% of GDP for each US$ 1 billion laundered. In other words, according to this study, money laundering does not itself dampen economic growth, but the crime that it is intermingled with does\textsuperscript{241}. Another point of view is that whether money laundering and predicate crime can be separated geographically. Even for the sake of argument if organized groups decided not to undertake criminal activities in the countries where they have laundered their proceeds or invested their funds, it would be unrealistic to assume that they would not engage other criminal activities, especially things like corruption which is always possible and at times necessary. Some authors have pointed out that money laundering can lead to spill over mechanism, from criminal money to crime. Because of the possibility of money laundering in the financial sector, reinvestment of the money in illegal activities in the licit sector can be the consequence.

The problem at times is that it is always not easy to differentiate between the money laundering offence and the predicate offence, and the tendency is to see them as a single offence\textsuperscript{242}. The United Nations in its Model Legislation on Money Laundering adopted a broad definition of money laundering, and by permitting each country either to define the same by a category, by a sanction based assessment of seriousness or by a list of specific offences. Though the UN legislation is silent on the scope of predicate offence, it does not envision a broad definition of predicate offences. On the contrary the UN Model Crime Bill defines a predicate offence as any ‘serious offence’. Profit generating character of any given criminal activity shall be the criteria for listing an activity as a predicate offence of money laundering\textsuperscript{243}.

\textsuperscript{240} supra note 130; p130
\textsuperscript{241} ibid; p117
\textsuperscript{242} supra note 5; p195
\textsuperscript{243} supra note 1; p.v.5
Predicate crimes are crimes whose proceeds are laundered. In most countries, however, only the laundering of the proceeds of certain crimes is illegal\textsuperscript{244}. As the essence of money laundering normally center around handling other person’s proceeds of crime, it is evident that a predicate offence must have been committed. In cases of laundering of proceeds of crime relating to drug trafficking or other organized crime, it may not be difficult to identify the nature of predicate crime. However the position changes with regard to offences relating to tax evasion. For instance if a tax payer obtains rebate from revenue authority by making a false declaration, the offence at a later stage can be easily found out and established. But it is not so in other corporate frauds or offences. For instance if a company presents false accounts to authorities to minimize profits on which corporate tax need to be paid, the position is different. Although the criminal offence of false accounting would have been committed, in this situation the criminal conduct will not have caused the tax payer to obtain any money which he did not already have. In other words in the above situation it can be said that the company has acquired any money out of the crime\textsuperscript{245}. The UK money laundering legislation does not prevent the use of safe deposit boxes for cash to be spent later. If the predicate offence is already a crime and there exists power to confiscate the profits of the offence, what additional force do provisions have which make it a crime to dispose of the money? If somebody contemplating a course of conduct involving the unlawful acquisition of money followed by its laundering is not put off by the existence of the predicate offence nor by the existence of power to confiscate it is hardy likely that the existence of the laundering offence will make much difference. The deterrent argument would be slightly stronger if the chances of being detected for the predicate offence are significantly lower than for laundering, which will seldom be the case, or where the penalties for the laundering offences are so much higher than for the predicate offence as to make a different to a rational, calculating criminal\textsuperscript{246}. With regards to legal definitions of money laundering, the most problematic aspects relate to

\textsuperscript{244} supra note 133; p22
\textsuperscript{246} supra note 12; p288
predicate offences. From a legal point of view mere hiding or disguising the source of money will not amount to laundering, unless the funds were from a criminal activity. Therefore, what exactly amounts to money laundering, which actions and who can be prosecuted is largely dependant on what constitutes a crime for the purpose of money laundering.\footnote{Unger, Brigite (2006), “The Amounts and Effects of Money Laundering” Report for the Ministry of Finance, 16th February 2006; p24}.

It is argued frequently that if laundering of proceeds is made difficult there would be less predicate crime to commit. Assuming that there is in place a perfect mechanism to curtail laundering, the profits which come out of drug sale is so huge that there would be ample incentives if them simply hold the proceeds in cash form, till they feel it safer to use it. Predicate offence refer to the original crimes from which ‘dirty’ proceeds were derived and which necessitated the laundering process. Logically terrorism does not fit in to this view, as it is not a crime from which dirty proceeds are generated, which needs to be laundered sooner or later. Rather financing of terrorism involve dirtying of money or reverse laundering. Money may pour in from clean sources and since it is used to finance a criminal object, it becomes dirty. Unlike money laundering, terrorist financing does not seek to get rid of dirty money of past crimes, but primarily aim to avoid detection of clean money which has to be used for future crime (terrorism). For these reasons listing of terrorism as a predicate crime, does not appear to make since in the classical paradigm\footnote{supra note 36; p28}. In terms of defining the predicate offences which trigger a money laundering prosecution a broad-brush approach could be taken with the legislation bringing into net the profits of ‘all criminal activity’. A first approach would be that money laundering could be defined in relation to proceeds of a list of specific offences. To prevent this list from being too restrictive, there could be a provision that the predicate offences could be extended by a secondary legislation. Second approach could be made to either the minimum or maximum sentence of the predicate crime\footnote{supra note 208; p114}. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 19908 (the Strasbourg
Convention), takes this a step further, by giving its Article 6 the title: 'Laundering offences'. Whilst repeating constituent elements already contained in the Vienna Convention, it widens the circle of 'predicate offences' beyond drug trafficking. The Strasbourg Convention define 'predicate offence' as: any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in the 'laundering article'.

Despite harmonization efforts at both the European and international level, national legislation criminalizing money laundering continue to differ. Most countries have listed serious offences as predicate crimes but have nevertheless adopted different approaches to what exactly constitutes a serious crime for the purpose of money laundering. The best possible way to address the problem of definition, would be to adopt a very broad approach to predicate offences, to expand their scope as much as possible. This will also take care of double criminality requirement and would nurture international efficacy of law enforcement actions. Alternatively a broader list of predicate offences would also lead to increased effectiveness in the domestic legal context, in cases where the predicate offence was committed within the same state as the laundering offence. In the absence of such a coverage, important aspects of laundering may go unregulated and thus would proliferate.

Criminal money, corrupt money and commercial money are three types of dirty money which flows across borders. Criminal activities range from contraband goods, slave trading, embezzlement, securities fraud, racketeering, counterfeit trafficking, prostitution and more. However many nation states bar only criminal inflows from activities such as drugs, terrorism, bank frauds etc. Cross border dirty money is distinguished, from legitimate money by two features. First feature is it is usually evading of taxes, which may not be the primary motive. Secondly it almost disappears from any record of the originating country. While legal transfers are recorded as deposits/expenses in the books of the company/individual making such transfer, illegal

250 supra note 232; pp300-301
251 supra note 173; p115
252 supra note 69; p2
transfer are specifically designed to avoid reports or bank statements or evidence of their place of re-location\textsuperscript{253}. One point of view is that tax evasion borders on clear money activity, as the money involved tend to be legal in origin.\textsuperscript{254}.

