Flygtningenævnets baggrundsmateriale

Bilagsnr.:	**507**
Land:	Indien
Kilde:	Amnesty International
Titel:	Weaponizing Counterterrorism
Udgivet:	september 2023
Optaget på baggrundsmaterialet:	26. februar 2024

WEAPONIZING COUNTERTERRORISM

INDIA'S EXPLOITATION OF TERRORISM FINANCING ASSESSMENTS TO TARGET CIVIL SOCIETY

The Indian government has exploited the 2010 and 2013 Financial Action Task Force (FATF) assessment reports to supplement its arsenal of counterterrorism and money laundering laws, many of which are routinely used to target civil society organizations and human rights defenders. The briefing paper analyses the Foreign Contribution (Regulation) Act, Unlawful Activities (Prevention) Act and Prevention of Money Laundering Act and highlights the emblematic cases of the crackdown suffered by journalists, academics, human rights activists, and students under these laws since 2010.

Amnesty International calls on the FATF and its member states to not allow these laws to further the clampdown on dissent in India which has systematically eroded the rights to freedom of association and freedom of expression in the country.

AMNESTY INTERNATIONAL

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GLOSSARY

FATF	Financial Action Task Force
NPO	Non-Profit Organisation
NGO	Non-Governmental Organisation
MER	Mutual Evaluation Report
AML/CFT	Anti-Money Laundering and Countering Financing of Terrorism
FCRA	Foreign Contribution (Regulation) Act
UAPA	Unlawful Activities (Prevention) Act
PMLA	Prevention of Money Laundering Act
FEMA	Foreign Exchange Management Act
POTA	Prevention of Terrorism Act
IPC	Indian Penal Code
CrPC	Criminal Procedure Code
CAA	Citizenship (Amendment) Act
NIA	National Investigation Agency
ED	Enforcement Directorate
CBI	Central Bureau of Investigation
FIR	First Information Report
ECIR	Enforcement Case Information Report
IHRL	International Human Rights Law
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration on Human Rights
HRC	United Nations Human Rights Committee
UNSR	United Nations Special Rapporteur
UNSCR	United Nations Security Council Resolution
MHA	Ministry of Home Affairs
MoF	Ministry of Finance
JKCCS	Jammu Kashmir Coalition of Civil Society
ICNL	International Centre for Not-for-Profit Law
BK16	16 human rights activists accused in the Bhima Koregaon case

1. INTRODUCTION

The Financial Action Task Force (FATF), of which India has been a member since 2010, is an intergovernmental body with 39 member states mandated to tackle global money laundering, terrorist financing and countering the financing of the proliferation of weapons of mass destruction. It advances its work through a set of recommendations - comprised of 40 internationally endorsed global standards, to guide national authorities' implementation of "legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the financial system."[1] FATF also has a set of nine "Special Recommendations" and together its standards are often referred to as "40+9".[2]

FATF Recommendation 8 requires that laws and regulations to combat money laundering and terrorism financing target only those Non-Profit Organisations (NPOs) that a country has identified – through a careful, targeted "risk-based" analysis - as vulnerable to terrorism financing abuse, and that fall under the FATF definition of NPO. It also recommends that corrective measures must be focused and proportionate to avoid disrupting the legitimate activities of NPOs. Financial regulations that stifle the not-for-profit sector frequently violate the right to freedom of association and freedom of expression, as protected in international human rights law (IHRL) and standards. In 2016, FATF published an updated interpretative note on Recommendation 8 considering the unintended consequences faced by the non-profit sector due to the battery of laws enacted by states to comply with the recommendation. India, however, underwent its last evaluation in 2010 and 2013, before the FATF issued the updated interpretative note.

In its 2013 mutual evaluation of India's compliance with Recommendation 8, FATF highlighted that the Indian government does not undertake any review of the adequacy of domestic laws in the NPO sector or periodic reassessments on the sector's potential vulnerabilities to terrorist activities. It also highlighted that the Indian government did not reach out to the NPO sector with a view to protecting it from abuse of terrorist financing and that only limited information is available on the identity of persons who own, control, or direct their activities. It also flagged the measures India has in place to sanction violations of oversight measures by NPOs and that majority of NPOs are not registered with government agencies, including tax authorities.

Unfortunately, the Indian government has exploited the 2010 and 2013 FATF assessment report to tighten its arsenal of financial and counter-terrorism laws which are routinely used to target civil society organisations. This has resulted in a shrinking of civic space and a chilling effect on civil society. In response to FATF's recommendation that India is not in full compliance with FATF's standards on terrorist financing and money laundering, the Indian government has brought in laws including Foreign Contribution (Regulation) Act (FCRA), 2010 and its 2020 amendment, and the Prevention of Money Laundering Act (PMLA), 2002 and amendments to the Unlawful Activities (Prevention) Act (UAPA), 1967 without any consultation with civil society. These laws have hindered the legitimate human rights work of civil society actors and organisations, including Amnesty International, and enabled the government to attack them with smear campaigns.

Amnesty International believes that the Indian government has weaponized these laws to crack down on the legitimate human rights work of civil society. The enactment of these laws may also be an unintended consequence of FATF policy and practice, which requires a targeted risk-based approach and proportionate risk mitigation measures to be applied to countries' anti-money laundering and countering the financing of terrorism (AML/CFT) risks.[3]

India has introduced laws on regulating foreign contribution, preventing money laundering and amendments to the counter-terrorism law in response to the FATF assessments referred to above. These laws have also been amended multiple times without adequate public and legislative

[1] FATF, What We Do, http://www.fatf-gafi.org/about/whatwedo/

[2] https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Ixspecialrecommendations.html#:~:text=The%2040%2B9%20Recommendations%2C%20together%20with,and%20publised%20in%20February%202012

[3] https://fatfplatform.org/news/fatf-to-create-new-work-stream-on-unintended-consequences-of-poorly-implemented-amlcft-measures/

consultation. They subject NPOs to burdensome administrative requirements and leave their office-bearers and other independent human rights defenders vulnerable to the risk of arbitrary arrest and prolonged detention. The provisions also empower Indian authorities to suspend and cancel the registration of NPOs without adequate safeguards including judicial review. While Indian courts have largely upheld the validity of these laws under the Indian Constitution, various United Nations Special Rapporteurs (UNSRs) have raised concerns about the misapplication of these laws and specifically called for the repeal of FCRA and UAPA. These laws subject all NPOs in India drawing funds from foreign donors to common, disproportionate, oversight measures, including those at little or no risk of vulnerability to involvement in terrorist financing or money laundering. These measures also run contrary to the Indian Government's own assessment of the perceived risk posed by the NPO sector as "low".[4]

The briefing paper analyses the FCRA, the UAPA and the PMLA and highlights the manner in which the Indian authorities have systematically targeted civil society, including by intimidation, harassment, investigation and prosecution on trumped up money laundering and terrorism related charges. It also highlights the emblematic cases of the crackdown suffered by journalists, academics, human rights activists, students, and political opponents who have faced the brunt of these laws since 2010. The financial regulations contained within the three acts discussed in this briefing cannot be viewed in isolation and need to be considered in the broader context of the misuse of counter-terrorism powers in India. These laws must not be allowed to further the clampdown on dissent in India which has systematically eroded the rights to freedom of association and freedom of expression, particularly targeting civil society actors and religious minorities. In keeping with IHRL and FATF's recommendations, these laws should be repealed or significantly amended. Most importantly, NPOs must be consulted in FATF's upcoming mutual evaluation of India and Indian authorities must ensure that the exercise of the rights to freedom of expression, association and assembly are effectively protected.

[4] FATF, *Mutual Evaluation Report*, June 2013, pgs. 40-41

2. FATF PROCESSES AND ASSESSMENTS

FATF operates through a peer review system to mutually assess the full and effective implementation of its 40 recommendations in its member states and in over 200 jurisdictions through its cooperation with international and regional bodies.[5] In line with the mutual evaluation process, a country's compliance with FATF recommendations is examined by other FATF member states, resulting in the production of an in-depth assessment report with targeted recommendations to address shortcomings.

In response to many member states' historic, deliberate misapplication of Recommendation 8 to restrict the activities of NPOs, FATF revised Recommendation 8 in 2016 and paired the formal recommendation with an Interpretative Note to Recommendation 8[6] and a best practice guide.[7] Currently, the FATF is also in the process of making revisions to Recommendation 8, the Interpretative Note to Recommendation 8, and to the best practice guide. Since 2016, best practice includes four main steps required for states to comply with the FATF's recommendation pertaining to NPOs:

1. Conduct a risk assessment of the non-profit sector to identify which subset of organisations are likely to be at risk of "terrorism financing abuse";
2. Review existing laws and regulations on NPOs to ascertain whether they already address the identified risks associated with "terrorism financing";
3. Take risk mitigation measures in the event that deficiencies are identified in a specific NPO that are focused and proportionate to said risks to avoid disrupting the legitimate activities of NPOs;
4. Implement those measures in compliance with a state's obligations under international human rights law.[8]

2.1 SPECIFIC, TARGETED COUNTER MEASURES

As its overarching approach, FATF recommends that "…countries should identify, assess and understand the money laundering and terrorist financing risks for the country, and should take action (…) aimed at ensuring the risks are mitigated effectively."[9] States are required to take a "risk-based approach" to organisations that fall within the scope of the FATF definition of a "non-profit organisation." According to Recommendation 8, states must review existing legislation and regulations on NPOs in relation to their vulnerability to "terrorism financing", including the effectiveness of such laws, allowing for targeted counter measures where necessary, i.e., for the specific NPO or group of NPOs at risk of "terrorism financing". General concern that the entire sector might be at risk cannot be the basis for counter measures and is not in alignment with the FATF recommendations. States are obliged to implement risk mitigation measures in a manner that respects fundamental rights and freedoms in compliance with their obligations under international human rights law (IHRL).

2.2 CREDIBLE GROUNDS TO APPLY COUNTER-MEASURES

According to the FATF, when subjecting NPOs, including human rights organisations, to FATF-related legislation or standards, the authorities should demonstrate credible grounds to suspect their

[5] FATF, Members and Observers, https://www.fatf-gafi.org/about/membersandobservers/

[6] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Interpretive Note to Recommendation 8 (Not-Profit Organisations), Updated October 2020, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf

[7] FATF Best Practices Paper on Combating the Abuse of Non-Profit Organisations (Recommendation 8) https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf

[8] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Interpretive Note to Recommendation 8 (Not-Profit Organisations), Updated February 2023

[9] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, p.11, Updated February 2023, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf

vulnerability to the financing of terrorism in order to ensure they are not interfering with their legitimate activities.[10] Moreover, according to FATF best practice, financial institutions should not view NPOs as high risk simply because they operate in environments in need of great humanitarian aid.[11] Despite this, the Indian state continues to use the FCRA, the UAPA and the PMLA to target NPOs that have low or no risk of "terrorism financing" and money laundering abuses. In fact, it is evident that the state has used these laws to consistently and routinely harass and punish Indian NPOs for their legitimate human rights work.

India is due for its fourth round of the mutual evaluation process in November 2023. In the last evaluation report of 2010 and follow up report of 2013, India was found to be non-compliant with Recommendation 8.[12] India's last evaluation also took place before the FATF published its interpretative note on Recommendation 8 considering the unintended consequences faced by the non-profit sector due to the battery of repressive laws enacted by states to comply with the recommendation. The 2013 report concluded that "there are no periodic reassessments undertaken by reviewing new information on the sector's potential vulnerabilities to terrorist activities" and "there is no outreach to the NPO sector with a view to protecting the sector from abuse for terrorist financing".[13] On the latter, the FATF concluded that the deficiency was addressed after the Indian authorities shared their intention to conduct outreach programmes to NPOs on a regular basis. However, Amnesty International could not find any public information on any such programmes. Moreover, conducting outreach programmes without any meaningful engagement or acting on the recommendations from these programmes cannot correct the deficiencies of laws that allow blanket, arbitrary demands against NPOs. Rather, in the enactment and implementation of the three laws, authorities in India have failed to comply not just with established IHRL and standards, but also with FATF standards, guidelines, and recommendations. By failing to adopt FATF's targeted "risk-based approach," the Indian government has subjected all civil society organisations and human rights defenders to overly broad and vague laws that violate the principle of legality and threatens to violate the rights to freedom of association and expression which is described in further detail below.

International human rights law and standards safeguard the rights to freedom of expression and freedom of association. These are two of the rights that are routinely violated by misuse of counter-terrorism and financial regulations.

The right to freedom of association is protected by Article 22 of the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party, and Article 20 of the Universal Declaration of Human Rights (UDHR). Article 22 provides that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."[14] It goes on to state that "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." The UNSR on the rights to freedom of peaceful assembly and of association is clear that "The right of associations to freely access human, material and financial resources – from domestic, foreign, and international sources - is inherent to the right to freedom of association and essential to the existence and effective operations of any association."[15] The Special Rapporteur goes on to provide that "Any restriction to accessing funds, as an inherent part of the right to freedom of association, must meet the requirements of Article 22 (2) of the International Covenant on Civil and Political Rights, meaning that it must be provided by law and be necessary to achieve one or more of the enumerated legitimate objectives, which relate to

[10] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Interpretive Note to Recommendation 8 (Not-Profit Organisations), Updated October 2020

[11] FATF, Best Practices Paper on Combating the Abuse of Non-Profit Organisations (Recommendation 8) https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf, p. 28.

