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Due Diligence v Client-Attorney Privilege: The Changing Role of Professionals under the Ambit of the Prevention of Money Laundering Act 2002

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In this article, Section II elucidates the history of the term and the expansion in the scope of money laundering over the years. Section III explains the methodologies employed and stages in the complex process of laundering money and some contemporary uses of the practice. Section IV highlights the key initiatives of financial regulatory authorities worldwide as a global effort to counter terrorist financing, drug trafficking, and other related evils arising out of illicit financing through laundered money. Section V and Section VI discuss the legal and institutional framework in place to combat money laundering in India. Section VII highlights the recent developments in legislative reform by the Government of India in accordance with the recommendations of the Financial Action Task Force. Section VIII explains the role of professionals, with particular emphasis on legal professionals, in their fight against money laundering activities on clients. It further discusses their responsibilities in contrast with client privilege and exemption from liability as a 'reporting entity' under the Act. Section IX highlights the implications of anti-money laundering regulations pertaining to the legal community worldwide, particularly in the European Union and the United Kingdom. Section X elaborates on the potential effects of AML regulations on the legal profession and raises the issue of overriding the contractual obligation of confidentiality. Section XI lays down the case against the exclusion of lawyers under the scope of PMLA, 2002. This article concludes with recommendations for further consideration for the introduction of possible legislative reform and action in the future and an effort to spark a debate about this proposal in the society of legal and financial professionals.

Keywords: *money laundering, legal professionals, pmla.*

INTRODUCTION

The social cost of unbridled money laundering surfaces in the form of infiltration of crime, especially organised crimes in our society, emerging from a shift in financial and economic power towards participants in this transgression. To deter these criminals from incentives derived from their illicit activities, a legislative framework intended for this purpose has been put in place worldwide in the fight against this evil. However, Anti Money Laundering regulations endanger legal and financial professionals entrusted with the responsibility of compliance as a reporting entity for fraudulent or suspicious transactions of their clients. This article scrutinises the expansion in techniques employed in the process of laundering money, the relevance of global Anti Money Laundering measures along with the legal and institutional framework and recent legislative reform in India, stirring up a debate and agitation among professionals, including Indian lawyers on the controversy around the potential effects of their changing role. The article further discusses the implications of similar extant laws in other jurisdictions and dives deeper into the concept of client-attorney privilege. The research concludes by offering a window into recommendations for possible legislative action in the future.

Money laundering refers to the complex and illegal method of concealing the actual sources of large amounts of proceeds acquired or generated, usually through immoral and unlawful pursuits such as the trafficking of drugs and terror financing, by transiting a system of transactions mainly involving bank transfers.[1] The origins of the term 'laundering', in this case, can be traced back to the definition of dirty money.[2] Essentially, money that is obtained through crimes such as extortion, gambling, and insider trading and put to illicit uses like prostitution is

[1] Prevention of Money Laundering Act 2002, s 3
[2] Peter Reuter and Edwin M. Truman, *Chasing dirty money: The fight against money laundering* (Peterson Institute Press 2004)

dirty and needs to be 'cleaned' in order to pass off as legal tender, which may then be put to intended uses without casting suspicion from financial institutions and other watchdogs in the economy. This practice would be a crime in many jurisdictions and an essential operation in organised crime.[3]

