
DUE PROCESS IN FINANCIAL SURVEILLANCE: A COMPARATIVE CONSTITUTIONAL STUDY OF ECIR IN INDIA AND SAR REGIMES IN THE UK AND UNITED STATES

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ABSTRACT

This paper offers a critical comparison of India's Enforcement Case Information Report (ECIR) system under the Prevention of Money-Laundering Act 2002 and the Suspicious Activity Reporting (SAR) frameworks in the United Kingdom and the United States. It attempts to explain how each system works with respect to the anti-money laundering framework and how the protection of people's rights is balanced with the enforcement of laws against money laundering. The ECIR process in India gives the executive branch a lot of power which makes it easier to follow the law but also makes it more likely that due process and transparency rules will be broken raising questions about the existence of separation of powers in India. The SAR system in the UK on the other hand, is based strictly on the law. It requires strict reporting but it makes sure that courts quickly review enforcement actions and that human rights are respected. The U.S. approach gives banks and federal agencies broad surveillance powers but these are checked by judicial safeguards post facto. Courts have generally supported this system because of strong state interests though there are ongoing debates about privacy and executive power. This paper compares the legal authority, judicial oversight, protection of fundamental rights and adherence to the rule of law in each country. It draws attention to the ways that the constitutional values of each country influence its anti-money laundering framework leading to a variety of models that are each successful in their own unique ways but entail trade-offs.

Keywords: ECIR, SAR, PMLA, ED, POCA.

Introduction

India, the United Kingdom and the United States have each developed their own ways to start and carry out financial crime investigations in response to money laundering. In India the Enforcement Directorate (ED) investigates under the Prevention of Money-Laundering Act 2002 (PMLA) by creating an internal Enforcement Case Information Report (ECIR) even though this process is not clearly defined in the law. In contrast the UK and USA use Suspicious Activity Reports (SARs) which financial institutions must file under the UK's Proceeds of Crime Act 2002 (POCA) and the U.S. Bank Secrecy Act of 1970 (BSA). In this paper the constitutional authority of these systems, the degree of judicial oversight and due process, the protection of fundamental rights, the rule of law and separation of powers, the potential for judicial review and the degree to which each system complies with constitutional values are all examined. The analysis uses statutes and case law from each country to evaluate how India, the UK and the U.S. balance strong anti-money laundering enforcement with the protection of constitutional rights.

Research Objective:

- To critically compare the constitutional frameworks of India's Enforcement Case Information Report (ECIR) under the Prevention of Money Laundering Act 2002 (PMLA) with the Suspicious Activity Reporting (SAR) regimes in the United Kingdom (Proceeds of Crime Act 2002) and the United States (Bank Secrecy Act 1970).
- To examining the extent to which they uphold the enforcement against money laundering while preserving the protection of fundamental rights, judicial oversight and the principle of separation of powers.

Research Question:

- How do the constitutional frameworks of Indias ECIR system and that of UK/US SARs differ and what trade-offs in balancing financial integrity with individual liberties become apparent?

Constitutional Authority

In India the PMLA was enacted by Parliament in 2002 partly to fulfil India's international anti-

money laundering commitments under the Union's criminal law and treaty implementation powers.¹ The Act created the ED's powers to investigate and prosecute money laundering. However, the Enforcement Case Information Report (ECIR) which is the ED's internal document to initiate a case has no explicit statutory basis in the PMLA. Unlike a First Information Report (FIR) under general criminal procedure which is mandated by law, the ECIR is a creature of executive practice without express legislative authorisation. Its extra statutory nature means the ED initiates cases on an internally recorded ECIR raising questions about the scope of the agency's authority in the absence of clear parliamentary sanction. However, through a number of PMLA provisions such as Section 5 for the provisional attachment of property, Section 17 for searches and Section 19 for arrests, Parliament has given the ED extensive investigative powers.² In *Vijay Madan Lal Choudhary v. Union of India (2022)*³ the Supreme Court of India upheld the main legal provisions of the PMLA. The Court said it is best for the state to let Parliament use its authority to fight economic crimes through this law. Even though the Court noted that the ECIR does not have a clear legal basis it did not see this as a major problem. The Court stressed that the legislature has wide authority to create special enforcement tools to achieve important government goals.