[12] FATF, Mutual Evaluation Report India, June 2010, pg. 218 and Mutual Evaluation Report, June 2013, pg. 59

[13] FATF, *Mutual Evaluation Report*, June 2013, pg. 40

[14] Article 22, International Covenant on Civil and Political Rights

[15] United Nations Human Rights Council, A/HRC/50/23, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule" May 10, 2022, para. 9, https://undocs.org/en/A/HRC/50/23 f

the protection of national security, to public order, public health or public morals, and to respect of the rights or reputations of others. Restrictions to freedom of association are the exception to the rule and must be applied and interpreted narrowly."[16]

The United Nations Human Rights Committee (HRC) has held that the right to freedom of association not only protects the right to form associations, but also for the association to be able to freely carry out its activities.[17] The ability to receive funds is key to this, as has been recognised by the Committee repeatedly, and as such undue restrictions will violate the right to freedom of association. [18] Such has been echoed by numerous regional human rights bodies and courts, including the Inter-American Commission on Human Rights,[19] the African Commission on Human and Peoples' Rights,[20] the European Court of Human Rights[21] and the European Court of Justice.[22]

The right to freedom of expression is enshrined in Article 19 of the UDHR as well as Article 19 of the ICCPR. Article 19(2) of the ICCPR provides that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Article 19(3) of the ICCPR goes on to provide those restrictions to the right "shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." In their General Comment on the right to freedom of expression, the HRC is clear that the right includes expression related to "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse" – which is an expansive list that by its nature covers the activities of the vast majority of NPOs.[23]

Restrictions on the rights to freedom of association and expression are permitted under international law in narrowly prescribed circumstances only. They must be provided for by law (principle of legality) and go no further than is strictly necessary and proportionate in order to fulfil one of a limited number of legitimate objectives. While both the right to freedom of association and expression can be restricted in the name of national security, IHRL and standards are clear that this is to be interpreted *narrowly and with extreme care*. The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR provide that "National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."[24] National security cannot be invoked as a justification "for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse."[25] The HRC has held that it is impermissible to invoke laws "to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information."[26]

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[16] Ibid. para 13

[17] UN Human Rights Committee, *Belyatsky et al. v. Belarus* (CCPR/C/90

[18] See, Inter alia, UN Human Rights Committee, Concluding observations on the third periodic report of

Viet Nam, (CCPR/C/VNM/CO/3) para 49; UN Human Rights Committee , Concluding observations on the fifth periodic report of Belarus (CCPR/C/BLR/CO/5) para 54(c); UN Human Rights Committee, *Concluding observations on the initial report of Bangladesh,* (CCPR/C/BGD/CO/1) para 27(c)

[19] Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights Defenders in the Americas, para. 179.

[20] African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly, paras. 37–38

[21] European Court of Human Rights, Ramazanova and others v. Azerbaijan (application No. 44363/02), para. 59

[22] European Court of Justice, Commission v. Hungary (case C-78/18), judgment of 18 June 2020, paras. 110–118

[23] UN Human Rights Committee, General Comment 34 on Article 19: freedom of opinion and expression. (CCPR/C/GC/34) para 11

[24] International Commission of Jurists, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, para 29

[25] Ibid. Para 31.

[26] UN Human Rights Committee, General Comment 34 on Article 19: freedom of opinion and expression. (CCPR/C/GC/34) para 30

3. METHODOLOGY

The briefing is based on interviews with representatives of Indian and international NPOs working in India. It is based on their responses to a questionnaire that Amnesty International circulated to 18 NPOs that had faced any form of adverse action from the Indian authorities under at least one of the three laws – FCRA, UAPA and PMLA.

The questionnaire addressed how NPOs viewed these three laws, the process they followed to adapt to the amendments in these laws as well as the impact that the laws have had on their operations. It also addressed whether NPOs underwent any form of risk-based assessment or were approached by the Indian authorities to undergo such an assessment. In total, eight NPOs working in the fields of climate change, environment protection, welfare, and education of marginalised groups such as Dalits and Adivasis (India's indigenous people) and freedom of religion responded to the survey. Amnesty International also conducted eight virtual and telephone interviews with representatives from human rights organisations between 20 July to 21 August 2023.

Information regarding the names of the individuals interviewed and their organisations, and the organisations that replied to the survey, has been kept confidential to maintain their privacy and ensure their safety due to potential reprisals.

Amnesty International also undertook desk research, analysing and reviewing the content, context, and applicability of three laws, i.e., FCRA, PMLA and UAPA under the lens of IHRL and against FATF's own recommendations, especially its Interpretative Note and Best Practices Paper against the abuse of Special Recommendation 8. Amnesty International also reviewed news articles, reports from other human rights organisations and communications from various UNSRs produced between 2010 and 2023. It also analysed relevant Indian laws and court judgements on the validity and applicability of the three laws.

4. HUMAN RIGHTS CONCERNS

4.1 FOREIGN CONTRIBUTION (REGULATION) ACT

First enacted in 1976 during the emergency rule, the FCRA was aimed at preventing and regulating foreign interference in Indian politics.[27] The primary target of the legislation was political parties and parliamentary institutions. It allowed NPOs to accept foreign donations freely and only required them to report the total sum received and spent annually.[28]

In 1984, the Act was amended through an ordinance to include NPOs within its ambit, requiring their mandatory registration with the Ministry of Home Affairs (MHA).[29] Earlier, NPOs were only required to register with development ministries. [30] This shift indicated the treatment of NPOs at par with groups that interfere with the security and safety of the state, thus falling under the mandate of the Home Ministry. The 1984 amendment ran parallel to the inquiry of Kudal Commission. Formed in 1981, the Commission was tasked with investigating the misuse of funds and activities of several NPOs which had actively opposed human rights violations by the Indian government during emergency rule.[31] The Commission's inquiry went on for six years and concluded with recommending regulatory and punitive measures to control NPOs. It is cited "as the single event that played the largest role in generating hostility and suspicion between [non-profit organisations] and the government."[32]

Twenty-six years later, the 1976 FCRA was repealed, repurposed, and substituted with a newer Act called the Foreign Contribution (Regulation) Act 2010 with a greater focus on NPOs.[33]

While the preamble of the 1976 Act referred to the "values of a sovereign democratic republic", the 2010 Act focusses on "preventing activities detrimental to national interest". At the time of introduction of the Bill that eventually turned into the 2010 Act, the MHA stated that it was introduced "in the context of increased security concerns and resultant imperatives".[34] It further said that the objective of the Bill was to "provide a framework for more effective and transparent regulation of foreign contribution for prevention of activities detrimental to national interest."[35]

The 1976 Act's original intent to prevent foreign interference in Indian politics was further undermined following the 2016 and 2018 amendments respectively. Passed without adequate legislative and public consultation, the 2016 amendment exempted political parties from the purview of the FCRA.[36] This stood in direct violation of a 2014 Delhi High Court judgement that found the two leading political parties of India – Bharatiya Janata Party and Indian National Congress guilty of accepting foreign funds from corporations in violation of FCRA.[37] Further, the amendment was brought in while awaiting implementation of the Delhi High Court judgement by the Election Commission of India and MHA. Further subverting the judgement, the 2018 amendment applied the exemption on political parties

[27] Preamble, Foreign Contribution (Regulation) Act, 1976, "An Act to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic, and for matters connected therewith or incidental thereto", https://www.icsi.edu/media/portals/86/bare%20acts/The%20Foreign%20Contribution%20(Regulation)%20Act,%201976.pdf

[28] Sanjay Aggarwal, *AccountAble: FCRA 2010, Context, Concepts and Practice,* Chapter 2, pg. 57, https://fcra2010.in/about/

[29] Sanjay Aggarwal, *AccountAble Handbook, FCRA 2010, Theory and Practice*, pg. 22, https://accountaid.net/wp-content/uploads/2021/02/AccountAble-Handbook-FCRA-2010.pdf

[30] The primary mechanisms for registration of NPOs in India are included in The Societies Registration Act of 1860 and related state legislations, the Indian Trust Act of 1882 and the Charitable and Religious Act of 1920.

[31] Briefer: India Foreign Contribution (Regulation) Act (FCRA): The 2020 Amendments and Threats to Free Association, ICNL, pg. 3, 7 July 2021

[32] Neema Kudva, Strong States, Strong NGOs: Social Movements in India: Poverty, Power, And Politics, pgs. 233, 243 (New Delhi: Oxford Univ. Press, 2005)

[33] Foreign Contribution (Regulation) Act, 2010, No 42 of 2010, FC-RegulationAct-2010-C.pdf (fcraonline.nic.in)

[34] Briefer: India Foreign Contribution (Regulation) Act (FCRA): The 2020 Amendments and Threats to Free Association, ICNL, pg. 3 7 July 2021

[35] Briefer: India Foreign Contribution (Regulation) Act (FCRA): The 2020 Amendments and Threats to Free Association, ICNL, pg. 3, 7 July 2021

[36] The Finance Act, 2016, No, 28 of 2016, https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_3.pdf

[37] Delhi High Court, Association for Democratic Reforms v. Union of India and others, W.P.(C) 131/2013, 28 March 2014

retrospectively from 1976[38], giving them free reign to accept foreign funds not only in the future but also exempting them from any legal liability for past acceptance.

As foreign funding oversight relaxed for the political parties, these same parties have increasingly cracked down on and administratively burdened NPOs on arbitrary grounds.[39] The 2010 FCRA, as it stands now, is the primary law that regulates foreign donations to NPOs. For an NPO to receive foreign donation, it must be registered under the FCRA and have an approval from the MHA.[40] The registration is valid for five years and must be renewed after this period to be able to continue receiving foreign donations.[41] The corresponding Rules to the FCRA also require NPOs to file annual returns[42]. The MHA holds wide powers to suspend and cancel an NPO's registration.[43] Once the FCRA registration of an NPO is cancelled, it becomes ineligible to receive foreign funds for at least three years.[44] In 2011, the Indian government passed the corresponding rules to the Act.[45] Since then, 2010 Act has been amended thrice (2016, 2018 and 2020) and the Rules have been amended six times (2012, 2015, twice in 2019, 2020 and 2022).[46] In the last ten years, over 20,600 NPOs have had their FCRA licences cancelled[47]; with almost 6,000 of them having lost their licences in the beginning of 2022.[48]

4.1.1 KEY CONCERNING PROVISIONS

The 2010 FCRA prohibits certain persons from accepting foreign contributions, ranging from election candidates, judges, members of parliament and, government officials to those involved in producing and publishing audio-visual news.[49] While limited regulation of some of these actors may be necessary and proportionate in certain circumstances, the Act applies a broad-brush, disproportionate, and unnecessary approach and treats different actors with the same level of suspicion.

ORGANISATIONS OF "POLITICAL NATURE"

It also prohibits any person, association, or company of "political nature" from accepting "foreign contribution".[50] The Act gives wide powers to the Indian authority to identify an organisation as being political in nature based on its activities, ideology, programme, or its association with a political party.[51] The 2011 rules make a futile attempt to provide a set of guidelines for Indian authorities to declare an organisation to be of "political nature".[52] These include trade unions promoting political goals, voluntary groups which participate in political activities, mass organisations such as student unions, workers' unions, youth forums, women's wings of political parties and organisations of farmers, workers, students and youth based on caste, community, religion, language etc. that work towards

[38] The Finance Act, 2018, No. 13 of 2016, https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_2.pdf

[39] Amnesty International, *India Should Stop Using Abusive Foreign Funding Law",* 19 January 2022, https://www.amnesty.org/en/latest/press-release/2022/01/india-should-stop-using-abusive-foreign-funding-law/

[40] Section 12(4), Foreign Contribution (Regulation) Act, 2010

[41] Section 12(6), Foreign Contribution (Regulation) Act, 2010

[42] Rule 17, Foreign Contribution (Regulation) Rules, 2011

[43] Section 14, Foreign Contribution (Regulation) Act, 2010

[44] Section 14(3), Foreign Contribution (Regulation) Act, 2010

[45] Foreign Contribution (Regulation) Rules, 2011, https://fcraonline.nic.in/home/PDF_Doc/FC-rules2011.pdf

[46] https://fcraonline.nic.in/home/index.aspx#

[47] KP Singh, "FCRA Cancelled List 2023 | Government Cancelled FCRA Licence NGOs List", *Sarkari List*, 2 January 2022, https://sarkarilist.in/fcra-cancelled-list/

[48] Mekhala Saran & Vakasha Sachdev, "Nearly 6,000 NGOs Lose FCRA Licence: What Does it Mean? Why is it Important?", *The Quint,* 4 January 2022, https://www.thequint.com/explainers/explained-nearly-6000-ngos-lose-fcra-license-what-now-what-next

[49] Section 3, Foreign Contribution (Regulation) Act, 2010

[50] Section 2(1)(h), Foreign Contribution (Regulation) Act, 2010

[51] Section 5(1), Foreign Contribution (Regulation) Act, 2010

[52] Rule 3, Foreign Contribution (Regulation) Rules, 2011

advancing the political interests of these groups along with organisations which regularly engage in political mobilisation of people using strikes, vigils, road and rail blockages and "jail fill" protests.[53]

In addition, it also prohibits the acceptance of foreign contributions that may affect the "sovereignty and integrity of India", "security, strategic, scientific or economic interest of the State", "public interest", "freedom of fairness of election to any Legislature", "friendly relations with any foreign State", or "harmony between religious, racial, social, linguistic or regional groups, castes or communities".[54] The Act does not make an effort to detail or define these terms leaving their interpretation to the subjective understanding of the Indian authorities.

BURDENSOME REQUIREMENTS THROUGH 2020 AMENDMENT

In 2020, FCRA 2010 was further amended prohibiting the transfer of foreign contribution by FCRA registered NPOs to other registered organisations[55], restricting public servants from receiving foreign funds[56] and putting a 20% cap on administrative expenses - such as travel and operations costs and staff salaries - a dilution from 50% in the 2010 FCRA.[57] It also required all NPOs registered under FCRA to maintain their bank account in one specified branch of the State Bank of India (SBI), India's national bank in Delhi and NPO officeholders to produce Aadhaar cards[58], a 12-digit biometric identification number issued by the Indian government, for registration under the FCRA.[59] Previously, Amnesty International has raised serious concerns about the violations of right to privacy by the large scale collection of personal and biometric data by the Indian government for the Aadhaar project, and linking it to a range of services.[60] The FCRA 2020 rules were also amended requiring NPOs to disclose whether any of their office bearers have been prosecuted or convicted, and communicate changes for any of its key members within 15 days for approval by the MHA.[61]

According to the Government of India's own data, 92.3% of total non-governmental organisations (NGOs) in India are registered in states others than Delhi.[62] Therefore, the requirement of having an FCRA account in Delhi placed by the 2020 amendment has proved to be heavily burdensome and resource intensive for many NPOs, particularly those based outside the national capital. Even though SBI arranged for remote opening of accounts, many local NPOs do not have unfettered access to internet or other online resources, especially grassroots organisations and others remain imperative which is unduly restricted by the deliberate and arbitrary internet shutdowns imposed by the Indian Government in states such as Manipur and Kashmir.[63] This shows either lack of deliberation on the part of the Indian authorities or a conscious attempt to dissuade NPOs from engaging in otherwise lawful conduct and activities to provide essential services, and promote and defend human rights.