THE EVER-EXPANDING SCOPE OF MONEY LAUNDERING

The term historically was not applied to actions like tax evasion or falsification of accounts and was rather restricted in its scope, dealing only with monetary transactions relating to organised crime.[4] However, its definition has seen drastic expansion over the years following the enactment of anti-money laundering laws by global regulators today, defining it as any transaction of a financial nature generating a value in the form of assets resulting from illegal acts of participants. For instance, in the United Kingdom, laundered money does not even necessarily have to be money inherently but may refer to any economic good for that matter. As for the individuals involved in this process, this crime can be committed not only by the Mafia or members of criminal organisations but also by private individuals and even the Government with their corrupt officials. If the fact that laundered money ipso facto is illegal and curbing this evil enables countering international terrorism was not enough to stimulate the global legal debate surrounding this financial crime, exacerbating the issue is the digital era of online payments maintaining absolute anonymity of transactors. The use of proxy servers makes the process of anonymisation virtually impossible, thereby rendering money laundering untraceable. Cryptocurrency has been widely criticised as compared to its traditional counterpart due to its unregulated nature, which, again, poses the problem of criminal activities going undetected.[5] Despite the lack of a central regulatory authority, it continues to be a part of the international economy and introducing a new law banning these dealings is a clear violation of the fundamental rights of citizens. The electronic alternative of laundering money has paved

[3] Lawrence M. Salinger, *Encyclopaedia of white-collar & corporate crime* (Sage 2005)
[4] Peuter (n 1)
[5] Charles Larkin et al., 'Criminality and cryptocurrencies: Enforcement and policy responses - Part I' in Shaen Corbet (ed), *Understanding cryptocurrency fraud* (De Gruyter 2022)

the way for an increasing number of blackmail and drug trafficking cases through virtual digital currencies.

METHODOLOGIES EMPLOYED

To launder money, the criminal must undergo three basic processes, which may be employed in stages or after eliminating, repeating, or combining one or two of the following:

Placement: This is the first stage in a cycle of money laundering where illicit funds are injected into legitimate bank accounts. Financial criminals make use of stolen, bribed or corrupt means to obtain access to illicit funds that they then withdraw from their source.[6] Here, the proceeds of crime are cleared and dispersed by depositing them into well-established financial systems such as offshore accounts.

Layering: The next step in this process is layering. These complicated transactions move funds to money and capital markets in most cases via offshore methods. This is an attempt by criminals to make it impossible for enforcement agencies to find cases of money laundering as soon as funds enter the financial system. To cover up their path, they strategically engage in fraudulent bookkeeping. Layering involves numerous such intricate monetary transactions keeping the sources completely anonymous.

Integration: Integration is the third and final step in a money laundering cycle. As soon as dirty money has been stacked and placed in the system, it will be transferred to, absorbed in the legitimate markets, and used as legal tender for transactions. The real estate sector has emerged as a very popular means to carry out this practice.[7] In order to create a persuasive narrative on

[6] Mohammed Ahmad Naheem 'Trade based money laundering: towards a working definition for the banking sector' (2005) 18(4) Journal of Money Laundering Control <https://www.researchgate.net/publication/282420020_Trade_based_money_laundering_towards_a_working_definition_for_the_banking_sector> accessed 18 November 2023

[7] Fatjona Mejdini and Fabian Zhilla, 'A safe Haven in the Gulf: Balkan criminals, and their money, are hiding in the United Arab Emirates' (*Global Initiate*, 19 April 2022) <https://globalinitiative.net/analysis/balkans-criminals-uae-gulf/> accessed 18 November 2023

where the money was coming from, it is very important that reliable sources of information are effectively utilised.

A broad understanding of these stages is essential in identifying this practice which can take several forms as the growth in the financial sector opens doors to highly sophisticated money transfer schemes.[8] To shed light on some of the most common ways, businesses such as restaurants, being legitimate cash cows, rank first in terms of ease of channeling funds through inflated receipts of cash. In criminal parlance, these are known as 'fronts'.

It may be noted that easy movement to funnel cash through jurisdictions is of utmost importance, as in the case of smuggling in foreign exchange and wire transfers across borders and deposits in countries with comparatively lenient law enforcement.[9] While gambling, counterfeiting and the use of shell companies are rather difficult to detect and prevent, criminals also circumvent the limits imposed on the monetary value of transactions to be reported to the regulatory authorities through a process called structuring, whereby huge chunks are broken up into numerous smaller and seemingly insignificant deposits in multiple bank accounts.

