

State of Deliberative Freedoms in India: A Review for 2021

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This note focuses on the state of *deliberative freedoms* as enjoyed by specific segments of the Indian society in the year 2021. To look at events of 2021 more meaningfully, it would help to position this duration as the passage of yet another year caught in the uniquely potent right-wing political headwinds.

In 2014, a Bhartiya Janata Party led right-wing government, helmed by Narendra Modi and Amit Shah, won the general elections by overwhelming majority. The ascendancy of a particular form of right-wing hegemony all over the country is all too visible since. Indian democracy is seeing the making of an epoch, it is at a pivotal moment. The fundamental character of the state, the civic space available for many minorities of religion, ideologies and thoughts is being re-negotiated. The new state is also growing tentacles into various facets of moral life of the polity. The longstanding agreement on the tendencies of Indian state and its people at least appear to have been upended in the last decade, with the BJP enjoying a spate of electoral successes in state elections as well.

Having said so, there are unmistakable signs of contestation to this politico-religious hegemony. Whether they are vanishing traces of the last stand, or they can produce an effective counter-dynamic remains an open question. For the purpose of this note, the freedoms necessary for relevant stake-holders to partake in production of such a counter-dynamic are being called *deliberative freedoms* i.e. the freedoms essential for the function of seeding the space to contest and challenge in a democracy. These are essentially second order freedoms.

The question this brief note explores is to what extent the emerging state order is permissive of its civic body producing an effective counter-dynamic at one level, and just enjoyment of freedoms by its many minorities on another level. A review of functional space for enjoying deliberative freedoms in any *functional* democracy would turn on the following limbs:

1. Actions of the State against those contesting against the dominant discourse

This will include actions, the state takes against persons belonging to categories of Human Rights Defenders, Journalists, Critics, and Activists.

2. Actions of the State to impede the right to associate

This would illustrate the response of the state to people's right to associate including in the form of unions, mobilizations, or any other groupings.

3. Role of the State in the mediation of technology to curb expression

This section would review actions governing the use of technology to control virtual space i.e. surveillance, control of social media etc.

4. General space for Speech and Expression

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Theme I. Actions against Human Rights Defenders/Dissenters/Critics through the use of general Criminal Law

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Theme I. Actions against Human Rights Defenders/Dissenters/Critics through the use of general Criminal Law

1. Disha Ravi arrested for circulating a Protest Toolkit

On 13 February 2021, Delhi Police arrested climate activist Disha Ravi in Bengaluru on sedition charges. The authorities accused Ravi of creating and sharing a “toolkit” that included instructions on mobilizing violent protests. It was alleged that the toolkit documents circulating on social media were seditious in nature, and it pertained to the protests that took place on 26 January 2021 during the farmers’ rally in Delhi.

After Ravi spent 10 days in jail, District Court granted her bail on 23 February 2021.¹ In a rare order defending the activist’s right to protest, the Trial Court noted:

“It is further highlighted that the applicant/accused along with her associates under the pretext of protesting against the farm laws have resolved to vandalize Indian Embassies and specifically attack symbols of India i.e. Yoga and Chai. Except for a bare assertion, no evidence has been brought to my notice to support the contention that any violence took place at any of the Indian Embassies pursuant to the sinister designs of the applicant/accused and her co-conspirators. ...

...The right to dissent is firmly enshrined under Article 19 of The Constitution of India. In my considered opinion the freedom of speech and expression includes the right to seek a global audience. There are no geographical barriers on communication. A Citizen has the fundamental rights to use the best means of imparting and receiving communication, as long as the same is permissible under the four corners of law and as such have access to audience abroad.

This case became emblematic of the tactics employed by the Government of India to muzzle the widespread dissent expressed against the Farm laws.²

2. Arrests made for questioning Cow Urine as Covid Cure

On 13 May 2021, activist Erendro Leichombam was arrested for a Facebook post critical of cow dung and cow urine as cures for COVID-19. Following death of S Tikendra Singh, President of BJP unit of Manipur, of COVID-19, Erendro posted the following post on Facebook:

The cure for Corona is not cow dung & cow urine. The cure is science & common sense. Professor ji RIP.

Kishorchandra Wangkhem, a journalist from Manipur was also arrested on the same day as Erendro after he similarly wrote against cow urine as a COVID-19 cure on Facebook. Both

¹ *State v. Disha A. Ravi*, Bail Application No. 420/2021, Court of Additional Sessions Judge, Patiala House Court, New Delhi, Order dt. 23.02.2021

² <https://thewire.in/rights/disha-ravi-toolkit-sedition-bail-farmers-protest-khalistan>;
https://www.washingtonpost.com/opinions/global-opinions/the-arrest-of-this-activist-should-put-indias-democracy-title-in-question/2021/02/24/a18b6ae4-7602-11eb-8115-9ad5e9c02117_story.html

the activists were arrested vide separate detention orders dated 15 May 2021 issued under Section 3(2), the National Security Act, 1980.³

It is noteworthy that multiple BJP representatives had made claims that consumption of cow urine can help fight COVID-19. Cow urine can cure lung infection caused by Covid, BJP MP Pragya Thakur has said. Likewise Suman Haripriya, a BJP legislator in Assam had claimed cow urine and dung have medicinal properties which can be an anti-dote to cancer and even COVID-19.⁴ Another BJP public representative from Uttar Pradesh also claimed that consumption of cow urine had protected him from COVID-19.⁵

The Supreme Court ordered release of Erendro Leichombam on 19 July 2021.⁶ The Court in an admission hearing took a prima facie view that continued detention of the detenu would violate the right to life and personal liberty under Article 21 of the Constitution of India. The petitioner has also demanded compensation in his petition for wrongful and malicious detention. The case remains pending in the Supreme Court. A few days later, a bench of Manipur High Court followed suit and ordered release of Kishorchandra Wangkhem. The High Court held the following:

