



# The Adverse Impact of Counter Terrorism Laws on Human Rights Defenders and FATF Compliance in **India**

**October 2023**

## ■ ABOUT

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# ■ I. EXECUTIVE SUMMARY



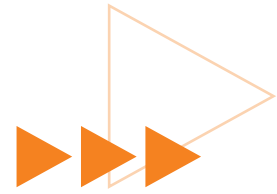
The Financial Action Task Force (FATF) is an intergovernmental body charged with combatting money laundering and terrorism financing. India was granted membership to FATF in 2010 and has repeatedly amended its anti-terrorism and money laundering laws allegedly to be in compliance with FATF's requirements. This process, however, has resulted in wide-ranging adverse impacts on non-profit organizations (NPOs) and human rights defenders who have been targeted with prosecutions, in many instances, for exercising their civic freedoms by critiquing the government.

This report examines FATF's recommendations on money laundering and terrorist financing and how India's Anti-Money Laundering (AML)/Counter Financial Terrorism (CFT) regime contravenes FATF's requirements and guidelines by impacting the human rights of civil society actors. The report first analyzes the three laws that form India's counter-terrorism regime—the Unlawful Activities Prevention Act 1967 (UAPA), the Prevention of Money Laundering Act (PMLA), and the Foreign Contribution (Regulation) Act of 1976 (FCRA). The report then analyzes five illustrative cases of NPOs and human rights defenders in India that have been the target of the government's enforcement of these laws. The analysis of this report is based on desk research and interviews with human rights defenders in the field.

The findings of this report highlight the misuse of countering terrorism financing legislation to target human rights defenders and close civic space. The report finds that India's counter-terrorism laws have expanded over time, becoming increasingly vague, and often overturning basic procedural safeguards for defendants. In enforcing these counter-terrorism laws, investigating officers often use vague allegations and inconsistent evidence to attempt to punish human rights defenders and NPOs that are critical of India's government. The process of prosecuting individuals under these laws has also become punishment itself through the use of extensive pretrial detention and repeated denial of bail.

The report concludes by setting forth recommendations for India that are to be taken into consideration in reviewing its compliance with FATF requirements, specifically regarding the effects that India's counter-terrorism regime has on the exercise of civil and political rights. As human rights defenders and NPOs critical of the government are often the victims of the government's abuse of counter-terrorism laws, the report concludes with recommendations for the Indian government to stop its abuse of its counter-terrorism laws, which if ignored, will impact democracy, the rule of law, and India's credibility as an international partner on counter-terrorism.

## ■ II. INTRODUCTION



The intergovernmental body, the Financial Action Task Force (FATF), was set up by the Group of Seven (G-7) countries with the objective of combating money laundering.<sup>1</sup> Its Forty Recommendations (“the Recommendations”) in 1990 were directed at the misuse of financial systems by persons laundering drug money.<sup>2</sup> In response to evolving money laundering trends and techniques, the Recommendations were revised for the first time in 1996, and again in October 2001, which created Eight (later expanded to Nine) Special Recommendations on Terrorist Financing (the “Special Recommendations”) to deal with the issue of the funding of terrorist acts and terrorist organizations, resulting in “40+9 Recommendations.”<sup>3</sup>

The first of the Recommendations, Recommendation 1 (Assessing Risks and Applying a Risk-Based Approach), seeks for governments to ensure that there is a correspondence between the measures undertaken to prevent or mitigate money laundering and terrorist financing and the risks identified.<sup>4</sup>

Section C of the Recommendations sets out measures expressly for terrorist financing. These are:

Recommendation 5 (the criminalization of terrorist financing);  
Recommendation 6 (targeted financial sanctions related to terrorism and terrorist financing); and  
Recommendation 8 (measures to prevent the misuse of non-profit organizations).<sup>5</sup>

The Interpretive Note to Recommendation 5 also emphasizes that terrorist

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1 History of the FATF, FATF (2023), <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html>.

2 FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations 7 (2012, updated March 2022), <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf> [hereinafter FATF Recommendations].

3 FATF, IX Special Recommendations (2008), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html>.

4 FATF Recommendations, *supra* note 2, at 10.

5 *Id.* at 13.

financing offenses should be included as predicate offenses for money laundering.<sup>6</sup> The recommendations laid out in Section B pertaining to money laundering and confiscation, therefore, assume importance too. Recommendation 3 deals with money laundering offenses, while Recommendation 4 sets out the broad framework for confiscation and provisional measures to “freeze or seize and confiscate” property and proceeds related to money laundering and terrorism.<sup>7</sup>

Most significant of all, FATF’s 2021 stocktake examines revised Recommendation 8, which “aims to protect NPOs from potential TF abuse while also ensuring that focused risk-based measures do not unduly disrupt or discourage legitimate charitable activities.”<sup>8</sup> The Interpretive Note to Recommendation 8 specifically states that “measures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach.”<sup>9</sup>

The stocktake found that across the globe, non-profit groups conducting legitimate activity report being subject to “intrusive supervision” “restrictions on access to funding and bank accounts” and “dissolution, de-registration or expulsion.”<sup>10</sup> Additionally, the report concluded that

The FATF’s assessment on the global implementation of the RBA in relation to R.8 indicates that most countries are not yet conducting adequate risk assessments of their NPO sector, and fewer are conducting risk-based outreach and monitoring.<sup>11</sup>

This is particularly important for India, where NPO’s have made allegations along the lines of those mentioned in the report and have alleged that the government is not engaged in risk-based assessments, and instead is using these laws to target critics. For example, the World Organization Against Torture (OMCT) has pointed out that “little evidence of the effectiveness of recommendation 8 in stopping terrorism financing have been put forward,” while “[s]everal UN independent experts but also the United Nations Working

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6 *Id.* at 41.

7 *Id.* at 12.

8 FATF, High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards 4 (2021), <https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf> [hereinafter Stocktake Synopsis]

9 FATF Recommendations, *supra* note 2, at 58.

10 Stocktake Synopsis, *supra* note 8, at 4.

11 *Id.*

Group on Tackling the Financing of Terrorism ('CTITF') put into question the systematic link between NPOs and terrorism."<sup>12</sup>

Additionally, FATF has taken notice of the potential curtailment of human rights through the abuse of counter-terrorism laws against human rights defenders. This curtailment is often justified by countries as a means to comply with FATF standards, and FATF has become aware of the misapplication of its "[s]tandards, which are allegedly introduced by jurisdictions to address AML/CFT (anti-money laundering/ combatting the financing of terrorism) deficiencies identified through the FATF's mutual evaluation or ICRG process, potentially as an excuse measures with another motivation."<sup>13</sup> This other "motivation" can include the targeting of human rights defenders and NPO's critical of the government, whose due process and fair trial rights are also violated despite the fact that the FATF stocktake reviewing compliance with "specific provisions relating to due process and procedural rights in the FATF Standards, which include multiple references to relevant human rights and fundamental principles of domestic law..."<sup>14</sup> While FATF had not focused on this issue in the past, it is particularly relevant to India during its mutual review process as will be described below.

## A. India and FATF

India launched its bid to be admitted as a member of FATF in 2009 and was allowed entry as its 36th member in June 2010.<sup>15</sup> In the interim, FATF and the Government of India held mutual consultations in November and December 2009, and the June 2010 plenary of FATF adopted the mutual evaluation report (MER).<sup>16</sup> The 2010 MER flagged some "technical concerns" with respect to the "coverage" of the extant Indian legislation for combating the financing of terrorism. The MER made several recommendations which included:

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12 OMCT, *FATF's Recommendation 8 on Non-profit Organizations: A New Tool to Unfairly and Dangerously Shrink Civil Society Space* (July 10, 2019), [https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/Submissions/OMCT\\_GA74CT.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/Submissions/OMCT_GA74CT.pdf).

13 <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Unintended-Consequences.pdf.coredownload.pdf>.

14 <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Unintended-Consequences.pdf.coredownload.pdf>.

15 FATF, *FATF Annual Report 2009-2010*, at 4 (2010), <https://www.fatf-gafi.org/media/fatf/documents/reports/2009%202010%20ENG.pdf>.

16 India Department of Economic Affairs, *Press Release: India's Membership of Financial Action Task Force* (June 29, 2010), <https://dea.gov.in/pressrelease/indias-membership-financial-action-task-force>.

address the technical shortcomings in the criminali[z]ation of both money laundering and terrorist financing and in the domestic framework of confiscation and provisional measures...enhance the effectiveness of the STR reporting regime... ensure that the competent supervisory authorities make changes to their sanctioning regimes to allow for effective, proportionate and dissuasive sanctions for failures to comply with AML/CFT requirements...<sup>17</sup>

Though granted membership, India was placed under a “follow up process” which later ended in 2013.<sup>18</sup> Additionally, it was reported that the U.S. government was “increasingly impatient with India’s progress on [anti-money laundering and counter-terrorism] issues, adding pressure to FATF’s recommendations and supporting the enactment of the 2010 FCRA.”<sup>19</sup> Thereafter, India pledged to strengthen its Anti-Money Laundering (AML)/Counter Financial Terrorism (CFT) regime, and to remove the identified deficiencies based on a high-level political commitment to the *Action Plan to strengthen India’s AML/CFT System*. India committed itself to implementing the plan and reporting on it to the FATF from time to time.<sup>20</sup>

As part of this action plan, India aimed to score Largely Compliant on at least eight out of 14 key and core recommendations.<sup>21</sup> These included, inter alia (a) Criminalization of Money Laundering; (b) Criminalization of Terrorist Financing; and (c) Confiscation and provisional measures. These fall squarely within Section B (R 3 and R 4) and Section C (R 5 and R 6) of the Recommendations. According to the Ministry of Home Affairs in its submission to a parliamentary committee, the government was partly acting on “the basis of commitment made by India at the time of admission to the said Financial Action Task Force” through its amendments to its principal

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17 FATF, Mutual Evaluation Report Executive Summary: India (June 2010), <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER%20India%20ES.pdf>.

18 FATF, Mutual Evaluation of India: 8<sup>th</sup> Follow-Up Report (June 2013), [http://www.fatf-gafi.org/media/fatf/documents/reports/mer/India\\_FUR8\\_2013.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/mer/India_FUR8_2013.pdf) [hereinafter 8<sup>th</sup> Follow-up Report]. See also Nishant Shah & Virangana Wadhawan, *FATF: The Global Fiscal Regulator*, *Economic Laws Practice* (June 1, 2023), <https://www.mondaq.com/india/money-laundering/1323836/fatf-series--article-1--fatf--the-global-fiscal-regulator>.

19 International Center for Not-For-Profit Law, Briefer: India’s Foreign Contribution (Regulation) Act (FCRA): The 2020 Amendments and Threats to Free Association 6 (2021), <https://www.icnl.org/wp-content/uploads/FCRA-Amendments-Briefer-7-7-21.pdf>.

20 See FATF, Mutual Evaluation Report: Anti Money Laundering and Combating the Financing of Terror: India (June 2010), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20India%20full.pdf> [hereinafter Mutual Evaluation Report]; see also 8<sup>th</sup> Follow-up Report, *supra* note 18.

21 Report on the Unlawful Activities (Prevention) Amendment Bill, 2011 §1.1.9, [https://prsindia.org/files/bills\\_acts/bills\\_parliament/2011/SCR\\_Unlawful\\_Activities\\_Prevention\\_Amendment\\_Bill\\_2011.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2011/SCR_Unlawful_Activities_Prevention_Amendment_Bill_2011.pdf).



anti-terrorism law, Unlawful Activities Prevention Act 1967 (“UAPA”), and its anti-money laundering law, Prevention of Money Laundering Act 2002 (“PMLA”).<sup>22</sup>

In order to enter the FATF compliance zone, India has repeatedly amended its anti-terrorism and money laundering laws.<sup>23</sup> In so doing however, it has expanded the scope of these laws in ways that have targeted non-profit organizations conducting human rights advocacy.<sup>24</sup> Critics have long argued that the laws upon which terror financing provisions were grafted suffered from several prior infirmities.<sup>25</sup> Critics argue that these laws militate against established principles for the right to fair trial. As explained by the Institute of South Asian Studies,

Over 240 petitions were submitted in different courts, arguing that the amendments passed in recent years have widened the scope of the Act and undermined the initial intention of the legislature. The challengers claimed the amendments violated personal liberty, procedures of law and the constitutional mandate and that the process itself was the punishment under the PMLA.<sup>26</sup>

Particularly concerning for the right to fair trial is the allegation that the PMLA has reversed the presumption of innocence against the defendants, which is “contrary to the tenets of basic criminal jurisprudence i.e., innocent unless proven guilty.”<sup>27</sup> The reversal of established principles of international law protecting the right to fair trial would render India non-compliant with

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22 The Unlawful Activities (Prevention) Amendment Bill, 2011, [https://prsindia.org/files/bills\\_acts/bills\\_parliament/2011/Unlawful\\_Activities\\_Amendment\\_Bill\\_2011.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2011/Unlawful_Activities_Amendment_Bill_2011.pdf); The Prevention of Money Laundering Act, 2002, <https://www.indiacode.nic.in/bitstream/123456789/2036/1/A2003-15.pdf>.

23 8th Follow-up Report, *supra* note 18, at 7-8.

24 See South Asia Human Rights Documentation Center, *An International Trojan Horse? Need for Review of UAPA Bill 2011*, 47 *Econ. & Pol. Weekly* 19 (2012), <https://www.epw.in/journal/2012/10/commentary/international-trojan-horse.html>.

25 See, e.g., Nair, *The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes*, 44 *Econ. & Pol. Weekly* 10 (2009), <https://www.epw.in/journal/2009/04/commentary/unlawful-activities-prevention-amendment-act-2008-repeating-past-mistakes>.

26 Vinod Rai, *Prevention of Money Laundering Act in India: The ECIR and Presumption of Innocence*, Institute of South Asian Studies (Sep. 5, 2022), <https://www.isas.nus.edu.sg/papers/prevention-of-money-laundering-act-in-india-the-ecir-and-presumption-of-innocence/>.

27 Shreyas Mehrotra and Shivangi Bajpai, *Reverse Burden of Proof Under Prevention of Money Laundering Act, 2002*, *Advocates & Solicitors* (Sep. 24, 2022), <https://www.akandpartners.in/post/reverse-burden-of-proof-under-prevention-of-money-laundering-act-2002>.

its commitments under numerous international covenants including the International Covenant on Civil and Political Rights (ICCPR).<sup>28</sup>

## **B. Measuring the Unintended Consequences of FATF Standards**

Compliance with human rights standards in relation to non-profit organizations, including human rights advocacy groups, was emphasized in FATF's stocktake, *Unintended Consequences of the FATF Standards*, inaugurated in its plenary in February 2021.<sup>29</sup> While the stocktake examines the unintended consequences in four broad areas, one section is particularly pertinent when examining India's compliance with FATF and human rights standards. The stocktake emphasizes the importance that terror-financing measures should be "implemented in a manner which respects countries' obligations under the Charter of the United Nations and international human rights law."<sup>30</sup> This includes the right to due process and procedural fair trial rights.<sup>31</sup> Further, the report acknowledges how terror financing laws are being used by some member states as a way to short-circuit these rights under the guise of addressing deficiencies in AML/CFT laws identified in FATF's mutual evaluation or International Cooperation Review Group (ICRG) process.<sup>32</sup>

The FATF stocktake also notes that hitherto, considerations of due process and procedural rights had been inconsistently respected in mutual evaluation exercises, and their active interaction with FATF standards had largely been ignored even when "widely reported by credible and reliable sources."<sup>33</sup> FATF therefore has not, by its own admission, evaluated whether the amendments brought about to remove "technical deficiencies" with respect to the criminalization of money laundering and terrorist financing and the implementation of effective confiscation and provisional measures in India through amendments to the PMLA and the UAPA challenged the procedural rights and due process requirements encapsulated in international rights jurisprudence and domestic obligations.

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28 Human Rights Watch, *Back to the Future : India's 2008 Counter terrorism L aws* (2010), <https://www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws>.

29 See Stocktake Synopsis, *supra* note 8. The four broad themes of the stocktake are: (1) de-risking; (2) financial exclusion; (3) undue targeting of NPOs, and (4) curtailment of human rights. *Id.*

30 *Id.* at 4.

31 *Id.* at 5.

32 *Id.*

33 *Id.*

The FATF analysis of misapplication of the FATF standards focuses especially on:

1. Excessively broad or vague offenses in legal counterterrorism financing frameworks
2. Issues relevant to the investigation and prosecution of terrorist financing and money laundering offences
3. Incorrect implementation of UN Security Council Resolutions and FATF standards on due process and procedural issues for asset freezing<sup>34</sup>

Additionally, it follows that the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recently expressed a deep concern that “CFT measures have increasingly been implemented in marked contravention of fundamental international law norms.”<sup>35</sup> Notwithstanding that CFT-specific obligations as contained in the Terrorist Financing Convention<sup>36</sup> and Security Council Resolutions 1373<sup>37</sup> and 2462<sup>38</sup> bind members states to undertake CFT

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<sup>34</sup> *Id.* at 6.

<sup>35</sup> Fionnuala Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *The Human Rights and Rule of Law Implications of Countering the Financing of Terrorism Measures* 1 (June 2022), <https://fatfplatform.org/assets/2022-06-13-SRCTHR-CFT-Position-Paper.pdf>.

<sup>36</sup> International Convention for the Suppression of the Financing of Terrorism, art. 17, Dec. 9, 1999, 2178 U.N.T.S. 197 (“Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.”), <https://treaties.un.org/doc/db/terrorism/english-18-11.pdf>; *Id.* at art. 21 (“Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.”)

<sup>37</sup> S.C. Res. 1373 (Sep. 28, 2001), [https://www.unodc.org/pdf/crime/terrorism/res\\_1373\\_english.pdf](https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf). The resolution calls upon states to prevent and suppress financing of terrorism by taking “appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights.” *Id.* at §3(f).

<sup>38</sup> S.C. Res. 2462 (Mar. 28, 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/090/16/PDF/N1909016.pdf?OpenElement>. The resolution reaffirmed that “Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort, noting the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and noting that failure to comply with these and other international obligations, including under the Charter of the United Nations is one of the factors contributing to increased radicalization to violence and fosters a sense of impunity . . .” *Id.*

measures consistent with their obligations under international human rights law, the human rights deficits in CFT regimes continue to remain a source of concern.<sup>39</sup>

The FATF too has clarified in the Interpretive Note to its Recommendation 6 that member jurisdictions must not digress from their international and human rights law obligations:

In determining the limits of, or fostering widespread support for, an effective counter-terrorist financing regime, countries must also respect human rights, respect the rule of law, and recognise the rights of innocent third parties.<sup>40</sup>

This gradual erosion of fundamental international law from CFT measures in India is not only bound to adversely impact rights hitherto seen as foundational, but also may ultimately serve to delegitimize the fight against terrorism, in particular, the measures to combat terrorist financing and money laundering. By dedicating time and resources on prosecuting human rights defenders rather than groups accused of violent terrorism, the government of India is failing to abide by its duty to effectively prosecute terrorism and terror financing.