### 2.5 Criminalization of Money Laundering

Criminalization of money laundering provides one more avenue to prosecute criminals. Criminals who do the underlying criminal offence can be prosecuted as well as the persons who assists them in laundering the illegally obtained funds.\textsuperscript{255} Traditionally the focus towards laundering was on the underlying offence generating the money. Started first by the US in 1986 and progressing rapidly around the world the trend is now to criminalize the very act of laundering money and to make the act of laundering, completely independent of the underlying offence, as a grounds for assets forfeiture. In fact in some jurisdictions that have taken this path, laundering the proceeds of crime can lead to far more severe penalties than the underlying offence\textsuperscript{256}. The criminalization of money laundering is deemed thus essential in order to protect interests as diverse as human life, property, the social fabric and public order\textsuperscript{257}. Criminalization serves three objectives. First it compels a state to be compliant with AML measures. Secondly it ties acts that may appear innocent to outright criminal activity. Thirdly criminalization provides a basis for international cooperation in critical law enforcement function. As the money laundering offence has been accorded a status of criminal offence nature, competent authorities are empowered to seek mutual legal assistance, and to use powerful international tools to trace, enforce and prosecute international money laundering. Originally criminalization of money laundering was the proverbial stick wielded by the government to ensure that the gatekeepers of the legitimate economy did not allow the proceeds of a number of criminal activities to enter the legal economy. Gradually however the criminalization of money laundering

\textsuperscript{253} supra note 153; p23
\textsuperscript{254} supra note 5; p250
\textsuperscript{255} supra note 1; p-II-7
\textsuperscript{256} supra note 20; p99
\textsuperscript{257} supra note 160; p105
came to be seen not only as a stick to beat the gatekeepers, but also to handle the predicate offenders.258

Criminalization of money laundering, serves three principal objectives of the AML law. First it rather compels compliance with AML preventive measures, and secondly it ties acts which may appear innocent to outright criminal activities, for example conduct of a person or entity in processing the illegal proceeds of a crime. Thirdly it establishes a basis for broader international cooperation, especially in the light of the transnational character of money laundering crime and domestic authorities at all times have recourse to powerful international tools such as tracking, enforcing and prosecuting international laundering.259

2.5.1 Defining a Crime

The Criminalization of money laundering should be done in accordance with the Vienna Convention and Palermo Convention, and the relevant provisions are contained in Art.3(1)(b) and Art.3(1)(c) of Vienna Convention and Art.6(1) of Palermo Convention.260

Though Vienna Convention restricts its scope to drug trafficking, and also do not define the term ‘money laundering’, it eventually classifies the offences into three categories (1) the conversion or transfer of property with the knowledge that such property is derived from drug trafficking offence, and any act of concealing or disguising the illicit origin of funds, or assisting any person involved in drug offence to evade the legal consequence of his/her action.261 (2) the concealment, or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property with the knowledge that such property was derived from drug trafficking offence262 and (3) the acquisition, possession or use of property with the knowledge that the property is derived from drug trafficking offence. According to

---

258 supra note 70; p121
259 supra note 1; p-V-3
260 ibid, Recommendation 1 of FATF, deals with scope of criminal offence of money laundering, p-V-3;
261 See Art.3 (1) (b) (ii) referred as conversion or transfer of property
262 See Art.3 (3) (c) (i) (referred as concealment or disguise of property)
Vienna Convention, the first two categories are to be incorporated in the domestic law, while the third one though not mandatory is subject to constitutional principles and basic concepts of its legal system\textsuperscript{263}.

These three types of criminal conduct differs to the extent to which their nexus with the predicate offence can be established. Although the three types of criminalization requires that the alleged offender should be aware of the criminal origin of the proceeds (termed as ‘property’ in Vienna Convention) it is clear that the first type of conduct constitutes a more active type of money laundering than the others. While the first type implies active engagement in the predicate offence, it is completely absent in the third type of laundering activity\textsuperscript{264}.

The Second type of conduct described in Vienna Convention Art 3 (b) namely the concealment or disguise of criminally derived proceeds, is where the heart of money laundering offence lies. The treaty description clearly draws from the American criminalization model\textsuperscript{265} and its provisions have been incorporated in to the legal system of many of the countries barring Netherlands\textsuperscript{266}. The third type of conduct is the most passive form of cooperation with the perpetrator of the predicate offence, inasmuch as it does not requires proof of any kind, but merely the acquisition, possession or use of proceeds, and the knowledge at the time of their receipt, that these proceeds were criminally derived is enough.\textsuperscript{267}

Art.6 (1) of Palermo Convention reads as follows

\textit{Art.6 – Criminalization of the laundering of proceeds of crime}

\begin{thebibliography}{9}
\bibitem{263} supra note 1; p-V-5
\bibitem{264} supra note 70; p114
\bibitem{265} Refer 18 USC 1956 (a)(i) (B) (I)
\bibitem{266} supra note 70; p115
\bibitem{267} ibid; p115
\end{thebibliography}
1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

The UN has adopted model legislation based on the concepts provided in the Palermo Convention, in the UN Model legislation on laundering, confiscation and international cooperation in relation to the Proceeds of Crime 1999\textsuperscript{268}.

Sec.17 – Money laundering offences\textsuperscript{269}

A person commits the offence of money laundering if the person:

(a) Acquires, possesses or uses property, knowing or having reason to believe that it is derived directly or indirectly from acts or omissions:

(i) In (name of State) which constitute an offence against any law of (name of State)punishable by imprisonment not less than 12 months

\textsuperscript{268} supra note 1; p-V-5
\textsuperscript{269} United Nations International Drug Control Programme (UNDCP) (2000), Model Money Laundering and Proceeds of Crime Bill 2000
Outside (name of State) which had they occurred (name of State) would have constituted an offence against the law of (name of State) punishable by imprisonment not less than 12 months

(b) Renders assistance to another person for:

(i) The conversion or transfer of property derived directly or indirectly from those acts or omissions, with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof

(ii) Concealing or disguising the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly from those acts or omissions

While drafting the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime 1990, the Council of Europe adopted elements from Vienna Convention. Other international organizations that followed suit are OAS (Organization of American States) with its Model Regulation Concerning laundering offences connected to Illicit Drug Trafficking and Other Serious Crime, 1999 (known as OAS Model Regulations), the UN Model Legislation on Laundering, Confiscation and International Cooperation in Relation to Proceeds of Crime, 1999, and the UN Model Money Laundering & Proceeds of Crime Bill, 2000. The definition of three types of activity under Art.3 (1) of Vienna Convention, was copied almost verbatim into Art.6 (1) of Money Laundering Convention and into Art.2 of European Money Laundering Directive.

