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# Critical Analysis of Fugitive Economic Offenders Act, 2018

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## ABSTRACT

*The government's inability to deal with situations in which the offender departs the nation to avoid facing the prosecution for the crime is demonstrated by India's experience with economic crimes. The Fugitive Economic Offenders Act of 2018 intends to help the government recover property from fugitive economic offenders who are seeking to evade the Indian court system. Economic crimes including fraud, counterfeiting, tax evasion, money laundering, Benami transactions, creditor deception, and other related omissions are not obsolete. Despite the fact that the Act was designed to ease the immobility that prosecution powers were compelled to face owing to the absence of the criminal, it goes far beyond natural justice principles and criminology foundations. The purpose of this essay is to critically evaluate the Fugitive Economic Offenders Act of 2018, as well as its silence on crucial components that were intended to be accommodated and served but are being overlooked.*

**Keywords:** *Fugitive Economic Offender Act, Economic Offence, Confiscation, Law.*

## I. HISTORICAL BACKGROUND

The recent extradition order of Mr. Vijay Mallya issued by the Westminster Magistrate's Court in the United Kingdom on December 10, 2018 must come as a huge relief to the government and Indian banks, which are currently under enormous pressure due to a long list of bad loans and absconding promoters. The special PMLA court in Mumbai promptly followed up on the UK ruling, declaring Mr. Vijay Mallya a "fugitive economic offender" under the Fugitive Economic Offenders' Act, 2018 ("the said Act") on January 5, 2019. This leads to an examination of why the Act was needed in the first place. The solution can be found in some sobering data. The number of fraud cases reported by banks increased dramatically in 2017-18, from an average of about 4,500 instances per year over the previous ten years to a staggering 5,835 cases. Fraud losses in the banking and financial sector are believed to have totaled Rs. 41,000 crores this year alone.<sup>2</sup> Over 30 persons suspected of different financial scams/frauds

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<sup>2</sup> RBI Annual Report 2017-18

and under investigation by the Enforcement Directorate/Central Bureau of Investigation are now absconding from India, according to the Ministry of External Affairs<sup>3</sup>. It is clear that, despite the presence of numerous legislation and regulations, they have failed to suppress white collar crime, either because they were poorly administered or because they were simply ineffective.

The Fugitive Economic Offenders Act of 2018 was introduced in the Lok Sabha on March 12, 2018, and passed by the Rajya Sabha on July 19 and 25, 2018. The bill was signed into law by the President on July 31, 2018, making it the first of its kind to expedite the confiscation of proceeds of crime, both in India and abroad, in order to force fugitives to surrender to Indian courts and face trial under the planned laws. Furthermore, this Act is a step toward achieving the promises made under the United Nations Convention Against Corruption (UNCAC). India has been a party to the aforementioned Convention since 2011, which it adopted in order to further international cooperation in the prosecution of corruption-related offences. The Act thus not only ensures rule of law by requiring fugitive economic offenders to return to India to face the scheduled law for which they have been declared fugitive economic offenders, but it also re-establishes and strengthens the likelihood of financial institutions recovering more from economic defaults and irregularities committed by such offenders<sup>4</sup>.

## II. INTRODUCTION

The stated Act was first proposed in the Union Budget of 2017 and was originally adopted as an Ordinance. The Fugitive Economic Offenders' Act, 2018 was passed with the President's assent and was declared to have entered into force on April 21, 2018.

According to the Act's preamble, it is intended to prevent fugitive economic offenders from escaping the Indian legal system by remaining beyond the jurisdiction of Indian courts, as well as to protect the rule of law in India. The Prevention of Money Laundering Act of 2002 is frequently referenced throughout the Act ("PMLA"). Because many definitions and provisions are similar to those found in PMLA, it wouldn't be incorrect to refer to the Act as a supplement to PMLA. Please keep in mind that the two legislation have distinct objectives.