The present report asks the following inter-related questions as it relates to Rules 5, 6 and 8:

1. To what extent does India incorporate a risk-based approach to ensure that measures put in place are necessary and proportionate?
2. To what extent is India's CFT/AML legal regime consistent with due process requirements in relation to the three key issues outlined above in the FATF stocktake?
3. Is India misapplying and exploiting FATF standards to eviscerate the law of procedural rights, thus rendering fair trials difficult, if not outright impossible?
4. Are procedural safeguards, due process and the right to a fair trial, non-arbitrariness, and non-discrimination visible in the manner in which India implements its CFT/ AML laws?
5. Are these laws being mobilized to target human rights defenders, political opponents, and minority and marginalized groups?

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<sup>39</sup> See generally Aol áin, *supra* note 35.

<sup>40</sup> FATF Recommendations, *supra* note 2, at 43.

## C. Methodology

The report examines the AML/CFT measures that India has adopted, evolved, and implemented. It focuses on the parameters laid down by FATF's stocktake and technical framework, particularly focusing on the failure of the Indian authorities to follow the risk-based requirement for prosecutions, especially concerning non-profit groups engaged in rights-based advocacy. It includes an analysis of the structure of the laws, the successive amendments, the concerns, and the documentary evidence collected by credible individuals and organizations.

In the second section, the report undertakes a granular look at the implementation of these laws through concrete cases of prosecution and persecution of non-profit organizations and human rights defenders. Given that the Indian judicial process can be protracted, not all cases discussed in the report have reached a conclusion, but even in those instances, the report looks to pre-trial orders by lower courts, special courts, and appellate courts that impact the analysis of compliance with FATF rules. The report also inspects the material adduced by the prosecution agencies in chargesheets and other documentary material to assess whether there is a misuse of FATF standards and CFT/AML law.

# ■ III. PART ONE: INDIA'S LEGAL FRAMEWORK FOR COUNTER-TERROR FINANCING



The legal architecture to counter terror financing in India has changed over time and straddles three main domains. The first deals expressly with anti-terror laws, the second with the prevention of money laundering, and the last with regulation of funding in the non-profit sector. While the alteration and expansion of these laws has been partly justified by Indian lawmakers as a response to FATF's concerns about India's ability to investigate terror financing, the ultimate targets of these laws, in many instances, have become political opponents of the ruling administration instead of individuals or groups engaged in terrorism and its financing. The misuse of these laws particularly violates the FATF standard that member states use comprehensive and objective risk assessments when amending or enforcing their CFT/AML laws.

## **A. UAPA and Terror Financing: The Evolving Legal Framework**

The extant anti-terror law is the Unlawful Activities Prevention Act 1967 (UAPA).<sup>41</sup> Promulgated originally in 1967, it empowered the government to declare an association unlawful<sup>42</sup> for a specified period through a prescribed procedure. This law provides for prohibition on the use of funds of a proscribed association and renders any person who deals with such funds liable for imprisonment.<sup>43</sup> The scope of the UAPA to deal with terror financing was limited. In 2004, however, when the existing anti-terror law, the Prevention of Terrorism Act (POTA) was repealed, several of its provisions were

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41 The Unlawful Activities (Prevention) Act 1967 (UAPA).

42 An organization could be deemed unlawful if the government is of the opinion that the association or its members, among other things, (1) does anything "which is intended, or supports any claim, to bring about . . . the cession . . . or the secession" of any part of India; (2) "disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (3) violates India's hate speech laws [Indian Penal Code §§ 153A, 153B]. UAPA §§ 2(o)(i)-(ii); 2(p)(ii).

43 *Id.* § 11.

absorbed into the UAPA, and new provisions were introduced.<sup>44</sup> This brought terrorism and terror funding within the remit of the UAPA. New sections now defined “terrorist act” (Section 15),<sup>45</sup> and made raising funds for a terrorist act (Section 17)<sup>46</sup> or for terrorist organizations (Section 40)<sup>47</sup> offences punishable by imprisonment and fine. The concept of “proceeds of terrorism”<sup>48</sup> was also introduced in the amended act, and anyone holding such proceeds was liable to be punished with imprisonment up to life (Section 21).<sup>49</sup>

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44 For full text of the amended act, see Unlawful Activities (Prevention) Amendment Act (2004), [https://prsindia.org/files/bills\\_acts/acts\\_parliament/2004/the-unlawful-activities-\(prevention\)-amendment-act-2004.pdf](https://prsindia.org/files/bills_acts/acts_parliament/2004/the-unlawful-activities-(prevention)-amendment-act-2004.pdf). A new Chapter 4 was added to introduce provisions related to terrorism. *Id.*

45 A newly added Section 15 defined “terrorist act” thus:  
Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act. *Id.* § 15.

46 *Id.* § 17 (“Punishment for raising fund for terrorist act: Whoever raises fund for the purpose of committing a terrorist 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.”).

47 *Id.* § 40. Offence of raising fund for a terrorist organization. (1) A person commits the offence of raising fund for a terrorist organisation, who, with intention to further the activity of a terrorist organisation,- (a) invites another person to provide money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or (b) receives money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or (c) provides money or other property, and knows, or has reasonable cause to suspect, that it would or might be used for the purposes of terrorism. **Explanation.** For the purposes of this sub-section, a reference to provide money or other property includes of its being given, lent or otherwise made available, whether or not for consideration. (2) A person, who commits the offence of raising fund for a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding fourteen years, or with fine, or with both. *Id.*

48 “Proceeds of terrorism” refers to all kinds of properties “derived or obtained from commission of any terrorist act” or “acquired through funds traceable to a terrorist act, irrespective of person in whose name such proceeds are standing or in whose possession they are found, and includes any property which is being used, or is intended to be used, for the purpose of a terrorist organization.” *Id.* § 2(g)(i).

49 UAPA, § 21.

In December 2008, following the terrorist attacks in Mumbai, the UAPA was amended further, making its scope even broader.<sup>50</sup> Not only was the definition of terrorist act expanded, to now include “disruption [to]...services essential to the life of the community” by using “any other means of whatever nature,”<sup>51</sup> so was the scope of the provision of funds to ensure broader coverage of terrorism offences.<sup>52</sup> A new section 51A was inserted to empower the central government to “freeze, seize . . . attach” and prohibit the use of “funds, financial assets or economic resources” of individuals “engaged in or suspected to be engaged in terrorism.”<sup>53</sup>

The scope of “terrorist act” was expanded yet again in 2012 to include threats to India’s “economic security,”<sup>54</sup> and smuggling and high-quality counterfeit currency was inserted into the list of offences punishable by imprisonment under Section 17.<sup>55</sup> To make it consistent with FATF requirements, under the amended Section 17 raising of funds would be penalized regardless of “whether such funds were or not used for commission of such act.”<sup>56</sup> It is extremely significant to note that the expansion of the UAPA in 2012 was justified by lawmakers in Parliamentary Standing Committee on Home Affairs as an action that complied with and addressed FATF’s guidelines for India.<sup>57</sup>

## **B. UAPA: A Law Without Rules**

Critics of the law have raised objections to it on several grounds. The amendments have been repeatedly pushed through without any larger public debate, inputs, or scrutiny.<sup>58</sup> More substantively, it has been argued that the definition of terrorist act is vague, imprecise, and so sweeping (note, for instance, “any other means of whatever nature”), as to include non-violent political activity within its ambit, hence rendering human rights defenders,

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50 For the full text of the amendments, see Unlawful Activities (Prevention) Amendment Act, 2008, [https://www.mha.gov.in/sites/default/files/UAPA-1967\\_0.pdf](https://www.mha.gov.in/sites/default/files/UAPA-1967_0.pdf).

51 *Id.* § 4; UAPA § 15(a)(iii).

52 Unlawful Activities (Prevention) Amendment Act, 2008, § 14.

53 *Id.* (emphasis added).

54 UAPA Amendment Act, 2012, § 4(i), [https://megpolice.gov.in/sites/default/files/Unlawful\\_Activities\\_p\\_Amendment\\_Act-2012.pdf](https://megpolice.gov.in/sites/default/files/Unlawful_Activities_p_Amendment_Act-2012.pdf); UAPA § 15.

55 UAPA Amendment Act, 2012, § 12; UAPA § 17.

56 UAPA § 17.

57 Department-Related Parliamentary Standing Committee on Home Affairs, One Hundred and Sixteenth Report on the Unlawful Activities (Prevention) Amendment Bill, 2011, (Presented to Rajya Sabha on March 28, 2012)(Laid on the table in Lok Sabha on March 28, 2012), [https://prsindia.org/files/bills\\_acts/bills\\_parliament/2011/SCR\\_Unlawful\\_Activities\\_Prevention\\_Amendment\\_Bill\\_2011.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2011/SCR_Unlawful_Activities_Prevention_Amendment_Bill_2011.pdf) [hereinafter One Hundred and Sixteenth Report].

58 Human Rights Watch, *supra* note 28.



political opponents and dissenters vulnerable to malicious prosecution.<sup>59</sup> For example, charges of terrorist conspiracy and terror funding have been invoked against leaders and activists of the peaceful movement against the new citizenship laws in 2020, such as Safoora Zargar and Khalid Saifi (See Section II for more details).<sup>60</sup> Again, “disruption to essential services” could bring within its sweep industrial strike actions, or other mass movements. These have grave implications for the enjoyment of the right to freedom of speech and expression, as well as the right to peaceful assembly and association.<sup>61</sup>

Moreover, it duplicates offences listed under ordinary law, thus providing the executive latitude in deciding when and against whom to invoke terrorism charges.<sup>62</sup> For example, the prohibition of the production and circulation of counterfeit currency added to Section 17 already exists as an offence under the Indian Penal Code.<sup>63</sup> However, the grounds for applying one over another are not apparent from the law.<sup>64</sup>

As such, this definition runs afoul of the framework recommended by the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.<sup>65</sup> The report of the Special Rapporteur provided three cumulative elements that must form the kernel of any definition of terrorist act when states legislate.

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59 Surabhi Chopra, *National Security Laws in India: The Unravelling of Constitutional Constraints*, 17 *Oregon Rev. Intl. L.* 1 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2441652](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441652).

60 Tania Abraham, *UAPA Being Used to Criminalise Human Rights Defenders*, *The Hindu* (Oct. 7, 2022), <https://www.thehindu.com/news/cities/Delhi/uapa-being-used-to-criminalise-human-rights-defenders/article65977734.ece>.

61 Human Rights Watch, *supra* note 28. See especially Section III. *Id.*

62 Offences listed under Sections 15(1)(a), (b), and (c), such as the use of weapons, bombs, and explosives, are all also crimes under other laws—the Indian Penal Code, Arms Act, Explosives Act, Explosive Substances Act, etc. It therefore remains the arbitrary decision of the government and investigative agencies whether or not to invoke charges under the UAPA.

63 “Counterfeiting currency-notes or bank-notes. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with 2[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.” Indian Penal Code § 498(A).

64 Gargu Parsai, *Offences Threatening Economic Security Now Under UAPA*, *The Hindu* (Dec. 21, 2012), <https://www.thehindu.com/news/national/offences-threatening-economic-security-now-under-uapa/article4222896.ece>.

65 Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), Report on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/2006/98, (Dec. 28, 2005), <https://digitallibrary.un.org/record/564925?ln=en>.

These are:

- (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages;
- (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and
- (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>66</sup>

The definition of terrorist act under UAPA is bereft of any relation to the aim of the act perpetrated or intended, and thus falls short of the recommendation made by the Special Rapporteur.<sup>67</sup> Insistence on a precise and narrow definition of terrorism can avoid the pitfalls of legislation designated “to outlaw political opposition, religious entities, or minority, indigenous or autonomy movements that have never resorted to violence against persons.”<sup>68</sup> FATF’s stocktake echoes the Special Rapporteur’s warning against the overbroad definitions that tend to limit the efficacy of counter terrorism legislation, and enable its abuse and misapplication.<sup>69</sup>

In recognition of the broad and vague definition of terrorism inhering in anti-terror law, Indian courts too have repeatedly urged that the provision be construed “narrowly to bring it within the constitutional framework.”<sup>70</sup> The gravamen of terrorist financing provisions in the UAPA is the “terrorist act”.<sup>71</sup> So, despite judicial caution, if terrorist act remains so broadly defined, allowing the state great subjective and arbitrary powers for its invocation, then the same imprecision, subjectivity and arbitrariness is bound to attach to terror financing sections as well. For example, the powers under Section 51 A,

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66 *Id.* at 26-50.

67 *Nair, supra* note 25.

68 *Scheinin, supra* note 66, at 19.

69 *Id.* at 8-9.

70 *Devangana Kalita v. Delhi*, (2021) CRL.A. 90/2021 (India). See *also* *Yakub Abdul Razak Memon v. Maharashtra*, (2013) 13 SCC 1 (India); *Hitendra Vishnu Thakur v. Maharashtra*, (1994) 4 SCC 602 (India).

71 See Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism) et al., Comment on the Rights to Freedom of Peaceful Assembly and of Association Concerning the Unlawful Activities (Prevention) Amendment Act 2019, U.N. Doc. OL IND 7/2020, at 3-4 (May 6, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25219>.

which enables the government to take control over the assets of an individual on the basis of mere suspicion, are excessively broad and subjective.<sup>72</sup>

### C. Legal Procedure in Prosecuting Terror Financing Offences

Under this category, issues of fair trial and presumption of innocence are significant and lie at the very heart of the due process and procedural rights that FATF seeks to evaluate and ensure the protection of. This section's analysis will limit itself inter alia to two key issues: a) extreme lengths of pre-trial detention and b) the refusal to grant bail in cases involving human rights defenders or non-profit organizations. The first pertains to the inordinately long pre-trial detention period allowed under the UAPA. Following the 2008 amendments, those arrested under the UAPA can be kept in police custody for up to 30 days,<sup>73</sup> exposing them to possible mistreatment and torture.<sup>74</sup> Further, they can be detained for up to 180 days, or six months,<sup>75</sup> without the chargesheet being filed against them if the magistrate is satisfied by the progress in the investigation shown by the public prosecutor.<sup>76</sup> This directly conflicts with international human rights jurisprudence which recognizes that curtailment of liberty should be limited, necessary, and proportionate.<sup>77</sup>

The second is the increasingly criticized non-provision of bail in contravention of domestic and international fair trial standards. The right to be presumed innocent unless proven guilty is the cornerstone of criminal law and as such, is an essential concomitant of the Indian Constitution's Article 21 guarantee of due process.<sup>78</sup> That custody is necessary for ensuring the accused person's presence in the trial and should never devolve into punishment is reflected in the Criminal Law Procedure (CrPC) which affords the sessions court and the

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72 Economic and Political Weekly, *Dissent in a Democracy: Political Imprisonment Under the UAPA in India* (July 29, 2022), <https://www.epw.in/engage/article/dissent-democracy-political-imprisonment-under>.

73 This is considerably higher than the limit of 15 days of police custody under section 167 of the Code of Criminal Procedure, 1973.

74 Human Rights Watch, *supra* note 28.

75 Under India's Code of Criminal Procedure section 167, the pretrial detention cannot exceed "ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; and "sixty days, where the investigation relates to any other offence."

76 Nair, *supra* note 25.

77 See International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171, [https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch\\_IV\\_04.pdf](https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf).

78 Indian Const. art. 21.

high court the power to grant bail.<sup>79</sup> On the contrary, the bail provision under the UAPA is quite distinctive. Section 43D(5) reads:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.<sup>80</sup>

This provision restricts the powers of the court to grant bail if it has determined that the accusations against the individual may be true *prima facie*.<sup>81</sup> The *prima facie* standard was further explained by the Supreme Court in *National Investigation Agency v. Zahoor Ahmad Shah Watali*,<sup>82</sup> wherein it interpreted *prima facie* to imply that the material placed by the investigating agencies must be presumed to be true unless contradicted by some other evidence in the chargesheet itself.<sup>83</sup>

The *Watali* case is also of direct relevance here as it dealt with terror funding charges. A chargesheet was filed against Watali and other accused for “funding of secessionist and terrorist activities in Jammu and Kashmir” in 2018.<sup>84</sup> Watali, in particular, was accused of receiving monies from the ISI of Pakistan through hawala routes, and then distributing it to the pro-Independence Hurriyat Conference and stone pelters in the Kashmir valley.<sup>85</sup> The trial court on perusing the chargesheet declined Watali bail.<sup>86</sup> The High court, in appeal apprising the material placed on record by the NIA, noted that the central piece of evidence against the accused was a loose sheet containing typed entries “purporting to be financial accounts”.<sup>87</sup> A plain

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79 Code Crim. Proc. §§ 437, 439. Courts usually invoke the “triple test” to measure the potential risks that may arise in conducting fair trial. The triple test considers whether the accused is (i) a flight risk; (ii) likely to tamper with evidence; or (iii) likely to influence witnesses. On this, see *P. Chidambaram v. Directorate of Enforcement*, (2020) 13 SCC 791, ¶117.

80 UAPA § 43D(5) (emphasis added).

81 Apurva Vishwanath, *Reading Section 43D(5): How it Sets the Bar for Bail so High Under UAPA*, *The Indian Express* (July 9, 2021), <https://indianexpress.com/article/explained/section-43d5-how-it-sets-the-bar-for-bail-so-high-under-uapa-7390673/>.

82 *Zahoor Ahmad Shah Watali v. National Investigating Agency*, (2018) CRL.A.768 (India).

83 *Id.*

84 *Id.* ¶ 8.

85 *Id.* ¶ 3.

86 *Id.* ¶ 29.

87 *Id.* ¶ 59.

reading of this document “not shown to form part of the books of accounts regularly maintained by the Appellant or his business entities” failed to “constitute material to even ‘prima facie’ connect the Appellant with terrorist funding.”<sup>88</sup> Furthermore, the Court held that nothing in “the entire bunch of documents ...would suggest that these trade activities were geared toward funding of terrorist activities, as alleged in the charge-sheet.”<sup>89</sup> The Delhi High court thus granted bail to Watali.<sup>90</sup> However, the NIA appealed against the order in the Supreme Court, which not only cancelled the bail, but reversed the High Court order finding the latter’s approach erroneous.<sup>91</sup>

Further, the Supreme Court held that courts should neither “dissect” evidence, nor discard documents which would otherwise be inadmissible at the stage of trial in arriving at the *prima facie* true conclusion for an offence under UAPA.<sup>92</sup> In order to be granted bail, an accused must contradict the prosecution’s case even as the court will examine only the material placed before it by the prosecution. The burden of proof to disprove the prosecution’s case is placed disproportionately on the accused under UAPA.<sup>93</sup>

This is a considerably difficult threshold to meet and has the effect of keeping the accused in custody in perpetuity as trials take years to commence and conclude. With pendency under the UAPA reported at over 85 per cent,<sup>94</sup> the impossibility of securing bail ensures that the process itself becomes the punishment. For example, Father Stan Swamy, a Jesuit priest, tribal rights activist and founder of the Persecuted Prisoners Solidarity Committee (PPSC) was arrested by the National Investigation Agency on charges that PPSC was a frontal organization of the CPI (Maoists) and that he had received funds

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88 *Id.* ¶ 68.