THE RELEVANCE OF GLOBAL ANTI-MONEY LAUNDERING MEASURES

Money laundering is a pervasive global issue that threatens the stability and integrity of financial systems worldwide. Despite significant efforts, money laundering remains a persistent challenge globally. Criminals continually adapt their methods, exploiting new technologies and gaps in regulatory systems. For addressing these challenges, this ongoing international cooperation is crucial. Key areas of focus include continuous updates and improvements to anti-money laundering frameworks, increased information sharing, and capacity building in developing countries. Recognising its detrimental impact on economies and society, countries across the globe have taken collective action to prevent and combat money laundering.

[8] Keith Furst, 'Merchant-Based Money Laundering' (*Data Derivatives*, 22 September 2017) <https://www.dataderivatives.com/blog/2017/9/22/merchant-based-money-laundering-part-3-the-medium-is-the-method> accessed 18 November 2023

[9] 'G2 Transaction Laundering Detection' *(G2 Web Services*) <https://www.g2llc.com/solutions/monitoring-solutions/transaction-laundering-detection/> accessed 18 November 2023

THE FINANCIAL ACTION TASK FORCE

The FATF is a multilateral organization that watches out for the financing of terrorism and money laundering. Global standards for the prevention of such unauthorised activities and their damage to society are developed by it. Headquartered in Paris, France, it was established in 1989 as part of the Group of Seven Summit.[10] The idea behind the establishment of this organisation was to carry out operational measures and set legal standards and regulations for curbing money laundering, any illegal drugs, human trafficking, terror financing and other threats to the integrity of global financial systems. Apart from the 39 countries that are members of this organisation, it also has regional organisations, known as FATF Style Regional Bodies, working for its cause. Needless to say, India, with its global diplomatic relations agenda and as a member state, supports and ensures the timely implementation of recommendations provided to circumvent the blacklist based on mutual evaluation. Non-Cooperative Countries or Territories (NCCTs) like Iran and North Korea are some examples of states that outrightly support terror funding and money laundering activities taking place in these regions.[11] Additions and deletions to the list take place regularly with changing scenarios. Issued as a warning of sorts, the grey list, on the other hand, consists of countries on the verge of making the blacklist if stringent actions are not undertaken. This invites troubles in obtaining loans from the International Monetary Fund, World Bank, Asian Development Bank and other nations apart from the economic sanctions imposed by these monetary authorities. It may also lead to a significant reduction in international trade as a result of a global boycott. As a global watchdog on how terrorism is funded, the FATF sets global standards to mitigate the risk of money laundering and assesses the effectiveness of actions taken by countries, thereby generating a political response and legal reforms.[12] There are 40 recommendations created to aid law enforcement

[10] THE FORTY RECOMMENDATIONS OF THE FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING 1990

[11] Simon NM Young, 'Money Laundering in International Law' (*Oxford Bibliographies*, 27 October 2021) <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0233.xml> accessed 18 November 2023

[12] 'About the Non-Cooperative Countries and Territories NCCT Initiative' (*FATF*) <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Aboutthenon-cooperativecountriesandterritoriesncctinitiative.html> accessed 18 November 2023

agencies. Even while not a part of the FATF, there are approximately 200 nations implementing them today. FATF regularly revises its standards to address new risks, like regulating virtual assets, as cryptocurrencies gain popularity as a novel method of illicit financing.

KEY INITIATIVES AND MEASURES

1. Enhanced Customer Due Diligence (CDD): One of the fundamental measures in preventing money laundering is the implementation of robust customer due diligence procedures. Countries are urged to create rules requiring financial institutions to recognise and confirm the identity of their clients, comprehend the nature of their business partnerships, and keep an eye out for dubious activities.

2. Reporting of Suspicious Transactions: Countries are urged to set up procedures for informing the proper authorities about suspicious transactions. Banks and other financial institutions must report any transactions potentially related to money laundering or terrorism financing. These reports make the early detection and prevention of illegal financial activity easier.

3. International Cooperation and Information Exchange: Fighting money laundering requires international cooperation. Through information and intelligence sharing, reciprocal legal assistance, and extradition, the FATF fosters global cooperation. Countries are better equipped to identify and dismantle cross-border money laundering networks by pooling their knowledge, experience, and financial intelligence.

