

THE MISUSE OF ANTI-TERRORISM LAWS: HOW UAPA AND PMLA VIOLATE HUMAN RIGHTS UNDER FATF'S WATCH

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ABSTRACT

This paper titled, *'The Misuse of Anti-Terrorism Laws: How UAPA and PMLA Violate Human Rights Under FATF's Watch'* under the theme *'Rights, Equality and Social Justice'* aims at analyzing anti-terrorism and combating the financing of terrorism and anti-money laundering laws of India with reference to the *Unlawful Activities (Prevention) Act, 1967* and the *Prevention of Money Laundering Act, 2002*. These laws formulated to counter terrorism and its financing have been broadened and modified to meet international standards, especially the *Financial Action Task Force Recommendations*. Nevertheless, this type of expansion has now elicited grievous human rights concerns. The paper examines the broad and ambiguous nature of these laws and their applicability to journalists, activists, and civil society organizations for politically sensitive cases. Using journalist Siddique Kappan's case where he was charged under both UAPA and PMLA, the study explains how these laws are being utilized to repress opposition and suppress freedom of speech.

The paper shall delve into the analysis of how India's compliance with FATF norms resulted in the violation of human rights. The paper also claims that due to the sweeping and vague nature of these laws, important fundamentals such as; the right to a fair trial, and the presumption of innocence are also violated. Besides, it highlights the fact that the use of these laws to stifle opposition is counter-productive for counter-terrorism, the violation of human rights in the fight against terrorism is counter-productive.

In the paper's conclusion, the author points to the need for the review of these laws, stricter regulation of such policies, and involvement of civil society in the evaluation of its policies by FATF, and for protecting human rights defenders. It asserts and insists that for justice to prevail, for India to win, it has to balance on the twin wheels of security and liberty, national security and the protection of rights to freedom.

Keywords: Human Rights, Terrorist Financing, Money Laundering, FATF, PMLA, UAPA, Due Process, Fair Trial

INTRODUCTION

India, the largest democracy in the world, is a diverse country with a multicultural population that guarantees the protection of human rights to maintain a peaceful existence in the nation. It is, however, impossible to define human rights, the lawmakers have described them as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and

enforceable by Courts in India" under the Protection of Human Rights Act, 1993.⁷¹ There are several international frameworks to which India is a signatory. Being the largest democracy in the world, it is of paramount importance that the nation shall be free of terrorism and that human rights are ensured fairly and justly. India has had several anti-terrorism laws such as the

⁷¹ The Protection of Human Rights Act, 1993, § 2(d).

Maintenance of Internal Security Act (MISA),⁷² Terrorist and Disruptive Activities (Prevention) Act (TADA),⁷³ Prevention of Terrorism Act (POTA),⁷⁴ the Disturbed Areas Act (DAA),⁷⁵ and the Armed Forces Special Powers Act (AFSPA),⁷⁶ the Assam Preventive Detention Act,⁷⁷ National Security Act,⁷⁸ and the Armed Forces (Jammu and Kashmir) Special Powers Act.⁷⁹ These laws, however, enforced with the intention of curbing terrorism, are draconian in nature and have been used by governments to abuse human rights.⁸⁰ Terrorism, however, cannot be defined, it may be described as the use of violence to disturb the even tempo, peace, and tranquillity of society and create a sense of fear and insecurity.⁸¹

As per the findings of a study on security laws conducted by the Committee on International Human Rights of the Association of the Bar of New York, the antiterrorism laws of India were considered to be vague and ambiguous and violate due process, personal liberty, judicial independence and the principles of natural justice.⁸² Vague laws are often used by the state to offend several important values and misuse the power vested in them. Even though terrorism is the most heinous attack on mankind, the Supreme Court has observed that if human rights are violated in the process of combating terrorism, it will be self-defeating.⁸³ Since terrorism is itself an attack on human rights, the anti-terrorism laws must be in consistency with human rights. This is where it becomes difficult to balance the nation's

integrity and security and protect human rights to ensure justice.⁸⁴

This paper shall analyze the abuse of power through laws countering terrorist financing, such as the Unlawful Activities (Prevention) Act, 1967⁸⁵ and the Prevention of Money Laundering Act, 2002,⁸⁶ which have been infringing upon human rights.