89 *Id.* ¶ 73.

90 *Id.* ¶ 82.

91 Satya Prakash, *SC Sets Aside Bail Granted to Watali in Terror-funding Case*, The Tribune India (Apr. 2, 2019), <https://www.tribuneindia.com/news/archive/j-k/news-detail-752314>.

92 Mehal Jain, *Supreme Court’s Watali Judgment Requires Reconsideration as it Rendered the Grant of Bail Impossible in UAPA Cases: Justice Gopal Gowda*, Live Law (July 25, 2021), <https://www.livelaw.in/top-stories/uapa-bail-justice-gopal-gowda-supreme-courts-watali-judgment-178102>.

93 Tanay Arora, *Section 43D UAPA: A Continuing Anomaly of State-sanctioned Infringement of Rights of the Accused*, Citizens for Justice and Peace (Oct. 14, 2022), <https://cjp.org.in/section-43d-uapa-a-continuing-anomaly-of-state-sanctioned-infringement-of-rights-of-the-accused>.

94 Sanchita Kadam, *95% Pendency of Trial of UAPA Cases, 85% Cases Pending Investigation: NCRB Report*, NewsClick (Sep. 16, 2021), <https://www.newsclick.in/Pendency-Trial-UAPA-Cases-Cases-Pending-Investigation-NCRB-Report>.

to further the agenda of the banned, terrorist designated organization.<sup>95</sup> Possibly the oldest person to be charged under the UAPA, and suffering from several serious ailments, Father Stan Swamy mounted a long and ultimately failed struggle to secure bail on medical grounds—which the state opposed at every step—before passing away in the hospital.<sup>96</sup>

By enabling extraordinarily long pre-trial detention, making bail a virtual impossibility through a presumption of guilt rather than innocence, and establishing a near reversal of the burden of proof, the UAPA radically departs from ordinary criminal procedure. This vitiates the possibility of a fair trial, which is protected under Article 14 of the ICCPR,<sup>97</sup> to which India is a state party.<sup>98</sup> Presumption of innocence has long been held to be the inviolable principle of human rights and fair trial,<sup>99</sup> which the UAPA violates. The UN Security Council Resolution 1456 expressly requires states to “comply with all their obligations under international law... in particular international human rights, refugee and humanitarian law.”<sup>100</sup> Under the present scheme, the UAPA stands in constant contravention of these rights and protections.

Groups like Human Rights Watch argued that the UAPA, especially in its amended, fortified version, repeats the shortcomings of the earlier counterterrorism laws, namely, the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) and the Prevention of Terrorism Act, 2002 (POTA).<sup>101</sup> These laws were documented to be particularly susceptible to abuse

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95 *Explained: Who Was Stan Swamy, Arrested in the Elgar Parishad Case, Who Died on July 5?*, The Indian Express (July 13, 2021), <https://indianexpress.com/article/explained/who-was-stan-swamy-6717126/>.

96 *Id.* See also American Bar Association Center for Human Rights, Preliminary Report: Arrest of Indian Attorneys and Activists in Apparent Retaliation for Human Rights Work (Oct. 2019), [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/JD/Asia/preliminary-report-india-bhima-koregaon.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/JD/Asia/preliminary-report-india-bhima-koregaon.pdf).

97 International Covenant on Civil and Political Rights art. 14, *supra* note 78.

98 *State Parties to the International Covenant on Civil and Political Rights*, U.N. Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND).

99 U.N. Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (July 7, 2007), <https://digitallibrary.un.org/record/606075?ln=en>.

100 S.C. Res.1456 (Jan. 20, 2003), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf>.

101 Human Rights Watch, *supra* note 28 (“In their previous incarnations, such measures were so closely associated with abuse that they were repealed. India should not repeat these mistakes of the past.”).

by authorities,<sup>102</sup> with their wrath falling disproportionately on minorities, Dalits and other marginalized communities.<sup>103</sup>

Notwithstanding all objections and appeals, the government pushed through with these amendments. In the “statement of the objectives and reasons of the bill” in 2012, the government stated that these amendments were to fulfil the commitment that had been made to FATF which had admitted India as its member.<sup>104</sup> This admission required India to take “various legislative and other legally binding measures” on a “medium term basis,” i.e., by March 31, 2012. During the debates concerning the amendment, the Ministry of Home Affairs explained that FATF had highlighted several issues that needed to be addressed:

As per the Mutual Evaluation Report (MER) some technical concerns have been identified with regard to the “coverage” of the extant Indian legislation for combating financing of terrorism....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 (CFT) regime in the country..<sup>105</sup>

The amendments would address the deficiencies mentioned in the mid-term evaluation reports and make the country FATF compliant, the government claimed.<sup>106</sup>

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102 Justice Ranganath Misra, the first chairperson of the National Human Rights Commission, in a letter to the members of Parliament (dated 25 February 1995), appealed for the removal of TADA from the country’s statute books. He wrote, “The TADA legislation is, indeed, draconian in effect and character and has been looked down upon as incompatible with our cultural traditions, legal history and treaty obligations. Provisions of the statute as such have yielded to abuse and on account of such a situation, the Act has been misused over the years and thousands of innocent people who could have been otherwise dealt with, have been roped in to languish in jail. Many feel that the police have found it convenient legal process to silence opposition and that it has been frequently abused for political considerations.” National Human Rights Commission, Annual Report 1994-1995, at 53-57, <https://nhrc.nic.in/sites/default/files/Annual%20Report%201994-95.pdf>.

103 Anil Kalhan et al, *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 *COLUM. J. ASIAN L.* 93 (2006). See especially Section V(A): Arbitrary, Selective and Non-uniform Enforcement by State Governments. *Id.* at 174-185.

104 One Hundred and Sixteenth Report, *supra* note 58.

105 *Id.*

106 *Id.*

But, the CFT law cannot satisfy the due process parameters identified by FATF in its stocktake exercise on at least two counts: namely, the definition of a terrorist act, on which hinge terrorist funding provisions, remains overly broad; and secondly, it also demonstrates contraventions from due process and procedural safeguards that are the touchstone of international human rights law, and which FATF upholds. It disregards the caution set out in the Interpretive Note to Recommendation 6, namely that, “[i]n determining the limits of, or fostering widespread support for, an effective counter-terrorist financing regime, countries must also respect human rights, respect the rule of law, and recognise the rights of innocent third parties.”<sup>107</sup>

#### **D. Money Laundering Offenses: The Legal Framework**

The Prevention of Money Laundering Act (PMLA), 2002 also provides for dealing with terrorist funding, and often, charges under the PMLA and Section 17 of the UAPA are invoked in tandem. As noted earlier, Recommendation 5 itself recommends that terrorism financing offenses are registered as predicate offenses for money laundering offenses.<sup>108</sup> Enacted in January 2003, the PMLA became law eventually on July 1, 2005.<sup>109</sup> Its Section 3 defines the offence of money laundering, and has undergone successive amendments.<sup>110</sup> Originally meant to target proceeds arising out of criminal activities specified in the schedule of the Act,<sup>111</sup> in 2012, the offense was widened to cover the “concealment, possession, acquisition or use and projecting or claiming” the proceeds of crime “as untainted property.”<sup>112</sup> The above amendment was made following FATF’s observations in 2010 that Section 3 of the PMLA in its earlier form failed to criminalize concealment, possession, acquisition and use of the proceeds of crime.<sup>113</sup>

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107 FATF Recommendations, *supra* note 2, at 43.

108 *Id.*

109 Department of Economic Affairs, Notifications & Rules Under PMLA, F.No.6/2/2005-E.S. (July 1, 2005), <https://dea.gov.in/sites/default/files/moneylaunderingrule.pdf>.

110 Sohini Chowdhury, *Money Laundering Offence Attracted by Mere Possession of Crime Proceeds; Projection as Untainted Property Not Required: SC Interprets “and” in Sec 3 PMLA as “or”*, Live Law (July 27, 2022), <https://www.livelaw.in/top-stories/money-laundering-offence-attracted-by-mere-possession-of-crime-proceeds-projection-untainted-property-not-required-sc-pmla-204976>.

111 “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 proceeds of crime.” PMLA § 3.

112 *Id.* § 3(i).

113 Mutual Evaluation Report, *supra* note 18.



Further explanations inserted into the PMLA via amendments by the Finance Act in 2019 have broadened the sweep of the law.<sup>114</sup> Firstly, the process or activity connected with proceeds of crime came to be envisaged as “a continuing activity which continues till such time a person is directly or indirectly enjoying the proceeds of crime,” thus introducing a retrospective effect to this law.<sup>115</sup> Furthermore, NPO’s were impacted by recent amendments in March 2023 whereby the definition of Non-Profit Organizations was expanded to include charitable organizations and the new category of “Politically Exposed Persons” was introduced.<sup>116</sup> These changes were included ahead of India’s 2023 FATF review: “[a]n official said the broader objective is to bring in legal uniformity and remove ambiguities before the FATF assessment.”<sup>117</sup>

Secondly, the definition of proceeds of crime has been unyoked from the scheduled offense, and instead it can include “*any property which may directly or indirectly be derived or obtained as a result of any criminal activity relating to the scheduled offence.*”<sup>118</sup>

Under this scheme, officers of the Directorate of Enforcement are empowered to carry out investigations as well as attach property in cases involving the offense of money laundering.<sup>119</sup> The orders to confirm the attachment or confiscation of properties fall under the jurisdiction of an Adjudicating Authority, while an Appellate Tribunal can hear appeals against its orders and actions of other authorities.<sup>120</sup>

## **E. PMLA: Constitutionality Under Question**

Over 240 petitions challenging the constitutional validity of the PMLA were filed before the Supreme Court, which it clubbed, heard, and disposed

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114 Finance (No. 2) Act, 2019, Part XIII, <https://egazette.nic.in/WriteReadData/2019/209695.pdf>.

115 *Id.*

116 Aanchal Magazine, Amendments to PMLA Rules and its Impact on ‘Politically Exposed Persons’, NGOs, The Indian Express (Mar. 10, 2023), <https://indianexpress.com/article/explained/explained-economics/disclosures-ngos-pmla-rules-new-8488484/> (available at <https://archive.ph/Tn2xS#selection-891.0-891.121>).

117 *Id.*

118 Finance (No. 2) Act, 2019, Part XIII (emphasis added).

119 Sohini Chowdhury, *Supreme Court Upholds ED’s Power of Arrest, Attachment, Search & Seizure and “Twin-conditions” for Bail; Says PMLA Has Stringent Safeguards*, Live Law (July 27, 2022), <https://www.livelaw.in/top-stories/supreme-court-upholds-eds-powers-of-arrest-attachment-search-seizure-and-twin-conditions-for-bail-says-pmla-has-stringent-safegaurds-204915>.

120 Department of Revenue, Enforcement Directorate, <https://dor.gov.in/preventionofmoneylaundering/ed-enforcement-directorate>.

of ultimately in July 2022.<sup>121</sup> Some of the key points raised by petitioners are outlined below.<sup>122</sup> The PMLA affords very wide-ranging powers to the Enforcement Directorate without concomitant procedural safeguards.<sup>123</sup> This is demonstrated in the case study of a journalist, Siddique Kappan, who engaged in investigative journalism but was charged under the PMLA by an E.D. which claimed that Siddique was charged in order to stop a conspiracy of international groups who aimed to incite communal violence in India.<sup>124</sup> There are several other examples of the E.D. using the opaque powers of their office to punish journalists, human rights defenders, and NPOs for their criticism of the government under the guise of stopping international terrorism as per the requirements from FATF.

Further, the commencement and the process of investigation of an alleged offence under the PMLA are unregulated by “procedure established by law.”<sup>125</sup> There is not even the recording of the First Information Report (FIR), which ought to inaugurate a criminal case. Instead, it is guided by an internal manual and only records the Enforcement Case Information Report (ECIR), which is not mandated to be disclosed to the accused.<sup>126</sup> The absence of formal procedure has serious consequences: statements made by the accused are not protected as under ordinary criminal law,<sup>127</sup> and there is a stark lack of judicial oversight.<sup>128</sup> For example, the Enforcement Directorate is

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121 Vijay Madanlal Choudhary v. Union of India, (2021) SLP (CrI) No. 4634/2014, 2021 SCC OnLine SC 1048 and 1049.

122 *Id.*

123 *PMLA Arguments Matrix: Challenges to the Prevention of Money Laundering Act*, Supreme Court Observer (Mar. 18, 2022), <https://www.scobserver.in/reports/pmla-arguments-matrix/>.

124 Mahtab Alam, *Hathras Case: Malayalam Journalist and Three Others Booked Under Sedition, UAPA*, *The Wire* (Oct. 7, 2020), <https://thewire.in/media/hathras-case-malayalam-journalist-siddique-kappan-booked-under-sedition-uapa>. See also, *ED Charges Popular Front of India, Its Student Wing With Money Laundering*, *The Wire* (Feb. 12, 2021), <https://thewire.in/government/ed-charges-popular-front-of-india-its-student-wing-with-money-laundering>.

125 Supreme Court Observer, *supra* note 124.

126 Section 19 of the PMLA only requires the disclosure of the basic grounds of arrest and the sections invoked therein, while permitting the non-disclosure of the ECIR. Though an individual does have remedies under section 482 of the Code of Criminal Procedure and Articles 226 and 32 of the Constitution, none of these can be invoked meaningfully in the absence of any information being provided to the accused.

127 Section 25 of the Indian Evidence Act says, “Confession to police officer not to be proved.—No confession made to a police officer, shall be proved as against a person accused of any offence.” The Indian Evidence Act § 25, 1872, [https://www.indiacode.nic.in/bitstream/123456789/15351/1/iea\\_1872.pdf](https://www.indiacode.nic.in/bitstream/123456789/15351/1/iea_1872.pdf). See also The Code of Criminal Procedure §§ 161, 162, 313, 315, 1973.

128 Nandini Shenai et al., *Transitioning of the Law on Money Laundering in India*, Live Law (Jan. 23, 2022), <https://www.livelaw.in/columns/the-prevention-of-money-laundering-act-2002-pmla-finance-act-ndps-act-1995-money-laundering-190165>.

empowered under Section 50, in the course of an investigation, to summon any person and demand that that person give and ratify a statement<sup>129</sup> under a threat of penalty or arrest.<sup>130</sup> This militates against the legal procedure established by law and the protection against self-incrimination.<sup>131</sup> This anomaly has been made possible by claiming that Enforcement Directorate officers are not police officers, and therefore, the safeguards do not apply to them.

The number of scheduled offenses that can trigger money laundering charges has burgeoned throughout the last several years to over 140. Some of these are relatively minor offenses (such as copyright violations or software piracy) punishable by fines.<sup>132</sup> This introduces inconsistency and subjectivity into the law and turns the PMLA into a possible weapon for abuse and targeting.

Section 24 of the PMLA explicitly states that when an individual is accused of committing an offense under section 3, “*the burden of proving that the proceeds are untainted property will fall on the accused.*”<sup>133</sup> By shifting the burden entirely without any safeguards, the PMLA effectively erodes the guarantee of a right to fair trial.<sup>134</sup>

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129 PMLA § 50. (2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act. (3) All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required. *Id.*

130 PMLA § 63. (2) If any person,—(a) being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any question put to him by an authority in the exercise of its powers under this Act; or (b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or (c) to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time, he shall pay, by way of penalty, a sum which shall not be less than five hundred rupees but which may extend to ten thousand rupees for each such default or failure. *Id.*

131 *Nandini Satpathy v. P.L. Dani & Anr.*, (1978) 2 SCC 424; *Selvi & Ors. v. State of Karnataka*, (2010) 7 SCC 263.

132 Supriya Sharma et. al., *How the Modi Government Has Weaponised the ED to Go After India's Opposition*, Scroll.in (July 5, 2022), <https://scroll.in/article/1027571/how-the-modi-government-has-weaponised-the-ed-to-go-after-indias-opposition>.

133 PMLA, § 24 (emphasis added).

134 See, e.g., *PMLA's Reversal of Burden of Proof 'Seems to Be Very Very Dangerous': Kerala HC*, The Wire (Mar. 23, 2023), <https://thewire.in/law/pmla-reversal-burden-of-proof-dangerous-kerala-hc>.

The search and seizure provisions of the PMLA, i.e., Sections 17 and 18, envision a framework by which the Enforcement Directorate can search any place or person without the existence of an FIR relating to the offense.<sup>135</sup> Section 5(1), which permits the Enforcement Directorate to attach property on *the mere suspicion* that money might disappear, even without an FIR and without any judicial oversight, is excessive, broad, and contains no checks and balances.<sup>136</sup> This, along with Section 8(4), which allows the Enforcement Directorate to take possession of the attached property, creates a framework by which the state has virtually unfettered powers of search and seizure.<sup>137</sup>

The bail provision under Section 45 of the PMLA goes even further than UAPA to impose extra twin conditions.<sup>138</sup> It requires, inter alia, the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such an offense and that the accused is not likely to commit any offense while on bail.<sup>139</sup> This is a higher threshold than even that required for acquittal. The presumption of innocence, which PMLA jettisons, is a non-derogable right and is central to upholding due process and the right to a fair trial.<sup>140</sup>

Cumulatively, the PMLA is in violation of Articles 14, 20(3), and 21 of the Indian Constitution. Its scheme also digresses from India's obligations to international human rights law, in particular ICCPR's Article 14(2).

## F. Judicial Seal on PMLA

One of the grounds for allowing the PMLA's derogation from norms was the Supreme Court's acceptance of the state's argument that it was not a penal statute, but a "sui generis law,"<sup>141</sup> and therefore it did not require the sheath of procedural guarantees associated with criminal law. It is paradoxical that a law which is meant to address a crime deemed most heinous, and which allows confiscation, seizure, search, arrests and interrogation of the accused, should be seen as falling outside the purview of criminal law, and

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135 PMLA §§ 17, 18.

136 PMLA § 5(1).

137 PMLA § 8(4).

138 PMLA § 45.

139 This was struck down by the Supreme Court as being unconstitutional in *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1, but was re-introduced via an amendment in 2019.

140 U.N. Human Rights Committee, General Comment No. 29, States of Emergency (Article 4): International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), <https://digitallibrary.un.org/record/451555?ln=en>.