---

Art.1.1.1- Definition of Money Laundering

For the purpose of the law, the following shall be regarded as money laundering

---

270 supra note 1; p-V-4
271 supra note 70; p114
272 supra note 233; p198
(a) The conversion or transfer of property for the purpose of concealing or disguising the illicit origin of such property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequence of his or her actions

(b) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of property

(c) The acquisition, possession or use of property by any person who knows/who should have known/who suspects that such property constitutes proceeds of crime as defined herein

“money laundering” means

(i) engaging directly or indirectly, in a transaction that involves property that is proceeds of crime; or

(ii) Receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing from or bringing into the territory any property that is proceeds of crime; and

(a) (i) knowing or having reasonable grounds for suspecting that the property is derived or realised, directly or indirectly, from some form of unlawful activity; or

(ii) where the conduct is the conduct of natural person, without reasonable excuse failing to take reasonable steps to ascertain whether or not the property is derived or realized directly or indirectly, from some form of unlawful activity

(iii) where the conduct is the conduct of financial institution, failing to implement or apply procedures and control to combat money laundering

Any person who after the commencement of this law engages in money laundering is guilty of an offence

Art.2 – Laundering Offences

273 supra note 233; p274
274 Organization of American States - Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and other Serious Offences
1. A criminal offence is committed by any person who converts, transfers or transports property and knows, should have known or is intentionally ignorant that such property is proceeds from illicit traffic or other serious offences

2. A criminal offence is committed by any person who acquires, possesses, uses or administers property and knows, should have known, or is intentionally ignorant that such property is proceeds from illicit traffic or other serious offences

3. A criminal offence is committed by any person who conceals, disguises or impedes the establishment of the true nature, source, location, disposition, movement, rights with respect to or ownership of property and knows, should have known, or is intentionally ignorant that such property is proceeds from illicit traffic or other serious offences

4. A criminal offence is committed by any person who participates in, associates with, conspires to commit, attempts to commit, aids and abets, facilitates and counsels, incites publicly or privately the commission of any of the offences established in accordance with this Article, or who assists any person participating in such an offence or offences to evade the legal consequence of his actions

5. Knowledge, intent or purpose required as an element of any offence set forth in this Article may be inferred from objective, factual circumstances

6. An offence defined in this Article shall be investigated, tried, judged and sentenced by a Court or other competent authority as an offence distinct from other illicit traffic or other serious offences

A good example of definition of organized crime is the definition given by UN in 1992, which reads as

“a relative large group of continuous and controlled criminal entities that carry out crimes for profit and seeks to create a system of protection against social
control by illegal means such as violence, intimidation, corruption and large scale theft.  

Recommendation 1 of FATF 40 Recommendations contains some important provisions to be followed while a country is defining a predicate offence for money laundering. By following the language used in Palermo Convention, FATF urges all countries to include at least all serious offences. The FATF describes the types or categories of criminal conduct that should be designated as predicate offenses for money laundering, but leaves to the discretion of each country the specific method of designation, which can be accomplished as follows (1) all offences OR (2) a threshold based linked to (a) category of offences or (b) penalty/imprisonment applicable to predicate offence OR (3) list or predicate offence or (4) a combination of the above three approaches. If “threshold approach” is followed the predicate offence should at a minimum cover all offences designated offences under the national law OR should include offences that are punishable by (a) a maximum term of imprisonment of more than one year, for countries with maximum penalties (b) a minimum term of imprisonment of more than 6 months for countries with minimum penalties. In both the situations the penalties are the minimum that would apply for ‘serious offences’. However countries are allowed to include offences with less penalties also as predicate offence of money laundering. However even if the threshold approach is followed it should cover all the 20 crimes (listed by FATF) listed as “designated categories of offenses”.  

The following legal actions are generally required to ensure that the criminal justice system can provide a sound base for a national anti-money laundering strategy.  

a. Laundering of proceeds of crime must be made a criminal offence in the domestic legislation. Such legislation should make possible the identification, seizure and forfeiture of the proceeds of such crime  

275 supra note 70; p7  
276 supra note 230; p10  
277 ibid; p11  
278 supra note 21; p43
b. Fully ratification and implementation of UN, Vienna and Palermo Convention

c. Enactment of measures that will permit or require financial institutions to provide to competent national authorities information about the identity of the customers, account activity, and other financial transactions

d. Adopting where applicable laws compatible with the Commonwealth Model Law for the Prevention of Money Laundering

e. Financial institutions, their directors and employees should be protected by legal provisions from criminal or civil liability, for breach of any customer confidentiality if they report their suspicions in good faith

One has to bear it in mind that money laundering operations are obviously facilitated through loopholes in our legal systems. Money launderers are able to exploit loopholes and wordings of legislation, and also succeed in getting technical acquittals. In short they make mockery of law. Though the administration of justice is sought to be delivered blind without bias to parties, the legislation which creates law should not be drafted blindly to allow culprits to escape. The legislative process requires a principled approach. Different regulations and laws spur transnational crime. Nikos Passas uses the term criminogenic asymmetries to describe differences among states that encourage transnational criminal activity. There is little to be gained from trying to come up with an exact definition of money laundering.

The legal structures on money laundering differ greatly from one country to another, due to the reason that criminalization of money laundering is dependent upon factors such as economic, social, political and psychological backgrounds of respective countries. One way of drafting a legislation is by following a rational deliberative model. The legislator will find out the extent of the ‘problem’ and after weighing all factors, decide upon the policy to pursue considering the cost and benefits of available

---

280 supra note 5; p100
281 supra note 235; p111
282 Toby Graham, Evan Bell, Nicholas Elliot – “Butterworths Compliance Series on Money Laundering” – Butterworths (2006); p3
283 supra note 279; p248
alternatives. The structural linguistic analysis of definitions did not reveal any significant differences among legal definitions. The definitions adopted in Dutch Penal Code, EU Directive, UN and FATF are in agreement as far as relating to the subject, source and goal of money laundering. There are however, some subtle differences among legal definitions of money laundering, which do not merge at first sight through a linguistic analysis, but which, are nevertheless extremely relevant.

2.5.2 Scope of Predicate offence – widest range of offence

A predicate offence for money laundering is the underlying criminal activity that generate profits, which when subsequently laundered, leads to an offence of money laundering. Designating certain criminal activities as predicate offences for money laundering is necessary to comply with international standards. Though the AML regime started off with measures to deal with drug proceeds, the range of predicate offences were extended quickly to cover all serious crime and to assist in repatriation of assets. The real breakthrough in extension of predicate offence came in 1996 when FATF adopted ‘serious offence’ approach leaving nation states to designate for themselves which offence would be regarded as ‘serious’.

Art.2 (a) of Palermo Convention imposes obligation on all state parties to apply the convention’s money laundering offence to widest range of offences. However, the Recommendation 1 of FATF adopted in 1996 specified that the predicate offences should be serious offences. Therefore the scope of predicate offence was left to the discretion of each country, but subject to the condition that drug offence have to be included in terms of Vienna Convention.