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<sup>3</sup> Question No. 3198 in Rajya Sabha answered on 14th March 2018

<sup>4</sup> Question No.1129 Extradition of People Involved in Financial Irregularities, MINISTRY OF EXTERNAL AFFAIRS, GOI, <https://www.mea.gov.in/rajyasabha.htm?dtl/30801/question+no1129+extradition+of+people+involved+in+financial+irregularities>. Accessed on January 21, 2021

### III. SALIENT FEATURES OF THE BILL

- The bill intends to re-establish the rule of law by forcing fugitive economic offenders to return to India and submit to the relevant authorities. This would also help banks and other financial institutions recover more swiftly from financial defaults caused by such criminals, bolstering their financial health and avoiding the economy from suffering as a result of such crimes.
- It attempts to seize illegal and Benami properties acquired as a result of financial collapses, as has been done in the past under other legislation such as the PMLA, 2002.
- Declaration of a fugitive economic offender- To be declared a fugitive economic offender, the director<sup>5</sup> or deputy director<sup>6</sup> must submit an application with a Special Court<sup>7</sup>. When the Special Court receives an application, it will send the applicant a notice asking him or her to appear at a particular place on a date six weeks from the day the notice was sent<sup>8</sup>, as well as a The individual will be designated a fugitive economic offender if he or she fails to appear. If the individual appears at the specified place, the Special Court's procedures will be terminated.
- Possession of a fugitive economic offender's property <sup>9</sup>. As long as they file an application with the court within 30 days, the Director can attach the property listed in the application on a Special Court order or provisionally attach it without Special Court permission. Your property will be released at the end of your case if you are found not guilty.
- After hearing the application, the Special Court may declare a person a fugitive economic offender and issue a notice of seizure. Criminal gains, benami properties in India or abroad, and any other property in India or elsewhere are examples of such properties.<sup>10</sup>
- The Bill allows any civil court or tribunal to prohibit a person who has been identified as a fugitive economic offender from filing or defending any civil claim, therefore avoiding numerous processes and preventing the offender from disputing the Bill's provisions before the trial.

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<sup>5</sup> “*Supra* note 3, at Section 2(1)(e).”

<sup>6</sup> “*Id.* at Section 2(1)(d).”

<sup>7</sup> “*Id.* at Section 2(1)(n).”

<sup>8</sup> “*Supra* note 3, at Section 18.”

<sup>9</sup> “*Id.* at Section 5.”

<sup>10</sup> “*Id.* at Section 4(2)(c) and (d).”

- The Bill's entire procedure is based on the burden of proof that an accused individual has amassed property as a consequence of illegal behaviour. The Director's "reason to suspect" that an individual is an offender, as well as the filing of an application to discharge the burden of proof for proving that an individual is a "fugitive economic offender," are both imprecise and ambiguous. All the police need to do is demonstrate that the individual detained committed one or more of the Scheduled offences. It is a highly dependent act on preponderance of probability, which means that an act is proved when the court either believes it exists or considers its presence so plausible that a sensible man would act on the premise that it exists given the circumstances.<sup>11</sup> The 1872 Evidence Act, which requires proof beyond a reasonable doubt in criminal trials, has a lower bar.
- The whole procedure under the Bill is time-limited, giving the accused the option to appeal (within 180 days)<sup>12</sup> or dispute the order within that time frame.
- The bill's retroactive application is debatable. It does specify, however, that it applies to anyone who is or become fugitive economic offenders as a result of the ordinance's implementation.<sup>13</sup> As a result, the bill's scope has been expanded to include criminals who have already left Indian jurisdiction but whose cases are still pending.

A fugitive economic offender, according to Section 2 (f) of the Act, is:

- "Any person named in a warrant of arrest issued by any Indian court, who—
- has fled India in order to evade criminal prosecution; or has refused to return to India in order to face criminal prosecution"

The schedule of the Act defines for the description of an offence under various substantive Acts *inter alia* including offences under Indian Penal Code, 1860, Negotiable Instruments Act, 1881, Prohibition of Benami Property Transactions Act, 1988, Prevention of Corruption Act, 1988, Securities and Exchange Board of India Act, 1992, Prevention of Money Laundering Act, 2002, Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 etc. for which an individual could be declared as a Fugitive Economic Offender under the Act.

The total amount of the infraction under the scheduled law must be at least one hundred crores to be classified as a fugitive economic offender.

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<sup>11</sup> Section 3, The Indian Evidence Act, 1872; *State (Delhi Admn.) v. Sanjay Gandhi*, (1978) 2 SCC 411 at page 419.

<sup>12</sup> *Supra* note 3, at Section 5(3).