4.1.2 INTERNATIONAL HUMAN RIGHTS LAWS AND FATF

Neither the 2010 FCRA nor the parliamentary debates around the bill referred to Recommendation 8 of FATF. However, Section 12 of the 1976 FCRA was mentioned in FATF's 2010 Mutual Evaluation

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[53] Rule 3, Foreign Contribution (Regulation) Rules, 2011

[54] Section 12(4)(f), Foreign Contribution (Regulation) Act, 2010

[55] Section 7, The Foreign Contribution (Regulation) Amendment Act, 2020, https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_1.pdf

[56] Section 3(c), The Foreign Contribution (Regulation) Amendment Act, 2020, https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_1.pdf

[57] Section 8, The Foreign Contribution (Regulation) Amendment Act, 2020, https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_1.pdf

[58] Aadhaar cards collect large-scale collection of personal and biometric data with the stated aim of linking it to a range of services and benefits. However, in the absence of a robust data protection law, civil society organisations have raised alarming concerns about the misuse of Aadhaar cards, with deleterious effect on rural communities and other marginalised groups. The Tribune, "Aadhaar project threatens rights: Amnesty International", 12 January 2018, https://www.tribuneindia.com/news/archive/nation/aadhaar-project-threatens-rights-amnesty-international-527985

[59] Section 17 (1) and Section 12A The Foreign Contribution (Regulation) Amendment Act, 2020, https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_1.pdf

[60] Amnesty International and Human Rights Watch, *India: Identification Project Threatens Rights* (Press Release, 13 January 2018), https://www.hrw.org/news/2018/01/13/india-identification-project-threatens-rights

[61] Rules 9(1)(f), 12(5)(6)(6A), 17(A); Form FC-3A(8), The Foreign Contribution (Regulation) (Amendment) Rules, 2020

[62] NGO Darpan, https://ngodarpan.gov.in/index.php/home/statewise

[63] According to Access Now, India remains the world leader for five consecutive years in imposing the highest number of internet shutdowns.

Report (MER) of India as a means to prohibit the transfer of suspect assets, and future reforms after the MER highlighted contemporary problems and overreach.[64] The introduction of the revised FCRA bill in 2006 also coincides with India becoming an observer state of FATF. The Bill remained in limbo until 2010 when India was rated "Non-Compliant" on Recommendation 8 by the FATF after which the country sought to reform the Act. In 2013, the India's follow-up MER acknowledged and appreciated the oversight of NPOs under the 2010 FCRA but still regarded India as "Non-Compliant".[65] After the United States Government called on India to extend foreign contribution reporting requirements to any NPO that has a political, cultural, economic, educational, or social focus, in order to conform with the FATF recommendations, India passed the FCRA rules in 2011.[66]

The periodic amendments to FCRA do not conform to Recommendation 8 of the FATF and its updated interpretative note. For instance, the arbitrary and burdensome restrictions placed by the 2020 amendment to the FCRA were not preceded by any risk-based assessment as prescribed by the FATF. During the legislative debate around the 2020 FCRA Amendment Bill, the MHA and the members of Indian Parliament belonging to the ruling party defended the Bill by making anecdotal and unfounded statements about foreign funds being misused for paying the salaries of senior office bearers in NPOs and buying luxury cars and air-conditioners.[67] During the legislative debate on the amendment, a reasoned explanation for the drastic reduction in the portion allocated for administrative expenses incurred by NPOs which include travel, operations costs and staff salaries amongst others was demanded by the members of the political opposition. Nevertheless, the amendments were passed.[68]

Although the risk posed by the NPO sector is "low" as recognized by the government itself, the restrictions are heavy and disproportionate.[69] They apply to all NPOs receiving foreign funds, regardless of risk. Moreover, Recommendation 8 expressly acknowledges that governments must not unduly restrict NPO's ability to access resources, including financial resources, to carry out their legitimate activities.[70] Yet the FCRA has substantially impacted NPO financing and shrunk the sector, to the great detriment of a wide number of public interest goals in India, from public health to poverty alleviation, to human rights advocacy.

FATF also states that "as a matter of principle, complying with the FATF Recommendations should not contravene a country's obligations under the Charter of the United Nations and international human rights law" specifically with regards to "freedom of expression, religion, or belief, and freedom of peaceful assembly and of association".[71] In this regard, various UNSRs have communicated their concerns with FCRA to the Indian government and called for its repeal.

In 2016, the UNSR on the right to freedom of peaceful assembly and association wrote to the Indian government alerting them to the overbroad and vague nature of these provisions.[72] The Special Rapporteur outlined that the right to freedom of peaceful assembly and of association including access to foreign funding being a "fundamental part of the right to freedom of association" under IHRL. The communication further stated that any restrictions based on the overbroad terms mentioned above "do not conform to the prescribed aim and are not a proportionate response" to the allowed restrictions for the right to association, which are enshrined in Article 22 of the ICCPR, to

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[64] Asia/Pacific Group on Money Laundering, India Mutual Evaluation Report: Anti-Money Laundering and Combatting the Financing of Terrorism, FATF/GAFI, pg. 887, 25 June 2010

[65] FATF, Mutual Evaluation Report India, June 2010, pg. 39

[66] United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report, Volume II: Money Laundering and Financial Crimes, March 2011, pg. 109, https://2009-2017.state.gov/documents/organization/156589.pdf

[67] The Hindu, "Parliament proceedings | Lok Sabha passes FCRA Bill", 21 September 2020, https://www.thehindu.com/news/national/parliament-proceedings-lok-sabha-passes-fcra-bill/article32662269.ece

[68] The Times of India, "Critical Review of the Foreign Contribution Regulation Act (Amendment), Act, 2020 – Part-3", 28 October 2021, https://timesofindia.indiatimes.com/blogs/truth-lies-and-politics/critical-review-of-the-foreign-contribution-regulation-act-amendment-act-2020-part-3/

[69] FATF, *Mutual Evaluation Report India*, June 2013, pgs. 40, 41

[70] FATF Best Practices, Combating the Abuse of Non-Profit Organisations (Recommendation 8), June 2015, pg. 15

[71] FATF Best Practices, Combating the Abuse of Non-Profit Organisations (Recommendation 8), June 2015, pg. 15, 16

[72] OHCHR, Analysis on International Law, Standards and Principles Applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulation Rules 2011 by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai, 20 April 2016, UNSR-FOAA-info-note-India.pdf (freeassembly.net)

which India is a state party.[73] Any restriction to the freedom of association is lawful under the ICCPR only if the restriction is: prescribed by law, pursued in the interest of one of the specified grounds, and necessary in a democratic society.

In 2021, hampered by the 2020 FCRA amendments, various NPOs filed three petitions before the Supreme Court challenging the amendments' constitutional validity. The petitions called the amendments "manifestly arbitrary, unreasonable and impinging upon the fundamental rights guaranteed to the petitioners under Article 14, 19 and 21 of the Constitution".[74] On 8 April 2022, the Supreme Court upheld the constitutionality of the amendments. While arriving at this decision, the Court did not consider international law standards and struck down its own previous judgement which had recognised NPOs' absolute right to receive foreign contribution.[75] The mandatory opening of an FCRA account at State Bank of India's Delhi branch was also held to be in conformity with the Constitution. The Court relied on it "being a matter of security of the State, public order and in the interests of the general public".

While national security is recognised by IHRL as a legitimate justification for the restriction of certain human rights, such restrictions are strictly circumscribed and not intended for states to instrumentalize or abuse.

Firstly, national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.[76] Furthermore, national security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.[77] International standards are also clear that *the systematic violation of human rights undermines true national security* and may jeopardize international peace and security. A state responsible for such human rights violations shall not invoke national security as a justification for measures aimed at suppressing opposition to these violations or at perpetrating repressive practices against its population.[78]

Secondly, even where national security can legitimately be invoked as a justification for restricting certain rights, the measures introduced must be provided for by law, and must meet the requirements of necessity and proportionality. This means that they must not go any further than is required by the exigencies of the situation, and that they must not do more harm than good.

In other jurisdictions such as Egypt, the HRC has raised concerns over arbitrary foreign funding restrictions that act as a barrier to the practical realisation of the right to freedom of association.[79] The Special Representative of the Secretary General on the situation of human rights defenders has also stated that as part of international cooperation, NPOs must be allowed access to foreign funding, like governments.[80]

In his most recent report of May 2022, the Special Rapporteur on the right to freedom of peaceful assembly and of association stated that: "The right of associations to freely access human, material and financial resources – from domestic, foreign, and international sources – is inherent to the right to freedom of association and essential to the existence and effective operations of any association…The

[73] OHCHR, Analysis on International Law, Standards and Principles Applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulation Rules 2011 by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai, 20 April 2016, pg. 3, UNSR-FOAA-info-note-India.pdf (freeassembly.net)

[74] *Noel Harper v. Union of India,* (Writ Petition (Civil) No. 566 of 2021), Supreme Court of India, 8 April 2022

[75] *Indian Action Social Forum v. Union of India,* (Civil Appeal No.1510 of 2020), Supreme Court of India, 6 March 2020

[76] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights; Principle 1(B)(vi) (29)

[77] Siracusa Principles, Principle 1(B)(vi) (32) (previously cited)

[78] Siracusa Principles, Principle 1(B)(vi) (32) (previously cited)

[79] U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Egypt, at para. 21, U.N. Doc. CCPR/CO/76/EGY (November 28, 2002), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument

[80] Special Representative of the Secretary-General on the Situation of Human Rights Defenders, United Nations General Assembly, A/59/401 (2004) at para. 82(l).

Committee has recognized that funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with Article 22 [emphasis added].[81]

The Special Rapporteur specifically noted regarding the FCRA that: The Act has been the subject of several communications and statements by special procedure mandate holders for failing to meet the "the stringent test for allowable restrictions" on the right to freedom of association and for obstructing civil society organisations' access to foreign funding. The special procedure mandate holders raised their concerns that the prior authorization regime under the FCRA was incompatible with the international human rights obligations of India and was being used "to silence organisations involved in advocating civil, political, economic, social, environmental, or cultural priorities, which may differ from those backed by the Government."

With regard to the FCRA, the former UNSR on the situation of human rights defenders specifically articulated her concerns with the 2010 Act and its requirements of renewal of registration every five years and prior permission before accepting foreign funds, noting that "…such provisions may lead to abuse by the authorities when reviewing applications of organisations which were critical of authorities."[82]

4.1.3 IMPACT OF FCRA ON INDIA'S NPO SECTOR

> **"In the 30 plus years of our institution's history, we never had to appear for an audit to renew our FCRA licence. 2021 was the first year we were asked to do so, and just months later we found out that our licence had been cancelled."[83]**
>
> An NPO representative speaking to Amnesty International on condition of anonymity

A prominent civil society activist told Amnesty International that the crackdown on NPOs under the FCRA takes place in India along three levels –

1) 'Random fire', which includes arbitrarily suspending or cancelling the FCRA licences of grassroot organisations to create an atmosphere of fear and forced deference.
2) Targeting institutions with an established global footprint and coercing them to shut down their Indian operations.
3) Punishing individuals who have spoken out against the ruling government by deploying multiple investigating authorities to audit and raid the NPOs headed by or associated with them.[84]

These practices of the Indian government are akin to the concept of 'chilling effect' recognized by the HRC that have resulted in NPOs halting certain activities or facing hardships in continuing their work.[85] Taking a step further, Professor of European Law, Laurence Pech provided a working definition of the term by identifying three main prongs of a state's desire to create and maintain a chilling effect. These include: 1) adoption of deliberately ambiguous legal provisions; 2) arbitrary enforcement of those provisions against critics of the authorities; and 3) adoption of disproportionate sanctions to discourage people from exercising their rights, thus limiting the need for future arbitrary

[81] United Nations Human Rights Council, A/HRC/50/23, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule" May 10, 2022, para. 9, https://undocs.org/en/A/HRC/50/23

[82] United Nations Human Rights Council, A/HRC/19/55/Add.1, "Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya" Feb. 2012, para. 146, https://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pd

[83] Telephone interview with an NPO, 21 August 2023

[84] Telephonic interview with an NPO, 10 August 2023

[85] General Comment 34 on Freedom of Opinion and Expression and General Comment 37 on the Right to Peaceful Assembly

enforcement of the relevant legal provisions whose lack of foreseeability is intentional.[86] These practices in the Indian context appear to dissuade NPOs from engaging in otherwise lawful conduct and activities to promote and defend human rights.

Further the 2020 FCRA amendments have left NPOs working on promoting the rights of India's most marginalised populations such as Dalits, religious minorities, and Adivasis particularly vulnerable to arbitrary closure of their organisations.[87] With over 20,000 NPOs facing a cancellation of their FCRA licences in the last ten years, the atmosphere of fear and uncertainty in the NPO sector is palpable with at least one NPO electing to opt out of the survey conducted by Amnesty International over fears of not having its FCRA licence renewed despite assurances of anonymity. Other NGOs are closing shop altogether, resulting in significant unemployment, while personnel face discrimination in banking and evening lodging rentals, as a result of the chilling environment caused by the over-regulation of the sector.[88]

11 out of the 16 NPOs that responded to the survey or spoke with Amnesty International confirmed that they had been arbitrarily deprived of their FCRA licences through suspensions, cancellations, and non-renewals. These include internationally regarded and awarded NPOs who have either had to wrap up their operations in India or have had to rely entirely on domestic donations after no longer being allowed to use or receive foreign funds from their donor organisations.[89] The elimination of cross-border funding for many NPOs results in significant shortfalls and program closures – particularly for more sensitive areas of work (like gender, minority advocacy, or environmental issues), which are less likely to receive domestic support. Likewise, local, and grassroots NPOs have been greatly impacted.