The scope of offences under Recommendation 1 of FATF is wide and lengthy. There are around 20 designated categories of offences. (Note- Glossary of ‘designated category of offences’ – FATF) The Recommendation specifies certain important points,
as the language used is ‘range of offences’. For example under the category ‘robbery or theft’ it is not restricted to ‘vehicle theft’ alone as a money laundering predicate offence. However countries are provided with discretion on how to define the offences in the list, and the nature of any particular elements of these offences that make them money laundering predicate offences. The important and essential element would therefore be to criminalize proceeds from the type of ‘conduct’ described in the said list. Further it is also not necessary to have an offence in the penal code described in the exact terms as above, like for example some countries may not have an offence under category ‘fraud’ which may be covered under ‘theft’. It would suffice if in that country it is possible to award a conviction for laundering proceeds of fraudulent behavior, it has discretion to describe the conduct of that behavior supranote 1.

The broadening of crime is also necessitated due to the reason that many profitable forms of crime such as environment crime, arms trafficking, illegal trade in cultural property etc., are now receiving attention on international political agenda. This is connected to geo-political argument, that fight against drug trafficking is promoted by western world notably the USA, many Asian and African countries are geared up towards combating the laundering of capital flight supranote 70. From an ethical point of view it is hard to understand why the laundering of drug proceeds should be criminalized and not the laundering of say, proceeds of environmental offences supranote 1. Often the proceeds of various crime groups are intermingled and hence the proceeds of drug can neither be separated nor calculated. To overcome this the application field of the incrimination of money laundering should include as many predicate crimes as possible supranote 70.

However the above discretion is not available in respect of financing of terrorism, which is covered under 9 Recommendations (Special Recommendations 1999) which requires that financing of terrorism, terrorist acts, and terrorist organizations should be designated as money laundering predicate offences supranote 1. 

289 supra note 1; p-V-9
290 supra note 70; p12
291 ibid; p14
292 ibid
293 supra note 1; p-V-9
First a legislative process which is blind to principles, tantamount to tyranny. Secondly various rights are at issue. Money laundering strategies require information, forcing monitoring of individuals activity routinely. This monitoring must be kept secret especially from the individuals under investigation. Further the information has to be shared domestically and abroad with agencies The legislation that makes money laundering a criminal offence has to be drafted in an expansive manner to bring increasing number of grey money issues also. Contemporary money laundering laws tend to be wide in both scope and applications, and now it has reach far below the drug dealer\textsuperscript{294}.

2.5.3 Scope of predicate offence – methods of describing offence

FATF describes the types or categories of criminal conduct that should be considered as money laundering predicate offence, but the discretion of which is left to each individual country subject to its specific legal method of criminalization\textsuperscript{295}. The designation may be accomplished by reference to the following (a) all offences (b) threshold linked either to (i) category of serious offences OR (ii) the penalty of imprisonment applicable to predicate offence (c) a list of predicate offence (d) a combination of the above three approaches\textsuperscript{296}.

If threshold approach is followed by a country, it must at a minimum cover all offences that are designated as ‘serious offences’ under domestic law OR offences punishable by a maximum penalty of more than one year imprisonment (in the case of countries following minimum penalties – 6 months) Some of the serious offences are ‘felonies’ (as opposed to misdemeanors) ‘indictable offence’ (as opposed to summary offences) and ‘crimes’ (as opposed to delits) If threshold approach is followed by a country it should cover all the 20 designated categories, and all serious offences with a maximum period of imprisonment exceeding one year or 6 months as the case may

\textsuperscript{294} supra note 5; p101
\textsuperscript{295} supra note 1; p-V-8
\textsuperscript{296} supra note 230; p10
be\textsuperscript{297}. Most countries have criminalized serious offences but have nevertheless, adopted
different approaches to what constitutes a serious crime for the purpose of. Thus, the
predicate offences that generate proceeds vary from one country to another\textsuperscript{298}.

United Kingdom is following ‘all crime’ approach, and even if a criminal
activity is trivial, if there is a suspicion of laundering, there is an obligation to report it.
The advantages for such a stand is simple and plain. If every criminal offence is
potentially looked at as a predicate offence, laundering of its proceeds constitute money
laundering offence. The prosecutor has choice of prosecuting for the predicate offence
or money laundering offence or both\textsuperscript{299}. The Council of Europe has indeed adopted a
very broad definition of predicate offenses in its Anti-Money Laundering Convention,
which is not confined to the laundering of drug money alone\textsuperscript{300}.

The problem is that despite harmonizing efforts at both EU and international
level, national legislation criminalizing money laundering continue to differ. Most
countries have criminalized serious offences but have nevertheless, adopted different
approaches to what constitutes a serious crime for the purpose of money laundering.
Thus predicate offences that generate proceeds vary from country to another\textsuperscript{301}. Many
affected or vulnerable governments have neither criminalized all forms of money
laundering and financial crime, nor given sufficient authority to banking regulatory
bodies\textsuperscript{302}.

It is only logical to have a wide application field of predicate offences, as
conviction on a charge of money laundering may often be the only way, other than
value confiscation, to ensure deprivation of proceeds that can no longer be traced in the
estate of the person who has committed the predicate offence\textsuperscript{303}. Legislation of some
countries allows the conviction of money laundering of the persons who have

\begin{footnotes}
\textsuperscript{297} supra note 1; p-V-9
\textsuperscript{298} supra note 247; p25
\textsuperscript{300} supra note 1; p-V-5
\textsuperscript{301} supra note 36; p25
\textsuperscript{303} supra note 70; p117
\end{footnotes}
committed the predicate offences. For example the money laundering offence under 18 USC 1956, of USA, as well as the English offences of “concealing or transferring proceeds of drug trafficking/criminal conduct” Section 49 of DTA 1994 and S.93 C of CJA 1988 also apply to persons who have committed the predicate offences.

Unlike other jurisdictions (such as US and Europe) the money laundering offences in UK is not restricted to proceeds of serious crime or based on monetary limits. Further the money laundering offence in UK need not involve money also, as the legislation covers assets of any description. As a consequence any person who commits an ‘acquisitive crime’ will also be committing a laundering offence in UK304.

Whether tax offences can be treated as predicate crime is a debatable issue. In countries where the revenue is not raised through income tax, evasion of income tax is not a crime. Further as per the basic principle of international law one country cannot enforce tax laws on the other305. Criminal organizations avoid paying tax for the reason that they do not want to come under the purview of revenue or tax authorities306. There is incoherent approach to predicate crime by various countries, to say the approach to tax evasion as predicate crime for money laundering. In the US tax evasion is predicate crime while in Germany tax evasion is not a predicate crime. In Australia laundering of proceeds of all indictable offence including tax evasion is a predicate crime In Switzerland and Greece tax evasion is not even a crime, and hence the concealing of such proceeds does not tantamount to money laundering, as the main condition as to the criminal origin of proceeds is not met307. Inclusion of tax related crimes into the list of predicate offence would create implementation problem in a AML regime. It is well known that criminals are few in number when compared to tax evaders. Further if in case tax evasion is to be treated as a predicate crime the number of Suspicious Activity Reports (SAR) would be voluminous and huge burdening the existing over supply and reporting. Sharing information between tax authorities who receive it voluntary

305 ibid; p10
306 ibid
307 supra note 173; p117
disclosures, with the criminal enforcement agencies gathering evidence to prosecute for a criminal offence is quite a sensitive issue. Only in 2001 France and UK agreed to criminalize transnational bribery. Consistent with the mandate of FATF, the 40 Recommendations did not include tax evasion among list of predicate offences. In Switzerland and USA, foreign tax evasion is not a crime, and therefore financial services staff are not obliged to report those suspicious transactions to authorities. Driven by its disapproval of financial deregulation and concerns about tax evasion in offshore centres, France had strong interest in money laundering regulation. However its domestic law listing tax evasion as a laundering offence is undercut because the offence is not reportable by financial institutions. Though money laundering and tax evasion share many techniques in common, operationally they are quite distinct process. Tax evasion turns something legal into illegal. Money laundering does the opposite as it gives the illegally earned income an appearance of being legally earned. Even in terms of impact on fiscal position of a State, tax evasion and laundering have quite opposite effects.