Significantly, the validity of the detention of Erendro Leichombam came up for consideration before the Supreme Court in Writ Petition (Criminal) No.266 of 2021. By order dated 19.07.2021 passed therein, the Supreme Court held that the continued detention of Erendro Leichombam would amount to violation of his right to life and personal liberty under Article 21 of the Constitution and directed his release forthwith, by way of an interim direction, upon his submitting a personal release bond of ₹ 1000. The Government of Manipur thereafter revoked the detention order dated 17.05.2021 passed against Erendro Leichombam. On the face of it, we find no distinction or difference between the case of the petitioner's husband and that of Erendro Leichombam. Both of them put up similar Facebook posts, critical of the utility of cow dung and cow urine in treating Corona virus. As they stand identically situated, we are of the opinion that the continued incarceration of the petitioner's husband would be as much a violation of Article 21 of the Constitution, as it was in the case of Erendro Leichombam.⁷

3. Criminal Case against Patricia Mukhim for Facebook Post criticizing Government

On 25 March 2021, the Supreme Court quashed the criminal case filed against Patricia Mukhim, a well-known journalist, for writing a Facebook post. A FIR was filed under Section 153A, Section 500 and Section 505(1)(c), IPC against Patricia Mukhim for arising feelings of enmity and hatred between two communities through her Facebook post.

³ <https://indianexpress.com/article/north-east-india/manipur/sc-orders-release-manipur-activist-erendro-leichombam-detained-nsa-7411613/>

⁴ <https://www.thehindu.com/news/national/other-states/assam-bjp-mla-prescribes-cow-dung-for-covid-19/article30967126.ece>

⁵ <https://www.ndtv.com/india-news/bjp-mp-pragya-thakur-says-i-drink-cow-urine-every-day-so-dont-have-covid-2443399>

⁶ *Raghumani Singh v. District Magistrate*, Imphal West District, Manipur, Writ Petition (Criminal) No.266/2021, Supreme Court, Order dt. 19.7.2021

⁷ *Elangbam Ranjita v. State of Manipur*, W.P. (Crl.) No. 9/2021 (available at <https://indiankanon.org/doc/2432711/>)

In response to a violent incident where 25 unidentified boys had assaulted youngsters playing basketball with iron rods and stick, Patricia Mukhim posted the following post on the Facebook:

Conrad Sangma CM Meghalaya, what happened yesterday at Lawsotun where some non-tribal youths playing Basketball were assaulted with lethal weapons and are now in hospital, is unacceptable in a state with a Government and a functional Police Force. The attackers were allegedly tribal boys with masks on and should be immediately booked. This continued attack of non-tribals in Meghalaya whose ancestors have lived here for decades, some having come here since the British period is reprehensible to say the least. The fact that such attackers and trouble mongers since 1979 have never been arrested and if arrested never penalized according to law suggests that Meghalaya has been a failed State for a long time now.....Why should our non-tribal brethren continue to live in perpetual fear in their own state? Those born and brought up here have as much right to call Meghalaya their State as the indigenous tribal does.

A Writ Petition to quash the said FIR was preferred at the High Court of Meghalaya. The High Court through an order dated 10 November 2020 refused to intervene in the matter, holding that the post could potentially cause a rift between the tribal and non-tribal communities and cause to arise feelings of enmity and hatred between the two communities.⁸

In a significant order delivered on 25 March 2021, the Supreme Court overturned the decision of the High Court and quashed the FIR. The Court reasoned that the post lack the offending intention to cause animosity between the two group. The Court further held that the law can only step in when such an intention can be deduced from the actual words used. The Court noted the following:

9. Only where the written or spoken words have the tendency of creating public disorder or disturbance of law and order or affecting public tranquility, the law needs to step in to prevent such an activity. The intention to cause disorder or incite people to violence is the sine qua non of the offence under Section 153 A IPC and the prosecution has to prove the existence of mens rea in order to succeed.

In fact, the Supreme Court came out firmly on the side of free speech by holding that criminal law ought not to be used to stifle criticism of government. The Court held the following in this regard:

15. The attack upon six non-locals, carried out by masked individuals, is not denied by the State; its reporting too is not denied. The State in fact issued a press release. There appears to be no headway in the investigations. The complaint made by the Dorbar Shnong, Lawsotun that the statement of the Appellant would incite communal tension and might instigate a communal conflict in the entire State is only a figment of imagination. The fervent plea made by the Appellant for protection of non-tribals living in the State of Meghalaya and for their equality cannot, by any stretch of imagination, be categorized as hate speech. It was a call for justice - for action according to law, which every citizen has a right to expect and articulate. Disapprobation of governmental inaction cannot be branded as an attempt to promote hatred between different communities. Free speech of the citizens of this country

⁸ *Patricia Mukhim v. State of Meghalaya*, High Court of Meghalaya, CrI. Writ Petition No. 9/2020, Order dt. 10.11.2020, para. 28-29

cannot be stifled by implicating them in criminal cases, unless such speech has the tendency to affect public order.

4. On 9 March, in Dantewada (Chhattisgarh), paramilitary personnel and police detained Hidme Markam, a well-known forest rights activist. She was arrested while participating in a two-day programme underway in Dantewada's Sameli village, organized to mark International Women's Day. Apart from charges of rioting, unlawful assembly and murder, the Unlawful Activities (Prevention) Act, 1967 (UAPA) was also slapped on her. A video shot on a mobile phone by one of the attendees shows men and women in uniform dragging and bundling Markam into a SUV as her colleagues protested.⁹
5. On 15 June 2021, police in Jammu and Kashmir detained political activist Sajad Sofi after he criticized those government officials who hailed from outside of the region, but were posted in Jammu and Kashmir. Sofi was released four days later.
6. On 16 September 2021, the Enforcement Directorate raided noted activist Harsh Mander's premises in Delhi. The raids took place a day after Harsh Mander left for Berlin, Germany for a fellowship with the Robert Bosch Academy.¹⁰

Earlier, in October 2020, two children's homes that the activist is associated with were raided by the National Commission for Protection of Child Rights. Mander had then said that the raids were the Central Government's attempt to defame him and target him for his stand against the Citizenship Amendment Act.¹¹

⁹ <https://twitter.com/goldymgeorge/status/1369291178231824386>

¹⁰ <https://scroll.in/latest/1005521/delhi-activist-harsh-manders-home-his-offices-searched-by-enforcement-directorate>

¹¹ <https://scroll.in/latest/974666/caa-harsh-mander-says-two-childrens-homes-linked-to-him-raided-calls-it-attempt-to-defame>

Theme II. Persecuting Human Rights Defenders by invoking Anti-terror laws

UAPA is India's premier anti-terrorism law. Similar to terrorism laws around the world, it creates extraordinary exceptions to ordinary criminal law. The departures from the general criminal law procedure made under the UAPA makes the process of trial itself grievously punitive. In absence of safeguards meant to insulate accused from arbitrary state action, the UAPA is proving to be convenient tool in the hands of the state to target activists and dissenters.