RESEARCH QUESTIONS

This paper shall analyse and evaluate the following questions:

1. Has India's adherence to the FATF norms contributed to the growth and application of anti-terrorism laws such as UAPA and PMLA and what does it mean for the human rights activists and civil society organizations?
2. How do these counter-terrorism and anti-money laundering provisions under UAPA and PMLA violate human rights standards?
3. To what extent has the liberty of journalists, activists, and NGO's politically sensitive cases been compromised by the use of such vague provisions under the UAPA and PMLA in India?

INDIA AND FATF

The G-7 countries set up the **Financial Action Task Force (FATF)** in 1989 to counter money laundering.⁸⁷ It has given forty recommendations to combat the misuse of money by financial institutions.⁸⁸ India became its 36th member in June, 2010.⁸⁹ The Mutual Evaluation Report (MER) made several recommendations to rectify the shortcomings

⁷² The Maintenance of Internal Security Act, 1971.

⁷³ The Terrorist and Disruptive Activities (Prevention) Act, 1987.

⁷⁴ The Prevention of Terrorism Act, 2002.

⁷⁵ The Disturbed Areas (Special Courts) Act, 1976.

⁷⁶ The Armed Forces Special Powers Act, 1958.

⁷⁷ The Assam Preventive Detention Act, 1980.

⁷⁸ The National Security Act, 1980.

⁷⁹ The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

⁸⁰ Tehmina Janjua, "Impact of Anti-Terrorism Laws on Human Rights," OHCHR (Feb. 29, 2008), https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session1/IN/LIB_IND_UPR_S1_2008_Liberation_uprsubmission.pdf (accessed September 11, 2024).

⁸¹ Hitendra Vishnu Thakur v. State of Maharashtra, 4 SCC 602 (1994).

⁸² Tehmina Janjua, *supra* note 10.

⁸³ People's Union for Civil Liberties v. Union of India, 9 SCC 580 (2004).

⁸⁴ Prakash Tatia, "Law, Terrorism and Human Rights," West Bengal Judicial Academy, https://www.wbja.nic.in/wbja_adm/files/lecture.pdf (accessed September 11, 2024).

⁸⁵ The Unlawful Activities (Prevention) Act, 1967.

⁸⁶ The Prevention of Money Laundering Act, 2002.

⁸⁷ "History of the FATF," FATF (2023), <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html> (accessed September 11, 2024).

⁸⁸ "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations 7," FATF (2012, updated March 2022), <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf> (accessed September 11, 2024).

⁸⁹ FATF Annual Report 2009-2010, FATF (2010), <https://www.fatf-gafi.org/media/fatf/documents/reports/2009%202010%20ENG.pdf> (accessed September 11, 2024).

in the legal frameworks criminalizing money laundering and terrorist financing.⁹⁰ Thereafter, to modify and strengthen the Anti-Money Laundering (AML)/ Counter Financial Terrorism (CFT) regime, India amended its primary anti-terrorism law, i.e. Unlawful Activities Prevention Act 1967 (UAPA), and its anti-money laundering law, Prevention of Money Laundering Act 2002 (PMLA).⁹¹ To keep complying with the FATF, India has time and again amended its laws which has resulted in expanding the ambit of these laws and therefore, encroach upon the established human rights.

THE IMPACT OF ANTI-TERRORISM LAWS ON HUMAN RIGHTS DEFENDERS

TERROR FINANCING UNDER UAPA

The primary anti-terrorism law of India, UAPA, vests absolute powers in the Central Government to declare individuals and associations as terrorists. Not only raising funds for an act of terrorism⁹² or for terrorist organizations⁹³ are penalized under the Act but also holding proceeds of terrorism⁹⁴ are offenses punishable with life imprisonment. Following the terrorist attacks in Mumbai in December, 2008, the Act was as such amended to insert Section 51A which empowered the Central Government to prohibit the use of funds, financial assets or economic resources of individuals engaged in or suspected to be engaged in terrorism.⁹⁵ Even if these funds were not being used for their intended purpose, raising them is a punishable offense.⁹⁶ These amendments were substantiated with justification from lawmakers that this is an action only to comply with FATF guidelines for

India.⁹⁷ However, these amendments are immensely vague and arbitrary (for instance, “any other means of whatever nature”)⁹⁸ to include activities, even non-violent, which are contrary to the interests of the government, thereby, rendering human rights defenders, political opponents, and dissenters vulnerable to malicious prosecution⁹⁹ like how Safoora Zargar and Khalid Saifi were charged with terror funding amidst the protest against new citizenship laws in 2020.¹⁰⁰ Such actions have adverse impacts on the rights of individuals. The United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism¹⁰¹ has made a recommendation to make the legislation more precise and narrow to avoid its abuse and misapplication by the state.