4. Regulation of Non-Financial Sectors: Anti-money laundering laws have been extended to non-financial sectors in recognition that money laundering can happen in industries other than traditional financial institutions. This includes businesses like real estate and casinos, as well as accountants, lawyers, and other professionals who might be exploited for money laundering.[13]

[13] 'Money Laundering: The Importance of International Countermeasures' (*International Monetary Funds*, 10 February 1998) <https://www.elibrary.imf.org/view/journals/001/1996/055/article-A001-en.xml> accessed 18 November 2023

5. Technological Advancements: Because money laundering methods have evolved, it is now necessary to use cutting-edge technologies to identify and stop illegal financial activity. Creating and applying cutting-edge tools and systems, like artificial intelligence, data analytics, and blockchain technology, can improve the efficacy of countermeasures against money laundering.

An organised global response is needed to combat money laundering. Countries have made significant progress in implementing measures to counter terror financing and money laundering through organisations like the FATF and international cooperation. However, fighting against money laundering is a never-ending task that demands constant vigilance, flexibility, and international cooperation.[14] The international community can contribute to the development of a more secure and open global financial system by enhancing anti-money laundering systems, exchanging information, and embracing technological advancements.

LEGAL FRAMEWORK IN INDIA

Political parties, corporate entities, and the stock market are where almost all of the money laundering operations in India take place.[18] The Enforcement Directorate and the Indian Income Tax Department are conducting investigations into these. Out of the 2,480 billion rupees ($31 billion) in total tax arrears, the Indian Government estimates that about 1,300 billion rupees ($16 billion) are related to cases of money laundering and securities fraud. The Prevention of Money Laundering Act 2002 was passed by the Indian Parliament with the intention of stopping the heinous practice of money laundering in the nation. The Act and the established rules took effect on July 1st, 2005.[15] The goal was to support international efforts to combat money laundering with associated crimes. Furthermore, in addition to harsh penalties, such as imprisonment, the Act provided for the confiscation of any assets obtained through the use of laundered money in order to stop such illegal activities. The PMLA 2002's provisions may be viewed as quite stringent by some as bailing out becomes a grueling process. In some cases, the PMLA

[14] Sukanta Sarkar, 'The parallel economy in India: Causes, impacts & government initiatives' (2010) 11(1) Economic Journal of Development Issues <https://indianstrategicknowledgeonline.com/web/black%20economy.pdf> accessed 18 November 2023

[15] Prevention of money laundering Act 2002

proceedings come with a heavier burden than the original offence; for example, Section 419 of the Criminal Procedure Code deals with impersonating someone else to cheat. Three years is the maximum sentence, and bail is available.[16] Violations are non-bailable, and the term of imprisonment must be at least three years in duration. The PML act is tediously lengthy in order to cover much ground. With the approval of the Enforcement Directorate (E.D.), any person may be charged under the Act.[20] This discourages private individuals and traders mired in criminal investigation and charges against them from carrying out their business activities routinely and efficiently. However, the PMLA remains to be used frequently.

INSTITUTIONAL FRAMEWORK IN INDIA

In terms of sub-section (1) of section 6 of the Prevention of Money Laundering Act, 2002, an Adjudicating authority under PMLA has been constituted to exercise jurisdiction, powers and authority conferred by or under the said Act.[20] The Directorate of Enforcement was established with the objective of enforcing the specific provisions of the Foreign Exchange Management Act of 1999 (FEMA) and the Prevention of Money Laundering Act. Formed by the Government of India on May 1st, 1956, it comes under the Department of Revenue, Ministry of Finance. It is headquartered in the capital of India, New Delhi. Responsibility for the work relating to criminal prosecution and inquiry into cases under the PMLA has been transferred to the Enforcement Directorate. The Department of Economic Affairs oversees the policy features of the FEMA, its legislation, and any amendments thereto. The Directorate reports to the Department of Revenue for administrative purposes, and the direct responsibility of formulating policies is delegated to the Finance Minister of India.