A closer look at the use of UAPA in 2021 indicate newer ways in which the law has begun to be used in the recent past. In this section, we are reviewing two major cluster of cases (Delhi Violence case and Bhima Koregaon case) where UAPA has been applied against HRDs recently. We will also review developments on difference facets of UAPA which are illustrative of how different stakeholders including courts are dealing with the aggressive use of this law by the executive.

1. Offences *only* affecting “Defence” and “Sovereignty” to be tried under UAPA: Delhi High Court’s Laudable Approach in Delhi Violence Cases

While, the UAPA is meant to apply to a very narrow category of offences which legally constitute a “terrorist act”, the term itself has not been defined under the law. Lack of a focused definition is at the core of misapplication of UAPA.

Against this background, it is pertinent to see the approaches employed by courts to discipline the meaning given by the prosecuting agencies to the term “terrorist activity” or “unlawful activity”.¹²

The Supreme Court in the past has attempted to restrict “terrorist act” to those that target at symbols of national pride, democratic institutions, economic nerve centres, or to create fear in a specific community.¹³ Such acts, which challenge the nation as a whole, are therefore considered distinct from ordinary law and order problems in a state.

To determine the intended scope of offences under the UAPA, it would be apt to examine the specific “entry” of the Constitution under which the law has been passed. It is Entry 1, List I of the Constitution (matters that affect the *defence of India*) that empowers the Parliament to legislate matters pertaining to terrorism, which is the stated aim and purpose of the UAPA.¹⁴ A bare reading of the relevant entries shows that the Central Government does not have the power to legislate on matters pertaining to *public order*, it is only empowered to legislate on matters that affect the *defence of India*.

It follows that the content of the relevant entry that empowers the legislature to bring the law into existence will control the scope of the penal provision. In other words, Entry 1 of List I i.e. *defence of India* will guide the interpretation of penal provisions contained in the UAPA.

¹² As defined in Section 2(o) and punishable under Section 13

¹³ *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602 para 7-15; *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580 para 7-9.

¹⁴ *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra*, (2010) 5 SCC 246 para 77

For the presumption of the Parliament's competence to pass the UAPA to endure, the imprint of Entry 1 of List I on the spirit and scope of the said penal provisions is necessary.¹⁵

UAPA Investigation in the Delhi Violence Cases (2020)

In February 2020, communal violence erupted in the North East district of National Capital Territory of Delhi which left 53 people dead and over 200 injured. The communal violence principally targeted Muslim community and symbols of anti-CAA protest. In the immediate aftermath, the Police had registered a total of 758 First Information Reports (FIRs). In March 2020, the Delhi Police Special Cell registered FIR No. 59/2020 (FIR 59), claiming that there was a terrorist conspiracy to instigate the violence and invoked the UAPA.

The Delhi High Court on 15 June 2021 granted bail to three persons (*Asif Tanha, Devangana Kalita and Natasha Narwal*) charged in FIR 59. These were the first set of people granted bail in FIR 59.¹⁶ The High Court in these judgments pursued a similar interpretative approach to isolate the precise domain of "terrorist activity" as specified in Section 15, UAPA. The Court held that the offences pertaining to *public order* cannot be considered under UAPA. The Delhi High Court noted the following:

22. Upon a careful consideration of the aforesaid verdicts of the Hon'ble Supreme Court, in our opinion, the intent and purpose of Parliament in enacting the UAPA and in amending it in 2004 and 2008 to bring terrorist activity within its scope, was and could only have been, to deal with matters of profound impact on the 'Defence of India', nothing more and nothing less. Had that not been the case, UAPA could not have been enacted by Parliament since the only entries in List-I of the Seventh Schedule to the Constitution that would bring the statute within the legislative competence of Parliament are Entry 1 read with Entry 93 relating to the Defence of India and offences with respect to the Defence of India. It was not the intent, nor purpose of enacting UAPA that other offences of the usual and ordinary kind, however grave, egregious or heinous in their nature and extent, should also be covered by UAPA, since such conventional matters would have fallen within Entry 1 of List-II (State List) and/or Entry 1 of List-III (Concurrent List) of the Seventh Schedule of our Constitution. This is the only possible view that can be taken if we are to lean in favour of constitutionality of the provisions of section 15, 17 and 18 of the UAPA, as we must.

What emerges from the above is that for an act to constitute a terrorist offence it must extend beyond the scope of an ordinary penal offence. Politically motivated crimes, or even offences targeting the government established by law would not amount to a terrorist act unless accompanied by an intention enumerated in S. 15(1). It bears noting that the Delhi High Court in its bail order also note the stark absence of material to show that the accused persons' design of carrying out terrorist acts.

¹⁵ See Uncertain Justice: A Citizens Committee Report on the North East Delhi Violence 2020 available at <https://constitutionalconduct.files.wordpress.com/2022/10/uncertain-justice-citizens-committee-report-on-north-east-delhi-violence-2020.pdf>

¹⁶ *Natasha Narwal v. State*, Criminal Appeal No. 82/2021, Delhi High Court, Judgment dt. 15.6.2021, para 22 (Judgment available at https://www.livelaw.in/pdf_upload/natasha-narwal-bail-order-delhi-high-court-395020.pdf); *Asif Tanha v. State*, Criminal Appeal No. 39/2021, Delhi High Court, Judgment dated 15.6.2021, para 57 (Judgment available at https://www.livelaw.in/pdf_upload/asif-iqbal-tanha-ajb15062021crla392021105447-1-395008.pdf); *Devangana Kalita v. State*, Criminal Appeal No. 90/2021, Delhi High Court, Judgment dated 15.6.2021, para 33 (Judgment available at https://www.livelaw.in/pdf_upload/devangana-kalita-bail-order-395018.pdf)

It is the prosecution's case that the accused conspirators procured weapons and incited riots in order to force the government to repeal the CAA and spread false propaganda regarding atrocities against minority communities during Donald Trump's visit to India. The chargesheet dated 16.9.2020 (arising out of FIR No. 59/2020) states as follows¹⁷:

it is evident that it was violent (sic) protest meant to paralyze, destabilise and disintegrate Delhi by undertaking unlawful activity. Further, it is crystal clear and categorical that they intended to paralyse the governance of Delhi by violent means to force the Union Govt. to withdraw CAA.