141 *Vijay Madanlal Choudhary v. Union of India*, SLP (Crl) No. 4634/2014, 2021 SCC OnLine SC 1048 and 1049.

the accused is thus denied the protections afforded to all accused under it.<sup>142</sup> The court held that the authorities given to the Enforcement Directorate were not equivalent to police officers at the stage of summons, but rather were equivalent to police officers after the stage of arrest.<sup>143</sup> In some instances, this means that Enforcement Directorate officers can now escape the ambit of the Sec. 25 IEA safeguard and ostensibly extract confessions under coercion simply by delaying arrest and questioning suspects substantively through summons. In doing so, the Supreme Court also turned its back on a series of judgments which have settled the question of who is a police officer.<sup>144</sup>

The apex court's pronouncement, accepting virtually every argument of the government, was met by a swift and strong critique in the public domain. The upholding of the PMLA would reintroduce "unconstitutional law," it was feared.<sup>145</sup> It was seen as an example of the executive turn of the Supreme Court<sup>146</sup>—indeed, one commentator bemoaned that the Supreme Court had become a "threat" rather than a custodian of citizens' rights.<sup>147</sup> Others noted that the judgment would imperil democracy and push India towards

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142 Abhinav Sekhri, *Money Laundering a Heinous Crime But PMLA Not a 'Criminal' Law in India?*, BQ Prime (Aug. 1, 2022), <https://www.bqprime.com/opinion/money-laundering-is-a-heinous-crime-but-pmla-is-not-a-criminal-law-in-india>.

143 *ED Authorities Are Not Police Officers; Article 20(3) Protection Available Only After Arrest & Not at Summons Stage: Supreme Court*, LIVELAW (July 27, 2022), <https://www.livelaw.in/top-stories/ed-authorities-are-not-police-officers-article-203-protection-available-only-after-arrest-not-at-summons-stage-supreme-court-204950>.

144 Until now, the question of who is a police officer had been based on a two-fold test. First, the powers test says the officer should be legally authorised to file a chargesheet. See *Badku Joti Savant v. Mysore*, (1966) 3 SCR 698; *Romesh Chandra Mehta v. West Bengal*, (1969) 2 SCR 461; *Illias v. Collector of Customs*, (1969) 2 SCR 613; *Raj Kumar Karwal v. Union of India*, (1990) 2 SCC 409; *Ram Singh v. Central Bureau of Narcotics*, (2011) 11 SCC 347. Second, the functions test focuses on the function of crime control and prevention. See *Nanoo Sheikh Ahmed v. Emperor*, AIR, (1927) Bom 4; *Amin Shariff v. Emperor*, AIR, (1934) Cal 580; *Punjab v. Barkat Ram*, (1962) 3 SCR 338; *Tofan Singh vs. Tamil Nadu*, (2020), 2020 SCC OnLine SC 882; *Raja Ram Jaiswal v. Bihar*, (1964) 2 SCR 752.

145 Suhrith Parthasarathy, *PMLA Verdict, an Erosion of Constitutional Buffers*, *The Hindu* (Aug. 1, 2022), <https://www.thehindu.com/opinion/lead/the-pmla-verdict-overlooks-constitutional-safeguards/article65707726.ece>.

146 On the rise of the Executive Court, see Gautam Bhatia, *The Fear of the Executive Court*, *The Hindu*, (Dec. 14, 2018), <https://www.thehindu.com/opinion/lead/the-fear-of-executive-courts/article25735185.ece>; see also Gautam Bhatia, *The Executive(s) Court: Notes on the Legacy of Justice AM Khanwilkar*, *Indian Const. Law and Phil.* (July 29, 2022), <https://indconlawphil.wordpress.com/2022/07/29/the-executives-court-notes-on-the-legacy-of-justice-a-m-khanwilkar/>.

147 Pratap Bhanu Mehta, *By Upholding PMLA, SC Puts its Stamp on Kafka's Law*, *The Indian Express* (July 29, 2022), <https://indianexpress.com/article/opinion/columns/pratap-bhanu-mehta-by-upholding-pmla-sc-puts-its-stamp-on-kafkas-law-8057249/>.

a “police state.”<sup>148</sup> The judicial approval of the PMLA would enable protracted incarceration, turning the process into the punishment.<sup>149</sup>

A month later, in a departure from tradition, the Supreme Court agreed to hear a review of its own judgment upholding the law.<sup>150</sup> It framed “at least two issues” for review which were seen as its most egregious violations of due process. These are firstly, the bail provisions that reverse the burden of proof and presumption of innocence, and secondly, the Enforcement Directorate’s non-sharing of the ECIR with the accused.<sup>151</sup> The Supreme Court had earlier accepted the federal government’s stance that the ECIR was not equivalent to a First Information Report, and hence the Enforcement Directorate was not mandated to share it with the accused, who must remain satisfied with merely knowing the grounds of their arrest.<sup>152</sup>

Petitioners in the courts and activists and commentators outside have tried to hold the Indian government to the standards embedded in the international human rights law frameworks and the fundamental rights enunciated in Articles 14, 20 (3), and 21 of the Indian Constitution.<sup>153</sup> The Union of India in the Supreme Court justified the “conscious legislative departure from conventional penal law in India” as its legal and moral commitment to the FATF recommendations and other international directives and conventions that have preceded it.<sup>154</sup> It presented itself as “merely a cog in this international vehicle,” and asked the court to adjudicate the constitutionality of the PMLA “from the standpoint of the country’s obligations and evolving responsibilities internationally.”<sup>155</sup> The absence of compliance with international human rights law serves only to highlight the concern expressed by the UN Special Rapporteur that CFT regimes tend to hollow out due process and rule of law guarantees.<sup>156</sup> Though the solicitor general argued that the rules framed under the Act “place sufficient inbuilt checks

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148 Krishnadas Rajagopal, *PMLA Verdict a Hurdle for Undertrials*, *The Hindu* (July 31, 2022), <https://www.thehindu.com/news/national/scs-pmla-verdict-at-odds-with-calls-for-speedy-justice-for-undertrials/article65707544.ece>.

149 *Id.*

150 *PMLA review: Supreme Court Agrees to Relook into Aspects of Providing ECIR to Accused & Negation of Presumption of Innocence*, *Live Law* (Aug. 25, 2022), <https://www.livelaw.in/top-stories/pmla-review-supreme-court-agrees-to-relook-into-aspects-of-providing-ecir-to-accused-negation-of-presumption-of-innocence-207439>.

151 *Id.*

152 *Vijay Madanlal Choudhary v. Union of India*, SLP (Crl) No. 4634/2014, 2021 SCC OnLine SC 1048 and 1049.

153 Mrinal Satish et al., *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court’s Approach to Terror-Related Adjudication*, 21 *Natl. L. Sc. India Rev.* 51 (2009).

154 *Vijay Madanlal Choudhary v. Union of India*, SLP (Crl) No. 4634/2014.

155 *Id.*

156 Scheinin, *supra* note 66.

and balances to prevent potential abuse,” documentary evidence points to the “weaponization” of the Enforcement Directorate and money laundering charges to target the country’s political opposition.<sup>157</sup>

## G. Regulating Foreign Contribution

Reports from Africa and Eastern Europe have pointed to how AML/ CFT legislations across the globe have ended up overregulating the NPO sector through “the lack of a risk-based approach, lack of involvement of NPOs in risk assessments, burdensome requirements, lack of clear guidance on implementation and disproportionate sanctions.”<sup>158</sup> In India, the law governing the flow and utilization of foreign contribution to NPOs is the Foreign Contribution (Regulation) Act (FCRA) of 1976.

The burden of compliance and reporting requirements has increased since amendments in 2010 necessitated organizations to renew their license every five years.<sup>159</sup> The fear of losing the certificate, as well as the assets created through foreign funds received previously, have had a chilling effect on the sector as a whole. It is seen as an instrument to silence civil society activists who have been outspoken critics of the government. The new FCRA Rules framed in 2020 inter alia prohibit a recipient of foreign contribution from transferring it to any other entity. Utilization of funds was to be read strictly as utilization by the recipient NPO only.<sup>160</sup>

It is significant to note that the changes to the FCRA rules have been justified by the government at least in part due to FATF’s own requirements. As the International Center for Not-For-Profit Law (ICNL) notes:

FATF and AML/CT narratives continue to be used by the Indian government to justify the existence of the FCRA. The Indian government’s FCRA website currently includes as part of its “Charter for Associations Applying for Grant of Prior Permission/Registration Under The Foreign Contribution (Regulation) Act, 2010” a list of “Good

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157 Sharma, *supra* note 133.

158 European Center for Not-for-Profit Law, *Impact of Anti-money Laundering and Countering Terrorism Financing Measures on Non-profit Organizations in the Eastern Partnership Region* (2021), <https://ecnl.org/sites/default/files/2021-07/EaP%20AML%20CT%2002072021.pdf>.

159 Foreign Contribution (Regulation) Act, 2010, §12(6), [https://fcraonline.nic.in/home/PDF\\_Doc/FC-RegulationAct-2010-C.pdf](https://fcraonline.nic.in/home/PDF_Doc/FC-RegulationAct-2010-C.pdf).

160 Srishti Ojha, ‘You Are Discouraging NGO Activities’: Supreme Court Tells Centre on FCRA Amendments, *Live Law* (Oct. 31, 2021), <https://www.livelaw.in/top-stories/fcra-amendments-supreme-court-foreign-contributions-ngo-supreme-court-184731>.

practice Guidelines to the Non-Profit Organisations (NPOs) to ensure compliance with FATF requirements,” indicating some linkage between the FCRA and FATF.<sup>161</sup>

The amendments were the subject of a constitutional challenge in the Supreme Court. The state’s affidavit in response to the writ petitions and in support of the proposed ramping up of regulation is strikingly devoid of any mention of the risk assessment which the FATF strongly recommends in its interpretive note to Recommendation 8. The affidavit remains silent on whether such an exercise was carried out prior to moving these amendments and crafting of new rules, and whether these are commensurate with risks identified. Furthermore, the solicitor general’s assertion in open court that “[t]here are intelligence inputs that most of the time, money is received for development works but is used to train Naxalites,”<sup>162</sup> also reflects a risk assessment-devoid approach. Such a broad-brush approach is speculative and has disrupted legitimate NPO activity, imperiling many crucial services that NPOs provide to society.<sup>163</sup>

By failing to adopt a risk-based approach during the prosecution stage, the government has not only violated the rights of NPO’s to freely carry out their statutory activities by having access to financial resources,<sup>164</sup> the government has also failed to engage in good faith with NPO’s. In 2010, FATF’s Asia Pacific Group (APG) found that India was not compliant with FATF rules regarding the engagement with and evaluation of the NPO’s of the country.<sup>165</sup> The APG recommended that the government “undertake comprehensive outreach to the NPO sector with a view to protecting the sector from abuse for terrorist financing as well as wider outreach in relation to good governance and accountability.”<sup>166</sup> Failing to engage with the NPO’s not only limited the effectiveness of the government’s ability to execute risk-based evaluations,

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161 International Center for Not-For-Profit Law, India’s Foreign Contribution (Regulation) Act (FCRA): The 2020 Amendments and Threats to Free Association (July 7, 2021) <https://www.icnl.org/wp-content/uploads/FCRA-Amendments-Briefer-7-7-21.pdf>.

162 Abraham Thomas, *NGOs Misusing Foreign Funds, Support Changes to FCRA: NCPDR*, Hindustan Times (Nov. 10, 2021), <https://www.hindustantimes.com/india-news/ngos-misusing-foreign-funds-support-changes-to-fcrancpcr-101636482609981.html>.

163 International Center for Not-For-Profit Law, Foreign Funding Barriers Hinder COVID Relief Efforts in India, [https://www.icnl.org/wp-content/uploads/FCRA-in-India-Overview.pdf?\\_ga=2.144239093.1341372194.1678889895-106568981.1670253191](https://www.icnl.org/wp-content/uploads/FCRA-in-India-Overview.pdf?_ga=2.144239093.1341372194.1678889895-106568981.1670253191).

164 U.N. Human Rights Council, Access to Resources: Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Nyaletsossi Voule, U.N. Doc. A/HRC/50/23, at 4-6 (May 10, 2022), <https://www.ohchr.org/en/documents/thematic-reports/ahrc5023-access-resources-report-special-rapporteur-rights-freedom>.

165 Mutual Evaluation Report, *supra* note 20.

166 *Id.*



but it also facilitated the government's efforts to punish NPO's that were critical of the government.

## H. Overall Findings on India's Legal Structure

1. India's CFT/ AML legal architecture reflects a marked lack of risk assessment. It is not known whether any assessment was carried out before amending existing laws and creating new ones, in order that these may be in line with identified potential risks. In contrast to objective risk assessment exercise, the highest authorities in the government have consistently sought to delegitimize civil society and human rights defenders, thus subjecting them to greater vulnerability.<sup>167</sup> The repeated portrayal of activists and NPO's as indulging in the misuse of foreign funds, religious conversion, and blockage of developmental schemes encourages investigating agencies to charge and arrest HRDs.
2. As discussed in the preceding pages, the UAPA has adopted an overbroad definition of terrorism, which has further been unyoked from any acts of violence. This is compounded by allegations that are neither particularized nor specific but fall more in the nature of vague speculations, inferences, and insinuations. [See Section II for case studies]. This allows agencies and the government to taint all legitimate political activity as terrorism, and, consequently, to squeeze their flow of funds through the CFT/AML laws.
3. In July 2022, in response to a question in the upper house of the Parliament, the Minister of State for Home stated that over 5,027 cases—in which 24,134 people are accused—were registered between 2016 to 2020. Of these, an overwhelming 97 percent continue to languish in jail as undertrials.<sup>168</sup> These high figures confirm the indiscriminate resort to the Act and left for the judiciary to construe “terrorism” narrowly rather than broadly, and to avoid its invocation where other laws would suffice. This blurs the boundaries between the exceptional and the normal, where anti-terror provisions can be mobilized to meet everyday crime control situations and to target movements and HRDs.

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<sup>167</sup> *Some NGOs Misusing Foreign Funds for Anti-national Activities, Religious Conversions: Amit Shah*, Scroll .In (Oct. 28, 2022), <https://scroll.in/latest/1036055/some-ngos-misusing-foreign-funds-for-anti-national-activities-religious-conversions-amit-shah>.

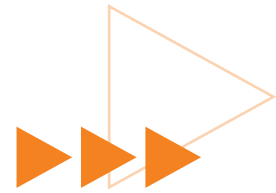
<sup>168</sup> Ministry of Home Affairs, Unstarred Question No. 383, UAPA Cases, Rajya Sabha (Jul. 20, 2022), <https://rsdebate.nic.in/handle/123456789/732596?viewItem=search>.

4. The harsh bail provision and the developing bail jurisprudence in the UAPA, especially in *Watali*, have curtailed the interpretive liberties of courts, allowing them even less discretion in siding with individual liberty over a textualist reading of the law. The Supreme Court's dictum in *Watali* that no "elaborate examination or dissection" of the material placed by the prosecution was needed for determining if the case against the accused was "prima facie true"<sup>169</sup> threatens to turn courts into mere rubber stamps for the prosecution.
5. The PMLA in particular has been eviscerated of procedural safeguards that exist in ordinary criminal law, granting the Enforcement Directorate extraordinary powers of arrest, seizure and attachment *sans* judicial oversight. This empowers the government to act punitively against human rights workers.
6. The near impossibility of bail in UAPA and PMLA has effectively turned these laws into preventive detention laws—the trial in the Bhima Koregaon case, in which the first round of arrests took place in 2018, are yet to start as we enter 2023. The protracted incarceration of activists, academics, lawyers, and political opponents of the regime under these draconian laws has an overall chilling effect, leading to the shrinking of democratic space.

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<sup>169</sup> Zahoor Ahmad Shah *Watali v. National Investigating Agency*, (2018) CRL.A.768 ¶118 (India).

## ■ IV. PART TWO: CASE STUDIES



This section analyses some prominent cases where terror funding allegations have been levelled against human rights defenders and NPOs and provides a close look at the ways in which terror funding laws work to challenge legitimate political opposition. These cases bring out the procedural irregularities, the abuse of process, and the violations of fundamental human rights that are implicit in the UAPA and the PMLA, as has been flagged in the previous section. These case studies are by no means exhaustive but demonstrate the use of “compliance with FATF rules” by the anti-terror and financial crime investigating agencies pretextually to target and silence dissidents.

### A. Case Study I: Journalist Siddique Kappan

The case of journalist Siddique Kappan and his co-accused—of whom, two are student activists, and another a taxi driver—is one of the starkest illustrations of the misuse of terror funding laws for political means. Kappan was in prison for over two years,<sup>170</sup> since October 5, 2020, facing multiple charges under the UAPA and the PMLA. Kappan has worked as a journalist for over a decade, and at the time of his arrest, he served as a contributing reporter for a Malayalam language online portal *azhimugham.com* and was also the Secretary of the Delhi chapter of Kerala Union of Working Journalists (KUWJ).<sup>171</sup>

In September 2020, Kappan was sharing a taxi with two others to follow up on a story in Hathras, where a Dalit woman was raped and murdered. Kappan’s family has insisted that his low paying employment, and his lack of proficiency in the local language Hindi, forced Kappan to share a taxi with two others who were also travelling to Hathras to pay a visit to the victim’s

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<sup>170</sup> *Siddique Kappan: India Journalist Walks Out of Jail After 2 Years*, Al Jazeera (Feb. 2, 2023), <https://www.aljazeera.com/news/2023/2/2/siddique-kappan-india-journalist-walks-out-of-jail-after-2-years>.

<sup>171</sup> *Journalist Siddique Kappan Gets Bail from SC; Know Who is He and Why He Was Arrested*, Livemint (Sep. 9, 2022), <https://www.livemint.com/news/india/journalist-siddique-kappan-gets-bail-from-sc-know-who-is-he-and-why-he-was-arrested-11662710359421.html>.

family.<sup>172</sup> These were student activists Atiqur Rehman and Masood Ahmed, affiliated to Campus Front of India (CFI), the students' wing of the Islamist organization Popular Front of India (PFI).

However, before they could reach Hathras, the three passengers and the driver were detained by the police<sup>173</sup> and a petty case of breach of peace was registered against them.<sup>174</sup> The next day, another First Information Report<sup>175</sup> invoking far graver sections of IPC and UAPA<sup>176</sup> was registered against the arrested men. Subsequently, whilst in judicial custody, Kappan and his travel companions were also arraigned in one more case that the Hathras district police had previously registered against "unknown persons".<sup>177</sup>

### **i. Terror Funding Charges**

In December 2020, a businessman and the national secretary of CFI, Rauf Sharif, was arrested by the Enforcement Directorate in Kerala on allegations of money laundering and for acting as a conduit for PFI funds.<sup>178</sup> The arrest was made purportedly in connection with an ECIR filed in 2018. In its prosecution complaint (equivalent to the chargesheet) filed before the Lucknow PMLA court, the Enforcement Directorate also named Kappan, Atiqur Rehman, Masood Alam and the driver of the taxi.<sup>179</sup>

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172 Nidhi Suresh, 'Beaten for Knowing Arabic and Studying at Jamia': Siddique Kappan's Wife on His 700 Days in Jail, *News Laundry* (Aug. 24, 2022), <https://www.newslandry.com/2022/08/24/beaten-for-knowing-arabic-and-studying-at-jamia-siddique-kappans-wife-on-his-700-days-in-jail>.

