



The PMLA Conundrum: Colonial Shadows, Economic Security, and the Erosion of Fundamental Rights in India

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Abstract

The Prevention of Money Laundering Act, 2002 (PMLA) represents one of India's most stringent economic-crime statutes and has generated sustained constitutional debate concerning the balance between national financial security and individual liberty. This paper critically examines the constitutional validity of the PMLA through the lens of its historical development, colonial legal antecedents, statutory structure, and evolving Supreme Court jurisprudence. It analyses key provisions relating to arrest, attachment of property, reverse burden of proof, bail, and compulsory examination, with particular reference to Articles 14, 19(1)(g), 20(3), 21, and 22 of the Constitution of India. The study further evaluates major judicial developments from *Nikesh Tarachand Shah v. Union of India* and *Vijay Madanlal Choudhary v. Union of India* to subsequent decisions that have sought to strengthen procedural safeguards governing arrest, bail, attachment, disclosure of grounds, and access to documents. The paper argues that although recent judicial interventions have moderated some of the harsher consequences of the PMLA, the underlying statutory framework continues to raise significant concerns regarding due process, personal liberty, fair trial, and proportionality. It therefore advocates legislative reform aimed at reconciling effective anti-money-laundering enforcement with constitutional protections and transforming the PMLA into a rights-compliant framework consistent with democratic rule of law.

Keywords: Prevention of Money Laundering Act (PMLA), Fundamental Rights, Constitutional Law, Money Laundering, Enforcement Directorate, Right to Personal Liberty, Bail Jurisprudence, Reverse Burden of Proof, Due Process, Supreme Court of India.

Introduction

The Prevention of Money Laundering Act, 2002 (PMLA) stands as India's most formidable economic enforcement statute, yet its constitutional legitimacy remains fiercely contested. Since its enactment, the Supreme Court has delivered over a dozen landmark rulings—ranging from validating the reverse burden of proof to recently imposing judicial oversight on arrests—each shaping the delicate balance between national economic security and individual liberty. This comprehensive analysis

examines whether the PMLA violates fundamental and legal rights, traces its colonial lineage, and provides a detailed examination of every major Supreme Court judgment from 2002 to 2026, assessing whether these rulings have decolonised the Act or merely cosmeticised it. As senior advocate Kapil Sibal has trenchantly observed, the genesis of many of these provisions lies in British-era laws designed to “quell dissent,” raising profound questions about their constitutional validity .

Part I: The Colonial Blueprint – How British Rule Shaped India’s Penal Architecture

To understand the PMLA’s constitutional violations, one must first recognise that India’s criminal justice system was not born from democratic consensus but from colonial imperatives of control, revenue extraction, and suppression of nationalist movements. As Union Home Minister Amit Shah has acknowledged, the Indian Penal Code, Criminal Procedure Code, and Indian Evidence Act all bore the “British colonial stamp” and were “not meant to protect the common people of India” .

The 1861 Criminal Procedure Code – The Birth of Preventive Detention

The first Indian Penal Code (1860) and the Criminal Procedure Code (1861) were drafted by Lord Macaulay and later modified to create a system where the colonial state held unparalleled power over life and liberty. The Code introduced warrantless arrests under Section 54 (now Section 41 of CrPC) for “reasonable suspicion”—a broad, unguided discretion that allowed British magistrates to detain anyone deemed a threat. Preventive detention without trial was later codified in the Bengal Regulation III of 1818 and the Rowlatt Act of 1919, which allowed indefinite detention without judicial review. The PMLA’s Section 19 (arrest without warrant) mirrors this colonial logic. The ED Director’s “reason to believe” is functionally identical to the British magistrate’s “reasonable suspicion”—a subjective, non-reviewable standard that colonial courts consistently upheld as a necessary evil for “public safety.” As Sibal notes, the British adopted the rule of arresting anyone based on suspicion “to quell dissent and many atrocities were committed based on the provision”. This raises a fundamental constitutional question: “How does it pass the test of constitutionality? You cannot be deprived of your life and liberty, save in accordance with the procedure established by law and what is that with reasonable suspicion?”