The UK's anti-money laundering regime is grounded in the Proceeds of Crime Act 2002⁴ (POCA) an Act of Parliament reflecting the doctrine of parliamentary sovereignty. POCA consolidated and expanded the UK's money laundering offences and reporting obligations, in part to implement international standards including EU Money Laundering Directives and FATF recommendations.⁵ Under Part 7 of POCA those in the regulated sector like banks and other financial institutions among others have a legal duty to file a SAR which is termed as an "authorised disclosure" in the statute whenever they suspect money laundering. The authority for this requirement flows from Parliament's plenary power over criminal law. Unlike India or the U.S., the UK has no written constitution to limit Parliament's enactments. The Human Rights Act 1998 requires that POCA be applied in line with the European Convention on Human Rights.⁶ This means the SAR regime must respect fundamental rights. POCA also clearly sets out the legal basis for the SAR system and its related consent process. Under that

¹ Constitution of India, arts 246, 253; Prevention of Money-laundering Act 2002.

² Prevention of Money-laundering Act 2002, ss 5, 17, 19.

³ *Vijay Madan Lal Choudhary v Union of India* (2022) 10 SCC 386.

⁴ Proceeds of Crime Act 2002.

⁵ Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (FATF 2012, updated 2023).

⁶ Human Rights Act 1998, s 3; European Convention on Human Rights, art 8.

regime which is now known as the Defence Against Money Laundering (DAML)⁷, a reporting entity that files a SAR must temporarily halt the suspicious transaction and seek consent from authorities. Hence completing the transaction without clearance is prohibited. These mechanisms are spelt out by law as Section 327–329 of POCA define the primary money laundering offences and Section 335 establishes the consent as per DAML procedure thereby satisfying the European Convention on Human Rights (ECHR) principle that any interference with rights is “prescribed by law”.⁸

In the United States, Congress enacted the Bank Secrecy Act of 1970 (BSA)⁹ (codified at 31 U.S.C. §§5311 *et seq.*) pursuant to its constitutionally enumerated powers over interstate commerce and taxation. The BSA authorises the U.S. Treasury Department and also its Financial Crimes Enforcement Network (FinCEN) to require financial institutions to maintain records and file reports of specified transactions to aid in criminal and regulatory investigations. The SAR obligations however, were imposed by Treasury regulations under the BSA after the 1992 Annunzio–Wylie Act amendments and extended the reporting regime to any suspected legal violations. The constitutional authority for these requirements derives from Congress’s broad Commerce Clause power to regulate transactions affecting interstate commerce. The U.S. Supreme Court in *California Bankers Assn. v. Shultz* (1974)¹⁰ upheld the BSA’s record-keeping and reporting provisions, finding them within Congress’s commerce power and not violative of due process. The Court noted that the Act’s requirements applied to banks and not individual account holders directly which helped fend off due process and Fifth Amendment challenges. In sum the U.S. SAR system rests on a firm federal statutory foundation and has been accepted as constitutionally authorised without need of any amendment given the judiciary’s recognition of Congress’s authority to enact expansive financial reporting laws in pursuit of crime prevention.

All three countries implement their anti, money laundering systems through laws enacted by their legislatures. India depends on the PMLA with the ECIR that the executive in the UK on POCA and the U.S. on the BSA have developed. Although each country’s lawmakers have demonstrated a strong commitment to addressing money laundering, the legal grounds and authoritativeness of their powers vary. In India, the executive enjoys greater latitude than what

⁷ Proceeds of Crime Act 2002, ss 335–336.

⁸ *Sunday Times v United Kingdom* (1979) 2 EHRR 245

⁹ Bank Secrecy Act 1970, 31 USC §§ 5311–5336.

¹⁰ *California Bankers Association v Shultz* 416 US 21 (1974).

is stipulated in the law. The UK depends on comprehensive legislation that has to safeguard human rights. In the U.S., federal laws are influenced by constitutional provisions concerning commerce and due process. Due to these differences each country has its own method of oversight and rights protection.

Judicial Oversight and Due Process

In India's PMLA enforcement process, the judiciary's role is minimal at the initial stages. The ED can initiate an ECIR and begin an investigation without any judicial approval as the ECIR is not registered with a court and the person named may not even be informed until an arrest is made. By contrast under ordinary criminal law an FIR is a public document accessible to the accused who can challenge it in court but the ECIR remains confidential and purely internal to the ED. The Supreme Court has held that failure to furnish the ECIR to the accused at the time of arrest does not by itself violate due process or Article 22¹¹ of the Constitution so long as the grounds of arrest are disclosed at that time and the person is later able to seek bail or quashing of charges.