The Financial Intelligence Unit - India, referred to as FIU-IND, has been set up by the Government of India via an Order in Motion dated November 18th, 2004, to serve as the nationwide organisation entrusted with collecting, interpreting, assessing, and communicating information concerning suspicious monetary transactions.[17] Additionally, FIU-IND is

[16] Code of Criminal Procedure 1973

[17] Rajini Arora, 'Black Money in India: Present Status And Future' (2012) 5(1) International Journal of Science, Engineering and Technology Research <https://studylib.net/doc/18419776/black-money-in-india--present-status-and-future> accessed 18 November 2023

responsible for organising and assisting both domestic and foreign intelligence, research, and enforcement agencies in their efforts to contribute to the global struggle with money laundering and related crimes. Led by the Finance Minister of India, the Economic Intelligence Council (EIC) receives reports immediately and directly from the Financial Intelligence Unit, which works as an autonomous organisation. Receiving reports of cash and unauthorised transactions, analysing those reports, and as necessary, providing valuable financial data to governing bodies and intelligence/enforcement agencies are the main duties of FIU-IND. Its main duties include gathering, analysing, and disseminating information, providing a central repository, coordinating activities, and conducting research and analysis, among other tasks.

RECENT DEVELOPMENTS IN LEGISLATIVE ACTION

Through its recommendations and by closely watching its implementation around the globe, the Financial Action Task Force (FATF) has examined the steps various nations took to combat the threat of money laundering and terrorism financing. The Indian Government is consequently under pressure to adhere to the FATF's various recommendations. Before the year is out, there will be a Compliance Review of how India has implemented the FATF recommendations. Any negative findings might significantly affect the rating and international funding for different development projects.[18]

According to FATF recommendation 22, certain non-financial businesses and professions, including casinos, real estate agents, precious metals dealers, lawyers, notaries, other independent professionals, and accountants, are subject to the requirements for customer due diligence and record-keeping when they prepare for or execute transactions for their clients involving certain specified activities. Additionally, the FATF's recommendations impose certain duties on trustees, directors, etc. In light of this, the Government has released two notifications, dated May 3rd and May 9th, 2023. The 3rd May notification is a watered-down version of the aforementioned requirements and seeks to place responsibility on practising chartered accountants, company secretaries, and cost accountants to report the specific financial

[18] Sarkar (n 14)

transactions carried out during the course of their profession on behalf of their clients to the Financial Intelligence Unit (FIU). The Government's action may have also been prompted by certain investigations into the recent formation, management, and operations of Chinese companies and the roles played by various professionals. Lawyers, notaries, and accountants who are not practising have been excluded from the notification. What is wrong with the diluted application of FATF recommendations can be debated. Nevertheless, if the Government's goal is to follow the FATF's recommendations, then it should have included non-practising accountants, lawyers, and notaries as well.

ROLE OF PROFESSIONALS

In accordance with the provisions of the Prevention of Money Laundering Act 2002, there are three types of proceedings in which professionals play a huge role. These include civil proceedings that are taken out under the Act in a case of attachment or confiscation of property, a criminal indictment for the offence of Money Laundering and lastly, compliance proceedings in case of failure to comply by financial intermediaries. Therefore, abiding by the regulations could prove to be a difficult task for businesses providing intermediary services. Full disclosure by clients would lead to an investigation into the activities of professionals like C.A., CWA, C.S., and lawyers. As a result, they may become involved in the crime of money laundering by strategising, planning company structures, etc., as well as by certifying documents or statements. The demand for professional services that were not previously used in money laundering has increased as the criminal activity has become more sophisticated. Lawyers are specifically mentioned as preferred agents for the laundering of money obtained illegally.[19] Criminals are increasingly using lawyers as professional intermediaries in the modern money laundering trend. One reason for the trend could be the perception that any service provided by an upholder of the law is itself legitimate.