The inclusion of tax evasion within the predicate offence for the criminalization of money laundering is clouded by the perception that tax evasion is domestic crime as opposed to an internationally recognized serious crime such as drug trafficking. To a question whether fiscal offences such as tax evasion is a predicate offence, the answer depends on the definition of crime in the legislation of the particular jurisdiction. Generally tax evasion and other fiscal offences are treated as predicate money laundering crime in most effectively regulated jurisdictions. While countries include all serious crimes within the definition of money laundering, tax related offences are omitted from serious crime. In fact many countries have taken the decision to specifically exclude tax-related offences from their money laundering legislation.

---

308 supra note 119; p14  
309 ibid; p13  
310 supra note 32; p113  
311 supra note 21; p58  
312 supra note 304; p19
some countries tax offences are still subject to the money laundering legislation, but information that might relate to the laundering of the proceeds of fiscal offences is not passed on to the revenue authorities until another criminal offence is proved. Substantive law of taxation needs to be examined in the light of tax evasion. Schemes to avoid tax employ complex structure or routing without any apparent commercial reason or rationale. Movement of money under a tax avoidance scheme makes it difficult to detect laundering. If the law of taxation is modified to discourage such ‘artificial’ avoidance scheme, financial flows would not be camouflaged to facilitate money laundering\textsuperscript{313} Tax authorities in many jurisdictions are vested with powers than the police. The privilege or defence against self-incrimination is not available if the information is sought for by tax sleuths. If the taxman require production of records, failure of which may lead to penal action or levy of fine, without taking recourse to court of law\textsuperscript{314}. If tax evasion is a predicate offence to criminal laundering, then since, all income from unlawful sources is taxable, there is a danger that the choose enforcement mechanism – against, for example, drug dealers – will be to treat the money as the proceeds of tax evasion. If the prosecution need establish nothing other than that the money was undeclared income then unless the sentences for laundering vary according to those which would have been available for predicate offences they will not put themselves to the trouble of proving any other, more serious ‘criminal conduct’ as a predicate. Moves towards taxation rather than the confiscation as a means of recouping the profits of crime, or moves to charging laundering the proceeds of tax evasion rather than those of any substantive offence as a means of punishing people involved in acquisitive crime, are radical ones, which endanger the traditionally accepted distinction between the system of taxation and criminal justice\textsuperscript{315}. Taxation Financial abuses have been around for as long as there have been finances to abuse.

\textsuperscript{313} supra note 102; p98
\textsuperscript{314} ibid; p100
\textsuperscript{315} supra note 102; p151
Money laundering and tax evasion are often viewed as complicated, boring matters hinging on the trivia of tax codes and regulatory laws\textsuperscript{316}. 

Criminal law being subject matter of nation states, difference countries would follow different yardsticks of what constitutes a predicate offence of money laundering. To prevent inevitable national variations each country has to follow a constructive approach in applying the criminality criteria so as to not thwart the overall intent\textsuperscript{317}. Even at the national level if the list of predicate crime is not all inclusive then it could be problematic in reality and one of the reason for extremely low prosecution and conviction, for example in countries like UK and Australia for example. If the launderers who are not predicate offenders – such as financial institutions, accountants etc, it is easier for them to defend themselves by arguing that they do not know the exact provenience of the funds. Though they may be knowing that the proceeds may be one from a crime, it may be difficult for them to identify whether it is a predicate offence or not. Similar stand may also be taken by the financial institutions to justify their failure to report suspicious transactions for lack of legal status about the exact nature of basic crime\textsuperscript{318}. For predicate offences an expansive approach is necessary as the norm is to cast the net as wide as possible, to trap all serious offences\textsuperscript{319}.

\subsection{Cross border considerations}

FATF regulations only stipulate minimum category of offences to be considered by a county as predicate offences, which gives an element of discretion to a country. In other words there is no compulsion to legislate beyond the minimum prescribed. In such a satiation, the extent to which a country does so, however has implications for that

\begin{itemize}
\item \textsuperscript{317} supra note 1; p-V-6
\item \textsuperscript{318} supra note 69; p18
\item \textsuperscript{319} Leslie, Daniel A (2014), \textit{Legal Principles for combating cyber laundering - Vol.19 – Law Governance & Technology Series}, Springer; p213
\end{itemize}
country’s ability to cooperate internationally and exchange information with other national authorities\textsuperscript{320}.

Recommendation 1 provides that predicate offence should extend to a conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted an offence if it had occurred domestically. This is also referred to as “dual criminality” test, under which the conduct committed in the other country must be a predicate offence both domestically and in the other country\textsuperscript{321}. In the context of money laundering, the condition of double criminality is especially prone to pose problems in respect of the predicate offence. In practice a laundering offence would not have been criminalized in the requested state. Like for example the requested state has not criminalized negligent money laundering the lack of double criminality may be a ground for refusal of cooperation\textsuperscript{322}. Double criminality is thus not a mandatory condition, but only a optional ground for refusal which is moreover limited to requests for coercive measures\textsuperscript{323}.

Recommendation 1 also states that countries may provide that only condition for prosecuting money laundering, is that the conduct committed in the other country would have constituted a predicate crime, has it occurred domestically. Such a stand would allow for prosecution where the proceeds were obtained by a conduct that was not a predicate offence in the country where it was committed, but was an offence in the country where the proceeds were laundered\textsuperscript{324}.

The double criminality requirement should not be seen as a condition to jurisdiction, but as a legal consequence from a legality principle. One of the constituent element of money laundering offence is that the proceeds should be criminally derived. Whether the proceeds are criminally derived or not should be judged according to the law of the place where the predicate activities were committed, and any other answer

\textsuperscript{320} supra note 1; p-V-9
\textsuperscript{321} ibid
\textsuperscript{322} supra note 70; p289
\textsuperscript{323} ibid; p290
\textsuperscript{324} supra note 1; p-V-10
would fail foul of the legality principle\textsuperscript{325}. The Vienna Convention is silent on the subject of double criminality which is only logical in view of the fact that it is mainly concerned with drug trafficking offences. The question of double criminality of predicate offence only arises once the application field \textit{rationemateriae} of the money laundering offence is broadened to other predicate offences. Art.6 (2) of MLC which defined the money laundering offence explicitly states that it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party, and what follows from that is, money laundering is a criminal offence irrespective of the place where the predicate offence took place\textsuperscript{326}.