Further, the amendments in the UAPA are repetitions of offenses already existing in the Indian Penal Code, 1860¹⁰² (replaced by the Bharatiya Nyaya Sanhita, 2023),¹⁰³ for instance, the prohibition of the production and circulation of counterfeit currency.¹⁰⁴ However, the distinction between the two and the grounds for charging with one over another is not clear.

The two main issues that hinder due process and therefore, violate human rights are fair trial and presumption of innocence. There is an

⁹⁰ Mutual Evaluation Report Executive Summary: India, FATF (June 2010), <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER%20India%20ES.pdf> (accessed September 11, 2024).

⁹¹ The Unlawful Activities (Prevention) Amendment Bill, 2011, https://prsindia.org/files/bills_acts/bills_parliament/2011/SCRC/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> (accessed September 12, 2024).

⁹² The Unlawful Activities (Prevention) Act, 1967, § 17.

⁹³ The Unlawful Activities (Prevention) Act, 1967, § 40.

⁹⁴ The Unlawful Activities (Prevention) Act, 1967, § 21.

⁹⁵ The Unlawful Activities (Prevention) Act, 1967, § 51A.

⁹⁶ *Supra* note 23.

⁹⁷ 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/SCRC/Unlawful_Activities_Prevention_Amendment_Bill_2011.pdf (accessed September 12, 2024).

⁹⁸ The Unlawful Activities (Prevention) Act, 1967, § 15.

⁹⁹ 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 (accessed September 12, 2024).

¹⁰⁰ 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> (accessed September 12, 2024).

¹⁰¹ 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> (accessed September 12, 2024).

¹⁰² The Indian Penal Code, 1860.

¹⁰³ The Bharatiya Nyaya Sanhita, 2023.

¹⁰⁴ *Supra* note 23.

extremely long pre-trial detention period without a chargesheet being filed against the accused which exposes them to mistreatment and torture.¹⁰⁵ This is in contrast with the international human rights jurisprudence which says that curtailment of liberty should be limited, necessary, and proportionate.¹⁰⁶ The second issue pertains to the reversed principle of presumption of innocence. This principle is a postulate of criminal jurisprudence¹⁰⁷ and a recognized human right and the arrested cannot be deprived of the right to life by presuming the guilt of the offence beforehand.¹⁰⁸ The Supreme Court held that a fair and independent investigation is crucial to the preservation of the rule of law and, in the ultimate analysis of liberty itself.¹⁰⁹ ***Ei incumbit probatio qui dicit, non qui negat*** is a legal maxim meaning that the burden of proof is on the one who declares, not on the one who denies.¹¹⁰ UAPA also restricts the granting of bail to the accused if the allegations appear to be true prima facie.¹¹¹ Such provisions of the UAPA mitigate the possibility of a fair trial which is protected under Article 14 of the ICCPR,¹¹² to which India is a state party.¹¹³ UAPA stands contrary to human rights and can be/ are being misused by the people in power to curb dissent.

MONEY LAUNDERING UNDER PMLA

The Prevention of Money Laundering Act 2002 aims to combat money laundering and also

deals with terrorist financing. Often, charges under UAPA and PMLA overlap as the recommendations of FATF suggest that terrorist financing and money laundering often work together in tandem. The last two decades have seen the use of certain obstructive and controversial provisions of the law to impede proper human rights activities by nongovernmental organizations in India. This is clearly contrary to international human rights law and standards and also contrary to guiding principles of the FATF.