173 Somya Lakhani et al., *Journalist from Kerala, Three Others Detained on Way to Hathras*, *The Indian Express* (Oct. 7, 2020), <https://indianexpress.com/article/india/journalist-three-others-detained-on-way-to-hathras-6705914/>.

174 Case No. 3462 of 2020 (copy on record); *The Code of Criminal Procedure, 1973*, § 151, 107, 116.

175 FIR Number 199/2020, PS Manth (copy on record).

176 Alam, *supra* note 125.

177 FIR Number 151/2020, PS Chandpa (copy on record). This too invoked serious charges of sedition (124 A), criminal conspiracy (Section 120B) and promoting enmity between different sections of society (153A).

178 PTI News Agency, *UP Police Will Seek Custody of PFI Student Wing Leader Rauf Shareef: Officer*, *The Indian Express* (Dec. 13, 2020), <https://indianexpress.com/article/>. Toby Antony, *CFI Leader Rauf Sherif Gets Bail, But Decides to Remain in Jail*, *The New Indian Express* (Feb. 13, 2021), <https://www.newindianexpress.com/states/kerala/2021/feb/13/cfi-leader-rauf-sherif-gets-bail-but-decides-to-remain-in-jail-2263317.html>.

179 *Hathras Case: ED Files Money Laundering Chargesheet Against Journalist Siddique Kappan*, *Scroll.in* (Feb. 12, 2021), <https://scroll.in/latest/986673/hathras-case-ed-files-money-laundering-chargesheet-against-journalist-siddique-kappan-four-others>.

There are overlapping allegations between the ED case and the charges in the UAPA case. The essence of these allegations is that the accused were members of Popular Front of India (PFI) and were receiving funds from abroad, mainly the Gulf countries, to “incite communal riots and spread terror”.<sup>180</sup> The Uttar Pradesh (UP) government has claimed in Lucknow High Court that PFI was a terror funding organization with links to Al Qaeda and Turkey’s International Humanitarian Relief Foundation,<sup>181</sup> though at that time PFI had not been proscribed as such.<sup>182</sup>

In a press release following the filing of its chargesheet, the ED’s office claimed that “the visit [to Hathras] of these PFI/CFI members was under the instructions of Rauf Sherif and funds for the same were also provided by him.” “[L]aundered through different layers,” this money allegedly reached Sharif and his associates,<sup>183</sup> which the agencies claim was used to fund “unlawful activities” such as anti-CAA protests “which led to Delhi riots in the month of February, 2020, and in respect to the more specific incident investigated in this chargesheet that is the purported visit of PFI/CFI to Hathras with an intent to disturb communal harmony, incite communal riots and spread terror.”<sup>184</sup> Nonetheless, many alleged that the prosecution had not been able to demonstrate any link between this money and Kappan, barring alleging that Kappan used it “directly” by travelling to Hathras in a car procured through proceeds of crime and “being part of the purported visit to Hathras along with other accused, the funds for which were transferred to the bank account” of his co-accused Atikur Rehman on the instructions of Rauf Sharif.<sup>185</sup>

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180 Alam, *supra* note 125. See also, *ED Charges Popular Front of India, Its Student Wing with Money Laundering*, The Wire (Feb. 12, 2021), <https://thewire.in/government/ed-charges-popular-front-of-india-its-student-wing-with-money-laundering>.

181 *UP Govt Opposes Siddique Kappan’s Bail, Claims He is Part of Larger Conspiracy to Spread Terror*, The Wire (Sep. 7, 2022), <https://thewire.in/law/siddique-kappan-up-government-police-hathras-gangrape>.

182 The only state government to moot a ban against PFI at the time was Jharkhand. However, the ban notification was set aside by the Jharkhand High Court on 27 August 2021. The Court came “to a conclusion that the State Government has failed to provide appropriate reasons which would come within the parameters of the exception envisaged in Article 19(4) of the Constitution of India and therefore the impugned notification as contained in Notification No. 18/12 Aa. Su (29)07/2009- 1096, Dated 21.02.2018, is not sustainable in the eyes of law and accordingly the same is hereby quashed and set aside”. WP(Cr) No. 94/2018 (copy on record).

183 *Id.*

184 Alam, *supra* note 125 (quoting Enforcement Directorate’s press release).

185 ECIR/02/HIU/2018, at 94-98 (May 2, 2018) (copy on record).

The trajectory of the ED case is revealing of the arbitrary manner in which terror funding charges are invoked and the ways in which it runs afoul of FATF’s recommendations that fair trial and due process rights be afforded to those accused of terrorism.<sup>186</sup> In its order granting bail to the so-called terror financier Rauf Sahrif, the PMLA Special Court in Ernakulum, assailed the very basis of the ED’s case. The court noted that “there is absolutely no case” that the proceeds of crime now projected in the present ED case were derived directly or indirectly from the scheduled offence in the 2013 case.” Neither, observed the court, is the ED able to demonstrate any cogent connection between Sharif and the UAPA case.<sup>187</sup>

More damningly, the court observed that the entire scheme of the PMLA has been reversed by the ED. Section 3 and 2(4) of the PMLA makes the commission of the scheduled offence a fundamental precondition for proceedings under the PMLA.<sup>188</sup> Therefore, chronologically, laundering follows the commission of scheduled offence. By making FIR 199 which was registered in 2020 as one of the bases of the money laundering case (registered in 2018), the state has “practically overturned the scheme.”<sup>189</sup> While the trial is yet to start in the PMLA case—and charges have finally been framed<sup>190</sup>—these scathing observations of the PMLA court indicate the infirmities of the case, and the tenuous and forced connections that the state is making.

## ii. The Process as the Punishment

When news of Kappan’s arrest first came, his colleagues assumed it was a case of mistaken identity.<sup>191</sup> However, when it became known that he was going to be charged under the anti-terror law for pursuing his journalistic duties, and when his whereabouts continued to remain unknown, the Kerala Union of Working Journalists (KUWJ) immediately moved a habeas corpus

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186 Stocktake Synopsis, *supra* note 8, at 6.

187 K.A. Rauf Sherif v. The Assistant Director (PMLA), Directorate of Enforcement New Delhi, CrI. M.C. Number 2435 of 2020 (2021) (copy on record).

188 PMLA §§2(4), 3.

189 WP(Cr) No. 94/2018, *supra* note 183.

190 *UP Court Frames Charges Against Journalist Siddique Kappan, 6 Others*, The Indian Express (Dec . 8, 2022), <https://indianexpress.com/article/cities/lucknow/up-court-frames-charges-against-journalist-siddique-kappan-6-others-8312077/>.

191 Prasanth M, *How We Fought for Siddique Kappan*, The Indian Express (Sep . 12, 2022), <https://indianexpress.com/article/opinion/columns/how-we-fought-for-siddique-kappan-8146837/>.

petition<sup>192</sup> under Article 32 of the Constitution.<sup>193</sup> The writ argued that his detention was illegal and infringed on his fundamental and inalienable rights, including the right to equality (Article 14), freedom of speech and expression (Article 19) and right to life (Article 21).<sup>194</sup> However, the court repeatedly adjourned the matter for over six months, granting it no urgency that habeas corpus petitions typically demand.<sup>195</sup> As will be demonstrated below, the incredibly slow speed at which the justice system operates for NPO's or human rights defenders in relation to terror and terror-financing cases is a punishment in and of itself and stands in violation of FATF's requirements for observing due process and respecting fair trial rights.<sup>196</sup>

While the courts continued to defer hearings on the matter for Kappan months after his arrest and the commencement of his detention, the Uttar Pradesh Special Task Force filed an additional chargesheet, which, according to a lawyer familiar with the case, rendered the habeas corpus petition infructuous.<sup>197</sup> It is notable that the chargesheet itself was filed on April 4, 2021, 178 days after the arrest, since the UAPA empowers the Investigating Officer to continue the investigation beyond 90 days in contrast to what is mandated in ordinary law.<sup>198</sup>

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192 Apoorva Mandhani, *122 Days & 6 Adjournments Later, Siddique Kappan's Habeas Corpus Plea Still Pending in SC*, The Print (Feb. 4, 2021), <https://theprint.in/judiciary/122-days-6-adjournments-later-siddique-kappans-habeas-corpus-plea-still-pending-in-sc/598289/>.

193 Article 32 entitles the citizens to move the Supreme Court for the enforcement of their fundamental rights. Under it, specifically at clause (2): "*The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part...*" India Const. art. 32, [2023050195.pdf](https://www.s3waas.gov.in/docs/default-source/constitution-of-india-1950/2023050195.pdf) (s3waas.gov.in).

194 Mandhani, *supra* note 193.

195 *Id.*

196 Stocktake Synopsis, *supra* note 8, at 5.

197 Aishwarya S Iyer, *188 Days & Counting: Kappan's Habeas Corpus Plea Pending in SC*, The Quint (Apr. 13, 2021), <https://www.thequint.com/news/india/siddique-kappan-habeas-corpus-plea-supreme-court-delayed>.

198 K Venkataramanan, *Explained: What Makes the UAPA so Stringent?*, The Hindu (July 11, 2021), <https://www.thehindu.com/news/national/explained-what-makes-the-uapa-so-stringent/article61443821.ece>.

Kappan's bail application was rejected by the Mathura Sessions Court primarily on grounds that the charges against him were very grave in nature,<sup>199</sup> which does not relate to the risk assessment required both under the FATF recommendations and Indian domestic law. When the Allahabad High Court was considering Kappan's bail application, it invoked the high threshold established by *National Investigation Agency vs. Zahoor Ahmad Shah Watali* noting that Section 43(D)(5) "prohibits a Court from granting bail to accused if on a perusal of a final report filed under Section 173 Cr.P.C., the Court is of the opinion that there are reasonable grounds to believe that the accusations against such person are prima facie true."<sup>200</sup> The High Court was satisfied by the prosecution's argument that Kappan's visit to the area where he was arrested had "nothing to do with the incident of Hathras and [he] had deliberately with malafide intent come with the co-accused persons and was arrested at Mathura."<sup>201</sup> The chargesheet and the claims therein were enough to nullify Kappan's defence that he was a journalist that was only discharging his professional duties. This order denying Kappan bail is an example of the circularity of logic inherent in the UAPA bail regime.

### iii. The Supreme Court's Oral Observations

On September 9, 2022, the Supreme Court granted bail to Siddique Kappan after his bail had been rejected by the lower courts.<sup>202</sup> In its oral observations, the apex court raised serious questions over the prosecution's case that Kappan and others had planned to incite violence. Responding specifically to the state's counsel that "provocative" literature, which sought justice for the Hathras victim, had been seized from Kappan, the then Chief Justice of India, U.U. Lalit, reminded him that "everyone has a right to free expression"

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199 Siddique Kappan v. State of UP, Bail application number 1939/2021 (July 6, 2021) (copy on record), [https://www.slideshare.net/sabrangsabrang/siddique-kappan-bail-rejected-mathura-sessions-court?next\\_slideshow=251249769](https://www.slideshare.net/sabrangsabrang/siddique-kappan-bail-rejected-mathura-sessions-court?next_slideshow=251249769). The only brief period that Kappan has been out from jail has been the five-day conditional bail he got to visit his ailing mother in February 2021. The bail came with the condition that he could only meet his close family. PTI, *Kerala Journo Siddique Kappan Charged Under UAPA, IT Act by UP Special Task force*, The News Minute (Apr. 3, 2021), <https://www.thenewsminute.com/article/kerala-journo-siddique-kappan-charged-under-uapa-it-act-special-task-force-146475>.

200 Siddique Kappan v. State of U.P, Criminal Misc Bail Application Number 1612 of 2022 (Aug. 2, 2022), [https://images.assettype.com/barandbench/2022-08/4473e49c-7040-4cbe-a371-97b51f879dd4/Siddique\\_Kappan\\_v\\_State\\_Of\\_UP.pdf](https://images.assettype.com/barandbench/2022-08/4473e49c-7040-4cbe-a371-97b51f879dd4/Siddique_Kappan_v_State_Of_UP.pdf).

201 *Id.*

202 *Supreme Court Grants Bail to Siddique Kappan; Reporter Spent 23 Months in Jail*, The Wire (Sep. 9, 2022), <https://thewire.in/law/supreme-court-grants-bail-to-siddique-kappan>.



and asked if raising voice for justice “was a crime in the eyes of the law?”<sup>203</sup> Additionally, Judge Bhat noted that the prosecution had not been able to produce anything which might be deemed provocative.

#### **iv. No Relief Despite Bail by Supreme Court**

Even after the apex court granted Kappan bail, the verification of sureties supplied by Kappan’s lawyers stretched on indefinitely.<sup>204</sup> But what effectively came in the way of Kappan’s release was the Lucknow PMLA court’s rejection of Kappan’s bail application in the ED case.<sup>205</sup> The PMLA court appeared to have ignored the Supreme Court’s observations in the UAPA case. As observed by the retired chief justice of Allahabad High Court, Justice Mathur, the bail order “doesn’t reflect any role of Kappan to establish any case of money laundering.”<sup>206</sup>

An objective perusal of the developments in the case lends credence to the charge that laws like PMLA and UAPA are being used to conduct preventative detention. For example, when Rauf Sharif was granted bail by the PMLA court in Ernakulum, he was instantly arrested and brought to Lucknow in the UAPA case (by which time it had been transferred to the NIA court in Lucknow).<sup>207</sup> He was finally granted bail in July 2023 by the Allahabad High Court.<sup>208</sup>

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203 Padmakshi Sharma, *Siddique Kappan Case – “Everyone Has Right to Free Expression”, Supreme Court Asks UP Govt How Seeking “Justice for Hathras Girl” is a Crime*, Live Law (Sep. 9, 2022), <https://www.livelaw.in/top-stories/siddique-kappan-case-everyone-has-right-to-free-expression-supreme-court-asks-up-govt-how-seeking-justice-for-hathras-girl-is-a-crime-208837>.

204 Mayank Kumar, *Verification of Bail Sureties Remains Incomplete After 50 Days in Siddique Kappan’s UAPA Case*, The Hindu (Nov. 1, 2022), <https://www.thehindu.com/news/national/other-states/verification-of-bail-sureties-remains-incomplete-after-50-days-in-siddique-kappans-uapa-case/article66082138.ece>.

205 Sparsh Upadhyay, *Lucknow Court Denies Bail to Siddique Kappan in PMLA Case*, Live Law (Oct. 31, 2022), <https://www.livelaw.in/news-updates/lucknow-court-denies-bail-siddique-kappan-pmla-case-212851>.

206 Mekhala Saran, *No Freedom in Sight: Siddique Kappan Got Bail in UAPA Case, PMLA Holds Him Back*, The Quint (Nov. 4, 2022), <https://www.thequint.com/news/law/no-freedom-in-sight-siddique-kappan-got-bail-in-uapa-case-pmla-holds-him-back> (quoting Former Allahabad High Court Chief Justice Govind Mathur).

207 *Case Against Kappan and Others Shifted to NIA Court in Lucknow*, The Indian Express (Dec. 15, 2021), <https://indianexpress.com/article/cities/lucknow/case-against-kappan-and-others-shifted-to-nia-court-in-lucknow-7673430/>.

208 Sparsh Upadhyay, *Hathras ‘Conspiracy’: Siddique Kappan Co-Accused K.A. Rauf Sherif Granted Bail by Allahabad High Court in UAPA Case*, Live Law (July 12, 2023), [https://www.livelaw.in/high-court/allahabad-high-court/allahabad-high-court-hathras-conspiracy-siddique-kappan-co-accused-ka-rauf-sherif-granted-bail-uapa-case-232593?infinite\\_scroll=1](https://www.livelaw.in/high-court/allahabad-high-court/allahabad-high-court-hathras-conspiracy-siddique-kappan-co-accused-ka-rauf-sherif-granted-bail-uapa-case-232593?infinite_scroll=1); Criminal Appeal Number 43 of 2023, 2023: AHC-LKO: 44016-DB (July 7, 2023), <https://sabrangindia.in/wp-content/uploads/2023/07/ka-rauf-sherif-vs-state-of-up.pdf>.

Kappan's hopes of reuniting with his family were not realized even after the Supreme Court granted him bail in the UAPA case, as he was subsequently denied bail by the PMLA court in UP.

The accused remained behind bars until February 2023 when bail was granted by the High Court.<sup>209</sup> In a significant observation, the High Court noted: "Except for allegations that Rs 5,000 was transferred in the bank account of co-accused, Atikur Rahman, there is no other transaction, either in the bank account of the accused-applicant or in the bank account of co-accused."<sup>210</sup>

## B. Case Study II: The Bhima Koregaon Case

On December 31, 2017, members of Dalit groups gathered in Pune for an event named the Elgar Parishad ("loud assembly") to commemorate the 200<sup>th</sup> anniversary of the battle of Bhima Koregaon, fought on January 1, 1818 primarily between Dalit soldiers of the British East India Company and soldiers of the Maratha kingdom. The assembly was organized by retired Supreme Court judges PB Sawant and Kolse Patil and ended with a pledge by attendees to uphold the Indian Constitution and democracy.<sup>211</sup> However, the commemoration of the bicentenary on the following day, January 1, 2018, at Koregaon Bhima was marked by counter-protestors invoking violence and clashes erupting between caste groups.<sup>212</sup>

Following the violence, two successive and separate First Information Reports (FIRs) were lodged: the first on January 4, 2018 by Pune (Rural) Police against the activists and leaders of Hindu Janajagram Samiti, including Milind Ekbote and Sambahji Bhide for the attacks on Dalits who had congregated for the

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209 Sparsh Upadhyay, *Siddique Kappan Walks Out of Jail on Bail After Over Two Years of Incarceration*, Live Law (Feb. 2, 2023), <https://www.livelaw.in/top-stories/siddique-kappan-walks-out-jail-after-over-two-years-jail-220486>.

210 Sidhique Kappan v. Directorate of Enforcement, Crim Misc Bail Application Number 13642 of 2020 (Dec. 23, 2022), [https://images.assettype.com/barandbench/2022-12/a879c1f2-8567-429d-baa5-1eb7da0d0410/Sidhique\\_Kappan\\_v\\_ED.pdf](https://images.assettype.com/barandbench/2022-12/a879c1f2-8567-429d-baa5-1eb7da0d0410/Sidhique_Kappan_v_ED.pdf). See also Anand Mohan J, *Siddique Kappan's Trial and Tribulations: From Allegations to Court Observations*, The Indian Express (Feb. 1, 2023), <https://indianexpress.com/article/cities/delhi/siddique-kappan-trial-tribulations-from-allegations-to-court-observations-8418230/>.

211 *Videos of Bhima-Koregaon Speeches Offer a Rebuttal to 'Maoist' Claim*, NDTV (Sep. 5, 2018), <https://www.ndtv.com/india-news/videos-of-bhima-koregaon-speeches-at-elgar-parishad-offer-a-rebuttal-to-maoist-claim-1911415>.