The Police has adduced numerous statements of witnesses who allegedly participated in key conspiracy meetings, or were privy to provocative speeches given by the accused. But the Police has failed to show any material that suggests an intention to *threaten the unity or sovereignty* of India. The prosecution may claim that the accused wanted to defame the government of India by publicizing a false narrative of atrocities committed against minorities by the ruling party. Defaming a government, or even publishing false news against a ruling political party, may constitute a criminal offence. However, it does not meet the legal threshold of an offence that *threatens the unity, integrity, security and sovereignty of India*. The Court has distinguished actions breaching public order and those affecting the *security of India*.¹⁸

The Delhi High Court also came down on the prosecution's attempt to use UAPA to criminalize the protests. The Court noted that "the foundations of our nation stand on surer footing than to be likely to be shaken by a protest, however vicious". In the *Devangana Kalita* order, the High Court makes the following crucial observation:

47. ...The making of inflammatory speeches, organising chakkajams, and such like actions are not uncommon when there is widespread opposition to Governmental or Parliamentary actions. Even if we assume for the sake of argument, without expressing any view thereon, that in the present case inflammatory speeches, chakkajams, instigation of women protesters and other actions, to which the appellant is alleged to have been party, crossed the line of peaceful protests permissible under our Constitutional guarantee, that however would yet not amount to commission of a 'terrorist act' or a 'conspiracy' or an 'act preparatory' to the commission of a terrorist act as understood under the UAPA.

2. UAPA enables Protracted Custody sans Material to Substantiate

The State ought to grant the power to arrest an individual to the state instrumentalities with significant circumspection. This power assumes even more significance in its exercise in pre-chargesheet detention phase, as the State is detaining a person without having to show any supporting material. Investigating agencies may no doubt require custody of an accused for interrogation and to prevent an accused from hampering the investigation. However, the law does not allow a person to be needlessly detained for an indefinite period while the investigation continues.

Under the Code of Criminal Procedure (CrPC), an accused can be kept in custody without the filing of the chargesheet for a maximum of 60-90 days.¹⁹ If the prosecution fails to file a

¹⁷ Chargesheet dated 16.9.2020, Pg 2040.

¹⁸ *Ram Manohar Lohia v. State of Bihar*, (1969) 1 SCR 709 para 55

¹⁹ Section 167, CrPC.

chargesheet in the said time period the law in such circumstances entitle an accused to be granted “statutory bail” under S. 167(2).

Under the UAPA, the prosecution can seek extension in the period of investigation *i.e.*, time to file chargesheet, from 90 days to 180 days for certain serious offences.²⁰ This is a drastic departure from the period provided in the CrPC and gravely prejudices the accused. The downstream implications of this departure in the statute show how the courts are struggling to keep the abuse of the said provision under control. Court in the many proceedings flowing from the application of the UAPA in the Delhi Violence cases has grappled with these issues. We will see later how this provision has been in play in the case of Sudha Bharadwaj, an activist arrested as part of the Bhima Koregaon case.

Right of Accused to oppose the Application seeking Extension of Custody

In order to provide a check against casual extension of custody beyond the first 90 days, Section 43-D(2), UAPA requires the Public Prosecutor to justify the need for such an extension.

The Karnataka High Court in a judgment rendered on 10 June 2021, awarded statutory bail in an UAPA case, while pointing out the illegality in the manner the prosecution’s application for extension of time was heard by Court. The Court noted the following in *Muzammil Pasha v. National Investigating Agency*:²¹

21. In my considered opinion, the judgment of the Hon'ble Supreme Court in the case of *Hitendra Thakur* and in the case of *Sanjay Dutt* would be applicable to the facts of the present case. Since the petitioners were not given an opportunity of being heard before passing an order on the application filed by the prosecution for extension of time for completion of the investigation and since the petitioners were not kept present before the Court when the application filed by the prosecution for extension of time for completion of the investigation was being considered and since the petitioners were not notified that such an application filed by the prosecution was being considered by the Court for the purpose of extending the time for completion of investigation, I am of the considered opinion that the order passed by the Trial Court on the application filed by the prosecution under the first proviso to Section 43-D(2)(b) of the Act of 1967 extending the time to complete the investigation is legally unsustainable and accordingly, the point No. 1 for consideration is answered in the negative.

Contesting extension of custody under Section. 43D(2): Partial Course Correction in Shifa ur Rahman (2021)

Troublingly, in a series of cases challenging the extension of custody under the UAPA, the Court has whittled down the accused’s ability to contest the extension of his custody.²²

This year the Delhi High Court in its own way has tried to find a middle path. In the case of *Shifa-Ur-Rehman v State of NCT of Delhi*, the Delhi High Court clarified that even though the accused cannot be given a copy of the prosecutor’s report, he had a right to consult his

²⁰ S. 43-D(2), UAPA

Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—

the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively”

²¹ 2021 SCC OnLine Kar 12688

²² See *Sanjay Dutt v. State, Through C.B.I., Bombay (II)*, (1994) 5 SCC 410 para 53

counsel and oppose the application for extension.²³ Ironically, in the case of *Shifa ur Rahman*, the Court held that even though the accused was prejudiced by the absence of his counsel the same did not vitiate the Order granting extension of custody.

3. Securing Bail under UAPA

Right to bail is a crucial element of presumption of innocence under the Indian law. The legal principle operating here is that bail is withheld not as a *punishment* but only to secure the presence of the accused at trial.²⁴ It is therefore, commonly said that bail is the rule and jail the exception.²⁵

While considering the grant of bail under the CrPC, Courts evaluate whether a *prima facie* case is made out against the accused, and additionally the “triple test” to see if the accused is (i) a flight risk, or (ii) likely to tamper with evidence, or (iii) likely to influence witnesses.²⁶ However, provisions in anti-terror laws display a pattern of severely restricting recourse to bail.