There have been more than 240 petitions filed in the Supreme Court that challenged the constitutionality of PMLA, which it clubbed later on, claiming that they violated personal liberty, procedures of law, and the constitutional mandate¹¹⁴ by vesting a wide array of powers in the Enforcement Directorate without procedural safeguards.¹¹⁵ For instance, Siddique Kappan was charged under PMLA with conspiring communal violence only because he was engaged in investigative journalism.¹¹⁶ With wide powers in hands, the ED has often, under the guise of combatting terrorism, held innocent human rights defenders, journalists and non-profit organizations for criticizing the government. Under PMLA, the investigation process is yet again different from that of the ordinary practice. There is no filing of a First Information Report, but an Enforcement Case Information Report (ECIR), which may or may not be shared with the accused.¹¹⁷ The ED can summon any person and demand to give and ratify their statement under a threat of penalty

¹⁰⁵ Human Rights Watch, Back to the Future: India's 2008 Counterterrorism Laws (2010), <https://www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws> (accessed September 12, 2024).

¹⁰⁶ 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 (accessed September 13, 2024).

¹⁰⁷ Data Ram v. State of U. P., AHC 196688 (2023).

¹⁰⁸ Subhash Kashinath Mahajan v. State of Maharashtra, 6 SCC 454 (2018); Manu Sharma v. State of NCT, Delhi, 6 SCC 1 (2010); Ranjitsing Brahmajeesing Sharma v. State of Maharashtra, 5 SCC 294 (2005).

¹⁰⁹ Romila Thapar v. Union of India, AIR SC 4683 (2018).

¹¹⁰ Sardar Govindrao and Others v. State Of Madhya Pradesh And Others, AIR SC 1201 (1982).

¹¹¹ 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/> (accessed September 13, 2024).

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¹¹⁴ 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/> (accessed September 13, 2024).

¹¹⁵ PMLA Arguments Matrix: Challenges to the Prevention of Money Laundering Act, Supreme Court Observer (Mar. 18, 2022), https://www.scoobserver.in/reports/pmla_arguments-matrix/ (accessed September 13, 2024).

¹¹⁶ 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> (accessed September 13, 2024).

¹¹⁷ The Prevention of Money Laundering Act, 2002, § 19.

or arrest.¹¹⁸ This provision is absolutely against the principle of self-incrimination.¹¹⁹ Like UAPA, PMLA also shifts the burden of proof on the accused and effectively erodes the guarantee of a right to a fair trial.¹²⁰

The search and seizure provisions of the PMLA, specifically Sections 17 and 18, permit the Enforcement Directorate to search at any place or person, irrespective of the fact that no FIR for the concerned offense exists.¹²¹ Section 5(1) provides a law for the attachment of property under an FIR on a mere suspicion that the money will be flown out, without judicial review or oversight.¹²² This provision is broad, without checks and balances, and vests too much power. Combined with Section 8(4), which grants the Enforcement Directorate the power to take possession of attached property, these provisions essentially bestow the state with a near absolute authority in matters pertaining to search and seizure.¹²³

Further, the bail provision under Section 45 of the PMLA is harsher than that in the UAPA.¹²⁴ It requires the court to be satisfied that it is reasonable to believe that the accused is not guilty of the offence and is unlikely to commit any offence while on bail. The test is much more demanding than that which is necessary for acquittal. It has corroded the presumption of innocence, a fundamental right core to due process and a fair trial, by interposing an inordinately high hurdle.¹²⁵

CASE STUDY: SIDDIQUE KAPPAN

In September, 2020, Siddique Kappan, a journalist, was on his way to Hathras to cover a

rape story. Due to his low pay scale, he decided to share a taxi with two others who were student activists and were visiting the victim's family. They were associated to Campus Front of India (CFI), the students' wing of the Islamist organization Popular Front of India (PFI).¹²⁶ However, before they could reach the site, they were detained by the police and charged with breach of peace.¹²⁷ They were charged with more heinous offenses under IPC and UAPA the following day. In December, when a businessman and the national secretary of the CFI were arrested by the ED for money laundering, the ED added Kappan's name in the complaint. There are same allegations made in the ED case with that which has been made in the UAPA case. The basis of these charges is that the accused were members of the PFI and were allegedly receiving money from overseas, especially the Gulf countries, for 'stirring up communal riots and spreading terror.' The UP government described the PFI in the Lucknow High Court declaring that it was a terror funding organization linked to Al Qaeda and Turkey's International Humanitarian Relief Foundation. Nevertheless, at that time, PFI had not been declared as unlawful. The court adjourned the writ of habeas corpus filed for over six months. After repeatedly being rejected for bail, the Supreme Court granted him bail in the UAPA case but he was denied bail in the PMLA case in Uttar Pradesh. The charges related to terror funding were applied arbitrarily and illustrate that it contradicts the principles of FATF for fair trial and the due process rights of an individual accused of terrorism.