<sup>13</sup> *Id.* at Section 3.

#### IV. ISSUES

The Act forces the escapee, or offender, to return to India and submit to the jurisdiction of Indian courts, enhancing the chances of effective and timely restitution by financial institutions in the case of economic failures. However, constitutional and criminological considerations must not be overlooked. The remedial components of the Act are what give rise to the problems that arise as a result of it. The following are some of the problems that make judicial examination of the Act problematic:<sup>14</sup>

##### **(A) Pre-trial confiscation of property**

As stated in clause (b) of sub-section (2) of section 12 of the Act, confiscation does not apply just to property related to the profits of crime, but also to "any other property." Confiscation applies to "any other property," as specified in clause (b) of sub-section (2) of section 12 of the Act. It's crucial to understand that confiscation is not the same as the sort of attachment mentioned in Section 83 of the Criminal Procedure Code, 1860. The Act's definition of "confiscation" means that the property will now vest in the Central Government, free of encumbrances, and that the Central Government or Administrator (as defined in the Act) will be entitled to dispose of the property even if the fugitive is not present.

There is a ninety-day moratorium during which neither the Central Government nor the Administrator can sell the land. To begin, it's crucial to understand that the property that might be taken includes not just the offender's proceeds of crime, but also "any other property" that is unrelated to the economic crime. There have also been no remarks on how property would be taken if joint owners are not fleeing economic offenders.

Section 4 of the Act, on the other hand, provides that nothing precludes a person with an interest in immovable property from enjoying it. As a result, the second conclusion is that joint owners must be vigilant with their property in order to show their claims and entitlement to the property within ninety days of confiscation, or risk losing it if it is disposed of.

##### **(B) Manner for preservation of property**

The issue that emerges when property is seized is that the Act makes no provision for how the revenues of the sale will be used by the Central Government once the property has been sold.<sup>15</sup> The Special Court's ability to delay property seizure while evaluating the interested claimant

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<sup>14</sup> "Malcolm Katrak, Fugitive Economic Offenders Bill: A Viable Project or a Doomed Battle?,(INDIACORPLAW, December 18, 2017) > <https://indiacorplaw.in/2017/12/fugitive-economic-offenders-bill-viable-project-doomed-battle.html>. > accessed Jan 18, 2021, 17:54 IST"

<sup>15</sup> PRS Legislative Research, *supra*, note 2.

under Section 4 is unknown. Because the Act makes no provision for the payment of other people's obligations (secured creditors, unsecured creditors, and others) once the property is sold, this alone may make someone a fugitive economic offender. The Act, on the other hand, creates the position of Administrator, who will help the Central Government in managing the property, albeit the administrator's power is not specified. As a result, the problem remains unsolved.

### **(C) Fugitive economic offenders are prohibited from defending or filing civil actions**

The Act is a significant and blatant violation of a person's fundamental right to legal remedy. Article 14 and Article 21 of the Indian Constitution<sup>16</sup> establishes access to justice as a fundamental right. According to Section 14 of the Act,

“Regardless of any other legislation in existence at the time, –

- Any Court or tribunal in India, in any civil process before it, may prohibit a person from bringing or defending any civil claim if that individual has been declared a fugitive economic offender;
- Any Court or tribunal in India in any civil proceeding before it, may, disallow any company or limited liability partnership from putting forward or defending any civil claim if an individual filing the claim on behalf of the company or the limited liability partnership, or any promoter or key managerial personnel or majority shareholder of the company or an individual having a controlling interest in the limited liability partnership has been declared as a fugitive economic offender.”

## **V. ADVANTAGES OF FUGITIVE OFFENDERS ACT, 2018**

The Special Court seizes the alleged offender's properties, Benami Properties, and other styles of issue of alleged economic crime upon declaration as a fugitive from justice, which differs from other laws, such as the CRPC, 1973, where arrogation lasts two years after proclamation as a fugitive from justice. However, if the Special Court determines after the proceedings that the individual is not a fugitive economic offender, the Special Court shall order the release of any property or record attached or taken over under this Act to the person who is entitled to it. The rights and titles to the seized items can become vest with the federal government following a suitable arrogation of the possessions located in India or elsewhere and/or the opposite issue

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<sup>16</sup> Constitutional vision to access to Justice in India – Legal Articles in India, LEGAL ARTICLES IN INDIA, (May 3, 2018, 00:58), <http://www.legalservicesindia.com/law/article/937/10/Constitutional-vision-to-access-to-Justice-in-India..>, accessed on January 24, 2021

of crime. They become free of any encumbrances on the property, such as charges or liens<sup>17</sup>. The federal government may then appoint an administrator to administer and lose these properties through mercantilism them to hear creditors' claims and subsidize them.