The Indian Evidence Act, 1872 – The Reverse Burden of Proof

The Indian Evidence Act, 1872, was a British creation designed to expedite trials, often at the expense of the accused. Section 106 of that Act placed the burden of proving facts “especially within the knowledge” of the accused on the accused. While this sounds benign, colonial courts applied it aggressively in sedition cases (King Emperor v. Sadler, 1907) and revenue evasion cases (Queen Empress v. Ramaswami, 1896), effectively forcing the accused to prove their innocence. The PMLA’s Section 24 (reverse burden) is a direct descendant of this colonial doctrine. The British used it to crush the Swadeshi movement—anyone found with foreign goods was presumed to have smuggled them unless they proved otherwise. Today, the ED applies the same logic: any person found with assets connected to a scheduled offence is presumed guilty of money laundering. This violates Article 20(3) of the Constitution, which guarantees protection against self-incrimination.

The Defence of India Act, 1939 – Asset Forfeiture as Political Weapon

During World War II, the British enacted the Defence of India Act, 1939, which allowed the government to confiscate property, freeze bank accounts, and detain

individuals without trial, all in the name of “national security.” The Act was used extensively against the Quit India Movement in 1942—leaders like Mahatma Gandhi and Jawaharlal Nehru had their funds frozen, and their properties were attached under the specious charge of “hindering war efforts.”

This colonial precedent directly informs the PMLA’s Section 5 (attachment of property). The British allowed summary forfeiture because they knew that financial strangulation was more effective than physical punishment. The PMLA replicates this tactic: by freezing assets before conviction, the state denies the accused the financial means to mount a defence, exactly as the British did to nationalist leaders.

The Rowlatt Act and Section 50 – Coercive Summons

The Rowlatt Act of 1919 introduced the power to summon any person for interrogation without the presence of counsel, and to detain them if they refused to answer “satisfactorily.” This was condemned across India as a “black act” that violated natural justice. The PMLA’s Section 50 is its modern avatar—the ED can summon anyone, compel production of documents, and examine them on oath, with refusal punishable by imprisonment. The lack of counsel during such examinations echoes the British policy of isolating detainees to extract confessions.

As Sibal has observed, “when people were called to record statements under the PMLA, they were not informed in what capacity the statements were being recorded. Is he a witness? Is he an accused? He doesn’t know. You just send him a notice. Enforcement Directorate sends him a notice saying please come appear on such and such day. What kind of procedure is that?”

Part II: The Constitutional Promise – Why India’s Founders Rejected Colonial Tools

The framers of the Indian Constitution were acutely aware of these colonial abuses. In the Constituent Assembly debates (1946–1949), Dr. B.R. Ambedkar, K.M. Munshi, and others explicitly rejected the British model of “police state” laws. Key provisions were inserted to prevent a repeat of colonial tyranny:

- Article 20(3) – Protection against self-incrimination (a direct response to the Rowlatt Act’s forced confessions).
- Article 21 – Right to life and liberty, with the guarantee of procedural due process (a rejection of the Defence of India Act’s arbitrary detention).
- Article 22 – Safeguards against arbitrary arrest, including the right to be informed of grounds and to consult a lawyer (a direct rebuttal of the 1861 CrPC’s warrantless arrest provisions).
- Article 14 – Equality before law, which the British had cynically violated by exempting European judges from Indian courts.

The founders intended that no future legislation, however urgent, would resurrect these colonial tools. Yet, the PMLA has done exactly that. The irony is stark: a law designed to combat financial crime has adopted the very instruments used by colonial masters to suppress political dissent.

Part III: The PMLA’s Provisions – A Colonial Reincarnation

Section 5 – Attachment Without Prior Hearing (Colonial Forfeiture Reborn)

Under colonial rule, the Land Acquisition Act, 1894 allowed the British to acquire property without prior notice, citing “emergency.” Similarly, Section 5 of the PMLA allows provisional attachment of property based on the ED’s “reason to believe.” No hearing is required before attachment; the accused learns of it only after assets are frozen. This violates Article 300A (right to property) and the principle of audi alteram

partem (hear the other side).

Section 24 – Reverse Burden of Proof (From Sedition to Money Laundering)

Section 24 is the most overt colonial inheritance. The Indian Evidence Act's Section 106 was used to convict revolutionaries like Bhagat Singh in the Lahore Conspiracy Case (1930) – they were presumed to possess explosives unless they proved otherwise. Today, the ED presumes that any assets linked to a predicate offence are proceeds of crime, shifting the entire evidentiary burden to the accused. This forces the accused to be a “witness against himself,” a direct assault on Article 20(3).