RECOMMENDATIONS

Carry out a complete review of counter-terrorism and financial legislations like UAPA and PMLA that are too broad and contain ambiguous provisions. Amendments to these

¹¹⁸ The Prevention of Money Laundering Act, 2002, § 63(2).

¹¹⁹ Nandini Satpathy v. P.L. Dani & Anr., 2 SCC 424 (1978); Selvi & Ors. v. State of Karnataka, 7 SCC 263 (2010).

¹²⁰ "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> (accessed September 13, 2024).

¹²¹ The Prevention of Money Laundering Act, 2002, § 17; § 18.

¹²² The Prevention of Money Laundering Act, 2002, § 5.

¹²³ The Prevention of Money Laundering Act, 2002, § 8.

¹²⁴ The Prevention of Money Laundering Act, 2002, § 45.

¹²⁵ 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> (accessed September 12, 2024).

¹²⁶ "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> (accessed September 13, 2024).

¹²⁷ Case No. 3462 of 2020 (copy on record); The Code of Criminal Procedure, 1973, § 151, 107, 116.

laws should be made with the intent of preventing their abuse and also improving upon the judiciary's role in charging and investigating the cases. Specifically, the authorities should concentrate on objective risk assessments when investigating or prosecuting the individuals or organizational actors involved in legal, journalistic, or activist professions, in compliance with the FATF Standards.

Review the actions of the officers in the police force and the attorneys, especially in politically charged cases, and analyze the relations between police, attorney, and judiciary, especially as it regards the use of ambiguous evidence against a defendant. Indeed it is important to be mindful of the extent to which these laws compromise core human rights such as freedom of association, speech, and press, especially for those that are targeted under ever-broadening and ambiguous counter-terrorism laws.

In regards to the general population, urge the judiciary to protect the rule of law, avoid miscarriages of justice and respect the due process of the law especially to government critics who are held for lengthy periods before being produced in courts. Review the current UAPA and PMLA cases against human rights defenders and non-profit organizations against the governments and release many of the arrested, including on bail or quash charges on lawful exercise of political rights such as freedom of speech and the press.

Ensure civil society is involved during the FATF's evaluation of India's level of compliance to its requirements, to have divergent views. Last of all, ban terror-related convictions for the purpose of exploration and oppression of people's rights, and for suppressing their freedom and other democratic liberties.

CONCLUSION

While India has enhanced its position as an important member of the FATF in Asia, numerous challenges can be seen in the use of counter-terrorism laws against human rights

defenders and non-profit organizations in the name of FATF compliance. FATF has not raised issues such as the targeting of nongovernmental organizations or human rights violations on issues of fair trial and procedure but it is apparent from stocktake assessment and FATF reports that concerns on those issues have been raised, especially by NGOs. As shown before, India has used FATF compliance as a reason to expand its counter-terrorism and counter-terrorism financing laws beyond the intended purpose making them amorphous, ambiguous, and susceptible to misuse. This expansion has put into practice the persecution of human rights defenders, and the Indian government lapsed in doing FATF-required objective risk assessment during the application of these laws. The first worrying trend relates to the commencement of cases, whereby, based on frivolous allegations and trail some evidence, investigators jump to arrest human rights defenders and NPOs denying government criticisms. The second trend involves the punitive use of the legal process itself: people stay in jail awaiting trial for years, are denied bail time and again, and many fold Appeals, trials become a punishment in itself. This has been in contrary to the FATF's principles on due process and fair trial. The third trend is that the targets of these abuses are often human rights activists or NPOs that are in some way adversative to the government, be it protesters, journalists investigating certain topics, or activists helping vulnerable communities.

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