Wherever there are differences between countries as to what constitutes a predicate offence to money laundering, time may come where one jurisdiction could not prosecute for the offence committed in the other. The reason being that in such a situation element for the offence of money laundering is absent, as the funds were not of criminal origin. To overcome this a very broad approach to predicate offence is to be adopted, expanding its scope as much as possible. This would also increase bringing a charge of double criminality, leading to international efficacy of law enforcement actions\textsuperscript{327}. Even if one jurisdiction defines predicate crime so as to cover all crimes (take for instance Netherlands) it could still be faced with jurisdictional problems due to the transnational character of money laundering. Therefore a move towards convergence would not only benefit investigation and prosecution, but would be beneficial in international exchange of information\textsuperscript{328}. To facilitate extradition and international agreements, it has to be ensured that the predicate offence is also an offence in all countries involved, like the country where the crime was committed, the country seeking assistance, and the country whose assistance is required. If the predicate offense takes care of all serious offenses, regardless of jurisdiction, it would be more conducive to international cooperation considering transnational character of laundering. Countries should also consider exempting from the territoriality principle

\textsuperscript{325} supra note 70; p227
\textsuperscript{326} ibid; p226
\textsuperscript{327} supra 36; p26
\textsuperscript{328} supra note 36; p27
those predicate offenses that generate huge volume of proceeds, and which typically result in complex transnational laundering operations, such as drug trafficking and corruption\textsuperscript{329}. Cooperation among nations is likely to break down if there are serious differences as to define what a predicate crime is. However it is not so easy to internationally harmonize what a predicate crime is. If there is no consensus between states on a predicate crime, then it would be hard to prosecute laundering related to that predicate crime. Different legal standards of predicate crimes also stem from different value systems. What is crime in a country may be virtue in other, and this statement is particularly true when totalitarian dictatorships and democracies interact\textsuperscript{330}.

\textbf{2.5.5 State of Mind – Knowledge and Intent}

According to Art.3 (b) (1) of Vienna Convention, the perpetrator’s ‘state of mind’ that is his/her intent or purpose to commit money laundering offence means, ‘knowing’ that the proceeds which are in dispute are the conduct of predicate offence. Countries have lot of options in determining the ‘state of mind’.\textsuperscript{331} Legislature of a country may decide about the actual knowledge of illicit origin of property, or a mere suspicion about the illicit origin, which constitute the requisite state of mind, and can even adopt ‘should have known’ standard of culpability, which would lead to negligent money laundering. The extension of the ‘\textit{mens rea}’ requirement to cover cases of negligence was deemed indispensable by a German legislator in order to overcome obstacles in the production of evidence on money laundering and to effectively achieve prosecution of the offender. The extension of \textit{mens rea} to negligent money laundering has been subject to severe criticism, as such an approach which was exceptional phenomenon has been increasingly becoming common now\textsuperscript{332}. In addition to this general intention requirement, a legislature may also provide for specific intent to ‘conceal or disguise the illicit origin’ of the property or intent to help another person ‘evade the legal consequences of his/her actions’. (See Art.1.1.1(a) of UN Model

\textsuperscript{329} supra note 1; p-V-6
\textsuperscript{330} supra note 173; p229
\textsuperscript{331} supra note 1; p-V-10
\textsuperscript{332} supra note 160; p111
According to the UN Model Crime Bill, actual knowledge of ‘having reason to believe’ that the property is derived from criminal acts, constitutes the alleged mental element of money laundering. (See UN Model Crime Bill Sec.17 (a)). However the Model Crime Bill of the UN suggests that specific intent may apply to certain money laundering offences, such as concealing or disguising the origin, location, nature, disposition, movement or ownership of the property. However for certain laundering offences, the proof of specific intent of an individual to assist another person is required, for example in evading legal consequences of his/her actions (See UN Model Crime Bill Sec.17 (b)). Knowledge, intent or purpose required as an element of the offence may be inferred from objective factual circumstances.

Art.3(3) of the 1988 Vienna Convention, art 6(2)(f) of the Palermo Convention and the FATF Recommendations (Interpretive Note to R3 of the 2012) define *mens rea* of money laundering offences with reference to two central elements (a) the intent to commit the conduct elements of money laundering offences (b) knowing that the property is derived from a predicate offence or from an act of participation in such activities (known as the ‘knowledge’ element). International conventions take care of this by using adverb such as “intentionally” or “knowing that”. The knowledge or intent element shall be provide either by direct evidence or to be inferred from the surrounding circumstances. These two elements have caused a lot of controversy and challenge to prosecutors, in certain jurisdictions, especially in the cases relating to third party defendants. To address this issue a number of states have strengthened the prosecution hands by simplifying the burden of proof, like for example in the USA prosecutors need to prove only that the defendant knew that the property represents proceeds of crime. The burden of proof is simplified to meet the ‘actual knowledge’ requirement, by the prosecutor proving ‘willful blindness’.

At the heart of almost every ML trial is the dispute about the knowledge of the defendant. As it is often very difficult for the prosecution to establish that the defendant knew actually the proceeds were criminally derived, in most cases prosecution will try to infer knowledge from factual circumstances. The way of proving

---

333 supra note 235; p3-4
the knowledge requirement is sanctioned on an international level by Art.3 (3) of VC
and Art. 6 (2) (c) of MLC. A broad definition of ‘state of mind’ was adopted in Art.2 of
OAS Model Regulation, which takes into account three different states of mind such as
(1) the accused has knowledge that the property constitutes proceeds of a criminal
activity as defined in the Convention (2) the accused should have known that the
property was obtained with the proceeds of criminal activity, and (3) the accused was
intentionally ignorant of the nature of the proceeds. (Art.2 of OAS Model Regulations)
(P-28/V-11) Under the third category of state of mind as described above, the accused
neither ‘did not know’ nor ‘should have known’ the source of proceeds, but
nevertheless suspected its criminal origin and chose not to further probe and clear or
dispel his suspicion. The accused in other words remained ignorant of the source of the
proceeds or willfully blind when he ought to have known about the occurrence of a
criminal offence by an enquiry, as a precaution. Art.2 (5) of OAS Model Regulation
further provide that the three culpable states of mind can be inferred from objective and
factual circumstances. This view is also supported by Vienna Convention, Palermo
Convention and FATF recommendations, for the reason that it is very difficult to prove
the state of mind of person engaging in an activity which on its face otherwise appears
to be ordinary334.

A person has committed an act of laundering if he/she is engaged in an
arrangement which involves proceeds of crime. The requisite knowledge or suspicion
depend upon the specific offence, but is usually present in a situation where the person
providing the service suspects or has reasonable grounds to suspect that property
involved is the proceeds of crime335.

For the principal offences of money laundering the prosecution must prove that
the property involved is criminal property., it was obtained through criminal conduct
and at the time of alleged offence, the defendant knew or suspect that it was criminal
property.