During investigations the PMLA gives ED officials powers similar to those of the police but with much less outside oversight. Under PMLA Section 17¹² an ED officer can search premises and seize property on their own authority if they record reasons to believe the assets are proceeds of crime and only need to inform the PMLA Adjudicating Authority within 30 days. Under Section 19¹³ the ED can arrest someone suspected of money laundering without a warrant. After arrest the person must be brought before a special PMLA court within 24 hours but getting bail is very difficult because of strict conditions. ED officers can also freeze or attach property without prior notice and this is first reviewed by the PMLA Adjudicating Authority which is part of the executive branch. Independent judicial review usually happens only later such as if the accused files a writ or seeks bail in a High Court or during the trial. Unlike most criminal laws the PMLA gives broad powers to authorities allowing them to conduct searches, seizures or arrests that too even without getting a judge's approval thus reducing the role and purpose of the judiciary in protecting the rights and property of the people. Thus, the ED may have too much unchecked power raising concerns about government

¹¹ *ibid*

¹² Prevention of Money-laundering Act 2002, s 17.

¹³ Prevention of Money-laundering Act 2002, s 19.

overreach.

In the UK's SAR regime routine reporting by banks does not involve the judiciary but any enforcement action flowing from a SAR is quickly brought under judicial oversight. When a bank files a SAR with the UK Financial Intelligence Unit within the National Crime Agency (NCA) that act alone has no immediate legal effect on the customer the report is confidential and the subject is not notified. Thus, the act of "tipping off"¹⁴ a suspect about a SAR is a criminal offence under POCA. However, if authorities decide to act on a SAR for example to restrain the funds or investigate the account holder the law requires prompt court involvement. Under POCA upon receiving a SAR the NCA can issue a temporary hold on the suspicious transaction for a brief moratorium period initially up to 7 working days while it considers whether to investigate further. This period can be extended up to an additional 31 days but only with a magistrate's court order. If a longer restraint is needed to prevent the dissipation of suspected criminal assets, investigators must apply to a court for an Account Freezing Order (AFO). A magistrate's court will grant an AFO only if there are reasonable grounds to suspect that the funds in the account are criminal property. An AFO once granted can freeze an account initially up to 6 months and may be extended by the court to a maximum of two years with judicial review at intervals to ensure the investigation is progressing. The account holder is notified about the AFO and can challenge it or request changes such as for living or business expenses. This procedure adds due process and stops authorities from freezing assets for long periods based only on suspicion.

The U.S. SAR framework is designed so that the line between financial surveillance and state enforcement is policed by the courts. A SAR filed by a bank with FinCEN does not directly impose any restraint or penalty on the customer. It is simply an intelligence report.¹⁵ If law enforcement decides to follow up on a SAR's leads, they must proceed via the ordinary legal process with full constitutional safeguards.¹⁶ For example, if agents want to gather more detailed bank records or communications beyond the information in the SAR, they generally need to use a legal process, such as a subpoena or search warrant unless exigent circumstances justify an administrative summons which in any case can be contested in court. According to the Fourth Amendment's requirements the government must apply for a warrant or court order by demonstrating probable cause that the assets are subject to forfeiture in order to seize or

¹⁴ Proceeds of Crime Act 2002, ss 333A–333D.

¹⁵ Bank Secrecy Act 1970, 31 USC §§ 5311–5318; 31 CFR § 1020.320.

¹⁶ *California Bankers Association v Shultz* 416 US 21 (1974).

freeze money suspected of being related to criminal activity.¹⁷ Similar to this if authorities intend to make an arrest based on transactions discovered in a Suspicious Activity Report (SAR) they must either obtain an arrest warrant or establish probable cause. Following that the person must be taken right away before a judge and advised of their legal rights which include the right to counsel and the right to silence. To put it another way any coercive action brought on by a SAR is routed through the regular legal system where arrestees receive the full range of due process protections, searches require warrants and seizures require court approval. By doing this the constitutional balance is preserved, and judicial oversight is inserted at the point of enforcement.