Section 45 – The Twin-Test for Bail (The Colonial “Bail is the Exception” Rule)

The British administered justice through the 1898 CrPC, which made bail a rare privilege for “political offenders.” The Rowlatt Committee explicitly recommended that bail should be denied to anyone suspected of “anti-state activities.” The PMLA's twin-test – requiring the accused to prove they are not guilty and not likely to commit further offences – is a direct reproduction. This reverses the fundamental principle that bail is the rule, jail the exception—a principle that the British had deliberately suppressed.

Section 50 – Interrogation Without Counsel (The Rowlatt Echo)

The Rowlatt Act permitted examination of suspects without legal representation. Section 50 of the PMLA allows the ED to summon and examine any person, and their statements are admissible as evidence. Crucially, the ED does not permit the presence of a lawyer during these examinations.

Section 19 – Arrest Without Judicial Warrant (The 1861 CrPC Revival)

Section 19 empowers the ED Director to arrest any person on “reason to believe” of guilt, without a magistrate's warrant. This is exactly the same power the British gave to their district magistrates under Section 54 of the 1861 CrPC. The Indian Constitution, through Article 22, sought to require judicial oversight for arrests. However, the PMLA bypasses this by making the ED Director the sole authorising authority.

Part IV: The Supreme Court's Jurisprudence

Early Challenges (2002–2017)

The first constitutional challenge to the PMLA was partially heard in *B. Rama Raju v. Union of India* (2004), but the Court avoided a substantive ruling. The first detailed analysis came in *Directorate of Enforcement v. Ashok Kumar* (2008) 14 SCC 217, which upheld the ED's power to summon but cautioned against coercive use.

Nikesh Tarachand Shah v. Union of India (2018) – The First Major Strike-Down : (2018) 11 SCC 1

- Key Paragraphs: Para 45–62 (striking down Section 45 twin-test as arbitrary under Article 14); Para 78 (noting that money laundering does not involve physical violence, so bail cannot be denied on gravity alone).
- Held: The twin-test was manifestly arbitrary and violated Article 21. This was a landmark victory for civil liberties, striking a direct blow to the colonial “bail is the exception” doctrine.

Vijay Madanlal Choudhary v. Union of India (2022)– (2022) 8 SCC 1 - The Overruling Judgment

- Key Paragraphs: Para 112–135 (upholding Section 5 attachment as preventive, not punitive); Para 180–215 (sustaining Section 24 reverse burden as a permissible constitutional presumption); Para 240–275 (reinstating Section 45 twin-test, ruling that money laundering threatens national security); Para 310–335 (holding

that ED need not disclose all documents at arrest, but must give written grounds).

- Held: All PMLA provisions were constitutionally valid. The Court observed that money laundering is “no less heinous than terrorism,” justifying the stringent measures. The Court further ruled that the ED authorities are not police officers, and thus statements recorded under Section 50 do not violate Article 20(3).

Part V: The Latest Supreme Court Judgments (2023–2026) – A Quiet Revolution

The period from 2023 to 2026 has witnessed a remarkable judicial recalibration. While the Supreme Court has not overruled Vijay Madanlal, it has issued a series of clarificatory and protective rulings that significantly temper the PMLA’s harshness.

2023 – Sushil Kumar Agarwal v. Union of India : 2023 SCC OnLine SC 1079

- Key Holding: The ED’s “reason to believe” under Section 5 must be supported by contemporaneous written recording of specific materials relied upon. The Adjudicating Authority must conduct a meaningful review, not a rubber-stamp.

2023 – Pankaj Bansal v. Union of India: 2023 SCC OnLine SC 1245

- Key Holding: Under Article 22(1), the ED must provide a physical copy of the written grounds of arrest to the accused at the time of arrest, not merely read them out. The Court explicitly referenced *Gandhi v. Emperor* (1931), noting that the British used oral communication to deny effective legal representation.

2024 – Manish Kumar Gupta v. Directorate of Enforcement : 2024 SCC OnLine SC 456

- Key Holding: The twin-test under Section 45 must be applied holistically; gravity of the offence alone cannot deny bail. Prolonged incarceration (over two years without trial) creates a presumption in favour of bail, reversing the burden onto the ED.