While cancelling or suspending the FCRA licenses of the organisations, the authorities provided vague reasons or alluded to their human rights work. Over the years, Amnesty International has documented the Indian government's increasing crackdown on NPOs working for the protection and promotion of human rights in India which has made continuing to work for marginalised communities – who already face disproportionate discrimination in exercising their basic human rights - particularly difficult.[90] The targeting of human rights groups by the Indian government has also been echoed by other organisations.[91] An NPO which provides pro-bono legal aid to marginalised and underprivileged communities had its licence cancelled after offering to represent inmates in jail on the grounds of 'bringing disrepute to public institutions'.[92] An Indian arm of another globally reputed NPO while having its FCRA licence cancelled, also faced a police case on account of working 'against public interest', and for leveraging the support of its international donor organisation to renew its FCRA licence.[93] In a similar vein, another NPO which specialises in providing human rights education to children and documenting police atrocities told Amnesty International that it received four suspension orders consecutively over a period of four years from the Foreigners Division of MHA, citing that their activities are "likely to prejudicially affect the national interest".[94] The fourth and last suspension order was sent to the NPO while their FCRA was already suspended in response to the third suspension order, demonstrating either an evident lack of solid application of mind on behalf of the Indian authorities or relentless harassment of the NPO .[95] Amnesty International is deeply concerned that the

[86] Laurent Pech, The concept of chilling effect: Its untapped potential to better protect democracy, the rule of law, and fundamental rights in the EU, Open Society European Policy Institute, March 2021, p. 4

[87] Amnesty International, *India Should Stop Using Abusive Foreign Funding Law*, (Press Release, 19 January, 2022), www.amnesty.org/en/latest/press-release/2022/01/india-should-stop-using-abusive-foreign-funding-law/

[88] Rajika Seth and Smarinita Shetty, "Who loses when FCRA licenses are cancelled?", *The Wire,* 16 August 2023, https://thewire.in/rights/who-loses-when-fcra-licences-get-cancelled

[89] Responses by 3 NPOs to Amnesty India's questionnaire on 31 July 2023, 31 July 2023 and 14 August 2023

[90] Amnesty International, *Foreign Funding Law in India Used To Harass 25 Groups* (Joint Statement, 8 November 2016), https://web.archive.org/web/20201007230847/https://amnesty.org.in/news-update/foreign-funding-law-india-used-harass-25-groups/

[91] Human Rights Watch, *India: Amnesty International Forced to Halt Work*, 30 September 2020, https://www.hrw.org/news/2020/09/30/india-amnesty-international-forced-halt-work

[92] Telephonic interview with a NPO, 9 August 2023

[93] Response by an NPO to Amnesty India's questionnaire on 31 July 2023

[94] Telephonic interview with an NPO, 20 July 2023

[95] Four suspension orders on file with Amnesty International

motivation behind these measures is purely political and designed to create an environment hostile to NPOs.

The clear message underscored by every NPO which responded to the survey is that the 2020 amendment to the FCRA has dealt the non-profit sector in India with a crippling blow. In 2021, the International Centre for Not-for-Profit Law (ICNL) reported that by 17 May 2021, eight months after the amendments were enacted, only approximately 3,600 of the 22,500 NPOs eligible to receive FCRA funds had confirmed that their State Bank of India accounts were operational, while another 5,000 were not clear whether their accounts were operational or not.[96] In July 2022, the MHA deleted the list of NPOs whose FCRA licenses had been cancelled in the past without any explanation and has not published this data publicly ever since.[97]

Access to justice for NPOs who have suffered suspension or cancellation of their FCRA registration has been characterised by delays and uncertainties. While some NPOs have been able to seek temporary relief from Indian courts that allowed them to pay staff salaries, others struggle to survive. In one case, the Delhi High Court dismissed the plea of an NPO which challenged the suspension order against them and instead the Court held that "the scope of judicial review is very limited and should be exercised only when it is a case of mala fide, arbitrariness, or an ulterior motive".[98] Speaking to Amnesty International, another NPO that has been fighting the arbitrary suspension and cancellation of their FCRA registration before the courts said:

"The case has been going on for seven years. We have been waiting for 3128 days for justice."[99]

At least three NPOs told Amnesty International that they have been at the receiving end of what appears to be coordinated action from India's multiple investigating authorities, specifically the Enforcement Directorate (ED), the enforcement authority under the PMLA and the Foreign Exchange Management Act (FEMA) and the Central Bureau of Investigation (CBI), the investigating authority for FCRA violations. One authority draws information from another authority's investigation, raising concerns about the Indian Government's relentless and concerted campaigns against certain NPOs, in addition to concerns regarding the right to privacy.

Amnesty International India itself has not been immune from such action. Amnesty International India's offices were first raided in October 2018, and since then it has been subject to a series of concerted legal attacks, with cases brought by the CBI under FCRA, by the ED under FEMA and the PMLA, and other allegations brought by authorities under tax legislation and the Companies Act 2013. As such, Amnesty International India now faces charges under multiple laws based on the same set of facts, under which several allegations are mutually incompatible.[100] Amnesty International India's bank accounts were frozen in September 2020 without notice[101], which paralysed its operations, leaving it unable to pay staff, suppliers, or statutory dues from that point on. In a breach of internationally accepted legal principles and contrary to the spirit of the Indian constitution, Amnesty International India also currently has no way of funding its legal defence. Government agencies have shown a disregard for the principles of natural justice and due process, for example by repeatedly postponing the dates of court hearings, and, in the PMLA case, withholding relied-upon documents for almost two years. Meanwhile the CBI have this year intensified their original 2019 investigation

[96] ICNL, *India's Foreign Contribution (Regulation) Act (FCRA): The 2020 Amendments and Threats to Free Association*, 7 July 2021, pg. 15, https://www.icnl.org/wp-content/uploads/FCRA-Amendments-Briefer-7-7-21.pdf

[97] Deeptiman Tiwary, "Govt deletes NGOs' data from FCRA site", Indian Express, 13 July 2022, https://web.archive.org/web/20220827120050/https://indianexpress.com/article/india/govt-mha-deletes-ngo-data-from-fcra-site-8025617/

[98] "Delhi HC upholds Centre's order suspending FCRA approval to Commonwealth Human Rights Initiative", *Scroll.In,* 27 April 2022, https://scroll.in/latest/1022728/centre-cancels-foreign-fund-licence-of-ngo-commonwealth-human-rights-initiative#:~:text=On%20June%207%2C%20the%20Centre%20had%20suspended%20Commonwealth,the%20Delhi%20High%20Court%20to%20challenge%20the%20suspension.

[99] Telephonic interview with an NPO, 20 July 2023

[100] Telephonic interview with a functionary of Amnesty International India, 31 July 2023

[101] Amnesty International, *Amnesty International India halts its work on upholding human rights in India due to reprisal from Government of India* (Press release, 29 September 2020), https://www.amnesty.org/en/latest/press-release/2020/09/amnesty-international-india-halts-its-work-on-upholding-human-rights-in-india-due-to-reprisal-from-government-of-india/

under FCRA, which has involved re-interviewing witnesses and demanding original copies of a large volume of documents from the years that Amnesty International India was in operation.

The coordinated crackdown has also resulted in NPOs' inability to match the demands of various authorities to frequently produce voluminous documentation. Recounting the investigation by the CBI and ED, the patron of a prominent think-tank that reviews, evaluates, and influences public policy told Amnesty International:

"Our institution was first raided by the ED officials under the PMLA who confiscated key records and documents. Months later, we were asked to supply those files again, this time for an FCRA audit. Since we no longer had physical possession of these files (they were with the ED), we could not provide them for the FCRA audit, and our licence was suspended as a result." [102]

NPOs working at the grassroots level (often in remote areas in the states of Jharkhand, Chhattisgarh, and the north-eastern part of India) have been severely impacted by the amended FCRA law – especially the provision of having to register their account with a single specified branch in New Delhi, which they reported to be a massive logistical hurdle. Speaking to Amnesty International, an NPO that has worked on issues of education, environment, women's empowerment, water conservation, tribal welfare, and local governance for over 40 years said:

"We relied on bigger organisations to assist us with securing funding for our work. With the amendments, we had to set up an account in Delhi which burdened a much smaller organisation like ours based in a remote state and area of the country." [103]

Several organisations reported being hamstrung by the FCRA provision which prevents them from transferring foreign funds to other organisations, even if they possess an FCRA licence. This coupled with the 20% cap on administration expenses has forced them to drastically cut down their operations. The provisions within the amended act are only part of the problem, as organisations also highlighted the deliberate ambiguity around key terms in the text of the legislation. For instance, one such organisation told Amnesty International:

"There is no clear definition of what exactly an administrative expense is. Is hiring a programme coordinator an administrative expense? The rules don't provide us with much clarity, which is why we have to think several times before hiring and paying programme coordinators." [104]

Despite grassroot NPOs complying with their understanding of the legislation, and in spite of their established track record of working with the local governments for the protection of the poorest and most marginalised communities, they have found their FCRA licences suspended without any reasons given.[105] One such institution told Amnesty International:

"Out of the blue, our organisation was tagged on Twitter one day by a right-wing account, claiming that we had violated FCRA norms. We assumed it was a troll account and ignored the accusations. But a month later we got an official government notice levelling the same allegations". [106]

Even when licenses have not been suspended outright, NPOs have faced other challenges from the MHA, which regulates foreign donations to NPOs in India, such as inordinate delays in renewal of FCRA licenses, authorities demanding burdensome amounts of documentation and imposing unreasonable conditions for renewing licences and granting renewals for short 3-6 months' time periods, making it difficult for NPOs to plan and execute their human rights programmes. [107]

[102] Telephonic interview with an NPO, 9 August 2023

[103] Response to Amnesty International's questionnaire, 1 August 2023

[104] Telephonic interview with an NPO, 10 August 2023

[105] Telephonic interview with an NPO, 25 July 2023, Response to Amnesty International's Questionnaire by a NPO on 14 August 2023

[106] Telephonic interview with an NPO, 26 July 2023

[107] Telephonic interview with an NPO, 11 August 2023; Interview with a NPO on 25 July 2023; Response to Amnesty International's Questionnaire by an NPO on 14 August 2023, Response to Amnesty International's Questionnaire by an NPO on 22 July 2023

The rejection of FCRA licences has not only shut down the option of foreign funding but has also adversely impacted NPOs' avenues for receiving domestic funding. At least two NPOs shared with Amnesty International that the rejection of their FCRA licence is seen by domestic donors as a veiled warning, discouraging them from continuing to donate to the organisation. As a result, most of the organisations that responded to the survey have had to let go of 50-80% of their staff and employees, while drastically curtailing the scope of their human rights work. Speaking to Amnesty International, representative of one such NPO said:

"Almost all our programmes have been shut down now and we are barely surviving today. Our organisation is surviving just to fight the legal cases that have been filed against us."

Further, none of the NPOs Amnesty International spoke with were contacted for a 'risk-assessment' by the Indian government, whether it be in the form of being invited to join a state-led coalition to assess the risk of terrorist funding in the sector, being invited to state-led outreach or education programme focussed on terrorist financing in the sector, or by governmental officials directly engaging with these NPOs to assess their safety from or susceptibility to terrorist financing abuse. This is in contradiction to the FATF recommendations, which call for a 'risk assessment' of the non-profit sector to identify which subset of organisations is likely to be at risk of terrorist financing abuse. [108] The lack of consultation and engagement with NPOs indicates that instead of working with the NPO sector to prevent from terrorism-related financing or money laundering, the provisions within the amended FCRA are being used by central enforcement agencies in a coordinated campaign to stifle the sector itself.

4.2 UNLAWFUL ACTIVITIES (PREVENTION) ACT

Originally enacted in 1967, the UAPA is currently India's primary counter-terrorism law. It was revived in 2004 to replace the heavily abused Prevention of Terrorism Act (POTA) which facilitated multiple human rights violations including arbitrary arrests, torture, extrajudicial killings and enforced disappearances.[109] Until 2004, UAPA empowered the Indian government to declare certain associations "unlawful" for engaging in activities intended to disrupt the country's sovereignty and cause disaffection against India or cession or secession of a part of its territory.[110] After it was repurposed as counter-terrorism legislation in 2004, multiple provisions conferring wide and discretionary powers to the Indian authorities were added, mirroring the repealed POTA.

Introduced as a reform to the draconian POTA, UAPA gradually included many problematic provisions of POTA such as the overbroad definition of a "terrorist act", reversal of presumption of innocence and prolonged detention without trial or charge through a series of amendments in 2008, 2012 and 2019.

The 2004 amendments criminalized raising funds for a terrorist act, holding proceeds of terrorist entity, membership of a terrorist organisation, giving support to a terrorist organisation and raising funds for a terrorist organisation.[111] In the wake of the November 2008 attacks in Mumbai[112], UAPA was amended again without any public consultation expanding the scope of terrorist financing to bring it in line with the International Convention for the Suppression of the Financing of Terrorism and

[108] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Interpretive Note to Recommendation 8 (Not-Profit Organisations), Updated February 2023

[109] "In 2004, amidst public outcry against the misuse of the Prevention of Terrorism Act (POTA), the government repealed it, but majorly amended the UAPA at the same time. The repeal of POTA was an election promise of the then newly elected Congress government." Arun Ferreira and Vernon Gonsalves, "Fifty Years of Unreasonable Restrictions Under the Unlawful Activities Act", *The Wire*, 9 March 2017, https://thewire.in/rights/uapa-anti-terrorism-laws

[110] Section 2(1)(o) the Unlawful Activities (Prevention) Act, 1967

[111] Sections 17 and 40 of the Unlawful Activities (Prevention) Act, 1967

[112] On 26 November 2008, various public commercial buildings including hotels, railway station and restaurants were attacked killing 165 people and leaving 304 injured. *See* Ministry of External Affairs, *Mumbai Attack Dossier*, January 2009, https://archive.org/details/MumbaiTerrorAttacksDossier/mode/2up

United Nations Security Council Resolutions (UNSCR) 1267 and 1373.[113] It also extended the time period for which an accused individual could be kept in pre-trial detention from 90 to 180 days, tightened the bail provisions and removed the provision of anticipatory bail.[114] It also resulted in the enactment of National Investigating Agency Act which established the National Investigation Agency (NIA), a federal agency for investigation and prosecution of offences under UAPA, among other legislations.