Protection of Fundamental and Human Rights

The PMLA enforcement regime has raised significant concerns about infringement of fundamental rights guaranteed by the Indian Constitution. The right to silence during an investigation and the right against self-incrimination (Article 20(3)) are major issues because they are intimately related to the right to life and personal liberty under Article 21. Historically, Indian jurisprudence strongly protected the right of an accused to remain silent. In *Nandini Satpathy v. P.L. Dani* (1978), the Supreme Court affirmed that no one can be compelled to answer questions during an investigation that may incriminate them. The PMLA however empowers ED officers under Section 50 to summon any person and compel them to give statements and produce documents with a legal obligation to answer truthfully on pain of imprisonment (Section 63 PMLA). The twist is that at the time of summoning the person may not formally be an “accused” the ED often issues Section 50 summons to persons of interest before naming them in a complaint. The Supreme Court in *Vijay Madan Lal Choudhary* (2022) upheld this regime holding that statements given to ED officers are admissible and do not violate Article 20(3) because ED officers were deemed not to be “police officers” for purposes of the Evidence Act and the protection against self-incrimination applies only after a formal accusation. This formalistic approach has been heavily criticised as overly pedantic and ignoring the substance of the right. In reality during an ED interrogation a person may be forced to make potentially incriminating admissions and if they are later arrested and charged the same statements may be used against them in court.¹⁸ By using the technical timing of when one becomes an "accused" to get around the Article 20(3) guarantee the Court's position essentially

¹⁷ US Constitution, amend IV.

¹⁸ Proceeds of Crime Act 2002, § 335.

nullifies the right to remain silent. This is in stark contrast to U.S. law where the landmark *Miranda v. Arizona* (1966) rule requires advising suspects of their right to silence during custodial interrogation. Indian law's divergence here has prompted concerns that PMLA investigations trample Article 21 due process and the Article 20(3) privilege against self-incrimination.

Another fundamental right issue is the presumption of innocence and the related right to personal liberty which manifests in the right to bail. Article 21 encompasses the presumption of innocence and a fair trial. Yet PMLA's Section 24 inverts the burden of proof by presuming the accused guilty of money laundering unless they can prove otherwise regarding the origin of the alleged "proceeds of crime".¹⁹ Furthermore when Section 45²⁰ of the PMLA was first passed it placed harsh restrictions on bail known as the "twin conditions" which state that the court must have good reason to believe the accused is innocent and unlikely to commit another crime before granting bail.²¹ These conditions were far stricter than the norm and were struck down as unconstitutional in *Nikesh Tarachand Shah v. Union of India* (2018) for violating Article 21's guarantee of personal liberty. However, a tweaked version of Section 45 was reintroduced by amendment and was upheld in *Vijay Madan Lal* (2022). Because bail under the PMLA is still so difficult to obtain an accused person may be imprisoned for years before being tried, thereby punishing them without being found guilty. Hence the Supreme Court's acceptance of this strict bail regime has been controversial.

Furthermore, a key part of a fair trial under Article 21 is the right to know the case against oneself, which is limited in PMLA proceedings because the accused does not receive the ECIR. When a suspect is not told the specific allegations it becomes much harder for them to seek legal help or challenge unfair actions. The Supreme Court rationalised that as long as the arrest memo and subsequent remand documents disclose the reasons for arrest Article 22's requirements are met.¹⁹ Nonetheless, depriving the accused of detailed knowledge of the case has been criticised as undermining "equality of arms" in defending oneself.

The UK as a liberal democracy bound by the Human Rights Act 1998 must ensure its anti-money laundering measures including the SAR regime under POCA do not disproportionately

¹⁹ Proceeds of Crime Act 2002, §333A.

²⁰ Prevention of Money-laundering Act 2002, s 45.

infringe rights like the right to privacy and Article 8 ECHR the right to property, Protocol 1.

Article 1 ECHR and the right to a fair trial and presumption of innocence (Article 6). Overall, the SAR system has been designed to allow for both efficient enforcement and individual rights protection. Filing a SAR is basically a confidential requirement to comply with the regulators that in itself does not directly infringe on the individual's rights the person is generally not aware of the report. The only fact that privacy or property may be interfered with is when the authorities decide to act on a SAR in which case, as indicated, judicial control is exercised through the granting of warrants, account freezing orders, etc. This is one of the ways that the UK law is fair.

When they want to protect their right to a fair trial, people may also challenge forfeitures or restraining orders in court. The presumption of innocence is certainly not affected by the SAR regime because a mere SAR does not produce any legal presumption of guilt as it is only an alert to the authorities. If a SAR results in a prosecution, the usual criminal procedure will be followed whereby the prosecution carries the burden of proof and there is full disclosure.