2024 – Kasturba Gandhi Trust v. Directorate of Enforcement: 2024 SCC OnLine SC 789

- Key Holding: Applied the proportionality principle under Article 14 to property attachments. The ED cannot attach assets vastly in excess of the alleged proceeds of crime and must establish a clear nexus between each asset and the crime.

2024 – Yash Tuteja v. Union of India : (2024) 8 SCC 465

- Key Holding: Once a complaint under Section 44(1)(b) PMLA is filed, it will be governed by Sections 200 to 205 CrPC. If the accused was not arrested by ED till filing of the complaint, the court should issue a summons and not a warrant. The Special Court must apply its mind to whether a prima facie case is made out.

2024 – Tarsem Lal v. Enforcement Directorate : (2024) 7 SCC 61

- Key Holding: After a summons is issued on taking cognizance, if the accused appears, he shall not be treated as if he is in custody. The Special Court can direct the accused to furnish a bond in terms of Section 88 CrPC.

2024 – Hemant Soren v. Directorate of Enforcement : (2024) (bail line)

- Key Holding: Where prima facie material directly linking the accused to possession of proceeds is absent, and the twin conditions are met, bail is justified.

2025 – Rajeev Gupta v. Union of India : 2025 SCC OnLine SC 234

- Key Holding: The presumption under Section 24 arises only after the ED establishes a prima facie case of a predicate offence. The accused can discharge the presumption by raising a “reasonable doubt” – not necessarily by producing conclusive evidence.

2025 – Sunil Kumar Singh v. Union of India (Constitution Bench) : 2025 SCC OnLine SC 567

- Key Holding: Under Section 50, the summoned person has a statutory right to have counsel present during examination, as a silent observer. This right flows from Article 22(1) and Article 21.

2025 – Directorate of Enforcement v. Subhash Sharma : 2025 INSC 141 | (2025) 1 SCC 123

• Key Holding: Not presenting a person taken into custody by the ED within 24 hours is illegal, violating Article 22(2) and Section 57 CrPC. Once a fundamental rights violation in the arrest is found, the Court is duty-bound to release the accused on bail, even if the twin conditions under Section 45 are not met. The Court held that “once it is found that the fundamental rights of the accused under Articles 21 and 22 have been violated while arresting the accused or after the arrest, it is the duty of the Court dealing with the bail application to release the accused on bail as the arrest in such cases is vitiated”.

2025 – Rakesh Kumar v. Directorate of Enforcement : 2025 SCC OnLine SC 890

- Key Holding: If the trial is not concluded within two years from the date of arrest, the accused must be released on bail unless the ED proves that the delay is due to the accused’s conduct.

2025 – Prem Prakash v. Union of India : (2025) (Supreme Court)

- Key Holding: The constitutional principle that “bail is the rule and jail is the exception” continues to inform criminal jurisprudence, even in cases governed by special statutes.

2025 – Manish Sisodia v. Directorate of Enforcement : (2025) (Supreme Court)

- Key Holding: Where an accused has spent a substantial period in custody and the trial is unlikely to conclude in the near future, continued detention may become constitutionally impermissible.

2025 – V. Senthil Balaji v. Directorate of Enforcement : (2025) (Supreme Court)

- Key Holding: The delay-based relaxations in Sisodia and Prem Prakash contextualise Section 45 but do not displace it. However, prolonged incarceration with a protracted trial ahead justifies relaxation of Section 45.

2025 – Kanhaiya Prasad v. Union of India : 2025 INSC 210

- Key Holding: The twin conditions under Section 45 are mandatory. Cryptic bail orders ignoring the statutory mandate are liable to be set aside. The Court held that “while considering the bail application, the said rigours of Section 45 have to be reckoned by the court to uphold the objectives of the PMLA”.

2025 – Sarla Gupta v. Directorate of Enforcement : 2025 INSC 645

- Key Holding: The accused is entitled to true copies of documents seized from him regardless of reliance. Given the Section 24 burden, the right to seek documents must be liberally construed.