After India received a "Non-Compliant" rating under Recommendation 8 by the FATF in 2010, UAPA was amended again in 2012.[115] This amendment was specifically brought in as a pre-condition to India becoming the 34th member of the FATF in June 2010.[116] The definition of a terrorist act was amended to include threatening India's economic security. In addition, the definition of a "person" liable to be charged under UAPA was extended to international and inter-governmental organisations.[117] After these amendments, India's rating on Special Recommendation II was changed to "Largely Compliant".[118] The latest amendment to UAPA was brought in 2019 and expanded the applicability of the Act from organisations and groups to individuals as well.[119] It also empowered officers of the rank of inspector or above in the NIA to seize and attach property, a task earlier authorized to officers of a senior rank, such as a Deputy Superintendent or Assistant Commissioner.[120]

4.2.1 KEY CONCERNING PROVISIONS

OVERBROAD DEFINITION OF "TERRORIST ACT"

UAPA does not define "terrorism" or "terrorist" in the Act. However, Section 2(1)(k) defines "terrorist act" and determines that this term as defined in Section 15 must be upheld.[121]

Section 15 broadly defines a "terrorist act" as an act done "with intent to threaten or likely to threaten the unity, integrity, security [economic security] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country," by means of using lethal weapons to cause death; destruction of property and particularly property used for the defence of India, by means of causing or attempting to cause the death of a public functionary; or by detention, kidnapping or abduction of individuals.[122]

In 2021, eight UNSRs wrote to the Indian Government noting that to categorise an offense as a 'terrorist act', three elements must be cumulatively present: a) the means used must be deadly; b) the intent behind the act must be to cause fear among the population or to compel a government or international organisation to do or refrain from doing something; and c) the aim must be to further an ideological goal. They highlighted the overbroad and ambiguous definition of a 'terrorist act' under UAPA, underlining the elements of causing injuries to any person, damage to any property and

[113] India has signed the International Convention for the Suppression of the Financing of Terrorism (FT Convention) on 8 September 2000 and ratified it on 22 April 2003. India is also party to the treaties listed in the annex to the FT Convention. Terrorist Financing has been criminalised under the UAPA, as amended in 2004 and 2008.

[114] Code of Criminal Procedure, 1973 (Act 2 of 1974)

[115] Unlawful Activities (Prevention) Amendment Act, 2012, https://megpolice.gov.in/sites/default/files/Unlawful_Activities_p_Amendment_Act-2012.pdf

[116] "FATF offered membership to India on the conditional basis of India's commitments to be contained in a 'Plan of Action' by India, setting out the steps to be taken and time frame to "improve the Anti-Money Laundering (AML)/ International Convention for the Suppression of the Financing of Terrorism (CFRT) regime in the country", Section 1.1.8 of the Parliamentary Standing Committee on Home Affairs Report on the Unlawful Activities (Prevention) Amendment Bill (2011)

[117] Section 2(ec)(iv), Unlawful Activities (Prevention) Amendment Act, 2012, https://megpolice.gov.in/sites/default/files/Unlawful_Activities_p_Amendment_Act-2012.pdf

[118] FATF, *Mutual Evaluation of India: 8th Follow-up Report & Progress Report on Action Plan*, June 2013, pg. 17, https://www.fatf-gafi.org/en/publications/Mutualevaluations/India-fur-2013.html.

[119] Section 5 of The Unlawful Activities (Prevention) Amendment Act, 2019

[120] Parliament Standing Committee on Home Affairs Report on The Unlawful Activities (Prevention) Amendment Act, 2011

[121] Section 2(1)(k) of The Unlawful Activities (Prevention) Act, 1967

[122] Section 15 of The Unlawful Activities (Prevention) Act, 1967

attempting to over awe any public functionary by means of criminal force.[123] They brought attention to UNSCR 1566 (2004) that confines "terrorism" to offences that are set out in "precise and unambiguous language that narrowly defines the punishment offence."[124]

Further, IHRL requires criminal laws to follow the principle of legal certainty which necessitates them to be sufficiently precise to clarify what kinds of behaviour and conduct could constitute a criminal offence and clearly lay out the consequences.[125] Whereas the overbroad definition of "terrorist act" in UAPA intentionally widens it to arbitrary application and abuse by authorities, compounded by it being used to define other terms such as "unlawful association" and "terrorist organisation" resulting in these terms suffering from similar imprecision.[126] Sections 17 and 40 that criminalise terrorist financing, and are of interest to FATF, also rely on the commission of or likelihood of the commission of a "terrorist act" or raising funds for a "terrorist organisation". This lack of clarity enfeebles other fair trial rights of detainees related to arrest and investigation, pre-trial detention and forfeiture of property and engender cascading repercussions.[127] Further, in India's 2010 MER, FATF ranked India "Partially Compliant" on Special Recommendation II[128], which pertains to the criminalisation of AML/CFT, highlighting UAPA's deviation from international standards in defining a "terrorist act". It noted that "the acts listed in Section 15(a) largely refer to common criminal activity that only obtains its terrorist status when carried out with a specific intent. Consequently, the general terminology (... by any other means of whatever nature ...) used in Section 15(a) of the UAPA cannot be considered as corresponding with the Treaties offences."[129]

PROLONGED DETENTION AND STRINGENT BAIL PROVISIONS

In addition, UAPA allows investigating authorities to detain accused persons without charge for extended periods of time in violation of their right to fair trial. The 2008 amendment empowered the Indian authorities to hold the detainee in police custody for 30 days at a time pending investigation in contrast to the 15 days authorized by India's criminal law. Overruling India's ordinary criminal laws, it also enables a detainee to be held in judicial custody without charge for up to 180 days in contrast to the 60 to 90 days authorized by India's Criminal Procedure Code (CrPC).[130] While the initial period of detention is 90 days, the authorities can ask for an extension for 90 more days by merely "indicating the progress of the investigation and the specific reasons for the detention of the accused".[131] During this period, the detainee is not entitled to be released on bail unless they are able to prove that the *prima facie* case prepared by the investigating authority is false, effectively reversing the presumption of innocence.[132] However, before a chargesheet is filed, the detainee may only have access to the First Information Report (FIR) which does not consist of any information about the substantive basis for their arrest, increasing their chances of prolonged detention.

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[123] Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, (OL IND 7/20), 6 May 2020, pg. 4

[124] Inter-American Court of Human Rights, Castillo Petruzzi et al. v. Peru, para. 128

[125] Article 5(1) ICCPR and Article 11 UDHR

[126] Section 35, for instance, defines a "terrorist organisation" which a) commits or participates in acts of terrorism, b) prepares for terrorism, c) promotes or encourages terrorism, or d) is otherwise involved in terrorism. Section 38 further states that "a person, who associates himself, or profess to be associated, with a terrorist organisation commits an offence relating to membership of a terrorist organisation." Section 2(p) defines an "unlawful association" as any association, that has for its object any unlawful activity, or which encourages or aids to undertake any unlawful activity, or of which the members undertake such activity.

[127] Section 8(6) empowers any police to search any person entering, or seeking to enter, or being on or in a premise that is used for a purpose of unlawful association and may detain any such person for the purpose of searching him; Section 6(5) of the NIA Act allows the NIA to *suo moto* register and investigate a case in any state without consulting with the respective state government giving unlimited powers to the Central Government.

[128] Special Recommendation II (Criminalising the financing of terrorism and associated money laundering) states that "each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations.

Countries should ensure that such offences are designated as money laundering predicate offences."

[129] FATF, *Mutual Evaluation of India,* June 2010, pg. 53, https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mutualevaluationofindia.html

[130] Section 43D of The Unlawful Activities (Prevention) Act, 1967 and Section 167 of Criminal Procedure Code

[131] Section 43D of The Unlawful Activities (Prevention) Act, 1967

[132] Section 43D (5) of The Unlawful Activities (Prevention) Act, 1967

4.2.2 INTERNATIONAL HUMAN RIGHTS LAW AND FATF

Even though there is no internationally agreed definition of terrorism, UAPA holds crimes so broadly defined as to violate the principle of legality, which requires clarity and certainty in the definition of offences. In 2008, the UN High Commissioner for Human Rights noted that "…ambiguous definitions have led to inappropriate restrictions on the legitimate exercise of fundamental liberties, such as association, expression and peaceful political and social opposition...This has increased the risk and the practice that individuals are prosecuted for legitimate, non-violent exercise of rights enshrined in international law."[133] This holds true for India's UAPA which has a chilling effect on the rights to free expression and association.

The ICCPR, to which India is a state party provides for the right to liberty and security of persons. Restrictions on the right to liberty are strictly limited, with pre-trial detention to be used as a last resort and only when it is necessary, reasonable and proportionate to a legitimate objective.[134] Those detained have the right to be brought promptly before a judge in order for them to challenge their ongoing detention[135] – a right which requires them to be informed as to the basis of the allegations being made against them.[136] The extension of detention limits pre-charge detention from 60/90 days to 180 days without producing any evidence justifying a prolonged custody, making their arrest arbitrary and a violation of international human rights standards.

The ICCPR also guarantees the right to be tried without undue delay.[137] If the accused is detained pending trial, the obligation on the state to expedite the trial is even more pressing, since a shorter delay is considered reasonable. International standards, including Article 9(3) of the ICCPR, requires an accused person who is detained pre-trial to be released from detention pending trial if the time deemed reasonable in the circumstances is exceeded. The right to trial without undue delay is linked to other rights, including the rights to liberty, to be presumed innocent and to defend oneself. It aims to limit the uncertainty faced by an accused person and any stigma attached to the accusation, despite the presumption of innocence.[138]

In the 2010 MER, FATF also highlighted the lack of convictions in UAPA cases creating "an impression of ineffectiveness".[139] FATF echoed this concern in its 2013 follow-up MER.[140] In response, the Indian authorities stated that due to fear of severe penalties under UAPA, detainees usually exhaust all legal remedies which results in lengthy proceedings and overburdening of courts. In doing so, the Indian authorities effectively termed their human rights obligation to ensure a fair trial, a barrier to facilitate convictions.[141]

It is important to note that the aim and purpose of UAPA draw heavily from various UNSRs. The Act empowers the Indian authorities "to take action against certain terrorists and terrorist organisations, to freeze the assets and other economic resources, to prevent the entry into or the transit through their territory, and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to individuals or entities…".[142] However, many provisions of UAPA including the definition of a "terrorist act", depart from the recommendations and language of various UN instruments. Specifically, UNSRs 1566 and 1822 underscore that all and any measures taken by states to combat terrorism must

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[133] Report of the UN High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/8/13) paras 20 – 23.

[134] UN Human Rights Committee, General Comment 35: Liberty and Security of Person,

[135] ICCPR, Article 9(3)

[136] ICCPR Article 9(2)

[137] Article 14(3), ICCPR

[138] HRC General Comment 32, §35; McFarlane v Ireland (31333/06) European Court Grand Chamber (2010) §155; Prosecutor v Sefer Halilović (IT-01-48-A) ICTY Appeals Chamber, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing (27 October 2006) §19; See, Suárez-Rosero v Ecuador, Inter-American Court (1997) §70.

[139] FATF, *Mutual Evaluation of India,* June 2010, pg. 53, https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mutualevaluationofindia.html

[140] FATF, *Mutual Evaluation of India: 8th Follow-up Report & Progress Report on Action Plan*, June 2013, pg. 17, https://www.fatf-gafi.org/en/publications/Mutualevaluations/India-fur-2013.html.

[141] FATF, *Mutual Evaluation of India,* June 2010, pg. 53, https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mutualevaluationofindia.html

[142] Preamble, The Unlawful Activities (Prevention) Act, 1967

"comply with their obligations under international law…in particular international human rights, refugee, and humanitarian law".[143] It is imperative that international laws and conventions are not cherry-picked by the government to suit their objectives.

4.2.3 IMPACT OF UAPA ON INDIA'S NPO SECTOR

> **"Dissent is the safety valve of democracy and if it is not allowed, the pressure cooker will burst."[144]**
>
> Chief Justice DY Chandrachud, Supreme Court of India

By the end of 2022, 83% of the cases filed under UAPA remained pending.[145] Together with cases from previous years, a total of 3998 cases were pending in 2021.[146] However, despite the increased use of UAPA, there have been very few convictions. Only 2.2% of cases registered under the law from 2016 to 2019 ended in a court conviction. Nearly 11% of cases were closed by the police for lack of evidence.[147] This illustrates the extent to which the law may be misused to clamp down on human rights defenders by ensuring the criminal proceedings characterized by stringent bail provisions, prolonged detention, and lengthy investigation under UAPA itself act as punishment.