Another fascinating feature of this Act is that any Court or court in the Indian nation, in any civil proceeding before it, may prohibit such individual from asserting or defending any civil claim, which may appear to violate Article twenty-one of the Constitution<sup>18</sup>, the right to life enshrined beneath Article twenty-one, which has been interpreted to incorporate the right to access just information. When a fugitive economic offender is identified as a person, the Act goes so far as to prevent that person from defending alternative lawsuits involving his inheritance or marital problems.

Before an inquiry, the Act does not require the investigating Officers to obtain an exploration warrant or verify the presence of witnesses. This is in contrast to other statutes that provide such protections, such as the Code of Criminal Procedure (CRPC) of 1973. These measures protect against harassment and evidence tampering.

## **VI. DISADVANTAGES OF FUGITIVE OFFENDERS ACT, 2018**

1. The law holds a criminal responsible until he or she is proven innocent, which is in violation of the constitution.
2. It is unlawful to sell confiscated assets before the adjudication is completed.
3. The prohibition on pursuing civil lawsuits against an offender's wealth confiscation is unlawful.
4. Seized assets are considered distressed assets, and they are difficult to sell.

Despite the fact that the law includes strict requirements and attempts to plug vulnerabilities in India's financial system, it contains numerous clauses that are illegal and might be ruled null and invalid by the courts, rendering efforts to enact similar measures useless.<sup>19</sup>

## **VII. CRITICAL ANALYSIS OF FUGITIVE OFFENDERS ACT, 2018 AND JUDICIAL RESPONSES**

The first issue that emerges when the FEO is enacted in India is whether the act is actually

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<sup>17</sup> Sekhri, Abhinav (August 2017). "Running Argument: The flaws in the draft Fugitive Economic Offenders Bill". *The Caravan*. Retrieved 1 April 2021.

<sup>18</sup> Constitutional vision to access to Justice in India - Legal Articles in India, LEGAL ARTICLES IN INDIA, (May 3, 2018, 00:58), <http://www.legalservicesindia.com/law/article/937/10/Constitutional-vision-to-access-to-Justice-in-India>.

<sup>19</sup> INSIGHTS (2018), "DISCUSS CRITICALLY FEATURES AND SHORTCOMINGS OF THE FUGITIVE ECONOMIC OFFENDERS BILL 2018," AVAILABLE AT [HTTPS://WWW.INSIGHTSONINDIA.COM/2018/03/15/3-DISCUSS-CRITICALLY-FEATURES-AND-SHORTCOMINGS-OF-THE-FUGITIVE-ECONOMIC-OFFENDERS-BILL-2018/](https://www.insightsonindia.com/2018/03/15/3-DISCUSS-CRITICALLY-FEATURES-AND-SHORTCOMINGS-OF-THE-FUGITIVE-ECONOMIC-OFFENDERS-BILL-2018/)

essential or if it is simply a case of needless legislative activity meant to calm down Indian citizens who have been victims of day-to-day scams in the country. By the way, the money laundering prevention act is very similar to this legislation. It also has a direct connection to other comparable statutes that deal with the financial market or include a list of offences. In comparison to another legislation, this one covers a smaller number of offences. The explanation for this might be related to the fact that the other legislation "provides that when the procedure is completed, the seizure or disposition of the property occurs." The new act, on the other hand, stipulates that property (whether inside or outside India) be confiscated and disposed of as soon as a person declares himself a FEO, which could deter the accused and force him to face trial in his home country if he flees the country and fails to return to the country's jurisdiction.

Section 5(2) of the legislation has been criticised for neglecting to contain the crucial idea of natural justice, namely, "innocent until proven guilty." Even if no actions have been begun, this clause allows the director or a subordinate not below the level of deputy director, or the ED itself, to search, seize, and attach property. Furthermore, once a period of ninety days has passed after a person proclaims himself a fugitive economic offender, his property may be disposed of by the competent authorities. This viewpoint is informed by UNCAC Article 54.