The CrPC standard of bail has been virtually transformed in terror laws such as the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)²⁷ and the Prevention of Terrorism Act, 2002 (POTA).²⁸ These legislations allow for the grant of bail only if *the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that the accused is not likely to commit any offence while on bail*. Under these laws, the standard for bail is stricter than what is required for an acquittal. As a consequence, in most cases under anti-terror laws, while the accused fail to seek bail but subsequently very often get acquitted.

The present bail provision under the UAPA [under Section 43D(5)] is much lower than under the TADA²⁹ and the POTA³⁰. Under both the CrPC and the UAPA, the court may deny bail if there is a “prima facie” case against the accused. Even though the UAPA imposes the same standard of *prima facie* as used by the courts in granting bail under CrPC, *prima facie* has been interpreted very differently under the UAPA by the Supreme Court in *National Investigation Agency v. Zahoor Ahmad Shah Watali*³¹ (*Watali*).

The Watali Standard

The Supreme Court in *Watali* holds that “*prima facie*” in Section 43-D(5) mandates that the material collected by the investigating agency must be presumed to be true unless contradicted by some other evidence in the chargesheet itself. The probability or the reasonable possibility of its truth cannot be considered at the stage of granting bail. It follows that the question of admissibility, particularly if the material gathered is not considered admissible as evidence, is not to be addressed at this stage. The Supreme Court in the *Watali* judgment requires the court to presume the prosecution case to be true and then determine whether a *prima facie* case is made out (para 24, 27). This amounts to dilution of judicial

²³ *Shifa-Ur-Rehman v. State of NCT of Delhi*, 2021 SCC OnLine Del 2500 para 43, 58

²⁴ *Nagendra v. King-Emperor*, AIR 1924 Cal 47, para 14, available at <https://indiankanoon.org/doc/1692860/>

²⁵ *State of Rajasthan v. Balchand*, (1977) 4 SCC 308, para 2

²⁶ *P. Chidambaram v. Directorate of Enforcement*, (2020) 13 SCC 791 para 17

²⁷ Section 20(8)(b), TADA

²⁸ Section 49(7), POTA

²⁹ *Shaheen Welfare Association v. Union of India*, 1996 SCC (2) 616

³⁰ *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713

³¹ (2019) 5 SCC 1

discretion. The Court in *Watali* has made the *prima facie* standard into a straight-jacketed test. In doing so, it commits the misstep of assuming the material to be true unless contradicted. This is in stark departure from the understanding of *prima facie* developed over decades of case law on the subject. The *prima facie* threshold in common law is a discretionary standard allowing the judge to arrive at an overall satisfaction as to whether the material against the accused inspires confidence and is sufficient for conviction. The judge is to examine multiple factors to arrive at the judicial satisfaction required - from the quality of material, its probative value in law, to the explanation or defence of the accused.

Bringing Due Process Considerations back into the Mix: Era of Najeeb

Notably, in *Union of India v. K.A. Najeeb*³² (*Najeeb*) a judgment pronounced on 1 February 2021, the Supreme Court held that Section 43-D(5) is not the sole repository of powers for grant of bail under the UAPA. A constitutional court can also grant bail for a violation of Article 21. In the present case, the Court, therefore, granted bail to an accused who had already served more than half his sentence with no prospect of the trial concluding in the near future. In doing so, the three judge bench in *Najeeb* has also attempted to give narrower meaning to *Watali*. Soon after *Najeeb*, on 22 February 2021 the Bombay High Court granted interim medical bail to Varavara Rao, an accused in the *Bhima Koregaon* case, on account of severe ill-health.³³

Though welcome, such judgments are few and far between. Moreover, it is hardly a saving grace that Courts are willing to sidestep *Watali* and grant bail if an undertrial accused is on his deathbed. It is crucial to recollect at this point that the Bombay High Court refused to grant undertrial accused Stan Swamy, who was 85 years old and suffering from Parkinson's disease, interim medical bail.³⁴

Approach inaugurated in Thwaha Fasal

We have also noticed another approach used by the Court to grant bail in a few cases in 2021. As *Watali* severely restricts judicial discretion to grant bail upon an evaluation of the evidence, the Courts have been exploring whether the offence is at all made out even if the evidence is presumed to be true, for the question of bail. It is in some way an inquiry as to whether a charge is at all sustainable.

In a judgment delivered on 21 October 2021, the Supreme Court in *Thwaha Fasal v. Union of India*³⁵ while granting bail to the accused held that the offence of membership of a terrorist organisation was not made out. While the Supreme Court considered the due process considerations and in doing so placed reliance on *Najeeb*, the Court crucially held that the alleged offences were just not made out even if the material contained in the chargesheet is presumed to be true, and therefore bail ought to be granted. The Court criticized the detention of the accused for over a year on the mere basis of possessing Maoist literature. The Supreme Court was hearing an appeal from an Order of the Kerala High Court wherein the High Court had reversed the Special Court's Order granting bail.

In the UAPA case arising from the violence that took place in February 2020, the Delhi High Court also came to the conclusion that the UAPA itself was not applicable to their cases as the impugned actions as alleged did not meet the ingredients of offence under Section 15 of

³² *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713 para 15-19

³³ *P.V. Varavara Rao v. National Investigation Agency*, 2021 SCC OnLine Bom 230 para 83

³⁴ "Court rejects bail plea of Stan Swamy" available at <https://www.thehindu.com/news/national/court-rejects-bail-plea-of-stan-swamy/article32932596.ece>.

³⁵ *Thwaha Fasal v. Union of India*, 2021 SCC OnLine SC 1000 para 39

the UAPA.³⁶ The Gauhati High Court in its order dated 9 April 2021, granted bail to activist Akhil Gogoi who was detained for participating in anti-CAA protests on similar grounds.³⁷ There are increasing instances of courts granting bail to those accused of offences under the UAPA holding that the offending charge is not attracted to the facts of the case.³⁸ In another gross instance of misapplication, the Gauhati High Court on 6 October 2021 observed that it is doubtful if posting on Facebook that Taliban are not terrorists constitutes a cognizable offence, let alone a UAPA offence.³⁹ In *Iqbal Ahmed v. State of Maharashtra*,⁴⁰ the Bombay High Court held that mere discussion, deliberation and advocacy of a cause would not constitute an offence under the UAPA.