[19] Friedrich Schneider, 'Money Laundering and Financial Means of Organized Crime: Some Preliminary Empirical Findings' (2010) Economics of Security Working Paper Series <https://ideas.repec.org/p/diw/diweos/diweos26.html> accessed 18 November 2023

ROLES AND RESPONSIBILITIES OF LAWYERS

The prevention of money laundering is a collective responsibility that requires the active participation of lawyers, regulators, financial institutions, and law enforcement agencies. With their legal knowledge and expertise, lawyers contribute significantly to detecting, preventing, and prosecuting money laundering offences in India by ensuring compliance with anti-money laundering regulations, conducting due diligence, etc.

1. Compliance with Anti-Money Laundering Regulations: Lawyers have a responsibility to understand and comply with anti-money laundering regulations. They must be aware of the PMLA provisions, rules, and guidelines, along with any updates or amendments. By adhering to these regulations, lawyers contribute to the prevention and detection of money laundering activities.

2. Client Due Diligence: Lawyers must conduct thorough due diligence on their clients to identify potential risks associated with money laundering. This includes verifying the identity of clients, understanding the nature and purpose of proposed transactions, and assessing the source of funds. By implementing strict know-your-client (KYC) procedures, lawyers can identify suspicious activities and prevent involvement in money laundering schemes.

3. Reporting Suspicious Transactions: If lawyers encounter any transaction or activity that raises suspicion of money laundering, they are legally obligated to report it to the appropriate authorities. They are designated as 'reporting entities' under the PMLA and must file suspicious transaction reports (STRs) with the Financial Intelligence Unit (FIU) of India. This reporting mechanism is a crucial early warning system for detecting and preventing money laundering.

4. Legal Advice and Compliance Programs: Lawyers can advise businesses and individuals to ensure compliance with anti-money laundering laws. They assist in developing robust internal controls, policies, and procedures to prevent money laundering within organisations. By conducting risk assessments and implementing compliance programs, lawyers help their clients identify and mitigate vulnerabilities to money laundering.

5. Collaboration with Authorities: Lawyers play a significant role in assisting law enforcement agencies and regulatory bodies during money laundering investigations.[20] They provide legal expertise and support in gathering evidence, preparing cases, and ensuring the legal process is followed properly. Lawyers' involvement in these investigations enhances the effectiveness of law enforcement efforts to combat money laundering.

EXEMPTION FROM LIABILITY AS A REPORTING ENTITY: THE CONCEPT OF CLIENT PRIVILEGE

No client privilege is accrued to professionals other than lawyers in India. Section 126 of the Indian Evidence Act 1872, which deals with Professional communications, states that "No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment", subject to certain conditions as laid down the Section.[21]

IMPLICATIONS OF ANTI-MONEY LAUNDERING REGULATIONS ON THE LEGAL COMMUNITY AROUND THE WORLD

Foreign governments have acknowledged the need to tighten reporting requirements for organisations and institutions likely to act as agents for money laundering. It is possible that those in charge of drafting the rules had doubts about its ability to significantly increase the number of solicitors who are charged with money laundering while practising law. Although the regulations governing solicitors in the U.K. have been in effect for a while, it has taken some

[20] Dr. Anuradha Gupta, 'Money Laundering and Financing of Terrorism-A Study on Methods to Fight Money laundering in India and USA' (2010) 58(10) Journal of the Institute of Chartered Accountants of India <https://www.pgdavcollege.in/files/userResume/4/User-userResume-a87ff679a2f3e71d9181a67b7542122c-a65b29fc739c6aae15afa052571e2681.pdf> accessed 18 November 2023