In addition to the aforementioned, the Indian courts' domestic viewpoint should be considered. Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (which was constitutionally affirmed by the Supreme Court), has similar prohibitions in the case of **Attorney General for India vs Amratlal Prajivandas**<sup>20</sup> provision of seizing of assets of a company by the Serious Fraud Investigation Office under the Companies Act, 2013 and provisions of provisional attachment under the Income Tax Act 1961 among others.

The validity of Section 5(2) of the PMLA Act, which allows for "attachment of possessions on mere suspicion prior to the declaration of fugitive economic offender and commencement of any processes," might be challenged on the grounds that it breaches fundamental natural justice principles. It's a fair worry that by stating the attachment point in section 5(2) without beginning the procedure, the authorities handling the case would misread the section's wording, but it's also important to consider the act's architects' aim to compel the accused absconder to surrender.

Sushil Kr Sharma vs Union of India<sup>21</sup> and Mafatlal Industries Ltd. and Anrs . v. Union of

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<sup>20</sup> 1994 SCC (5) 54

<sup>21</sup> "(2005) 6 SCC 281".

India<sup>22</sup>

The Supreme Court said that the mere potential of misusing the authority given by a legislation is insufficient to strike down the provision or declare it unconstitutional or irrational without more evidence. The court also has the ability to set aside the order, judgement, and provide any suitable remedies to the aggrieved party without upsetting the bare provisions of the legislation.

### **J. Sekar and Anrs. vs Union of India & Anr<sup>23</sup>**

According to the article, “the Delhi High Court confirmed the constitutionality of the PMLA's Section 5(1) second provision.” Section 5(2) of the Act is referenced by the non-obstante provision. On the basis of mere suspicion, the relevant authorities can confiscate the accused's property under the PMLA Act without submitting an application or sending a report to the magistrate under the Criminal Procedure Code, 1973. However, the Supreme Court of India is now hearing this case, and the decision will certainly have an influence on the stated act.” Section 14 of the FEO act, on the other hand, which prohibits individuals, LLPs, and corporations from filing or defending civil cases in which the act applies, unreasonably creates a problem for the innocent if they are not involved in any of the activities listed in the act but are suspected of being FEO. As a result, because it violates the idea of natural justice, it will be challenged in the future.<sup>24</sup>

### **In Anita Kushwaha v. Pushap Sudan<sup>25</sup>**

The Supreme Court held that “Given that the aforementioned pronouncements have interpreted and understood the word "life" appearing in Article 21 of the Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no reason why access to justice should be considered to be outside the class and category of the aforementioned rights, which is already recognised as a fundamental right.”<sup>26</sup>.

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<sup>22</sup> “(1997) 5 SCC 536”

<sup>23</sup> “(2018CriLJ1720)”

<sup>24</sup> “ILSIJLM(2019),” ARTICLE ON ANALYSIS OF FUGITIVE ECONOMIC OFFENDERS ACT, 2018,”AVAILABLE AT [HTTPS://ILSIJLM.INDIANLEGALSOLUTION.COM/TITLE-ARTICLE-ON-ANALYSIS-OF-FUGITIVE-ECONOMIC-OFFENDERS-ACT-2018%EF%BB%BF-RAHUL-KUMAR/](https://ilsijlm.indianlegalsolution.com/title-article-on-analysis-of-fugitive-economic-offenders-act-2018%EF%BB%BF-RAHUL-KUMAR/)”

<sup>25</sup> “Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509”

<sup>26</sup> MIHIKA ATTRI(2021),” CRITICAL ANALYSIS OF FUGITIVE ECONOMIC OFFENDERS ACT, 2018 AND THE NEED FOR IMPROVEMENT,”AVAILABLE AT [HTTPS://ALLINDIALEGALFORUM.IN/2021/02/01/CRITICAL-ANALYSIS-OF-FUGITIVE-ECONOMIC-OFFENDERS-ACT-2018-AND-THE-NEED-FOR-IMPROVEMENT/](https://allindialegalforum.in/2021/02/01/critical-analysis-of-fugitive-economic-offenders-act-2018-and-the-need-for-improvement/)