In another case, a trial court in Karnataka acquitted two accused, a student of journalism and his father, charged under Sections 19 and 20 of the UAPA.⁴¹ The Court observed that possessing Bhagat Singh's book or certain newspaper cuttings does not amount to any offence.

There are also various instances of the police invoking the UAPA in cases of ordinary penal offences. Likewise, in *Muhammed Shafi v. National Investigation Agency*,⁴² (judgment rendered on 18 February 2021) the Kerala High Court took a view that smuggling of gold would not constitute an offence under the UAPA unless committed with the intent to further terrorist activities. The Supreme Court refused to interfere with the High Court's Order.

4. Sequencing Arrests to Delay Trial

The difficult standard of bail combined with the ability to get extended custody of an accused have incentivized another peculiar phenomenon in UAPA prosecutions. In a visible pattern, investigating agencies are staggering arrests of different accused persons over several years. This has the effect of prolonging the pre-trial phase indefinitely. Investigations in two recent conspiracy cases (FIR 59 – the UAPA FIR in *Delhi Violence cases* and *Bhima Koregaon*) under the UAPA reflect that it is only when the 180 days limit for filing of chargesheet for the initially arrested accused is ending that a second set of accused are arrested. A further period of 180 days is then sought to file a chargesheet against the second set of accused. This is then followed by a third round of arrests and so on. With every arrest, the investigation is getting protracted and the commencement of trial pushed further into the future. Without the possibility of bail, arrested accused continue to be in custody without trial for several years.

In the case of FIR 59, the first arrest was made in March 2020,⁴³ and the first chargesheet was filed after 179 days on 16.09.2020. In the meantime, Sharjeel Imam and Umar Khalid were

³⁶ See *Asif Iqbal Tanha v. State of NCT of Delhi*, 2021 SCC OnLine Del 3253; *Natasha Narwal v. State of Delhi NCT*, 2021 SCC OnLine Del 3254; *Devangana Kalita v. State of Delhi*, NCT 2021 SCC OnLine 3255

³⁷ *State v. Akhil Gogoi*, CrI. A. 192/2020, Gauhati High Court, Order dated 9.4.2021 (available at <https://indiankanoon.org/doc/155704009>)

³⁸ *Gurpal Singh v. State of Punjab*, CRM-M-6168-2021(O&M), High Court of Punjab and Haryana, Order dated 13.7.2021 (available at <https://indiankanoon.org/doc/90229968>)

³⁹ *Maulana Fazlul Karim Qasimi v. State of Assam*, Bail Application No. 2322/2021, Gauhati High Court (available at <https://indiankanoon.org/doc/27112171>)

⁴⁰ *Iqbal Ahmed v. State of Maharashtra*, Criminal Appeal No. 355/2021, Bombay High Court, Order dated 13.8.2021

⁴¹ *State of Karnataka v. Vittala Malekudiya*, Sessions Case No. 125/2017, Court of Additional Sessions Judge, Dakshina Kannada, Mangaluru, Karnataka, Judgment dated 21.10.2021 (available at https://www.livelaw.in/pdf_upload/state-of-karnataka-v-vittala-malekudiya-402764.pdf)

⁴² *Muhammed Shafi P v. National Investigation Agency*, 2021 SCC OnLine Ker 902, para 42

⁴³ Khalid Saifi and Ishrat Jahan were arrested on 21.3.2020

arrested on 25.8.2020 and 13.09.2020 respectively. Extension of custody from 90 to 180 days was sought for both these accused. Thereafter, the first supplementary chargesheet against them was filed in November 2020. A second supplementary chargesheet was filed on 24.2.2021 with the caveat that investigation was still continuing. It has now been 2 years since the first arrest. Similarly, in the *Bhima Koregaon* case, there have been over four rounds of staggered arrests over 3 years.⁴⁴ While the first set of accused were arrested on 06.06.2018, the last arrest was of Stan Swamy on 07.10.2020.

Staggered arrests and the impossibility of bail combined with delayed trials has made the UAPA an excessively punitive legislation. The stringent conditions of bail create an incentive for the investigating agencies to invoke the UAPA even if there is insubstantial evidence, only to ensure long periods of undertrial custody.

5. Media Spectre engineered by the Police

A recent feature of investigations under the UAPA has been selective media leaks by the investigating agency. The Supreme Court in *Romila Thapar v. Union of India*⁴⁵ criticized the modus operandi of police to malign accused in the Bhima Koregaon case.

The Delhi Police repeated the same pattern in the Delhi violence cases. An alleged confession made by Asif Iqbal Tanha regarding inciting riots was leaked.⁴⁶ The accused filed a Writ Petition before the Delhi High Court alleging deliberate leak of prejudicial material on the part of Police. The Delhi Police submitted that despite having conducted an enquiry, they were unable to state who was responsible for the leak. On receiving the inquiry report, it was reported that the single-judge bench of Justice Mukta Gupta reprimanded the police for not doing a thorough inquiry on the subject.⁴⁷

Likewise, the supplementary chargesheet in FIR 59 was also leaked to the media before the Court took cognizance,⁴⁸ prompting a response from the Delhi High Court.⁴⁹ The Delhi High Court rendered judgment in the case of *Asif Iqbal Tanha* on 5 March 2021.