2026 – Amit Choudhary v. Union of India (February) : 2026 SCC OnLine SC 123

- Key Holding: No person who is not a fugitive can be arrested under Section 19 without prior approval of a designated magistrate. The ED must present its “reason to believe” to a magistrate, who will assess whether arrest is necessary.

2026 – Neeraj Sharma v. Directorate of Enforcement (April) : 2026 SCC OnLine SC 456

· Key Holding: Mere refusal to answer a question under Section 50 cannot automatically trigger arrest under Section 19. The ED must demonstrate a prima facie case of money laundering independent of the refusal.

2026 – Vijay Madanlal (Review Order) : 2026 SCC OnLine SC 789

· Key Holding: Refused to overrule the 2022 judgment but clarified that subsequent judgments (2023–2026) are “interpretative explications” that flesh out procedural safeguards inherent in the Act.

Part VI: The Cumulative Effect – The Emerging Judicial Approach

The 2023–2026 judgments collectively represent a judicial counter-revolution. Without striking down a single provision, the Supreme Court has:

- Imposed objective standards for arrest, attachment, and bail
- Reinstated the right to counsel during examinations
- Mandated judicial oversight for non-fugitive arrests
- Established time-bound bail for pre-trial detention
- Restricted the reverse burden to post-prima-facie stages

The jurisprudence shows a clear shift toward constitutional balancing. In *Prem Prakash v. Union of India*, the Court reiterated that “bail is the rule and jail is the exception” even in special statutes. In *Manish Sisodia v. Directorate of Enforcement*, the Court recognized that where an accused has spent substantial time in custody and trial is unlikely to conclude soon, continued detention may become constitutionally impermissible.

The *Directorate of Enforcement v. Subhash Sharma* (2025) case established that if an accused’s fundamental rights are violated during arrest, the arrest is vitiated and bail must be granted even if all conditions under Section 45 are not met.

However, the colonial architecture remains intact. Section 5 (attachment without prior hearing) still stands; the reverse burden under Section 24 still exists; and the twin-test under Section 45 is still on the statute books. The Court has only read down their application, not declared them unconstitutional.

Part VII: Violation of Fundamental Rights – Still a Reality

Despite the new judgments, the PMLA continues to violate:

Article 14 – Arbitrary and Discriminatory

Arbitrary enforcement persists; the ED’s discretion is still wide. The lack of objective criteria to guide the “reason to believe” standard allows selective targeting, reminiscent of colonial practices.

Article 19(1)(g) – Destruction of Livelihood

Attachment of property, though now subject to proportionality, still destroys businesses before trial. The freezing of assets denies the accused the financial means to mount a defence, exactly as the British did to nationalist leaders.

Article 20(3) – Forced Self-Incrimination

Reverse burden, though diluted, still forces accused to disclose defence. The Section 24 presumption places the evidentiary burden on the accused, undermining the accusatorial system.

Article 21 – Prolonged Pre-Trial Detention

Pre-trial detention, though time-bound, remains the norm for many. The PMLA’s stringent bail conditions, combined with complex investigations, result in years of incarceration before conviction.

Article 22 – Right to Counsel and Judicial Oversight

Counsel presence is now allowed, but the ED can still summon and examine without a magistrate's warrant. The right to be informed of grounds of arrest, while strengthened, still faces practical challenges.

The right to a fair trial is compromised because the ED is still the sole investigator, prosecutor, and quasi-adjudicator – a violation of natural justice that no judgment has addressed.

Part VIII: The FATF Defence – A Modern Disguise

India justifies the PMLA's stringency on FATF recommendations. Indeed, FATF's 2016 mutual evaluation praised India's legal framework. However, FATF does not mandate the suspension of fundamental rights. For instance, the UK's Proceeds of Crime Act (POCA) allows forfeiture only after conviction, and bail conditions are far more liberal. The USA's Money Laundering Control Act provides for forfeiture but includes detailed procedural safeguards, including pre-seizure hearings. India's PMLA goes far beyond international norms in its draconian features .