UK courts have demonstrated a readiness to interpret and apply POCA consistent with fundamental rights. In case a particular aspect of the regime was found by the courts to be incompatible with rights, they could either issue relief or interpret the law in such a way that the violation is avoided under the HRA 1998. In addition, there are important safeguards such as judicial oversight and time limits on investigations besides confidentiality rules. Interestingly, a policy implementing SAR, derived powers in an arbitrary or overly broad manner may be challenged through judicial review on the grounds of abuse of power or disproportionality. The UKs method on the ground is pretty much intended to ensure that any restrictions imposed on individuals' rights in the context of AML are reasonable and only those restrictions necessary for achieving the legitimate goals are imposed.

In the US the Fourth Amendment which protects privacy from arbitrary searches and the Fifth Amendment which guarantees due process and the privilege against self-incrimination are the main constitutional rights in the United States that are implicated by anti-money laundering surveillance. The SAR requirement places obligations on banks rather than on individuals and under the longstanding third-party doctrine individuals have a diminished expectation of privacy in financial records held by banks. As for self-incrimination since the duty to report is on the bank which as an entity that cannot invoke the Fifth Amendment an individual account

holder cannot claim that their own compelled testimony is being used against them.

Thus, the American approach has been that the SAR regime does not itself violate fundamental rights especially when tempered by constitutional guardrails at the enforcement stage. Concerns about overreach have been aired in political and oversight forums but so far, the judiciary has not struck down these measures. The overall assessment is that while the U.S. system permits extensive monitoring of financial activity it survives constitutional scrutiny because it is formally directed at financial institutions and operates within a framework of judicially enforceable rights when actual investigative steps are taken. Instead of invalidating the statutory scheme courts have been practical and deferential permitting widespread financial surveillance as a tool for law enforcement and depending on case-by case challenges to stop any egregious abuses.

Adherence to Rule of Law and Separation of Powers

Each system's layout mirrors how it views the values of rule of law and separation of powers. India's PMLA is under fire for how it has given too much power to the executive without providing adequate transparency and judicial oversight. The lack of a legal foundation for the ECIR allows the executive to use the ED controlled Adjudicating Authority for investigations, property seizure and decisions without timely independent review. The separation of powers is compromised as only at a later stage higher courts get involved often when rights have already been curtailed. Unlike this the UK model has several legal safeguards embedded in it as the laws clearly define the duties and the executive branch carries them out effectively. Besides an independent judiciary reviews important actions through judicial review.

In the United States the courts make sure enforcement follows the Constitution and Congress allow broad surveillance powers but requires oversight and transparency. While the executive branch collects a large amount of financial data the other branches help prevent overreach. No single branch has total control; the rule of law is maintained by the courts' power to stop unlawful actions and by lawmakers' ability to change the law when necessary.

British courts cannot strike down Acts of Parliament but none of POCA's SAR provisions have been deemed incompatible with human rights. Instead, judges have applied the law flexibly to uphold rights for example reading a proportionality requirement into confiscation proceedings

in *R v Waya* (2012)²² and warning against duplicative charges in *G(Appellant) v H (Respondent)* (UKSC 2024).²¹

The U.S. Supreme Court in *California Bankers Assn. v. Shultz*²³ (1974) along with later cases like *United States v. Miller*²⁴ (1976) upheld the Bank Secrecy Act's reporting requirements against Fourth and Fifth Amendment attacks. American courts have since adopted the principles of these cases and follow them as precedents to keep the SAR regime intact as they only intervene to the extent of suppressing evidence and or addressing specific abuses instead of invalidating the entire scheme.

Conclusion

This comparison shows how India, the United Kingdom (UK) and the United States (US) balance the power of the state with the rights of the individual.

Enforcement in India under the Prevention of Money, Laundering Act (PMLA) is mainly through the Enforcement Case Information Report (ECIR) system which grants the executive branch a wide range of powers while at the same time such powers can lead to weakening of procedural safeguards.

In the UK the Suspicious Activity Report (SAR) system is deeply rooted in The Human Rights Act. The fundamental rights and rule of law being safeguarded, here proportionality and judicial oversight have to be a strict requirement. On the other hand, the United States federal agencies have extensive reporting and surveillance powers with judicial and legislative oversight generally being retrospective. Courts have largely given their nods to the BSAs system although civil liberties debates continue. Ultimately it is strong oversight that each system has to rely on for success.

India requires continuous judicial supervision to keep the executive under control. The UK has to maintain proportionality and oversight in order to be just; and the US depends on balances and democratic alertness to ensure that its surveillance powers are not used to erode fundamental freedoms.

²² *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

²³ *California Bankers Association v Shultz* 416 US 21 (1974)

²⁴ *United States v Miller* 425 US 435 (1976).