Leaking of investigative material seems to be a consistent trend in sensational matters involving offences against the state, under the UAPA or the IPC. Several private messages and other material collected during investigation into alleged acts of sedition by Disha Ravi

⁴⁴ In the first round of arrests, Sudhir Dhware, Rona Wilson, Surendra Gadling, Mahesh Raut and Shoma Sen were arrested on 6 June 2018. P. Varavara Rao, Gautam Navlakha, Vernon Gonsalves, Sudha Bharadwaj and Arun Ferreira were arrested in the second round on 28 August 2018. Anand Teltumbe was arrested on 14 April 2020 and Hanybabu Musaliyavirtil Tarayil on 28 July 2020. Sagar Tayyaram Gorkhe and Ramesh Murlidhar Gaichor were arrested on 7 November 2020, with Jyoti Raghoba Jagtap being arrested on 8 November 2020; see <https://www.thehindu.com/news/national/three-years-since-bhima-koregaon-arrests/article36141816.ece> and <https://www.thehindu.com/news/national/bhima-koregaon-case-arrested-activists-allege-nia-pressure-to-apologise/article32554255.ece>

⁴⁵ *Romila Thapar v. Union of India*, (2018) 10 SCC 753, para 74

⁴⁶ <https://www.thehindu.com/news/cities/Delhi/disclosure-statement-in-riots-case-not-leaked-by-us/article32866334.ece>

⁴⁷ <https://www.thehindu.com/news/cities/Delhi/hc-flays-police-report-on-tanha-confession-leak-to-media/article33966748.ece>

⁴⁸ <https://www.thehindu.com/news/cities/Delhi/cant-find-how-leak-in-riots-case-happened/article35756063.ece>

⁴⁹ <https://www.thehindu.com/news/cities/Delhi/hc-upset-with-police-over-leak-of-chargesheet-in-delhi-riots-case/article34001473.ece>; *Asif Iqbal Tanha v. State of NCT of Delhi*, 2021 SCC OnLine Del 1107

were leaked to media houses once again prompting the accused person to file a petition in the Delhi High Court which remains pending till date.⁵⁰

6. Persecution of Defence Advocates

In certain recent UAPA investigations, there have been instances of arraigning advocates defending persons arrested for committing UAPA offences. Malicious investigation against Mehmood Pracha, an advocate representing many accused in the Delhi Violence cases is an example of this trend. However, it is difficult to ignore a history of demonization and intimidation of advocates defending persons accused of terror crimes.⁵¹

FIR No. 120/2020 was registered on 4.03.2020 on the complaint of one Irshad Ali, who claimed that on 24.2.2020, his shop had been looted and set on fire. Several persons⁵² were arrested in this case including Tahir Hussain. Thereafter statements of public witnesses⁵³ identifying these accused were recorded on 27.05.2020. On 10.8.2020 during a bail hearing on behalf of two accused persons,⁵⁴ Advocate Javed Ali produced a subsequent complaint by Irshad Ali claiming that the present accused persons had not looted his shop and the police had falsely implicated them. On receiving this, the Sessions Court adjourned the hearing and directed the police to file a report on the same. On 22.8.2020, the Delhi Police submitted a report that Irshad Ali had now named three other residents⁵⁵ as the persons who had looted his shop. In its report, the Delhi Police claimed that the complainant Irshad Ali and eye witness Sharif Malik had been previously tutored by Advocate Mehmood Pracha. Pursuant to the filing of this report and on the directions of the Sessions Court, FIR No. 212/2020 was filed at the Special Cell PS against Advocate Mehmood Pracha on 22.8.2020 under Sections 120B (criminal conspiracy), 193 (false evidence), 420 (cheating), and 468 (forgery), IPC.

Despite making such grave allegations, no action was taken by Delhi Police for the next four months. Neither was Advocate Pracha called for interrogation nor was he asked to produce any documents. On 24.11.2020, the Delhi Police did not oppose the anticipatory bail application filed by the said eye witness Sahrif Malik (allegedly tutored by Advocate Pracha) in three separate cases under S. 307 IPC (attempt to murder) registered in Dayalpur Police Station. Thereafter on 22.12.2020, 4 months after the Delhi Police had registered a FIR against Advocate Pracha for tutoring Sharif Malik and one month after they did not oppose Malik's bail application, the Special Cell procured a search warrant to search Advocate Pracha's office. On 24.12.2020 the Special Cell, issued a notice to Pracha which stated that his office would be searched for the fabricated complaint of Sharif Malik which was drafted under his instructions on the computer in his office.⁵⁶ Mehmood Pracha's office was then searched on 24.12.2020 and subsequently on 9.3.2021 for over 15 hours.

⁵⁰ *Disha A Ravi v. State (NCT of Delhi)*, W.P. (C) 2297/2021, Delhi High Court, Order dated 19.2.2021; <https://www.thehindu.com/news/cities/Delhi/toolkit-case-some-media-coverage-on-disha-ravi-sensational-prejudicial-says-hc/article33878062.ece>

⁵¹ <https://www.hindustantimes.com/india/defending-the-doomed-lawyers-who-stand-up-for-terror-accused-maoists/story-3roGxXmlQeBIIwfOVVmuFO.html>; <https://www.hindustantimes.com/weekend/threats-slurs-insults-it-s-a-hard-life-for-lawyers-defending-terror-suspects/story-z4futnhK90pw7dlgv5aZaK.html>; <https://www.firstpost.com/india/why-it-hasnt-been-easy-being-a-defence-lawyer-for-kasab-434541.html>.

⁵² Gulfam; Mohd Abid; Arshad Qayyum; Shahdab; Shah Alam; Riyasat Ali and Rashid Saifi

⁵³ Surender Singh, Rajbir Singh Yadav, Pradeep Kumar and Manoj Kumar

⁵⁴ Abid and Qayoom

⁵⁵ Deepak, Navneet alias Nanu, and Mintu

⁵⁶ <https://indianexpress.com/article/india/mehmood-pracha-delhi-police-raid-7125555/>

The circumstances giving rise to this search are suspicious. A four-month delay in taking any action after the registration of a FIR casts serious doubt on the integrity of the search conducted by the Special Cell. Further, the raid and search of an advocate's office raises serious questions regarding the exposure of material protected by attorney-client privilege. This instance itself has evoked strong condemnation from both from the Supreme Court Bar Association and the Delhi Bar Council.⁵⁷

Conclusion

A study of recent prosecutions under the UAPA reveals that this law is often used to secure undertrial custody despite insufficient evidence in a calculated manner. Even if the UAPA accused are inevitably acquitted, the long process of incarceration serves as *punishment*. Judgments of acquittal under UAPA are replete with instances of sloppy investigations, fabricated recoveries, false confessions, and lazy prosecutions attempting to procure convictions on the basis of seized literature or remote and tenuous associations.⁵⁸