[21] Indian Evidence Act 1872

time for the practices to become commonplace. Regardless of whether they may be aware of the laws, British lawyers are careful not to jeopardise their obligations to their clients. The Law Society of England and Wales created guidelines to outline solicitors' duties under the law in order to increase awareness of the anti-money laundering provisions among the legal profession.[22] Legal professionals may be held accountable for helping a client hide illegally obtained money, warning a client who may be charged under common law offences and failing to disclose their knowledge of the same. Therefore, lawyers who fail to report knowledge or suspicion of money laundering may be fined or jailed. The dangerous trend of failure to comply with reporting standards, as seen in the U.K., can be attributed to the absence of adequate guidance among untrained legal professionals. This paves the way for widespread unethical interactions with clients. Although adherence to these standards is advisable for their own protection, it cannot be denied that these professionals are subject to a moral dilemma. Acting in accordance with and obeying the disclosure standards imposed by the law society, they would have to transgress the ingrained principle of confidentiality in the contractual relationship with their clients. In this regard, the legislation encourages them to defend themselves in case of prosecution rather than imposing a duty set in stone. Lawyers should be held to higher standards because of their role as middlemen in money laundering, which is acknowledged outside of the U.K. The European Commission proposed changes to the Money Laundering Directive in accordance with U.K. standards in response to the current money laundering trend. For instance, in order to strengthen the fight against money laundering, the European Parliament proposed limiting solicitor-client privilege in a way similar to loosening banking secrecy laws. The European Parliament was considering the idea of 'litigation privilege' prior to the changes becoming effective, which would have restricted the protection to only client and attorney communications that are directly related to legal proceedings. Similar to the extensive U.K. regulations already in place, laws covering sectors other than financial are also proposed to be implemented soon.

[22] The Money Laundering and Terrorist Financing Regulations 2019

SCOPE OF ATTORNEY-CLIENT PRIVILEGE IN COMMON LAW JURISDICTIONS

PRIVILEGE VS CONFIDENTIALITY

All information about the client, whether the client or someone working on their behalf shares it, is subject to a general obligation of secrecy that lawyers are obligated to uphold.

Confidentiality and privilege differ from one another in the sense that the former pertains to the exchange of information that takes place within the attorney-client relationship, whilst the latter only covers exclusive information that cannot be conveyed to a third party. In view of this, only the client, not the lawyer, may give up confidentiality rights before any information can be made available to the public.[23] For instance, revelations of suspicions about a monetary transaction undertaken by a client sabotage these primary obligations that apply in working with clients. However, attorneys who are acting in their professional and legal capacity are shielded from disclosing information confided in them. Lawyers would abstain from jeopardising their business relationships and expose themselves to disciplinary action by a professional organisation for breach of trust. Thus, there is a compelling public interest in invalidating and making a claim for breach of contracts from such disclosure unenforceable. Apart from the moral dilemma of abandoning the rules of ethical conduct under certain conditions that might obstruct fairness, there is also the question of how these policies affect client privilege.

OVERRIDING THE CONTRACTUAL OBLIGATION OF CONFIDENTIALITY

In order to encourage the legal professional community's cooperation in a criminal investigation of financial crime, U.K. statutes try to safeguard barristers and solicitors from potential violations of their ethical commitments. By defending lawyers against professional wrongdoing, the U.K. standards treat privilege in a way similar to how confidentiality is treated. As long as information is given to authorities while they are conducting a criminal investigation, it is not considered to be a disregard of privilege. In order to encourage the legal professional community's cooperation in a criminal investigation of financial crime, U.K. statutes try to

[23] *Marubeni Corporation v Aristides A. Alafouzos* [1986] EWCA Civ J1106-5

safeguard barristers and solicitors from potential violations of their ethical commitments. Additionally, as long as a reasonable attempt to comply is made, they are also provided adequate protection from being held liable. Likewise, the capacity to provide sound counsel may be jeopardised if money laundering reporting is given the same weight in India. The idea behind maintaining client confidentiality is to promote open communication about the facts of the case and the client's circumstances so that a lawyer can provide the most effective defence. With excessive concern about the disclosure of classified information by their counsel, clients may be reluctant to share it in its entirety. Notwithstanding the degree of the offence, a conservative and defensive attitude while obtaining advice is seen in almost such cases.[24]