212 Huizhong Wu, *Caste Violence Erupts in India Over 200-year-old Faultline*, CNN (Jan. 4, 2018) <https://edition.cnn.com/2018/01/04/asia/india-dalit-protests-explainer-intl/index.html>.

commemoration;<sup>213</sup> the second FIR was registered on January 8, 2018, against those associated with Elgar Parishad for commission of offences punishable under Sections 153A, 505(1)(b) and 117 read with Section 34 of IPC.<sup>214</sup>

In the first FIR, Ekbote was arrested only briefly in March 2018, after the Supreme Court cancelled the protection granted to him, but was immediately granted bail by a sessions court.<sup>215</sup> Bhide was never arrested, and after the then Chief Minister of Maharashtra defended him on the floor of the Assembly, claiming that no evidence had been found against the radical Hindutva leader,<sup>216</sup> his name was dropped ultimately from the chargesheet.<sup>217</sup>

On the other hand, in June and August 2018, several individuals were arrested from Delhi and Maharashtra in connection with the second FIR, under provisions of the UAPA and the IPC.<sup>218</sup> The police claimed in the trial court that the detainees were left-wing extremists (“urban Naxals”).<sup>219</sup> Many alleged that while the first FIR dealt with incitement committed by an individual who shared political beliefs with the ruling government, the second FIR addressed individuals including poets, academics, and others who stood in opposition to the current ruling administration. The treatment of the two FIR’s was starkly different: the accused in the first FIR was granted immediate bail, while those in the second FIR were not granted bail for several years (many of whom remain in jail five years after their arrest). This example has been used by critics to highlight the prejudicial use of the UAPA to silence and repress

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213 They were booked under the Indian Penal Code, 1860 for attempt to murder (Sec 307), rioting (Sec 147), arson (Sec 148), outraging religious feelings (Sec 295A), unlawful assembly (Sec 149), as well as sections of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, which deals with atrocities against Dalits. FIR Number 9/2020.

214 Shruti Ganapatye, *Anita Sawle’s FIR Against Ekbote, Bhide in Bhima Koregaon Violence Long Forgotten*, Mumbai Mirror ( Sep. 9, 2020), <https://mumbaimirror.indiatimes.com/mumbai/crime/anita-sawles-fir-long-forgotten/articleshow/78007546.cms>.

215 Shoumojit Banerjee, *Bhima-Koregaon Violence: Sessions Court Grants Bail to Ekbote*, The Hindu (Apr. 4, 2018), <https://www.thehindu.com/news/national/bhima-koregaon-violence-sessions-court-grants-bail-to-ekbote/article23436224.ece>.

216 *Fadnavis Gives Clean Chit to Sambhaji Bhide*, The Hindu (Mar. 28, 2018), <https://www.thehindu.com/news/cities/mumbai/fadnavis-gives-clean-chit-to-sambhaji-bhide/article23367777.ece>.

217 Chandan Haygunde, *Hindutva Leader Sambhaji Bhide Dropped from Koregaon Bhima Violence Case: Police to SHRC*, The Indian Express (May 5, 2022), <https://indianexpress.com/article/cities/pune/sambhaji-bhide-koregaon-bhima-violence-case-police-7901767/>.

218 *Koregaon-Bhima Riots: Several Dalit Activists, Maoist Sympathisers Held*, Deccan Herald (Oct. 13, 2013), <https://www.deccanherald.com/india/koregaon-bhima-riots-several-dalit-activists-maoist-sympathisers-held-673596.html>.

219 Aarefa Johari et al., *From Pune to Paris: How a Police Investigation Turned a Dalit Meeting into a Maoist Plot*, Scroll .In (Sep. 2, 2018), <https://scroll.in/article/892850/from-pune-to-paris-how-a-police-investigation-turned-a-dalit-meeting-into-a-maoist-plot>.

political opposition, rather than effectively prosecuting terrorism.<sup>220</sup> This poses questions not only on the issue of fair trial, but also about the effectiveness of India's counter-terrorism strategies.

The police held two press conferences where they claimed to possess sufficient evidence against the activists and selectively read out unauthenticated letters ostensibly written by them which seemingly implicated them in a conspiracy to assassinate the Prime Minister.<sup>221</sup> When a new state government was installed in Maharashtra in November 2019, it promised to review the case thoroughly, with the Deputy Chief Minister even casting doubts about the quality of evidence.<sup>222</sup> However, within two months, the case was transferred to the National Investigative Agency by the Central Government despite condemnation and protests by the state government that their consent had not been taken for the transfer.<sup>223</sup>

By 2021, the number of accused in the case had increased to sixteen.<sup>224</sup> Most of the accused academics, writers, artists, and activists, were neither named in the FIR pertaining to the Bhima Koregaon violence on January 1, 2018, nor were they present for the Elgar Parishad in Pune on January 31, 2017. They

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220 Shruti Ganapatye, *Bhima-Koregaon Violence: Why No UAPA Charges Against Hindutva Leaders? Ask Activists*, Mumbai Mirror (Aug. 31, 2018), [https://mumbaimirror.indiatimes.com/mumbai/crime/why-no-uapa-charges-against-hindutva-leaders/articleshow/65615421.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://mumbaimirror.indiatimes.com/mumbai/crime/why-no-uapa-charges-against-hindutva-leaders/articleshow/65615421.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

221 *5 Activists Arrest: SC Furious with Maharashtra Cop's Comment*, The Times of India (Sep. 7, 2018), <https://timesofindia.indiatimes.com/india/bhima-koregaon-case-sc-irked-over-maharashtra-police-officer-extends-house-arrest-of-activists/articleshow/65709038.cms>. See also Romila Thapar v. Union of India, SC 32319 / 2018, Case No. W.P.(Crl.) No.-000260 / 2018 (Sep. 28, 2018) (India), [https://www.sci.gov.in/supremecourt/2018/32319/32319\\_2018\\_Judgement\\_28-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2018/32319/32319_2018_Judgement_28-Sep-2018.pdf) (dissenting opinion of J. Chandrachud).

222 *Bhima Koregaon: Deputy CM Raises Doubts in Case Against 10 Activists, Seeks Proof in 15 Days*, Scroll .in (Jan. 24, 2020), <https://scroll.in/latest/950929/bhima-koregaon-deputy-cm-raises-doubts-in-case-against-10-activists-seeks-proof-in-15-days>.

223 *Bhima Koregaon Case Handed Over to NIA, Centre Didn't Take Our Consent, Alleges Maharashtra Minister*, Scroll .in (Jan. 24, 2020), <https://scroll.in/latest/951029/bhima-koregaon-case-handed-over-to-nia-centre-didnt-take-our-consent-alleges-maharashtra-minister>.

224 These included academics Anand Teltumbde, Shoma Sen and Hany Babu; Adivasi rights activists Stan Swamy and Mahesh Raut; poets Varavara Rao and Sudhir Dhawale; lawyers Surendra Gadling and Sudha Bharadwaj; writer-researcher Gautam Navlakha, activists Rona Wilson, Arun Ferreira and Vernon Gonsalves, and members of the cultural group, Kabir Kala Manch: Sagar Gorkhe, Ramesh Ghaichor and Jyoti Jagtap. Sayantani Biswas, *Bhima Koregaon Case: 16 Arrested, 1 Died in Custody, Some for Bail – A 2023 Update*, Live Mint (July 28, 2023), <https://www.livemint.com/news/india/bhima-koregaon-elgaar-parishad-case-16-arrested-1-died-in-custody-some-got-bail-a-2023-update-11690537456618.html#:~:text=A%20total%20of%2016%20people,%2C%20Anand%20Teltumbde%2C%20Gautam%20Navlakha%2C>.

were accused of being active members of the banned terrorist organization CPI (Maoist) and its frontal organizations, and thereby of receiving or collecting funds for the terrorist organization, thus attracting the provisions of Sections 17 and 40 of the UAPA, among other charges.<sup>225</sup> These funds, the chargesheet claims, have been used to procure “sophisticated weapons and ammunitions”.<sup>226</sup> For the bulk of the evidence in support of its allegation of terror funding, the prosecution has adduced documents and unsigned letters recovered ostensibly from the electronic devices of the accused, especially those seized from the residences of Surendra Gadling, Rona Wilson, and Sudhir Dhawale.

Independent forensic investigators have raised troubling questions over the authenticity of the evidence that has been produced so far. Amnesty International’s Security Labs found that Rona Wilson’s phone had been infiltrated using Pegasus spyware.<sup>227</sup> American digital forensics company Arsenal Consulting, in a series of reports, confirmed that the computers of Rona Wilson and Surendra Gadling had been hacked by using significant malware infrastructure,<sup>228</sup> and subsequently also reported that the computer of Jesuit priest Stan Swamy, who died while in judicial custody, was also at the center of an identical attack.<sup>229</sup> Even more damningly, an investigation by Sentinel One showed a direct link between the hacking of the three computers and the Pune Police. Researchers at Sentinel One have called this discovery “beyond ethically compromised... beyond callous.”<sup>230</sup> Not only does this demonstrate the aggressiveness of those attempting to discredit the Bhima Koregaon accused, it also shows how many resources are being

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225 Mridula Chari, *Not a Modi Assassination Plot: Arrested Activists Are Being Investigated in the Bhima Koregaon Case*, Scroll .IN (Aug. 28, 2018), <https://scroll.in/article/892229/bhima-koregaon-violence-arrested-activists-are-being-investigated-for-terrorism-under-uapa>.

226 Draft Charge in National Investigation Agency v. Sudhir Dhawale & Others, NIA Spl Case No. 414/2020, NIA Case No. RC-01/2020/NIA/MUM.

227 Niha Masih, *Phone of Indian Activist Jailed on Terrorism Charges Was Infected with Pegasus Spyware, New Analysis Finds*, The Wash. Post (Dec. 17, 2021), <https://www.washingtonpost.com/world/2021/12/17/india-pegasus-bhima-koregaon/>.

228 Bismee Taskin, *Like Rona Wilson, ‘Evidence Planted’ in Bhima Koregaon Accused Surendra Gadling’s Laptop: US Firm*, The Print (July 6, 2021), <https://theprint.in/india/like-rona-wilson-evidence-planted-in-bhima-koregaon-accused-surendra-gadlings-laptop-us-firm/691034/>.

229 Niha Masih, *Hackers Planted Evidence on Computer of Jailed Indian Priest, Report Says*, The Wash. Post (Dec. 13, 2022), <https://www.washingtonpost.com/world/2022/12/13/stan-swamy-hacked-bhima-koregaon/>; See also Anushka Jain, *The Arsenal Reports: The Rise of Targeted Surveillance in India*, Internet Freedom Foundation (Aug. 12, 2021), <https://internetfreedom.in/the-arsenal-reports-bhima-koregaon-arrests/>.

230 Andy Greenberg, *Police Linked to Hacking Campaign to Frame Indian Activists*, Wired (June 16, 2022), <https://www.wired.com/story/modified-elephant-planted-evidence-hacking-police/>.

expended by the counter-terrorism governmental prosecutors in a case where human rights defenders have ostensibly been digitally framed with false charges. The diversion of resources and focus from the government on cases like this implicitly limits their ability to pursue FATF objectives which are to prohibit actual terrorism and its financing.

Given that the case is built nearly entirely on the letters and documents seized from the devices of Wilson and Gadling, this further compromises the case of the NIA and lends credence to the defense's charge that there was a conspiracy to arrest the accused through fabricated evidence. While some accused have moved to quash the case against them following the revelations,<sup>231</sup> the Pune Police and NIA insist that the Arsenal reports cannot be relied upon.<sup>232</sup>

Disregarding the gravity of the fabrication that these forensic reports raised, the Enforcement Directorate initiated money laundering proceedings under the PMLA against some of the accused by filing an ECIR in March 2021.<sup>233</sup> In July 2022, the ED moved the NIA court seeking to record Surendra Gadling's statement under Section 50 (2) of the PMLA, alleging that Gadling was engaged in raising funds for terror activities and furthering the ideology of the CPI (Maoist). Towards this, the ED claimed in its application that Gadling had used his and his family members' bank accounts, as well as received funds into a "bank account under a fictitious name."<sup>234</sup> Gadling had challenged the basis of ED's investigation, contending that the chargesheet did not show any proceeds of crime, nor as much as whispered

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231 Rebecca Samervel, *Electronic Record Dubious: Elgar Parishad Case Accused Seeking Discharge*, The Times of India (Jan. 5, 2023), <https://timesofindia.indiatimes.com/city/mumbai/electronic-record-dubious-elgar-parishad-case-accused-seeking-discharge/articleshow/96748541.cms>. The bail hearing is ongoing before a division bench of the Supreme Court. See Sarah Thanawala, *Bhima Koregaon: Supreme Court Division Bench Led by Justice Aniruddha Bose to Hear Bail Pleas of Vernon Gonsalves and Arun Ferreira*, The Leaflet (Jan. 16, 2023), <https://theleaflet.in/bhima-koregaon-supreme-court-division-bench-led-by-justice-aniruddha-bose-to-hear-bail-pleas-of-vernon-gonsalves-and-arun-ferreira/>.

232 *Bhima-Koregaon Violence Case: Rona Wilson Cannot Rely Upon Report by Arsenal Consultancy, Says NIA*, The Hindu (May 1, 2021), <https://www.thehindu.com/news/cities/mumbai/bhima-koregaon-violence-case-rona-wilson-cannot-rely-upon-report-by-arsenal-consultancy-says-nia/article34453716.ece>.

233 Sukanya Shantha, *Now, ED Wants to Probe Elgar Parishad Case, Accuses Surendra Gadling of 'Money Laundering'*, The Wire (July 29, 2022), <https://thewire.in/government/now-ed-wants-to-probe-elgar-parishad-case-accuses-surendra-gadling-of-money-laundering>.

234 Sarah Thanawala, *Bhima Koregaon: ED to Interrogate Surendra Gadling on Allegations of Money Laundering*, The Leaflet (Aug. 11, 2022), <https://theleaflet.in/bhima-koregaon-ed-to-interrogate-surendra-gadling-on-allegations-of-money-laundering/>.

about a bank account under a fictitious name. Yet, the ED “stated on oath that I have received the money in a bank account under a fictitious name”.<sup>235</sup> Nonetheless, the NIA court allowed the ED to record Gadling’s statement.<sup>236</sup>

Meanwhile, the accused still awaits the start of the trial, even in the UAPA case. Some individuals from the sixteen have been granted bail in the interim. In the past three years, lawyer Sudha Bharadwaj was granted bail, and poet Varavara Rao was released on medical grounds in August 2022.<sup>237</sup> Most recently, the Supreme Court ordered the bail of Vernon Gonsalves and Arun Ferreira,<sup>238</sup> holding that “there has been no credible evidence against the appellants of commission of any terrorist act or enter into conspiracy to do so,” and that “we do not think at this stage, in absence of better evidence, the account statement is credible enough to justify invoking the bail-restricting clause by attracting Section 40” of the UAPA.<sup>239</sup> The Supreme Court’s decision highlights not only the extreme pretrial detention of several individuals for over five years in this case, but also highlights how scant the evidence was in this case involving human rights defenders and activists. This runs afoul of the Interpretive Note to Recommendation 6, which states that terrorist prosecutions “must also respect human rights, respect the rule of law, and recognise the rights of innocent third parties.”<sup>240</sup>

### **C. Case Study III: Terror Funding Charges Invoked Against Anti-CAA Protestors**

In mid-December 2019, the passage of the Citizenship Amendment Act (CAA) triggered protests against what was perceived as the new law’s patently

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235 *Id.*

236 Sharmeen Hakim, *ED to Investigate Bhima Koregaon Accused for Money Laundering, Seeks Permission to Record Surendra Gadling’s Statement*, Live Law (July 30, 2022), <https://www.livelaw.in/news-updates/bhima-koregaon-elgar-parishad-case-record-statement-surendra-gadling-ed-money-laudering-205204>.

237 *Bhima Koregaon: Vernon Gonsalves, Arun Ferreira Granted Bail by Supreme Court*, BBC (July 28, 2023), <https://www.bbc.com/news/world-asia-india-66333896>.

238 *Id.*

239 Ananthakrishnan G, *Bhima Koregaon Case: SC Bail for Gonsalves, Ferreira: Charges Are Serious, Can’t be Only Reason to Deny Relief*, The Indian Express (July 29, 2023), <https://indianexpress.com/article/india/bhima-koregaon-case-vernon-gonsalves-arun-ferreira-bail-plea-supreme-court-8864715/>.

240 FATF Recommendations, *supra* note 2, at 43.

discriminatory character.<sup>241</sup> The centers of the protests were predominantly Muslim educational institutions or universities with a majority Muslim student population, which saw swift and brutal police responses.<sup>242</sup>

This was followed by a peaceful sit-in by women at a neighborhood called Shaheen Bagh in Delhi.<sup>243</sup> Recognized by many in the international community as a non-violent movement, a prominent face of the protest, Bilkis 'Dadi' (grandmother), was recognized by the Time magazine as one of the 100 most influential people in 2020,<sup>244</sup> and was included in the BBC's 100 women list.<sup>245</sup> The protest was replicated in many towns and cities in India and drew hundreds of sympathizers and supporters every day.<sup>246</sup> In the speeches leading up to the assembly elections in Delhi, which were due to be held in February 2020, leaders of the Bharatiya Janta Party (BJP) called for clearing of the protest site and even openly called for violence against the anti-CAA protestors.<sup>247</sup> Many in the national media, particularly TV news channels, amplified the vilification of Muslims and protestors.<sup>248</sup>

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241 *Cops Use Teargas, Batons on AMU Students Protesting Against CAA; Internet Suspended in Aligarh*, Outlook (Dec. 15, 2019), <https://www.outlookindia.com/website/story/india-news-after-jamia-amu-students-protest-against-caa-cops-use-teargas-lathicharge-protesters/344184>; see also Niraja Gopal Jayal, *Faith-based Citizenship: The Dangerous Path India is Choosing*, The India Forum (Oct. 31, 2019), <https://www.theindiaforum.in/article/faith-criterion-citizenship> (discussing the discriminatory nature of the amended Citizenship Amendment Act prior to its passage).

242 See Campaign Against Witch-hunt of Anti-CAA Activists, *The Night of the Broken Glass: Testimonies from Jamia Millia Islamiya* (2020) (copy on record).

243 Anuj Kumar, *Women Playing Prominent Role in Anti-CAA, NRC Protests*, The Hindu (Feb. 9, 2020), <https://www.thehindu.com/news/national/other-states/women-playing-prominent-role-in-anti-cao-nrc-protests/article30777618.ece>.

244 Rana Ayyub, *Bilkis, The 100 Most Influential People of 2020*, Time (Sep. 22, 2020), <https://time.com/collection/100-most-influential-people-2020/5888255/bilkis/>.

245 *BBC 100 Women 2020: Who is on the List this Year?*, BBC (Nov. 23, 2020), <https://www.bbc.com/news/world-55042935>.