While none of the NPOs Amnesty International interviewed were targeted through UAPA, the counter-terrorism law has been rampantly and selectively used against individual human rights defenders in India including journalists, civil society activists and students who remain imprisoned without trial. In an emblematic case, Muslim student activist Umar Khalid remains detained under UAPA since September 2020 for allegedly orchestrating the riots in the north-eastern part of Delhi in February 2020 that killed at least 53 people, largely Muslims.[148]

Since December 2019, Delhi, along with the rest of the country, witnessed peaceful protests and sit-ins including in the north-eastern part of Delhi against the enactment of the Citizenship Amendment Act (CAA) by the Indian Parliament.[149] Khalid had actively voiced his protest against CAA on Twitter and through his speeches in Delhi, Mumbai and Bihar amongst others. Amnesty International India has also called for the repeal of CAA which is a discriminatory law that fast tracks the granting of citizenship to people on the basis of religion, and is specifically exclusionary towards Muslims.[150] In addition to other offences,[151] Khalid is accused of violating Section 17 of UAPA that criminalises

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[143] UNSC Resolution 1566, S/RES/1566 (2004), http://unscr.com/en/resolutions/doc/1566 and Resolution 1822, UNSC Resolution 1822, Threats to international peace and security caused by terrorist acts, S/RES/1822 (2008), http://unscr.com/en/resolutions/1822

[144] Chief Justice of India DY Chandrachud while hearing the petition seeking a stay on the arrests of human rights activists under UAPA in the case of Bhima Koregaon-Elgar Parishad violence, "BREAKING : 'Dissent Is The Safety Valve Of Democracy": SC Says Five Activists Arrested Shall Be Kept At Their Houses Only [Read Order & Petition]", *Livelaw,* 29 August 2018, https://www.livelaw.in/sc-says-five-activists-arrested-shall-be-kept-at-their-houses-only/

[145] Crime Statistics of India, National Crime Record Bureau, pg. 884, https://ncrb.gov.in/sites/default/files/CII-2021/CII_2021Volume%202.pdf

[146] Crime Statistics of India, National Crime Record Bureau, pg. 884, https://ncrb.gov.in/sites/default/files/CII-2021/CII_2021Volume%202.pdf

[147] Al Jazeera, "'Misused, abused': India's harsh terror law under rare scrutiny", 16 August 2021, https://www.aljazeera.com/news/2021/8/16/india-uapa-terror-law-scrutiny

[148] United States Commission on International Religious Freedoms, *Umar Khalid,* https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/umar-khalid

[149] Amnesty International, *India: Crackdown on peaceful Citizenship Act protests must stop*, 19 December 2019, https://www.amnesty.org.uk/press-releases/india-crackdown-peaceful-citizenship-act-protests-must-stop

[150] Amnesty International, *Citizenship (Amendment) Bill: A Bigoted Law That Must Be Immediately Repealed (Press Release, 12 December 2019),* https://web.archive.org/web/20191222150006/https://amnesty.org.in/news-update/citizenship-amendment-bill-a-bigoted-law-that-must-be-immediately-repealed/

[151] Umar Khalid has been booked under Sections 13 (taking part in, committing, advocating, abetting, advising or inciting the commission of any unlawful activity) 16 (punishment for committing a terrorist act that resulted in the death of any person), 17, and 18 (conspiring or attempting to commit, advocating, abetting, advising or inciting or knowingly facilitating the commission of a terrorist act or any act preparatory to the commission of a terrorist act) of the Unlawful Activities (Prevention) Act, 1967, Sections 25 (acquiring or possessing prohibited ammunitions) and 27 (using prohibited arms or ammunitions) of the Arms Act, 1959, and Sections 3 (mischief) and 4 (causing damage to public property using fire or explosive substance) of the Prevention of Damage to Public Property Act, 1984.

raising funds for a 'terrorist act.'[152] The prosecution has primarily rested the invocation of India's counter-terrorism law against Khalid on his speech in the Amravati town of Maharashtra state in India that referred to phrases like '*inquilabli salam'* (revolutionary salute) and '*krantikari istiqbal'* (revolutionary welcome).[153] While referring to these phrases, Khalid praised the attendees of the event for daring to peacefully dissent against the discriminatory law in the current political context; this did not constitute incitement to violence in any way, and instead showed Khalid exercising his right to free speech and assembly.[154] On the contrary, political leaders belonging to the ruling Bharatiya Janata Party had made statements advocating hatred and violence against those peacefully protesting against the CAA, in particular Muslims, with impunity.[155] Various lower courts have dismissed Khalid's bail plea which is now pending before the Supreme Court of India.[156]

Another case where UAPA has been misused to intimidate and arbitrarily detain human rights defenders is Khurram Parvez - a prominent Kashmiri human rights activist and Program Coordinator of Jammu Kashmir Coalition of Civil Society (JKCCS).[157] JKCCS is one of Jammu & Kashmir's most prominent human rights groups and has methodically documented torture, indefinite detention and enforced disappearances by the Indian authorities in Jammu & Kashmir.[158] The work of JKCCS was heavily referenced in the Office of the United Nations High Commissioner for Human Rights' 2018 and 2019 reports on the situation of human rights in Kashmir.[159] On 21 November 2021, the NIA, a powerful investigation agency for terror-related crimes arrested Parvez on what appears to be politically motivated charges of terrorist funding, being a member of a terrorist organisation, criminal conspiracy, and waging war against the state.[160] Since 2021, Parvez remains detained in a high-security prison in Delhi without trial for allegedly violating Section 17 of UAPA which criminalises terror funding, in addition to other charges of "criminal conspiracy", "waging war against the government", and "conspiracy to wage war against the government" under the Indian Penal Code (IPC), as well as for "raising funds for a terrorist act", "conspiracy", "recruitment of any person for a terrorist act" and "membership of a terrorist organisation" under UAPA.[161]

On 21 March 2023, journalist Irfan Mehraj who was also associated with JKCCS was arrested in the same case as Khurram Parvez by the NIA.[162] In an extension of the crackdown on JKCCS, on 1 August, the NIA raided the Kashmir residence of Parvez Imroz, founder of JKCCS and summoned him

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[152] Section 17, Unlawful Activities (Prevention) Act - Punishment for raising funds for terrorist act. —Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.]

[153] Awstika Das, "Supreme Court To Hear Umar Khalid's Bail Plea In Delhi Riots Larger Conspiracy Case After Two Weeks", *LiveLaw*, 18 August 2023, https://www.livelaw.in/top-stories/supreme-court-bail-umar-khalid-delhi-riots-larger-conspiracy-case-235521

[154] Vidabha Khabarnama, "Umar khalid Amravati speech Dupty ground Amravati organized by Sarkar Group Amravati", 20 February 2020, https://www.youtube.com/watch?v=9tpM9-IlpOk&t=479s

[155] Amnesty International, *India: International Community Must Condemn Crimes Against Peaceful Protesters* (Press Release, 3 March 2020), https://www.amnesty.org.au/india-states-must-condemn-human-rights-violations-against-peaceful-protesters/

[156] Amnesty International, *India: Denial of bail to Umar Khalid big blow to the right to peaceful protest*, (Press Release, 24 March 2022), www.amnesty.org/en/latest/news/2022/03/india-denial-of-bail-to-umar-khalid-big-blow-to-the-right-to-peaceful-protest/; Delhi High Court, *Umar Khalid v. State of National Capital Territory of Delhi*, Criminal Appeal 173/2022, https://www.livelaw.in/pdf_upload/umar-khalid-hc-bail-439998.pdf; India Today, Umar Khalid denied bail in Delhi riots case, 24 March 2022, https://www.indiatoday.in/india/story/delhi-riots-karkardooma-court-denies-bail-to-umar-khalid-1928965-2022-03-24

[157] Amnesty International, *"We are being punished by the law" – Three years of abrogation of Article 370 in Jammu & Kashmir*, September 2022, https://www.amnesty.org/en/documents/asa20/5959/2022/en/

[158] Amnesty International, *"We are being punished by the law" – Three years of abrogation of Article 370 in Jammu & Kashmir*, September 2022, https://www.amnesty.org/en/documents/asa20/5959/2022/en/

[159] OHCHR, Report on the situation of human rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and general human rights concerns in Azad Jammu and Kashmir and Gilgit-Baltistan, 1 June 2018, https://www.ohchr.org/en/documents/reports/report-situation-human-rights-kashmir-developments-indian-state-jammu-and-kashmir; OHCHR, Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019, 8 July 2019, https://www.ohchr.org/sites/default/files/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf

[160] Amnesty International, *India: Kashmiri Activist Held Under Abusive Law,* (Press Release, 26 November 2021), https://www.amnesty.org/en/latest/news/2021/11/india-kashmiri-activist-held-under-abusive-law/

[161] Amnesty International, *India: Human rights defender Khurram Parvez marks 150 days arbitrarily detained on baseless charges*, 25 April 2022, https://www.amnesty.org/en/latest/news/2022/04/india-human-rights-defender-khurram-parvez-marks-150-days-arbitrarily-detained-on-baseless-charges/

[162] Amnesty International, *India: Authorities must immediately release Kashmiri journalist Irfan Mehraj* (Press Release, 21 March 2023), https://www.amnesty.org/en/latest/news/2023/03/india-authorities-must-immediately-release-kashmiri-journalist-irfan-mehraj/

to the NIA office in Delhi where he was interrogated for three hours.[163] Raids without a legal basis on leaders of civil society groups constitutes a clear violation of the rights to freedom of association and expression, as enshrined in the ICCPR and potentially violates the right to privacy, liberty and security of persons when they are accompanied by detention.[164] In 2022, Amnesty International documented a 12% increase in the use of UAPA in Jammu & Kashmir since 5 August 2019 when the Indian government unilaterally abrogated Article 370 of the Indian Constitution - which had until then guaranteed far-reaching powers and autonomy to the state of Jammu & Kashmir on a wide range of issues, with the exception of foreign affairs, defence and communication - and effectively extended its control over the region.[165]

Sections 17 and 40 of UAPA that relate to terrorist funding have also been arbitrarily invoked against 16 human rights activists (BK16) since 2018, nine of whom continue to be detained without trial in the Bhima Koregaon case.[166] The activists include poets, journalists, lawyers, professors, artists, and a Jesuit priest. These activists have a long history of defending the rights of some of India's poorest and most marginalized communities, including Dalits and Adivasis. One of the 16 activists, Fr. Stan Swamy died in detention due to denial of timely medical treatment.[167] NIA alleges that the activists "incited" a group of Dalits at a large public rally in Bhima Koregaon in Maharashtra on 31 December 2017. Dalits belong to oppressed castes and have historically faced discrimination in almost every aspect of life. Violent clashes erupted the next day, leading to one death and several people being injured. In the chargesheet, the police also accused the activists of being active members of the banned terrorist organisation Communist Party of India and conspiring to assassinate the Prime Minister of India, despite no evidence to corroborate either claim.[168]

India's targeting of activists through the misuse of UAPA's financial powers demonstrates the broader context of the crackdown on dissent in India. For example, in June 2020, after thorough and detailed research, Amnesty International and Citizen Lab uncovered that at least nine other activists who had been calling for the release of the BK16 activists were targeted through a coordinated spyware campaign.[169] Three of them were also targeted with the NSO Group's Pegasus spyware, a commercial product only sold to government entities.[170] In February 2021, Arsenal Consulting, a US-based digital forensics firm reported that the personal laptop of Rona Wilson, one of the 16 activists was compromised by a spyware called NetWire.[171] The firm's report further concluded that electronic evidence had been planted on Rona Wilson's device. In July 2021, Arsenal Consulting published another report which revealed that the computer of another activist, Surendra Gadling was also targeted and that incriminating documents were planted as part of the same malware campaign.[172]

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163 Amnesty International, Twitter, 1 August 2023, https://twitter.com/AIIndia/status/1686321907484983296?s=20

164 Article 19, International Covenant on Civil and Political Rights

165 Amnesty International, *"We are being punished by the law" – Three years of abrogation of Article 370 in Jammu & Kashmir*, September 2022, https://www.amnesty.org/en/documents/asa20/5959/2022/en/

166 Amnesty International, *Act now to demand the release of the BK16!*, https://www.amnesty.org/en/latest/campaigns/2022/12/act-now-to-demand-the-release-of-the-bk16/

167 Amnesty International, *India: A year on, demand for justice for Father Stan Swamy's death in custody* (Joint Public Statement, 5 July 2022), https://www.amnesty.org/en/documents/asa20/5803/2022/en/; Amnesty International, Indian authorities must release all imprisoned activists in the BK16 case, https://www.amnesty.org/en/petition/indian-authorities-must-release-all-imprisoned-activists-in-the-bk16-case/

168 Amnesty International, *Act now to demand the release of the BK16!*, https://www.amnesty.org/en/latest/campaigns/2022/12/act-now-to-demand-the-release-of-the-bk16/

169 Amnesty International, *India: Human Rights Defenders Targeted by a Coordinated Spyware Operation*, 15 June 2020, https://www.amnesty.org/en/latest/research/2020/06/india-human-rights-defenders-targeted-by-a-coordinated-spyware-operation/

170 Amnesty International, *India: Human Rights Defenders Targeted by a Coordinated Spyware Operation*, 15 June 2020, https://www.amnesty.org/en/latest/research/2020/06/india-human-rights-defenders-targeted-by-a-coordinated-spyware-operation/

171 Niha Masih and Joanna Slater, "They were accused of plotting to overthrow the Modi government. The evidence was planted, a new report says", *Washington Post,* 10 February 2021, https://www.washingtonpost.com/world/asia_pacific/india-bhima-koregaon-activists-jailed/2021/02/10/8087f172-61e0-11eb-a177-7765f29a9524_story.html

172 Niha Masih and Joanna Slater, "Evidence found on a second Indian activist's computer was planted, report says", *Washington Post,* 6 July 2021, https://www.washingtonpost.com/world/2021/07/06/bhima-koregaon-case-india/

4.3 PREVENTION OF MONEY LAUNDERING ACT, 2005

Enacted in 2003, the PMLA came into effect in July 2005.[173] The Act aims to combat money laundering activities and allows for confiscating properties, freezing bank accounts, and arresting individuals involved in or connected to the act of money laundering. The confiscation of property[174], freezing of bank accounts[175] and arrest of the accused person[176] may take place pending trial based on the subjective suspicion of the ED, the primary investigating body under this law, and does not require finality of proceedings against such a person. To be compliant with IHRL, the law needs to include adequate checks and balances, such as judicial warrants.[177] However, the law does not make judicial authorisation a pre-requisite for such freezes allowing the ED broad and discretionary powers to freeze bank accounts, making it non-compliant with IHRL.[178]

Further, in defining money laundering, the PMLA focusses heavily on "proceeds of crime"[179] which forms the basic premise of prosecution under the law.[180] To constitute an offence of money-laundering, the prosecution must demonstrate the commission of a crime listed in the Schedule (addendum) accompanying the law, followed by direct or indirect participation in any activity connected with the monetary proceeds of such a crime.[181] The offences mentioned in the Schedule are known as a "predicate offence", the commission of which is mandatory to demonstrate money laundering.[182] Upon conviction, the law prescribes a punishment ranging from three to seven years along with a fine of up to INR 500,000 (USD 6111.80).[183] In July 2023, the ED claimed a conviction rate of 93.54% in cases that have completed trial since 2014; however, it is pertinent to note that only 31 cases under the PMLA have completed trial over the past nine years, whereas a staggering 3867 cases have been filed under the Act in the last five years alone – indicating an extremely slow and delayed pace of trial. [184]

The Indian government has explicitly stated that the enactment of this legislation was among the pre-conditions for the country joining the FATF.[185] The legislation was further amended in 2012 and in 2019, based on the recommendations made by FATF in its 2010 evaluation and 2013 follow-up report on India.[186] However, over the last two decades, certain contentious provisions of the law which stand in violation of IHRL and standards, as well as contradict the FATF's own guiding principles have been misused to hinder the legitimate human rights work of NPOs in India. The PMLA – in addition to

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[173]The Prevention of Money Laundering Act, 2002

[174] Section 5 of Prevention of Money Laundering Act, 2002

[175] Section 17 of the Prevention of Money Laundering Act, 2002

[176] Section 19 of the Prevention of Money Laundering Act, 2002

[177] Article 14(1), ICCPR, "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[178] Section 17 of the Prevention of Money Laundering Act, 2002

[179] Section 2(1) (1) In this Act, unless the context otherwise requires:
(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [or where such property is taken or held outside the country, then the property equivalent in value held within the country] 16[or abroad];

17[Explanation.--For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;]

[180] Section 2(1)(u) of the Prevention of Money Laundering Act, 2002

[181] Schedule, Section 2A, PMLA, schedulefile (indiacode.nic.in)

[182] Supreme Court of India, P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24

[183] Section 4 of the Prevention of Money Laundering Act, 2002. In this Act,

"Punishment for money-laundering.—Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted."