334 supra note 1; p-V-12
335 supra note 304; p19
2.5.6 Corporate liability

It is a fact that money laundering often involves corporate entities in one stage or other, and also the fact that the concept of corporate criminal liability varies among countries. Countries with common law tradition, subject such entities to criminal law liability, while in countries with civil law tradition may not invoke criminal liability. Companies are legal people and a corporate personality attaches to a company just like a natural personality is attached to an individual. A company has social obligation which include the obligation not to pursue anti-social behavior seriously.\(^{336}\)

Recommendation 2 of FATF suggests that corporations and their employees be subject to criminal liability whenever possible under the general principles of a country’s legal system (See also Art. 15 of OAS Model Regulation). Significant civil or administrative sanctions could be a surrogate in cases where the legal or constitutional framework does not subject such entities to criminal liability.

The UN Model legislation does not provide for criminal liability for corporations, but Art.4.2.3 provides for applying other sanctions to such entities, and also to its agents or representatives who commit the offence on behalf of the corporations. The sanctions include fines, interdict on carrying out certain business activities, and including closure or winding up.

As regards OAS Model Regulations the criminal liability is extended to corporations on the identical basis as it applies to natural persons. In fact Art.1 (6) of the Regulation defines “person” as “any entity, natural or juridical, including among others corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture or other unincorporated organizations or groups, capable of acquiring rights or enter into obligations” Similarly in the UN Model Crime Bill, Section 2(1) ‘person’ is defined to include both natural and legal persons.\(^{337}\)

In the money laundering context the launderer’s ability to create, link and liquidate companies is classic element of a money laundering process. This is due to the reason that a corporate entity is the primary medium through which the laundering

\(^{336}\) supra note 5; p120
\(^{337}\) supra note 1; p-V-12
process is executed, though an individual or natural person develops, refines and implements the strategy. From the perspective of criminal jurisprudence many of the problems posed to the concept of company stem from the fact that it is a deemed legal entity. In the context of criminal law, a debate often crops up as to who should be liable, whether the company or individual, or both. However some academics have argued that the liability should be on both, but in reality it often rests only with the company.\textsuperscript{338}

The concept of corporate criminal liability is being focused on the executives of the company who oversees its activities, that is the focus is on the action of the individuals rather than the actions of the company. Two factors come in the way of legislators, jurist and the judiciary for being slow to take up the challenge of corporate criminal liability. First one is that historically criminal laws have lacked in sanctioning penalties for criminal activity in appropriate manner. The second factor relates to existing theoretical framework which remains oriented against the individual. As an individual stands behind and directs the company’s action he should be accountable for the entity’s criminal conduct. To permit individual to pass on the liability to the company, is to shirk his or her social responsibility which will only undermine the rule of law.\textsuperscript{339}

To allow individuals who manage the affairs of the company to escape from liability by having the blame passed on to what is in essence a mere legal fiction is unjust. Since financial penalties are the primary medium through which companies are punished the civil law is a more appropriate mechanism through which accountability may be sought.

Companies in particular have the ability to create, link and liquidate their existence which are quintessential to the money laundering process. Individuals are behind these laundering strategies. Two common forms of punishment are fines and imprisonment. Imprisonment is not possible in case of companies, while fines can simple be internalized as cost. As individuals are behind the plans and execution,
allowing them to escape by blaming the legal entity would be unjust\textsuperscript{340}. Trust companies pose a risk in money laundering because of their capacity to conceal the beneficial ownership of the legal persons behind the entities they manage.

\subsection*{2.5.7 Perpetrator Liability for money laundering}

An important issue which crops up often is whether the liability of money laundering extends to the person who committed the predicate crime, as well as the person who has laundered the illicit proceeds. Some countries do not hold the perpetrator of predicate crime liable for laundering the proceeds of his/her criminal actions, if he or she is not involved in the money laundering activity. The rationale behind this concept is punishing the perpetrator for evading legal consequences for he or her criminal activity may amount to ‘double jeopardy’.

Rest of the jurisdictions are of the view that the perpetrator of predicate crime is liable for laundering of illicit proceeds, on the ground that the conduct and the harm of evasion are distinct from predicate crime. This view is also due to certain practical reasons. If the perpetrators of predicate offences are exempted from laundering offence, it would lead to severe penalization of third parties for handling criminal proceeds, while the perpetrators remain immune from liability. This may happen in situations where the predicate crime has been committed extra-territorially, placing it beyond the jurisdiction of the nation state which is prosecuting third parties for laundering activities\textsuperscript{341}.

In Austria with the 1993 amendment to the Penal Code money laundering was criminalized and penalties were introduced for the commission of such crimes ranging from six months to five years. The Austrian money laundering definition excludes self-laundering, and if the crime has been committed by somebody else then only laundering comes into the scenario. For example a fraudster or a drug dealer who launders his own illicit proceeds could not be prosecuted for money laundering\textsuperscript{342}. From an ethical

\textsuperscript{340} ibid; p392
\textsuperscript{341} supra note 1; p-v-13
\textsuperscript{342} supra note 173; p115
perspective it is difficult to understand as to why the laundering of proceeds of crimes punishable with more than 12 months of imprisonment should be criminalized, while offences punishable with 11 months of imprisonment are not. Another possible approach suggested is to cover only crimes generating substantial profits, which again is a debatable topic. Even this approach is possible only if there is a consensus internationally as to common list of offences with substantial profits, or a specific criteria for determining what constitutes a crime.

Most countries having counter money laundering laws, a person can be guilty of the offence of laundering the proceeds of someone else’s criminal conduct. There is no consensus among countries as to issues relating to self-laundering, which is an important and debatable issue. A question would arise as to whether the person who had committed predicate crime, would be liable for laundering offence also if he chose to launder the proceeds himself. Some countries do not hold the perpetrator of predicate crime liable for laundering his/her proceeds of crime. The rationale behind this is that doing so would amount to double punishment for a single crime. But other countries also hold the perpetrator of predicate offence liable for laundering, on the ground that the conduct and the harm of evasion are distinct from the predicate crime. But the Palermo Convention sends a clear message. The perpetrator should be held liable for laundering of his/her own criminal activities, except in circumstances if the same is not allowed due to fundamental principles enunciated in the national legislation. However the general international accepted standard on the subject issue is to provide for a broad laundering offence that permits the perpetrator liable for laundering the proceeds of his/her own criminal activities, regardless of active participation in money laundering activity.

Under English law a defendant who had no intention to launder money to avoid liability has to prove that he has acquired the property for adequate consideration. Thus under English law is not criminal for example, to buy a yacht from a drug trafficker.