246 Elizabeth Puranam, *Why Shaheen Bagh Protests Are an Important Moment in India's History*, Al Jazeera (Feb. 3, 2020), <https://www.aljazeera.com/features/2020/2/3/why-shaheen-bagh-protests-are-an-important-moment-in-indias-history>.

247 *Watch: Union Minister Anurag Thakur Encourages Crowd to Shout 'Shoot the Traitors' at Delhi Rally*, Scroll.in (Jan. 28, 2020), <https://scroll.in/latest/951317/watch-union-minister-anurag-thakur-encourages-crowd-to-shout-shoot-the-traitors-at-delhi-rally>.

248 See Campaign Against Hate Speech, *Wages of Hate: Journalism in Dark Times* (September 2020), <https://hatespeechbeda.wordpress.com/2020/09/08/report-wages-of-hate-journalism-in-dark-times/> (analyzing media reportage of anti-CAA protests); see also Padmakshi Sharma, *Mainstream News Channels Ran Programs with Anti-Muslim Prejudice While Reporting CAA Protests: Citizen's Committee Report*, Live Law (Oct. 10, 2022), <https://www.livelaw.in/news-updates/mainstream-news-channels-ran-programs-with-anti-muslim-prejudice-while-reporting-cao-protests-citizens-committee-report-211207>.



This amplifying of conflict culminated in full-scale violence in Northeast Delhi in late February 2020, at a site where anti-CAA women protesters had blocked the road outside a metro station.<sup>249</sup> Hate speeches by leaders affiliated with the BJP, as well as their pressures on police to clear the protest site,<sup>250</sup> were followed by stone pelting, arson and killings, resulting in 53 deaths, of which 40 were Muslims and 13 Hindus.<sup>251</sup>

A total of 758 First Information Reports (FIRs) pertaining to the violence were registered by the Delhi Police.<sup>252</sup> On March 6, 2020, the Delhi Police Special Cell registered a separate First Information Report, FIR No. 59/2020 (FIR 59), claiming that there was a pre-planned conspiracy to instigate the Delhi violence. Initially, it only mentioned sections under the IPC,<sup>253</sup> but a month later the investigative agency added provisions of the anti-terror law—including Sections 13, 16, 17, and 18 of the UAPA—to the FIR 59.<sup>254</sup>

Several leaders and activists associated with the protest, as well as students who were part of WhatsApp groups (such as “CAB Tea”, “United against Hate,” “Delhi Protest Support Group,” and “Muslims Students of JNU”) that

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249 *Anti-CAA Protesters, Mostly Women, Block Major Road in Jaffrabad; Metro Gates Shut*, Outlook (Feb. 23, 2020), <https://www.outlookindia.com/website/story/india-news-anti-caa-protesters-mostly-women-block-major-road-in-jaffrabad-metro-gates-shut/347738>.

250 *Kapil Mishra Sets 3-day Deadline for Cops to Remove Jafrabad Blockade*, The Times of India (Feb. 24, 2020), <https://timesofindia.indiatimes.com/city/delhi/kapil-mishra-sets-3-day-deadline-for-cops/articleshow/74274754.cms>.

251 *Delhi Violence: Death Toll Rises to 53*, The Hindu (Mar. 5, 2020), <https://www.thehindu.com/news/national/delhi-violence-death-toll-rises-to-53/article30992113.ece>. See also Joanna Slater and Niha Masih, *In Delhi's Worst Violence in Decades, a Man Watched His Brother Burn*, The Wash. Post (Mar. 6, 2020), [https://www.washingtonpost.com/world/asia\\_pacific/in-delhis-worst-violence-in-decades-a-man-watched-his-brother-burn/2020/03/05/892dbb12-5e45-11ea-ac50-18701e14e06d\\_story.html](https://www.washingtonpost.com/world/asia_pacific/in-delhis-worst-violence-in-decades-a-man-watched-his-brother-burn/2020/03/05/892dbb12-5e45-11ea-ac50-18701e14e06d_story.html).

252 *Northeast Delhi Violence: Delhi Police Files Fresh Status Report*, The Times of India (Jan. 28, 2022), <https://timesofindia.indiatimes.com/city/delhi/northeast-delhi-violence-delhi-police-files-fresh-status-report/articleshow/89180492.cms>.

253 Sections 120B (punishment for criminal conspiracy), 147 (punishment for rioting), 148 (rioting, armed with deadly weapon) and 149 (every member of unlawful assembly guilty of offence committed in prosecution of common object) were added. IPC, pp. 21-22 of the first chargesheet filed in FIR Number 59.

254 A letter dated April 21, 2020 from the Special Cell informing the Central Government of the addition of the UAPA to FIR 59 also merely repeats the recitals in the FIR. See Constitutional Conduct Group, *Uncertain Justice: A Citizens Committee Report on the Northeast Delhi Violence 2020*, at 126 (Oct. 2022), <https://constitutionalconduct.files.wordpress.com/2022/10/uncertain-justice-citizens-committee-report-on-north-east-delhi-violence-2020.pdf> [hereinafter *Uncertain Justice*].

coordinated or supported these protests were arraigned in FIR 59 over the next few months, eventually taking the total to 21 persons.<sup>255</sup>

Very broadly, the main contention of the prosecution is that the accused persons conspired to execute riots as a means of forcing the government to repeal the CAA and to embarrass the Indian government internationally during the visit of the US President to India. In a vast majority of the claims made by the prosecution—in the remand applications, to chargesheets, to arguments in bail hearings—the protests themselves have been made out to be criminal acts, and thereby any financial and logistical arrangements made for these demonstrations and protest sites have been brought under the shade of terror funds. As such, the fair trial violations discussed below are not only violations in and of themselves, but also facilitate the deprivation of other important rights including the right to association and free speech—all of which stand in contradiction to FATF’s interpretation of Recommendation 6 relating to human rights and counter-terrorism prosecutions.<sup>256</sup>

### **i. Example Case: Khalid Saifi**

Khalid Saifi is the founder of the Muslim activist group United against Hate.<sup>257</sup> Between February and June 2020, he was implicated in three different cases, including the FIR 59.<sup>258</sup>

While similar allegations—of conspiracy and funding the protests—are made in the first FIR registered in February and the FIR 59, the arbitrariness inherent in the UAPA is such that while the first FIR consists only of IPC sections, the FIR 59 invokes the UAPA, in particular Section 17, thus rendering

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255 Mekhala Saran, *2 Years of Delhi Riots: What’s the Status of UAPA-Accused Named in FIR 59?*, The Quint (Feb. 23, 2022), <https://www.thequint.com/news/law/2-years-of-delhi-riots-what-is-the-status-of-the-uapa-accused-named-in-fir-59>.

256 FATF Recommendations, *supra* note 2, at 43.

257 Aditya Menon, *Who ‘United Against Hate’ Are and Why Amit Shah is Targeting Them*, The Quint (Mar. 13, 2020), <https://www.thequint.com/news/politics/united-against-hate-amit-shah-khalif-saifi-hate-crimes-delhi-violence>.

258 Saifi was first arrested in FIR Number 44/2020 (P.S. Jagatpuri) on 26 February 2020 under a range of sections of IPC (Sections 147/148/149/186/353/332/307/109/34 IPC & 25/27 Arms Act) all of which are bailable barring Section 307 IPC & 25/27 Arms Act. FIR Number 44/2020 (copy on record). He was subsequently arrested in the FIR Number 59 on 21<sup>st</sup> March 2020 for conspiring, planning, funding and executing the Delhi violence. FIR Number 59/2020 (copy on record). Three months later on 6 June 2020, he was arrested in yet another FIR Number 101/2020 (P.S. Khajuri Khas) for conspiring and inciting mobs to riot on 24<sup>th</sup> February. The sections of IPC invoked were 109, 114, 147, 148, 149, 153A, 186, 212, 353, 395, 427, 435, 436, 452, 454, 505, 34 and 120B: Sections 3 and 4, the Prevention of Damage to Public Property Act, 1984; Sections 25 and 27, the Arms Act, 1959. FIR Number 101/2020 (copy on record).

bail very difficult. Indeed, while Saifi secured bail in the IPC cases within months,<sup>259</sup> bail has been denied in the UAPA case, despite similar narration of events and even identical witness statements.

For example, the statement of a protected witness identified as (PW) SATURN in FIR 59<sup>260</sup> is also the gravamen of evidence against Saifi in FIR 101. The Sessions Court, in its bail order, observed how the witness belatedly “blew the trumpet of ‘criminal conspiracy’” and “chargesheeting the applicant in this case on the basis of such an insignificant material is total non-application of mind by the police which goes to the *extent of vindictiveness*.”<sup>261</sup> This statement, disparaged by the sessions court to grant Saifi bail in the IPC case, is not however discarded in the UAPA case.<sup>262</sup>

The prosecution has attempted to interpret the booking of tickets for the defendant and others to attend anti-CAA protests, the use of his personal bank account to procure food items for protestors, and the payment for booking a venue for a press conference as terrorism. This essentially translates to the government using counter-terrorism tools to punish action by its political opposition, which not only violates international legal standards, but also contravenes FATF’s purpose to ensure the effective prosecution of individuals actually engaged in terrorist acts or the planning thereof.

A report authored and released by a citizen’s committee (comprising former judges of the Supreme Court and High Court) in 2022 concluded that:

the substratum of the prosecution case, i.e., the allegation of an overarching premeditated conspiracy, is based on grossly belated statements which are inherently unreliable in law. Other features of the investigation such as identical disclosure statements, inconsistencies between the investigations in FIR 59 and the IPC FIRs, and the non-examination of crucial witnesses only strengthen the suspicion of fabrication. Since material aspects of the investigation in FIR 59 suggest falsity, the integrity of the entire prosecution case appears to be cloaked in doubt.<sup>263</sup>

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259 State v. Khalid Saifi, Bail Application No. 906-2020, (Sep. 11, 2020) (copy on record); State v. Khalid Saifi, Bail Application No. 1460/2020, (Nov. 4, 2020) (copy on record).

260 See Supplementary Chargesheet 1 in FIR Number 59/2020, at 160 (copy on record).

261 State v. Khalid Saifi, Bail Application No. 1460/2020, *supra* note 259 (emphasis added).

262 State vs. Tahir Hussain & Ors, I.A. number 90-2021 [Khalid Saifi] (Apr. 8, 2022) (copy on record).

263 Uncertain Justice, *supra* note 255, at 134.

#### D. Case Study IV: Waheedur Rehman Parra

Waheedur Rehman Parra, a former journalist and social activist, is the president of the youth wing of the Peoples' Democratic Party (PDP) in Jammu and Kashmir. The PDP ran a government in the state in alliance with Bharatiya Janta Party (BJP) between March 1, 2015 and June 19, 2018, during which time Parra was the secretary of Jammu and Kashmir Sports Council. His case demonstrates not only the fair trial violations of a youth organizer, but also demonstrates the abuse of the counter-terror system by politicized prosecutors; the court that finally allowed bail for Parra stated that the evidence being used by the prosecution against the defendant was "too sketchy to be believed prima facie true..."<sup>264</sup>

On August 5, 2019, India declared removal of special status for Kashmir under Article 370 and bifurcated the state into two union territories.<sup>265</sup> This revocation of special status was paired with the government detaining political leaders<sup>266</sup> and imposing severe restrictions of movement and communications,<sup>267</sup> including a blanket ban on the Internet for over 200 days.<sup>268</sup> Following the revocation of the special status of Jammu and Kashmir, Parra, like other political leaders in the valley, was placed under house arrest. In July 2020, Parra had engaged with members of the UN Security Council

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264 PTI, *HC Bails Out Waheed Parra, Says Evidence Sketchy*, Kashmir Reader (May 26, 2022), <https://kashmirreader.com/2022/05/26/hc-bails-out-waheed-parra-says-evidence-sketchy/>.

265 Jeffrey Gettleman et al., *India Revokes Kashmir's Special Status, Raising Fears of Unrest*, The New York Times (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/world/asia/india-pakistan-kashmir-jammu.html>.

266 Fayaz Wani, *Article 370 Fallout: Once a Centre of Business, Now SKICC Turned into Jail*, The New Indian Express (Aug. 19, 2019), <https://www.newindianexpress.com/nation/2019/aug/19/article-370-fallout-once-a-centre-of-business-now-skicc-turned-into-jail-2020911.html>.

267 *SC Refuses to Pass Order on Restrictions Imposed in J&K After Scrapping of Article 370, Says Govt Should be Given Time to Restore Normalcy*, Firstpost (Aug. 13, 2019), <https://www.firstpost.com/india/sc-refuses-to-pass-order-on-restrictions-imposed-in-jk-after-scrapping-of-article-370-says-govt-should-be-given-time-to-restore-normalcy-7157131.html>.

268 *145 Days of Internet Shutdown in Kashmir, No Word on Service Restoration*, The Economic Times (Dec. 27, 2019), <https://m.economictimes.com/news/politics-and-nation/145-days-of-internet-shutdown-in-kashmir-no-word-on-service-restoration/articleshow/72996839.cms>.

in a closed virtual meeting highlighting the Indian Government's actions in Jammu and Kashmir, including the clampdown on civil liberties.<sup>269</sup>

In November 2020, Parra was arrested based on a case from January where he was accused of funding and facilitating Hizbul Mujaheddin (HM).<sup>270</sup> The NIA relied on a disclosure statement made by another accused in which it was claimed that Parra had given them Rs 10 Lakhs (12,770 USD) for purchasing five Ak-47 Rifles for HM. Telephone calls between Parra and other accused were proof, according to the prosecution, of the existence of a nexus between “mainstream politicians”<sup>271</sup> and terrorists, wherein the former seek “help from commanders of terrorist organi[z]ations for securing their cooperation during elections and for assisting their workers in the management of the electoral process”.<sup>272</sup>

However, the special court designated for trying NIA offenses granted bail to Parra on January 9, 2021. The court cast serious doubt on the legality of arresting Parra on the basis of evidence that was outdated. It is important to delineate the logic underlying the grant of bail in this case by the court. Firstly, the court observed that the disclosure statement was in the nature of a confessional statement made to the police, and not recorded before a magistrate, and as such is inadmissible in law. Moreover, this statement had been recorded in February 2020. The agency had filed two chargesheets between then and the date of Parra's arrest,<sup>273</sup> and in none of these chargesheets was there even a “whisper about the involvement” of Parra.<sup>274</sup>

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269 U.N. OHCHR, Letter dated March 31, 2021 from Mandates of the Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment et al. to the Government of India, U.N. Doc. UA IND 4/2021 (2021), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26181> [hereinafter U.N. OHCHR Letter dated March 31, 2021].

270 FIR Number 05/2020, P.S. Qazigund. The sections invoked were 18/19/20/38/39 of UA(P) Act, sections 7/25 of Arms Act, and section 3/4 of the Explosive Substances Act. NIA re-registered the case as RC-01/2020/NIA/JMU on 17 January 2020. The prosecution case as laid out in Bail order dated 9 January 2021 decided by 3<sup>rd</sup> Additional Sessions Judge Jammu in Waheed-ur-Rehman v. NIA, File No. 789/Bail (copy on record).

271 The label ‘Mainstream politicians’ is used to refer to those political groups and leaders who have not boycotted the electoral process and in fact participate in elections held in J and K.

272 Waheed-ur-Rehman v. NIA, File No. 789/Bail (copy on record).

273 First chargesheet filed on 6 July 2020, and then a supplementary chargesheet filed on 27 October 2020. Cited in bail order, op.cit. The sections in these chargesheets now included terror funding: sections 120-B, 121, 121-A and 122 IPC, sections 17/18/18(b)/19/20/23/38/39 and 40 of UAPA, sections 25(1)(a) and 35 of Indian Arms Act and sections 4 & 5 of ES Act.

274 Waheed-ur-Rehman v. NIA, File No. 789/Bail (copy on record).

The court also found that prima facie, no case of terror funding was made out against Parra as the decision to utilize Rs. 10 Lakhs for the purchase AK-47 rifles was made by Naveed Mushtaq and not Parra, hence the accused could not be linked with the commission of supporting a terrorist organization

### **i. Implicated in a Second Case**

Parra was re-arrested, this time by the Counter Intelligence in Kashmir (CIK)<sup>275</sup> on identical charges even before he could walk out of the jail following the grant of his bail.<sup>276</sup> After the special CIK court rejected Parra's bail application twice,<sup>277</sup> he moved the High Court of Jammu and Kashmir, which pronounced its order on May 25, 2022, granting him bail, paving the way for his release after one and a half years of incarceration.<sup>278</sup>

### **ii. Court Observations on Terror Funding Charges**

The court observed that the charges made out under Section 17 of the UAPA originate in the allegations that Parra attempted to arrange five AK 47, but even the prosecution admitted that the plan "did not materialize and was subsequently abandoned."<sup>279</sup> The only evidence to support this allegation is the disclosure statement recorded in the aforementioned NIA case, which had already been discarded by the Jammu NIA court. In granting bail, the court also relied on the Supreme Court judgement of *Sudesh Kedia v. Union of India*,<sup>280</sup> where it had held that the mere fact of the accused being seen in the company of a member of a terrorist organization without doing anything more was not enough to attract the applicability of the UAPA.

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275 JK Police Arrest PDP Youth Wing President Waheed Para, Hindustan Times (Jan. 11, 2021), <https://www.hindustantimes.com/india-news/jk-police-arrest-pdp-youth-wing-president-waheed-para-101610370244082.html>.

276 In connection with FIR no. 31/2020, dated 22 December 2020. Waheed-Ur-Rehman Parra v. Union Territory of J&K, CrI A(D) Number 15/ 2021 and CrLM Number 1064 2021, (May 25, 2022), [https://theleaflet.in/wp-content/uploads/2022/05/display\\_pdf-2.pdf](https://theleaflet.in/wp-content/uploads/2022/05/display_pdf-2.pdf)

277 Safina Nabi, *Arrested, Denied Bail and Allegedly Tortured: The Story of a Kashmiri Politician Who Had No Problem Being Indian*, Article- 14 (Aug. 5, 2021), <https://article-14.com/post/arrested-denied-bail-and-allegedly-tortured-the-story-of-a-kashmiri-politician-who-had-no-problem-being-indian--610b52ba2c1c2>.

278 PTI, *JK High Court Grants Bail to PDP's Waheed Parra, Says Evidence Sketchy*, The Print (May 25, 2022), <https://theprint.in/india/jk-high-court-grants-bail-to-pdps-waheed-parra-says-evidence-sketchy/970593/>.

279 Waheed-Ur-Rehman Parra v. Union Territory of J&K, CrI A(D) Number 15/ 2021 and CrLM Number 1064 2021.

280 *Sudesh Kedia v. Union of India*, (2021) 4 SCC 704.