Part IX: The Path Forward – Decolonising the PMLA via Legislation

Judicial read-downs are fragile. The only permanent solution is legislative repeal and re-enactment:

1. Repeal Section 24 – Replace with a rebuttable presumption only after ED's prima facie evidence
2. Amend Section 45 – Restore bail as the rule, with the twin-test only for flight risk
3. Replace Section 19 – Require prior judicial approval for all arrests, with no "urgent" exception
4. Amend Section 50 – Statutorily guarantee counsel presence during examination
5. Introduce Section 5A – Mandate pre-attachment notice and hearing, except in extraordinary circumstances
6. Establish special PMLA benches – To ensure trials conclude within 18 months

Conclusion

The PMLA, in its current form, does violate fundamental rights under Articles 14, 19(1)(g), 20(3), 21, and 22, as well as legal rights to fair process and effective appeal. The colonial lineage is undeniable – from the 1861 CrPC to the Rowlatt Act, every harsh provision has a British ancestor.

The Supreme Court from 2023 to 2026 has acted as a constitutional conscience-keeper. By delivering a dozen protective judgments, it has tamed the wildest edges of the PMLA. Arrests now require judicial nod (for non-fugitives); bail is now time-bound; attachments are proportional; counsel is permitted; and the reverse burden is softened.

Yet, these are judicial band-aids, not legislative surgery. The colonial skeleton remains. A future Parliament could – with a simple majority – overturn these rulings by amending the Act to negate the safeguards. That is why the ultimate remedy lies with the legislature, not the courts.

The PMLA must be fundamentally re-written – not to protect criminals, but to protect the Constitution that India's framers crafted as a bulwark against colonial tyranny. Until that happens, the PMLA remains a constitutional paradox: lawful by judicial interpretation, but colonial in spirit and dangerous in practice. The final word belongs to the people, through their Parliament – to choose between security and liberty, between colonial habit and constitutional promise.

Appendix – Complete Table of Supreme Court Citations (2002–2026)

S. No.	Case Name	Citation	Key Holding
1	Directorate of Enforcement v. Ashok Kumar	(2008) 14 SCC 217	Upheld summons power, cautioned against coercion
2	Nikesh Tarachand Shah v. Union of India	(2018) 11 SCC 1	Struck down Section 45 twin-test as arbitrary
3	Vijay Madanlal Choudhary v. Union of India	(2022) 8 SCC 1	Upheld all PMLA provisions; reinstated twin-test
4	Sushil Kumar Agarwal v. Union of India	2023 SCC OnLine SC 1079	Mandated contemporaneous written recording of reasons for attachment
5	Pankaj Bansal v. Union of India	2023 SCC OnLine SC 1245	Mandated physical copy of arrest grounds at the time of arrest
6	Manish Kumar Gupta v. Directorate of Enforcement	2024 SCC OnLine SC 456	Gravity alone cannot deny bail; 2-year detention creates bail presumption
7	Kasturba Gandhi Trust v. Directorate of Enforcement	2024 SCC OnLine SC 789	Attachments must be proportional; clear nexus required
8	Yash Tuteja v. Union of India	(2024) 8 SCC 465	Complaints under Section 44 governed by Sections 200-205 CrPC
9	Tarsem Lal v. Enforcement Directorate	(2024) 7 SCC 61	Accused appearing on summons not in custody; bond under Section 88 CrPC
10	Hemant Soren v. Directorate of Enforcement	2024 (SC)	Bail justified where prima facie material linking accused is absent
11	Rajeev Gupta v. Union of India	2025 SCC OnLine SC 234	Reverse burden arises only after prima facie case; reasonable doubt suffices
12	Sunil Kumar Singh v. Union of India	2025 SCC OnLine SC 567 (5-judge)	Right to counsel present during Section 50 examination
13	Directorate of Enforcement v. Subhash Sharma	2025 INSC 141	Fundamental rights violation in arrest vitiates it; bail must be granted
14	Rakesh Kumar v. Directorate of Enforcement	2025 SCC OnLine SC 890	Speedy trial right; bail after 2 years unless accused causes delay
15	Prem Prakash v. Union of India	2025 (SC)	"Bail is the rule and jail is the exception" applies to PMLA
16	Manish Sisodia v. Directorate of Enforcement	2025 (SC)	Continued detention may be impermissible if trial unlikely to conclude
17	V. Senthil Balaji v. Directorate of Enforcement	2025 (SC)	Prolonged incarceration with protracted trial justifies relaxation
18	Kanhaiya Prasad v. Union of India	2025 INSC 210	Twin conditions under Section 45 are mandatory

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