343 supra note 36; p17
344 supra note 302; p11
345 supra note 230; p14
originally purchased with drug money as long as one pays an adequate amount of money for it. While the money laundering activities that should be criminalized are the same under the Vienna Convention and Money Laundering Convention, the predicate offence is not. The former convention only applies to proceeds from drug trafficking whereas the later in principle applies to the proceeds from any predicate offences, even though it allows contracting parties to make a declaration to the effect that the money laundering will only be criminalized with respect to certain categories of predicate offences. The English incriminations were even specifically introduced with a view to allowing the punishment of the predicate offender for laundering the proceeds of his own crime. In other countries the legislation has been amended with a view to allowing the punishment of money laundering offences committed by those who have committed a predicate offence. Notwithstanding the prerogatives of the countries to criminalize acts of money laundering, the regime has been deeply influenced by a number of ‘soft law’ instruments. The term ‘soft laws’ refer to the lack of justiciability of the instruments in which the rules are enshrined, rather than to the content of the rules themselves. In some countries money laundering was initially fought not through legislative measures but through codes of conduct (for example Switzerland) or by regulatory measures issued by banking supervisors. The criminalization of money laundering is essentially aimed at third parties who launder proceeds, and who render proceeds of crime unrecognizable, frustrating the efforts of law enforcement. The obligation to incriminate money laundering that flowed from the Vienna Convention and the Money Laundering Convention has led to a plethora of domestic criminal legislation. The approach taken in most federal statutes targeting money laundering focus mainly on criminalizing transactions involving the proceeds of crime.

2.6 Criminalization of Terrorist Financing

---

346 supra note 70; p116-117
347 ibid; p111-113
The basic difference between money laundering and terrorist financing is the origin of flow of funds. In the case of money laundering process and concealment of funds it relates to funds derived from illegal activity, while terrorist organizations use both legal and illegal funds. Those who finance terrorism like criminals also use the same international financial system to hide the funds, even if they are from legal origin. In order to weaken the terrorist groups, and to prevent their funds from entering the global financial system, is to prevent it. Therefore a legislation for detection, forfeiture and confiscation of terrorist funds is a necessity. The nine FATF Special Recommendations on Terrorist Financing urges countries to criminalize financing of terrorism, terrorist acts, and terrorist organizations and to designate these as predicate offences of money laundering. Thus taking the 40 Recommendations and the nine Special Recommendations together, terrorism, terrorist acts, terrorist financing, and terrorist organizations each should be deemed to be a predicate offence for a nation’s AML regime.

At times money laundering and dirtying of money may co-exist when terrorism is financed through funds originating from criminal activities, for example funding the terrorist operations through proceeds from sale of narcotics. Significant difference between money laundering and terrorist financing is that funds involved may originate from legitimate source as well as criminal activities. The financing of terrorism is different from money laundering pattern, as criminals must have to find a way to launder their funds, while for financing terrorist it need not be so.

Enforcement agencies categorize two kind of illicit money transfers. The first being traditional money laundering wherein illegal funds are transferred to conceal their origins and present them appear legal, like for example drug dealers depositing monies in bank and transfer them after the funds appear to originate from legal sources. The second category relates to financing of terrorism where legal funds are transmitted for illegal purpose, like for example donations in the form of charity are transferred to fund terrorist attacks. One thing common in laundering is it is characterized by funds

---

348 supra note 173; p25
349 supra note 1; p-V-6&p-V-15
transfer\textsuperscript{350}. Warsaw Convention (2\textsuperscript{nd} Council of Europe measure on ML) is the first comprehensive international treaty covering both the prevention and control of money laundering and financing of terrorism. It impressed upon the fact that quick access to financial information, or information on assets held by criminal organizations including terrorist groups, is the key to a successful AML system.

Crime and terrorism is often related. The terrorist have not invented any new method of transferring funds, but merely step into the well worn paths to move their money. Available techniques are ready for them to grab and pick. They have three methods to procure money, earn it, steal it, or beg for it. Each of the three will bring them million dollars\textsuperscript{351}. There is a close nexus between acts to fund terrorist and the terrorist act itself. There is no universal definition of the term ‘terrorism’ due to political, religious and national dimensions, which differ from country to country. FATF which is an international standard setter also does not define the term ‘financing of terrorism’. Nonetheless it urges countries to ratify and implement UN Convention for Suppression of Financing of Terrorism, 1999. Freezing of assets of suspected terrorists though a weapon in the hands of enforcement agencies, it should not be used often, or abused. Those whose assets are frozen should have a right to know the reasons, and to seek appropriate statutory remedies.

It has to be kept in mind that though overall funds required for running a terrorist organization is large, cost of a single attack may be relatively small. To cite an instance the 1993 Bishop Gate bomb blast in London which caused loss of life and damage to property worth one billion pounds, appeared to have cost approximately 3000 pounds\textsuperscript{352}. Several factors point out abuse of HOSSPs for terrorist financing purpose and vulnerable to terrorist and their sympathizers. Factors like lack of supervisory will or resources, use of net settlement method, settlement across multiple jurisdictions. Limited or no enforcement actions against these entities makes them more

\textsuperscript{350} supra note 173; p197
\textsuperscript{351} supra note 153; p120
\textsuperscript{352} supra note 149; p4
vulnerable to terrorist abuse\footnote{supra note 87; p41}. Supporters of terrorism who finance the terrorist use the financial system to hide funds even if the funds originate from legitimate sources. Financing of terrorism, terrorist acts, and terrorist organizations should be criminalized as predicate offences to money laundering. A solution to tackle this problem is to prevent the funds from entering the global financial system, in the first place. If not a country need to have legislative backing to detect terrorist funds which has entered into its jurisdiction, and to take action for confiscation and forfeiture of such funds.

\section*{2.7 Money Laundering Typologies}

In addition to the revised 40 Recommendations, FATF also disseminated the results of a "typologies exercise" which highlights new money laundering methods and patterns of activities used by criminals\footnote{http://www.fincen.gov/news_room/rp/advisory/html/advissu4.html (accessed 30/12/2014)}. The various techniques used to launder money or finance terrorism are generally referred to as methods or typologies. The terms, methods or typologies may be referred to interchangeably, without any distinction between the two. These typologies are codified periodically and also revised for the reason that it is impossible to define the methods accurately, as launderers tend to change their methods often, as they are also privy to this published typologies. Further the typologies also differ from country to country as factors unique to each country such as economy, political situation, financial system differ\footnote{supra note 1; p-I-10}. The FATF also publishes annually an update of Money Laundering Typologies, providing refreshed assessments of money laundering risks and techniques.

In developing AML/CFT measures the FATF has examined money laundering & terrorist financing techniques and trends through typologies studies to identify current and emerging threat to the financial system. The FATF has published over 20 Typologies examining various thematic and sectoral areas vulnerable to money laundering and terrorist financing. This work is ongoing because of the fact that the\footnote{353 supra note 87; p41\footnotetext{354}\footnotetext{http://www.fincen.gov/news_room/rp/advisory/html/advissu4.html (accessed 30/12/2014)}\footnotetext{355 supra note 1; p-I-10}}
Typologies need to be re-assessed to reflect the changes in financial and trade system that criminals may take advantage of, as well as the evolution of techniques that may develop overtime to subvert control mechanism. (See the President, FATF Forward to FATF Report on Global Money Laundering and Terrorist Financing Threat Assessment – July 2010).