The court highlighted the speculative nature of the charges levelled against Parra, and observed:

*Prima facie*, we could not find any allegation in the final report which shows the association of the appellant with any terrorist organization, that too, with an intention to further its activities. Rather, the appellant is shown to be a member of a recognized political party i.e. People's Democratic Party which has remained in power in the erstwhile State of Jammu and Kashmir. There is nothing believable on record to demonstrate that the appellant has supported any terrorist organization with an intention to further activities of such organization.<sup>281</sup>

### iii. Allegations of Torture and Medical Negligence

There were serious allegations that Parra was being kept in “inhuman conditions and tortured”<sup>282</sup> and denied free access to legal counsel in the early days of his arrest.<sup>283</sup> Even as the NIA rebutted all allegations, arguing that Parra had been taken for medical examination every second day,<sup>284</sup> Parra was found unconscious in jail and had to be taken to the hospital.<sup>285</sup> The court ordered the police to get Parra “medically examined by a special and competent doctor.”<sup>286</sup>

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281 Waheed-Ur-Rehman Parra v. Union Territory of J&K, CrI A(D) Number 15/ 2021 and CrLM Number 1064 2021.

282 PTI, *Arrested PDP Youth Leader Para Being Kept Under 'Inhuman Conditions and Tortured', Alleges Mehbooba*, News18 (Feb. 3, 2021), <https://www.news18.com/news/politics/arrested-pdp-youth-leader-para-being-kept-under-inhuman-conditions-and-tortured-alleges-mehbooba-3384257.html>.

283 The special Rapporteurs of the UN in an official communication to the government in March 2021 alleged that Parra “was subject to abusive interrogations after his arrest, which lasted from 10 to 12 hours at a time and questioned about his participation at the above-mentioned event where he interacted with UN Security Council members. He was held in a dark underground cell at subzero temperature, was deprived of sleep, kicked, slapped, beaten with rods, stripped naked and hung upside down.” They further claimed that his “ill-treatment was recorded. Mr. Parra was examined by a government doctor three times since his arrest last November and three times by a psychiatrist. He requested medication for insomnia and anxiety.” U.N. OHCHR Letter dated March 31, 2021, *supra* note 270.

284 Muzaffar Raina, *UN Officials Accuse NIA of Torture of PDP Leader Waheed Para*, The Telegraph Online, (June 2, 2022), <https://www.telegraphindia.com/india/un-officials-accuse-nia-of-torture-of-pdp-leader-waheed-para/cid/1817446>.

285 *Waheed Para Falls Unconscious in Jail, Discharged from Hospital*, The Kashmir Walla (Feb. 1, 2022), <https://thekashmirwalla.com/waheed-para-falls-unconscious-in-jail-discharged-from-hospital/>.

286 Bashaarat Masood, *Days After He Fell Unconscious, Court Orders Parra's Medical Tests*, The Indian Express (Feb. 3, 2022), <https://indianexpress.com/article/cities/srinagar/days-after-he-fell-unconscious-court-orders-parras-medical-tests-7753526/>.

#### iv. Arrest as Reprisal?

The booking of Parra in a terror funding case more than eight months after his name was said to surface in a disclosure statement, and then his implication in another case the day after the court noted that prima facie no case was made out against him, lends credence to the charges being “politically motivated” and used to punish Kashmiri politicians opposed to the dissolution of Article 370.<sup>287</sup> The actions of the police do suggest that the arrest of a high profile political leader was part of the exercise to delegitimize political leadership of the valley, by drawing nebulous financial linkages, or “nexus,” between mainstream political parties and underground militant groups.

In an official communication to the government, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism expressed concerns that Parra’s “arrest and detention appear to be linked to his interaction with UN Security Council members, which would amount to acts of reprisals for such cooperation.”<sup>288</sup> According to this communication, Parra had received threats from NIA who warned him against participating in such events.<sup>289</sup>

This not only demonstrates the Indian government’s disregard for constitutional rights to fair trial, but also that the ruling administration is utilizing the counter-terrorism laws as a justification to crackdown on political rivals, lowering the effectiveness of India’s counter-terrorism campaign and calling into question the validity of the increasingly overbroad and vague rules surrounding counter-terrorism and its financing. Furthermore, this case demonstrates that risk-based assessments<sup>290</sup> are not being properly utilized as required by the FATF recommendations.

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287 *Mehbooba Mufti Alleges Torture of Waheed Para, Police Term Charges ‘Unfortunate’*, Greater Kashmir (Feb. 3, 2021), <https://www.greaterkashmir.com/kashmir/waheed-parra-being-tortured-forced-to-admit-allegations-alleges-mehbooba-mufti>.

288 U.N. OHCHR Letter dated March 31, 2021, *supra* note 270, at 5.

289 *Id.* at 2. See also Safina Nabi, *supra* note 278.

290 FATF Recommendations, *supra* note 2, at 58.



## E. Case Study V: Crackdown on Democratic Rights Activists in Telangana

### i. Background

In what was perceived as a crackdown on democratic and civil liberties groups, the police in the southern state of Telangana began a series of arrests in October 2019. Among those arrested were members of students', women, and democratic rights groups. This was dubbed the Gadwal Conspiracy Case.<sup>291</sup>

Around this time, the Hyderabad police commissioner declared that 23 organizations were frontal organizations of the banned Maoist party, and anyone—singling out “pseudo intellectuals” especially—who affiliated with these frontal organizations would be arrested.<sup>292</sup> However, no legal mechanism was utilized in the process as no gazette notification officially proscribing these organizations was issued.

### ii. Filing of Multiple Cases

The senior police officer's declaration coincided with the registration of a series of cases against several activists,<sup>293</sup> and FIRs which had been lying dormant were revived. Similar allegations have been made in all cases, namely, that the accused were supporting the Maoists logistically and raising funds for the banned group. In the course of investigating the Gadwal case, the police raided the house of Madilleti, who served as president of a students' organization (TVV) and claimed to have recovered incriminating materials. This led to the filing of a new case,<sup>294</sup> which was taken over by the Central Crime Station<sup>295</sup>, and subsequently by the NIA.<sup>296</sup> Two more activists, first arrested in the Gadwal and other FIRs registered around this time, were arraigned in this case through late-2019 up to mid-2020. By the time they

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291 Crime Number 191 of 2019, P.S. Gadwal Town (copy on record).

292 Abhinay Deshpande, *Hyderabad Police Warn Frontal Organisations of Maoists to Not Mislead Youth*, The Hindu (Oct. 11, 2019), <https://www.thehindu.com/news/national/telangana/hyderabad-police-warn-frontal-organisations-of-maoists-to-not-mislead-youth/article29654779.ece>.

293 FIR Number 1275/2019, L.B. Nagar P.S.; FIR Number 105/2019, Cherla P.S.; FIR Number 100/2019 Venkatapuram PS (Mulugu district).

294 FIR Number 176/2019 (Oct. 8, 2019) (copy on record).

295 FIR Number 219/2019 (Oct. 11, 2019) (copy on record).

296 RC-04/2019/NIA/HYD (Nov. 27, 2019) (copy on record). The charges were consistent throughout: S. 120 (B), TSPS Act (sections 8(1) and 8 (2)), and sections 18, 18B and 20 of UAPA.

were arrested in the present case, they had already been granted bail in other matters.<sup>297</sup>

### iii. Terror Funding Charges

Though the NIA did not invoke Sections 17 and 40 of the UAPA in its original FIR, the charges were added when the chargesheet was presented.<sup>298</sup> The prosecution argued throughout that the accused “Maddileti has received huge amounts of financial assistance to CPI (Maoist)” [sic].<sup>299</sup> The chargesheet further elaborates this to claim that Maddileti was a close associate of underground Maoist Hari Bhushan<sup>300</sup> who instructed him and other accused to organize protests, dharnas, and meetings. Maddileti is alleged to have sent funds for underground Maoists and alleged to have received Rs 30 Lakhs (approximately 37000 USD) for the CPI (Maoist) from one “Dada.” A similar role is ascribed to Krishna, who is also said to have extorted money from educational institutions to fund protests and meetings.

As stated earlier in Section I, the threshold of bail in UAPA cases has been set so high that courts are veritably required to adjudicate whether the accused are prima facie guilty or not. In this sense, bail orders become important signposts for understanding the nature of material adduced in the chargesheet and the strengths or weakness of the prosecution’s case. In

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297 For example, one of the accused, Nalamassa Krishna, was an accused in all the cases registered during this period, and first arrested in the Gadwal case on 15 October 2019. He secured statutory bail in the Gadwal case on 13<sup>th</sup> April 2020 when the prosecution failed to file chargesheet after completion of 180 days of custody. Order of the Additional District and Sessions Judge cum Special court for cases under UAPA at Mahbubnagar, CrI. M.P. no. 328 of 2020 (copy on record). Furthermore, when he was arrested by the NIA, he had already been enlarged on bail in the remaining three matters. In Cr 7/2016, P.S. Mulugu, granted bail on 30 March 2020. Order of VI Addnl District and Sessions Judge at Siddipet Bail in Mulugu (copy on record). In FIR number 1275 of 2019, L.B. Nagar P.S, granted bail on 22 May 2020. Order of High Court of Telangana (copy on record). In FIR 100/2019 Venkatapuram PS (Mulugu district), bail granted by High Court of Telangana on 5 June 2020 (copy on record.) He was in fact picked up from KHIMS Hospital at Khammam where he was undergoing treatment for his severe back pain.

298 Maddileti Maoist Case, National Investigative Agency, Chargesheet Number 4/2020 Dated August 28, 2020 filed before the IV Additional Metropolitan Sessions Judge cum Special Judge for NIA cases at Nampally (Copy on record).

299 See Petition for Remanding Nalasama Krishna to Judicial Custody (copy on record).

300 Accused number 2, who later succumbed to Covid.

the extant case, bail was sought multiple times by the accused.<sup>301</sup> Repeatedly, the special court which granted bail to all three accused held that from the material placed before it, the allegations against the accused “may not be true.” There were “no reasonable grounds” to believe in the existence of a nexus between the activists and their organizations and the banned group. Furthermore, the prosecution could not demonstrate the involvement of the accused in a single act of terrorism.

Specifically on funding, the statements of those who gave donations to the accused “would only show that they gave donations to various organizations who approaches them to avoid unnecessary nuisance” (sic). The amounts donated are Rs 1000 (12 USD) and Rs 2000 (24 USD), which led the court to reject the claim that this money was being channeled into any banned organization. The investigating agency could not substantiate the charge of Maddileti receiving Rs 30 Lakhs. In the bail orders, the court cogently demonstrated that the state’s argument that the “unlawful activities of the accused” pose a “great threat to the national security” was on weak footing.

#### **iv. Proscribing Political Ideas?**

If one were to review the language of the FIR’s, the statements of the investigating police officers, as well as the chargesheet, the overall impression is that the charges are vague, imprecise, and not grounded in facts. Much of these deficiencies were recognized by the special court when it granted bail to the three defendants, however, some allege that these shortcomings are indicative of a more expansive problem: the government utilizing the counter-terrorism framework to criminalize political opposition or independence. For example, the Sub Inspector in his complaint in the Nallakunta FIR says:

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301 Nallamasu Krishna vs. The State of Telangana, CrLMP Number 526 of 2020, dated July 21, 2020, copy on record. For example, Krishna moved his first bail application soon after his arrest, but the designated court rejected his application citing the embargo laid out by S. 43 D of UAPA, and on grounds that the offences were serious in nature. Subsequently, the special court granted bail to the three accused separately on 15 September 2020 (A1), 28 September 2020 (A3) and 21 August (A 4), the last on medical grounds. NIA appealed against the bail orders in the High Court which set the bail orders aside and remitted the case back to the special court. Again, the special court granted bail to all three accused on 4<sup>th</sup> September. However, the NIA appealed once again urging that the original bail applications (which had been based on FIRs rather than the chargesheet which had not been filed at the time of application of bail) did not contain all the sections that had been invoked against the accused in the chargesheet. The adding of sections 17, 38, 39 and 40 of UAPA and the dropping of TSPS merited reconsideration of the bail. The discussion above draws from the final bail orders passed by the special court on May 2, 2022.

During the search, I have recovered incriminating material evidence against the said accused [Maddileti], which shows him to be the President of Telangana Vidyarthi Vedika (TVV), which is one of the frontal organisations of the proscribed organisation CPI (Maoist). His association with the banned CPI (Maoist) has been *established beyond all reasonable doubt*.<sup>302</sup>

It was stressed by the petitioners while arguing bail that TVV was a registered organization (registration number 05/2011) which worked openly amongst students. Furthermore, the court also noted that there were no reasonable grounds to believe that TVV had “any nexus with banned CPI (Maoist) organization”, and further, that there was not even a “single incident of involvement of TVV in any terrorist act”.<sup>303</sup> The chargesheet however refers to them repeatedly as “over ground cadre”. In the chargesheet, it is stated that:

“A1 and A3 of TVV used to extort money from different educational institutions, professors and teachers and also ask the district level TVV cadres to collect money from schools, colleges or government employees. ... They used to spend the money for conducting TVV programmes as dharnas, protests, rallies, meetings etc.”<sup>304</sup>

Even the underlying acts that have been vaguely alleged by police in this case are on their face legal activities that citizens have the constitutional right to exercise—organizing protests, meetings, and programs. These do not constitute covered acts under the definition of terrorism as laid out in Section 15 of the UAPA, and hence raising funds for these legal activities cannot qualify as terror funding.

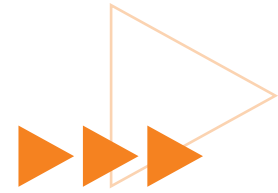
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302 FIR Number 176/ 2019 (Oct. 8, 2019) (copy on record) (emphasis added).

303 Maddileti vs. The State, *supra* note 302.

304 Maddileti Maoist Case, NIA, Chargesheet Number 4/2020, *supra* note 299.

## ■ V. CONCLUSION



Despite India's standing as a leading member with FATF in Asia, there are concerning trends relating to the abuse of counter-terrorism laws against human rights defenders and NPO's under the guise of FATF compliance. Despite FATF previously not focusing on issues like the targeting of NPO's and the violations of international human rights to fair trial and due process, it is clear from the stocktakes and FATF reports that the organization has received consistent notifications relating to these issues, especially from civil society.

As has been demonstrated above, India has used FATF compliance as a justification for expanding its counter-terrorism and counter-terrorism financing laws, rendering them overbroad, vague and susceptible to misuse. The increasing scope of the laws has facilitated the persecution of human rights defenders, and often led to a failure by the Indian government to engage in objective risk assessments when enforcing these laws as required by FATF. Accordingly, a few trends can be seen in relation to India's non-compliance with FATF recommendations that require its member states to respect international human rights, human rights defenders, and the right of NPO's to operate despite potentially being critical of the ruling government.

The first trend begins at the onset of cases, wherein investigating officers and others involved in the FIR process use vague allegations and inconsistent evidence to attempt to punish human rights defenders and NPO's that are critical of the ruling government. In many instances, courts have subsequently rebuked the investigative agencies for pursuing cases that lack prima facie validity and questioned the motives behind those cases. Yet, in some of those cases where bail was granted by the courts, police and prosecutors continued their harassment of the target by re-arresting them under new charges. As such, governmental actors are violating the principles of fair trial and due process, while also attacking the credibility of the judiciary, all of which amounts to a degradation of the principles of the rule of law, which are essential to FATF's recommendations relating to effective counter-terrorism prosecution.

The second trend is that the punishment is oftentimes meant to be the process itself: individuals are arrested, given extensive pre-trial detention, repeatedly denied bail, and their cases could take years to be resolved by the courts and could involve multiple rounds of appeals to various courts.

This 'process as the punishment' concept stands in contravention of FATF's recommendations that call for the respect of due process and fair trial rights for individuals.

The third trend for the cases in Part 4 is that the victims of the government's abuse of counter-terrorism laws are often human rights defenders or NPO's that are critical of the government. The targets could be protestors who oppose certain governmental policies, journalists covering issues sensitive to the government, or activists attempting to assist disenfranchised ethnic or caste groups. The common thread amongst most of the individuals discussed in Part II is that they pose some kind of political threat to the ruling administration. The continued treatment of human rights defenders and certain NPO's in this manner will result in a silencing of political opinion in the country which will impact democracy, the rule of law, and the credibility of India as an international partner in counter-terrorism.

Yet, the cases discussed in Part 4 of this report are manifestations of the larger issues discussed in Part 3 of this report which evaluates the structure of counter-terror and counter-terrorism financing laws. As indicated above, the laws concerning terrorism and its financing have ballooned over time with increasingly vague and expansive terms. In some instances, the basic principle of the presumption of innocence for defendants has been overturned such that the defendants must prove their innocence in the face of far-reaching allegations by the government that are unsubstantiated with proper evidence. In some instances, Indian lawmakers cite to FATF guidelines and requirements when they amended and expanded the scope of some of their anti-terrorism laws.

Therefore, critical collaboration between FATF and the Indian government will be required for India's FATF mutual evaluation review in 2023-2024. As has been explained in FATF reports, the organization has relied on input from non-profit civil society organizations, many of which employ human rights defenders themselves. Accordingly, not only should FATF engage with the Indian government during its review, but it should also facilitate the input and advise of Indian civil society organizations. This is especially important as some of these organizations themselves have become targets of the Indian ruling administration's misuse of counter-terrorism laws as punishment for their work.

Furthermore, FATF should encourage the government of India to adopt the following recommendations to begin its journey on becoming compliant with FATF rules and recommendations, particularly recommendations 5,6, and 8. Reviving a focus on risk-based assessments, respecting the rule of law and

human rights to due process and fair trial, and ensuring the fair treatment of all NPO's will allow India to live up to its status as a leading global counter-terrorism partner.

## **RECOMMENDATIONS FOR THE GOVERNMENT OF INDIA**

1. Engage in a substantial review of counter-terrorism and financing laws to address the overbroad and vague status of laws like the UAPA, PMLA, and FCRA.
2. Amend the UAPA, PMLA, and FCRA with a focus to curbing abuse of these laws and ensuring proper judicial review of prosecutions and investigations.
3. When initiating investigation or prosecution of individuals, particularly those involved in law, journalism, or activism, focus on an objective risk based assessment to ensure compliance with FATF recommendations.
4. Evaluate the practices of police and prosecutors and the interplay between law enforcement and the judiciary as it relates to politically sensitive cases, especially in the collection and use of vague evidence against the defendants
5. Consider the impact on the overall structure of human rights including the right to freedom of association, freedom of speech, and freedom of press when individuals exercising those rights are brought under the purview of the nation's increasingly expansive and vague counter-terrorism laws.
6. Encourage the judiciary to protect that the rule of law, fair trial, and due process rights can be guaranteed, especially for defendants critical of the government that are facing long periods of pre-trial detention;
7. Reevaluate the current docket of UAPA and PMLA cases in relation to human rights defenders and NPO's that have been critical of the government; where appropriate, grant bail to defendants to end multi-year pre-trial detention and/or drop charges against individuals engaged in the rightful exercise of their political rights including speech and press.
8. Facilitate input from civil society in FATF's review of India's compliance with FATF standards to ensure that diverse voices are heard by reviewers.
9. Avoiding the use of terrorism prosecution for political ends, ensuring the progress of rule of law along with respect for human rights and democratic values.



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