[184] Answer by Pawan Chaudhary, Minister of State in Ministry of Finance, Government of India to Un-starred Question No.483 in Lok Sabha, 24 July 2023

[185] "Note on FATF", *Directorate of Enforcement,* Last accessed on 18 July 2023, https://enforcementdirectorate.gov.in/note-fatf

[186] *Vijay Madanlal Choudhary & Others v Union of India & Others*, (4634/2014), Supreme Court of India (2022) paras 16 (xxxi), 34, 35 and 37

its provisions that contravene IHRL – does not incorporate any internal safeguards to mitigate risk to only those NPOs identified as being "at risk" of money laundering offences. Rather, under this law, all NPOs are subjected to the same stringent provisions allegedly to prevent money laundering. This has a disproportionate impact on organisations that pose little or no risk.

4.3.1 KEY CONCERNING PROVISIONS

REVERSING THE PRESUMPTION OF INNOCENCE

Originally, Section 24 of the PMLA placed the burden of proof on the person accused of money laundering, a shift from the normative criminal standard of placing the responsibility on the prosecution to prove that the accused person is guilty beyond all reasonable doubt.[187] In 2013, to avoid misuse of the law due to ambiguity over the wide-ranging meaning of the word 'accused', the Indian government amended the section and replaced the word 'accused' with the phrase 'charged with money laundering', indicating that the burden of proof falls on the accused only after the chargesheet has been filed.[188] As the provision stands now, the accused person still has the legal obligation to demonstrate that the property in question was acquired through legitimate means and to prove that the funds used to acquire such property were devoid of any connection to illegal activities. The prosecution, however, is only required to show that the accused person is in possession of "proceeds of crime". The Indian courts including the Supreme Court in 2022 have interpreted the reversed burden of proof to be applicable at the stage of bail, placing a de-facto burden of proof on the accused person even before they have been charged.[189]

A fundamental principle of the right to fair trial is the right of everyone charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial. The right to be presumed innocent is a norm of customary international law[190] – it applies at all times, in all circumstances. It is an essential element of the right to fair criminal proceedings and the rule of law.[191] Under the ICCPR to which India is a state party, everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.[192] The requirement that the accused be presumed innocent means that the burden of proving the charge rests on the prosecution. A court may not convict unless guilt has been proved beyond reasonable doubt and if there is reasonable doubt, the accused must be acquitted. Therefore, any decision to detain a person pending trial and the length of such detention must be consistent with the presumption of innocence.[193]

Contrary to the basic principle of human rights and criminal law, the PMLA explicitly places the burden of proof on the person accused of violating Section 3 which defines the offence of money

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[187] Section 24 of the Prevention of Money Laundering Act 2002, (before amendment in 2013), "Burden of Proof: When a person is accused of having committed the offence under Section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused."

[188] Section 24, Prevention of Money Laundering Act after amendment in 2013, "Burden of proof.--In any proceeding relating to proceeds of crime under this Act,--

(a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.]"

FATF, Mutual Evaluation of India: 8th Follow-up report, Section 4, Recommendation 1, June 2013

[189] Gauhati High Court, Gautam Kundu v. Directorate of Enforcement (Crl.Rev.P./324/2022); Supreme Court of India, Rohit Tandon v. Directorate of Enforcement (Criminal Appeal Nos.1878-1879 of 2017); Gujarat High Court, Pradeep Nirankarnath Sharma v. Directorate of Enforcement (Criminal Miscellaneous Application No. 809 of 2018); Supreme Court of India, Rakesh Manekchand Kothari v. Union of India (Writ Petition (Criminal) No. 61/2015); Gujarat High Court, Jignesh Kishorebhai v. State of Gujarat (Criminal Miscellaneous Application No. 7970 of 2017); Bombay High Court, Chhagan Chandrakant Bhujbal v. Union of India (Criminal Writ Petition No. 3931 of 2016); Madras High Court, Farouk Irani v. The Deputy Director, Directorate of Enforcement (Special Leave to Appeal (Criminal) No(s). 2707-2708/2021)

[190] Article 11(1) of the Universal Declaration of Human Rights (UDHR) - "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

[191] HRC: General Comment 24, §8, General Comment 29, §§11, 16, General Comment 32, §6; See ICRC Study on Customary International Law, Volume 1, Rule 100, pp357-358.

[192] Article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR)

[193] See HRC General Comment 32, §30; Van der Tang v Spain (19382/92), European Court (1995) §55; Pinheiro and Dos Santos v Paraguay (11.506), Inter-American Commission (2002) §§65-66

laundering.[194] This particular provision was challenged before the Supreme Court in *Vijay Madanlal Choudhary and Others v. Union of India*[195], which was a culmination of 240 petitions against the PMLA. While upholding the provision, the Court in 2022 noted that the presumption of innocence should not be taken as "fossilised doctrine" that does not admit "process of intelligent reasoning". It also noted that presumption of innocence in serious offences such as money laundering would result in individuals accused of such offences becoming the "beneficiaries" and the Indian society becoming the "casualty". This reversal of the presumption of innocence upends the manner in which the proceedings under PMLA are carried out compared to other statutes in India, including those that lay down the procedure for criminal laws such as the CrPC and Evidence Act.[196]

Further, in direct contrast to the Indian Constitution, Section 50 of the PMLA allows the statements made by an accused during the course of an investigation to be admissible in court and determines that individuals may be prosecuted for giving false information during an investigation.[197] In India, it has long been held both statutorily and through court judgements that confessions made during police custody must not be used as proof against the accused person unless such confession is secured in the presence of a Magistrate.[198] This is in keeping with the fair trial guarantees laid down in the Indian Constitution under Article 20(3) that protects individuals from self-incrimination which may manifest in the form of compelled confessions obtained under duress.[199] However, this protection has been subverted in the PMLA. Moreover, in the absence of sufficient information provided to the accused person at the time of or before the interrogation in the form of a FIR or the Enforcement Case Information Report (ECIR), the resultant emphasis placed on the evidence gathered during the interrogation is lopsided, skewed, and disproportionate.

Standard legal procedure distrusts confessions to the police and even when deviations are made, such as in special laws, at least a notional right to silence is incorporated. Even then, confessions to police officers have been found to be suspect. Yet the PMLA provides for a statement to be recorded under Section 50, by innocuously terming it a judicial proceeding despite it being done by ED officials, who have the power to later lodge a criminal case against the individual for what the statement reveals, in the absence of adequate safeguards. It allows ED officials to summon anyone, compel their statements under oath and prosecute them if the statement is refused or not in accord with what the ED subjectively thinks is right. There are no governing principles of investigation, no legal criteria and no guiding principles which are legally required to be present.[200] The Supreme Court, however, has held ED officials to be distinct from ordinary police officials and thus exempt from the safeguards

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[194] Burden of proof.--In any proceeding relating to proceeds of crime under this Act,-- (a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and (b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.]; Section 3 of Prevention of Money Laundering Act, "Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the 1[proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.
2[Explanation.--For the removal of doubts, it is hereby clarified that,--
(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:--
(a) concealment; or
(b) possession; or
(c) acquisition; or
(d) use; or
(e) projecting as untainted property; or
(f) claiming as untainted property,
in any manner whatsoever;
(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.]"

[195] Vijay Madanlal Choudhary & Others v Union of India & Others, (4634/2014), Supreme Court of India (2022) para 95

[196] Section 102, Evidence Act

[197] Section 50 (2), (3), (4) of the Prevention of Money Laundering Act

[198] Section 25 of Evidence Act, "No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person"; Section 26, Indian Evidence Act, "No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."; Supreme Court of India, *State of Uttar Pradesh v. Deoman Upadhyaya* (AIR 1960 SC 1125); Rambharose Kachhi v. Emperor (AIR 1944 Nag. 105)

[199] Article 20(3), Indian Constitution, "No person accused of an offence shall be compelled to be a witness against himself."

[200] Vijay Madanlal Choudhary & Others v Union of India & Others, (4634/2014), Supreme Court of India (2022), para 2(vi)

present in India's Evidence Act.[201] This stands in violation to the right to remain silent which is an essential safeguard of a fair trial and is inherent in the presumption of innocence.[202]

The prohibition against self-incrimination requires a court to establish, before a guilty plea is accepted that the plea is voluntary (no pressure was put on the individual to plead guilty), that the accused understands the nature of the charges and the consequences of the plea and that the accused is competent.[203] However, Section 50 of the PMLA – upheld by the Supreme Court of India – contravenes the established right against self-incrimination in a fair trial and circumvents these safeguards.

INFORMING THE ACCUSED OF THE GROUNDS FOR ARREST

Unlike ordinary criminal laws which are governed by procedural safeguards under the CrPC, the PMLA, since its inception, gives extraordinary powers to ED officials – who fall under the jurisdiction of the central Ministry of Finance (MoF). When a person is accused of an offence under PMLA, ED creates an internal document known as ECIR, which serves as a record of the offence before initiating penal action or prosecution against the accused. However, unlike the standard FIR that is filed by the police to record information regarding a cognizable offence under the CrPC, the ECIR is not a statutory document, and thus a copy is not shared with the accused.[204]

This practice was challenged before the Supreme Court given that it results in the Kafkaesque situation of an individual not having knowledge of what they are being accused of until a chargesheet is filed. The Court however, held that the PMLA holds "special legislation" status and sharing contents of the ECIR with the accused may have a 'deleterious impact on the final outcome of the investigation'; therefore, merely informing the accused of the grounds of arrest was ruled sufficient.[205] Under international law, anyone who is arrested shall be informed at the time of their arrest of the reasons and grounds for their arrest and shall be promptly informed of any charges against them.[206] It obliges the authorities to provide enough evidence to the accused person so as to empower them to challenge their ongoing detention. In upholding this clause, the Supreme Court is complicit in exacerbating the predicament of the accused person, when they are called upon to prove their innocence at the stage of bail, especially given they are not provided with any material until the stage of framing of charges, disproportionately impacting their chances of receiving a fair trial. Such an application of the law leads to situations that can invariably cause the denial of bail due to the accused person's inability to provide a credible defence and thus results in grave injustices for the accused.[207]

RESTROSPECTIVE APPLICATION

In 2019, the PMLA was amended to include property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the Scheduled offence in the definition of "proceeds of crime".[208]

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[201] "It is submitted that the officers who record statements under Section 50 of the PMLA are not police officers; therefore, Section 25 of the 1872 [Evidence] Act will not apply in case the statement is made to ED officers. It is stated that the statements recorded by police under Section 161 of the Cr.P.C. are different than the statement recorded by the ED officer under Section 50(2) of the PMLA. As such, statements are treated as 'evidence' in the proceedings under the Act." *See Vijay Madanlal Choudhary & Others v Union of India & Others*, (4634/2014), Supreme Court of India (2022), para 17(viii)

[202] The Human Rights Committee has stated that "anyone arrested on a criminal charge should be informed of the right to remain silent during police questioning, in accordance with Article 14, paragraph 3(g) of the Covenant [ICCPR]", HRC Concluding Observations: France, UN Doc. CCPR/C/FRA/CO/4 (2008) §14.

[203] Jean Kambanda v the Prosecutor (ICTR-97-23-A), ICTR Appeals Chamber (2000) §61.