THE CASE AGAINST THE EXCLUSION OF LAWYERS FROM THE AMBIT OF PMLA 2002

The perception that the legal community in our nation has a privileged status that encourages political partisanship in the execution of numerous laws, including Service Tax, VAT, GST, and other regulations, has escalated. Astonishingly, the highest-paid profession in the nation is exempt from any such responsibility, while on the other hand, modest businessmen are required to register under the GST Act and fulfill legal obligations.[25] The argument is that the Prevention of Money Laundering Act (PMLA) allows for legal action against any attorney found guilty of money laundering because the term 'Person' refers to any person or organisation that has been asserted. However, the same defence also applies to those who work in the three professions recently entrusted as 'Reporting Entities'. Instead of instilling a feeling of pride in being imparted a sense of responsibility as the upholder and protector of law, it is more likely to offend them for being associated with fraudulent conduct. Suppose the deteriorating moral values of professionals today have drawn this action from the state. In that case, it may be contended that the same is undoubtedly true for any other professional as well.

[24] *Éditions Plon v France* App No 58148/00
[25] Central Goods and Services Tax Act 2017

CONCLUSION AND RECOMMENDATIONS

As the world's most populous nation, India's leadership role in developing effective anti-money laundering policies has been acknowledged by the Financial Action Task Force. However, the gradual drift of money laundering activities toward unregulated businesses calls for additional action from both the professional groups in the country as well as the Government. It may not be enough to simply expand the current reporting standards to include additional experts and businesses operating under the extant regime. The community of lawyers is held in high esteem in our society because of the integrity generally expected of these professionals, thereby making regulation a comparatively challenging task. A hindrance to their commitments would render these laws undesirable. Moreover, the possibility of undue influence of the state in free enterprise systems is an impediment to economic growth. The importance of maintaining a certain degree of objectivity in this profession cannot be overstated. If unreasonable bias creeps into legal aid, the standards of services and their merit would be negatively impacted. It may be essential to pass legislation similar to those already in places in the E.U. member states, but it is highly improbable that India could do so without facing opposition from the legal profession. Since the legislature already covers all individuals, businesses and even the Government under the PMLA, there is virtually no requirement of a separate one for professionals other than C.A., CWA and C.S. There may be reluctance on the part of lawyers to take up such cases if they fear being convicted like their colleagues. Lawyers must be permitted to retain objectivity because a just legal system allows for adequate representation to all. Simultaneously, they must ensure that their expertise is not misused. As opposed to authoritative regulation by government intervention, self-governance in this fight is more desirable. This entails the formation of statutory bodies drafting rules applicable to various sectors, shielded from any undue influence. For the legal sector, this committee would likely be affiliated with the Bar Council of India and composed of experts in the financial laws of our country. In-depth research into the extent of awareness among lawyers about how the problem of illicit financing could be aggravated by unsound advice could also be conducted through surveys. Once this gap is identified, awareness campaigns would encourage them to carry out a detailed background check and understand the expectations of their clientele. However, simply putting the decision-making power for

encroachment on privacy and violation of confidentiality in the hands of lawyers is not the answer. Therefore, any future regulations must ensure this balance of authority in order to materialise its goal of deterring financial fraud. A facility for open discussion with other legal consultants anonymously can be achieved through virtualisation and reliable artificial intelligence. This would not only help lawyers make a prudential judgement but also circumvent vicarious liability. The challenge for an association like the one proposed is to determine how to keep lawyers from turning away prospective clients whom they seek to represent. If the legal community becomes hostile, the Bar Council of India may also choose to consider revising Chapter II, Part VI of the BCI's rules on Standards of professional conduct and etiquette. When an important public policy is at stake, specific exceptions to specific regulations may be given. The BCI may decide to outline particular instances in which lawyers may be exempted from their obligation of secrecy, such as when law enforcement authorities pursue an investigation into the criminal activities of their client. Although these suggestions are simply recommendations for further consideration, they are offered here in an effort to spark discussion among the professional community and possible legislative action in the future.