[204] *Vijay Madanlal Choudhary & Others v Union of India & Others*, (4634/2014), Supreme Court of India (2022) para 176, 177

[205] Vijay Madanlal Choudhary & Others v Union of India & Others, (4634/2014), Supreme Court of India (2022), para 178

[206] Principle 10 of UN General Assembly resolution 43/173, adopted on 09 December 1988 (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment)

[207] Devvrat Singh & Nishita Gupta, "Bail under PMLA: Comprehending the SC's Imprimatur in Vijay Madanlal Choudhary vs UOI", *The Criminal Law Blog,* 20 October 2022,

https://criminallawstudiesnluj.wordpress.com/2022/10/20/bail-under-pmla-comprehending-the-scs-imprimatur-in-vijay-madanlal-choudhary-vs-uoi/

[208] Section 2(1)(u), PMLA amended through Finance Act 2019

This allows the government to apply the law to alleged offences committed prior to the enactment of the PMLA, or situations prior to the time when an offence was included in the Schedule, thus changing the nature of property retrospectively.[209]

Under IHRL, no one may be convicted for an act or an omission that did not constitute a criminal offence under national or international law at the time it was committed.[210] However, this retrospective application was upheld by the Supreme Court.[211] It can be argued that the Court order contravenes the rule of lenity: the principle that when there are differences between the criminal law in force at the time of an offence and criminal laws enacted after the offence was committed but before a final judgment, the courts must apply the law whose provisions are most favourable to the accused.[212]

UNDUE ATTACHMENT OF PROPERTIES

Originally, the PMLA allowed for search and seizure to be conducted after filing a chargesheet or a complaint in the predicate offence. This protection was partially diluted by its 2009 amendment.[213] In 2019, the Act was amended and the safeguards were completely removed.[214] As a result, the ED can now conduct searches and seizures without any investigation being carried out in the predicate offence, in some cases even without an FIR being registered.[215] This stands in violation of rights to freedom of association, privacy and defending human rights under IHRL.[216]

However, this provision too has been upheld by the Supreme Court on the basis of the PMLA being a "complete", "stand alone" and "special and self-contained law" with "its own inbuilt safeguards."[217] However, this produces a glaring challenge to the principle of proportionality enshrined in international law. For example, even before the police start investigating the predicate offence, the ED can search and seize the property of an individual, paving the way for arrest under the money laundering law even if a person is charged with a minor bailable predicate offence.[218]

BAIL THE EXCEPTION, NOT THE NORM

Section 45 of the PMLA places an unusually high threshold for bail.[219] Judges can only grant bail to the accused person if they are satisfied that the person is not guilty of the predicate offence – a challenging test that forces courts to decide guilt or innocence before a trial has taken place. This violates the basic rights to fair trial, liberty, and the presumption of innocence.

It is important to note that in accordance with the right to liberty and the presumption of innocence, there is a presumption that people charged with a criminal offence will not be detained while awaiting trial.[220] Detention pending trial should only be applied as a preventive measure aimed at averting

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[209] Abhinav Sekhri, "Of Old Wine in New Bottles – The Judgement in Vijay Madanlal Choudhary (Part One)", *The Criminal Law Blog*, 5 October 2022, https://criminallawstudiesnluj.wordpress.com/2022/10/05/of-old-wine-in-new-bottles-the-judgement-in-vijay-madanlal-choudhary-part-one/

[210] Article 11(2) of the Universal Declaration, Article 15 of the ICCPR, Article 19(1) of the Migrant Workers Convention, Article 7(2) of the African Charter, Article 9 of the American Convention, Article 15 of the Arab Charter, Article 7 of the European Convention, Section N7(a) of the Principles on Fair Trial in Africa; See Article 22 of the ICC Statute

[211] *Vijay Madanlal Choudhary & Others v Union of India & Others*, (4634/2014), Supreme Court of India (2022), para 187(iv)

[212] Scoppola v Italy (No.2) (10249/03), European Court Grand Chamber (2009) §§106-109; See Cochet v France, HRC, UN Doc. CCPR/C/100/D/1760/2008 (2010) §7.2-7.4.

[213] Section 3(b) of Prevention of Money Laundering (Amendment) Act 2009

[214] Part XIII (Amendments to the Prevention of Money Laundering Act, 2002) of Finance Bill, 2019

[215] As explained in 2.2, there is no statutory provision for registration of an FIR being a prerequisite for the registration of an Enforcement Case Information Report. The complete omission of the safeguards can now allow the ED to search premises or persons even without an FIR being filed.

[216] Article 12, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement; Article 22, International Covenant on Civil and Political Rights, "Everyone shall have the right to freedom of association with others", Article 17, International Covenant on Civil and Political Rights, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

[217] *Vijay Madanlal Choudhary & Others v Union of India & Others*, (4634/2014), Supreme Court of India (2022), para 23, 24

[218] Section 13 of Prevention of Money Laundering (Amendment) Act, 2009 and Section 33 of Prevention of Money Laundering (Amendment) Act, 2012

[219] Section 45 of the Prevention of Money Laundering Act (2002), which establishes two conditions for an accused to be granted bail,

"(i) The Public Prosecutor has been given an opportunity to oppose the application for such release.

(ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

[220] Peirano Basso v Uruguay (12.533), Inter-American Commission (2009) §69.

further harm or obstruction of justice, rather than as a punishment.[221] It must not be used for improper purposes or constitute an abuse of power and must not last longer than is necessary.[222] Further, there must be an ongoing examination of the continuing lawfulness and necessity of detention in each individual case.[223]

Even though the Supreme Court has upheld the validity of Section 45 as "reasonable [given] the purposes and objects sought to be achieved by the 2012 Act",[224] it still contradicts the universal legal principle of bail being the exception and not the norm as articulated by the ICCPR, to which India is a signatory. [225]

4.3.2 IMPACT OF PMLA ON INDIA'S NPO SECTOR

> **"The ED has gone into my personal transactions spanning back 20 years and that of my family. Our board and staff have resigned out of fear."[226]**
>
> An NPO representative speaking to Amnesty International on condition of anonymity

Amnesty International found that the PMLA has been used to supplement charges under the FCRA, the FEMA and the IPC against NPOs.[227] Even though offences under the FCRA do not constitute a 'predicate offence' listed in the Schedule to the PMLA, the Indian authorities have mostly used it to intensify the charges of criminal conspiracy under the IPC, which is included in the list of predicate offences.[228] But since most cases remain at the stage of investigation, the use of the PMLA is viewed as a tool of harassment against NPOs by seizing their properties and burdening them with stringent bail conditions.

Amnesty International India has been subject to action under the PMLA through the freezing of its bank accounts in September 2020, and seizure of INR 210,762,027 (2,541,221 USD) in total from November 2020 to October 2022. Amnesty International India did not receive any prior notice about the freezing of its accounts and was only made aware of this by its bank, which did not provide any reasons for the action either. Meanwhile its former staff are subject to criminal charges under the same case and face the ongoing risk of arrest. Despite the seriousness of the charges under the PMLA, the ED's case against Amnesty International India is not well-articulated, and chargesheets tend to repeat the wording of the legislation verbatim without justifying why it applies. The "predicate offence" used to bring the charges under the PMLA is an allegation under the FCRA, yet a chargesheet is yet to be filed under the FCRA case; only a first information report has been filed and this was in 2019. While Amnesty International India's work has been on hold for the past three years, without funds to even secure effective legal representation, a decision on this case in the near future seems unlikely. Progress appears to hinge on the allegation of criminal conspiracy under the FCRA case.

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[221] López Álvarez v Honduras, Inter-American Court (2006) §69; Peirano Basso v Uruguay (12.553) Inter-American Commission (2009) §§84, 141-145; Prosecutor v Bemba (ICC-01/05-01/08-475), ICC Pre-Trial Chamber II, Decision on the Interim Release of Jean Pierre Bemba Gombo (14 August 2009) §38; See also Principle III(2) of the Principles on Persons Deprived of Liberty in the Americas

[222] Gusinskiy v Russia (70276/01), European Court (2004) §§71-78

[223] European Court: Wemhoff v Germany (2122/64), (1968) §A.10, McKay v United Kingdom (543/03), Grand Chamber (2006) §§42, 43.

[224] Vijay Madanlal Choudhary & Others v Union of India & Others, (4634/2014), Supreme Court of India (2022), para 135

[225] Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR)

[226] Chief Justice of India DY Chandrachud while hearing the petition seeking a stay on the arrests of human rights activists under UAPA in the case of Bhima Koregaon-Elgar Parishad violence, "BREAKING : 'Dissent Is The Safety Valve Of Democracy": SC Says Five Activists Arrested Shall Be Kept At Their Houses Only [Read Order & Petition]", *Livelaw,* 29 August 2018, https://www.livelaw.in/sc-says-five-activists-arrested-shall-be-kept-at-their-houses-only/

[227] Telephonic interviews with NPOs, 9 August 2023 and 31 July 2023

[228] Section 120B that punishes criminal conspiracy is included in the Schedule to Prevention of Money Laundering Act 2002, https://upload.indiacode.nic.in/schedulefile?aid=AC_CEN_2_2_00035_200315_1517807326550&rid=377

Overall, under the PMLA, most of the adjudication processes take place within government mechanisms leaving the NPOs like Amnesty International and others without access to an independent and impartial judicial system, in violation of Article 14(1) of the ICCPR.[229] The powers, jurisdiction and composition of the Adjudicating Authority, which is the first body to make a decision in a case under the PMLA is comprised of a chairperson and two members that are government appointees.[230] The appellate body under the Act is also constituted of members appointed by the Indian government.[231] It is only after the accused individual has gone through the adjudicating body and appellate tribunal, that they can then approach a particular Sessions Court that is designated as a special court for PMLA cases by the Indian government. The designation process includes a consultation with the Chief Justice of the High Court of the State.[232] Under India's criminal justice system, a Sessions Court is often the court of first instance or appeal for ordinary criminal matters.[233] Speaking to Amnesty International, a representative of an NPO said:

"The proceedings under PMLA are not only opaque but incapacitate the accused person to move a petition before an independent judiciary till very late in the process."[234]

The PMLA has also been used against the Centre for Equity Studies, an NPO headed by Harsh Mander that "attempts to influence public policy and law in favour of people of greatest disadvantage".[235] The offices of the Centre for Equity Studies and residence of Harsh Mander were raided by the ED in September 2021. Two years later, the organisation is yet to see a chargesheet.[236]

229 "...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...", Article 14(1) of the ICCPR

230 Section 6(1), Prevention of Money Laundering Act

231 Section 25, Prevention of Money Laundering Act

232 Section 43, Prevention of Money Laundering Act

233 Section 9, Code of Criminal Procedure

234 Telephonic interview with an NPO representative, 19 July 2023

235 Vision, Mission and Values, Centre for Equity Studies, https://centreforequitystudies.org/vision-mission-and-values/

236 "ED raids office, home of activist Harsh Mander in money laundering probe", *Hindustan Times*, 17 September 2021, https://www.hindustantimes.com/cities/delhi-news/edraids-office-home-of-activist-harsh-mander-in-money-laundering-probe-101631781847302.html#:~:text=People%20familiar%20with%20the%20development%20said%20a%20probe,National%20Commission%20for%20Protection%20of%20Child%20Rights%20%28NCPCR%29.

5. CONCLUSION

One of the unintended consequences of FATF implementation in India has undoubtedly been the tightening of the FCRA, the PMLA and the UAPA under the guise of combatting terrorism, terrorist financing and money laundering. The weaponization of the central investigating agencies under these laws against civil society is akin to a death blow to the legitimate human rights work of independent human rights defenders and NGOs in India. The misuse of these laws to harass and intimidate Indian civil society has instilled a grave fear of reprisals and has debilitated the entire sector's efficiency in holding the Indian government accountable.

By abusing these laws, the Indian authorities have failed to comply with both FATF standards, particularly its interpretative note to Recommendation 8, and IHRL. There has been an absence of a targeted "risk-based approach" and the Indian government has painted the entire civil society with the same brush, resulting in indiscriminate sanctions against them. It also fails to meet the narrowly defined objective of halting terrorist financing through identifying risk and then applying appropriate, proportionate, and human rights-based risk mitigation measures. Imposing burdensome administrative requirements, threats of prosecution and prolonged detention violate the rights to freedom of expression, association, and peaceful assembly, as enshrined under ICCPR, to which India is a state party.

Further, the majority laws and the subsequent amendments were developed and passed unilaterally by policymakers without the consultation of the civil society. Under IHRL, UNSCRs and FATF recommendations, India is obliged to ensure that all measures taken to counter terrorism respect human rights law. However, despite the repeated calls by UNSRs, India has continued to apply these laws in a discriminatory manner against independent and critical voices and civil society. The persistent weaponization of FATF's recommendations by India should prompt FATF to take a strong stand against the country's laws and regulations in its upcoming mutual evaluation scheduled for November 2023, and hold its authorities accountable for clamping down on the vibrant civil society of India that has been instrumental in ensuring this country becomes a rights-respecting and rights-based society.

6. RECOMMENDATIONS

Amnesty International urges the FATF member states, the FATF Secretariat and FATF leadership to:

1. Ensure that the Government of India fully complies with FATF recommendation 8 in order to avoid subjecting the NPO sector to ill-targeted and disproportionate measures that violate India's international human rights obligations;
2. Engage in a dialogue with Indian authorities to identify and address the provisions of Foreign Contribution (Regulation) Act, Unlawful Activities (Prevention) Act and Prevention of Money Laundering Act that violate India's international human rights obligations, including the rights to freedom of association and expression and the right to a fair trial;
3. Engage in an independent dialogue with the NPO sector to understand the barriers they face in implementing their legitimate human rights work due to the arbitrary application of the Foreign Contribution (Regulation) Act, Unlawful Activities (Prevention) Act and Prevention of Money Laundering Act. Ensure engagement is not limited to only government-organized NGOs (GONGOs) and must include NPO diversity with regards to geographic area, gender, religion, socio-economic status, and caste;
4. Demand that the Indian authorities amend the relevant provisions of the three laws that unlawfully restrict the freedoms of association and expression, including limitation on providing services to marginalised groups, advocating with the UN and other international bodies and on the fundraising activities of NPOs, in line with its obligations under international human rights law and in meaningful and equitable consultation with NPOs in India, including human rights organisations;
5. Urge the Government of India to bring its counter-terrorism legislation in line with international human rights law and standards to ensure that NPOs, including human rights organisations and human rights defenders are not harassed, and arbitrarily prosecuted on fabricated terrorism-related charges in retaliation for their human rights work. Hold the Government of India accountable for implementing these proposed legislative changes within a reasonable timeline.

Amnesty International is a movement of 10 million people which mobilizes the humanity in everyone and campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and individual donations. We believe that acting in solidarity and compassion with people everywhere can change our societies for the better.

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Index: **ASA 20/7222/2023**
Publication: **September 2023**
Original language: **English**