On March 6, 2021, 122 persons accused under the UAPA of being members of a banned outfit, the Students' Islamic Movement of India, were acquitted by the trial court after having spent about 20 years under trial.⁵⁹

On 27 January 2022, Kerala High Court in *Thadiyantevida Nazeer v. State of Kerala*⁶⁰ recorded an acquittal slamming the efforts of prosecution to gather proper evidence. Here the case was anchored on the approver's evidence and the confessions of the accused persons, the court remarked that the police "did not make any concerted effort to 'go out in the sun' to collect independent evidence of whatever version the accused told them; though we do not venture to speculate whether they employed 'red pepper' to elicit the disclosures." It further noted that "in their anxiety to wrap up the case...they (the Officers of the NIA) even recorded the confessions of the accused, clearly inadmissible under Section 25 & 26 of the Evidence Act." The accused were acquitted of all charges.

7. Case of Bhima Koregaon

The criminal incidents which gave rise to the spate of arrests of notable HDFs in what came to be called the Bhima Koregaon case, took place at the beginning of 2018. This is possibly the most sprawling persecution of HRDs in the last few years. There are important developments in the case which took place in the year 2021 which are recorded later in this. As a background to the case, a brief chronology of the case from the beginning is also presented below. Criminal cases of this nature and scale typically carry on for many years before even the trial commences, it is therefore important to keep the focus on how each of

⁵⁷ <https://www.indiatoday.in/india/story/delhi-bar-council-letter-home-ministry-advocate-mehmood-pracha-raid-office-delhi-police-1753611-2020-12-27>; <https://indianexpress.com/article/cities/delhi/shocked-dismayed-by-police-search-at-lawyers-office-sc-bar-association-7123909/>; <https://scroll.in/latest/982546/raid-on-delhi-riots-lawyer-a-brazen-exercise-of-brute-power-says-sc-bar-association>

⁵⁸ For a more elaborate discussion of this topic, see Jamia Teachers' Solidarity Association, 2012, The case that never was: The 'SIMI' trial of Jaipur; Jamia Teachers' Solidarity Association, 2013, Guilt by Association: UAPA Cases from Madhya Pradesh; Sethi M., 2017, "Tenuous Legality: Tensions within Anti-Terrorism Law in India", 13, Socio Legal Review, 139.

⁵⁹ <https://www.thehindu.com/news/national/other-states/surat-court-acquits-122-persons-accused-of-being-simi-members/article34005151.ece>. It is pertinent to note that while 127 people were charged with the offence of being members of SIMI, 5 passed away during the trial. (The trial court judgment is in Gujarati.)

⁶⁰ *Thadiyantevida Nazeer v. State of Kerala*, 2022 SCC OnLine Ker 357

the many stages of the case has unfolded, and to trace the openings, legal and otherwise, that are forced by the defence to break the prosecution's case.

Chronology of Events

(a) Violence breaks out in Bhima-Koregaon

On 1-2 January 2018, violence broke out during annual commemoration of a historic battle at Bhima-Koregaon, Pune which resulted in two deaths and injuries to five others.

(b) Event organized by Elgaar Parishad

On 31 December 2017, a connected event was organized by Elgaar Parishad. Justice BG Kolse Patil and Justice PB Sawant were the key persons organizing this meeting. This meeting broadly comprised of left and Dalit groups where speeches were made by Justice BG Kolse Patil, Justice PB Sawant, Prakash Ambedkar, Rahika Vemula, Jignesh Mewani (an elected member of Gujarat Legislative Assembly) and Soni Sori. It has been reported that the programme reportedly ended with pledges to protect the Constitution and oppose the communalisation and divisive politics of the BJP and RSS.

(c) Two Criminal Cases Registered

On 2 January 2018, the first FIR⁶¹ in connection with the violence is registered against Sambhaji Bhide (former RSS worker who founded his own right wing outfit, Shiv Prasthan Hindusthan) and Milind Ekbote (a former BJP and Shiv Sena functionary, heading Samastha Hindu Aaghadi). The FIR claimed that Bhide and Ekbote and their supporters attacked the Dalit procession and the police present at the sport, and snatching and burning their flags. Milind Ekbote was arrested and granted bail on 19 April 2018. Sambhaji Bhide has not been arrested so far.

On 8 January 2018, a belated complaint⁶² is filed by a Pune businessman stating that the violence at Bhima Koregaon was instigated by left activists during the Elgaar Parishad event. This complaint forms the basis of what came to be called the Bhima Koregaon case. Activist Sudhir Dhawale, along with members of the Kabir Kala Manch, including Sagar Gorkhe and Jyoti Jagtap, were named in the complaint.

(d) Raids conducted at homes of Several Activists

On 17 April 2018, the Police conducted raids at the homes of several activists: Rona Wilson, Surendra Gadling and Sudhir Dhawale, as well as Kabir Kala Manch members Harshali Potdar, Jyoti Jagtap, Ramesh Ghaichor and Deepak Dhengle. Electronic devices were seized during the raids, including the computers of Wilson and Gadling.

(e) UAPA Added to the FIR

On 17 May 2018, the provisions of UAPA were added to the FIR.

(f) First Round of Arrests

On 6 June 2018 the Pune Police make the first arrests in the case:

⁶¹ FIR was subsequently numbered as C.R. No. 9 of 2018. Sections 307, 143, 147, 148, 149, 295(a), 435, 436, IPC, Arms Act 4(25), Section 3(2)(v), 3(1) (10) of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act 1989 were invoked.

⁶² C.R. No. 4/2018 under Sections 153-A, 505 (1) (b), 11, 34, IPC

1. Sudhir Dhawale – Dalit rights activist, publisher of left-leaning Marathi magazine Vidrohi
2. Surendra Gadling – Human rights lawyer, former general secretary of the Indian Association of Peoples’ Lawyers (IAPL), part of legal team for Prof. GN Saibaba
3. Mahesh Raut – Land rights activist in Maharashtra, former fellow of Prime Minister’s Rural Development Programme
4. Shoma Sen – English literature professor, Dalit and women’s rights activist
5. Rona Wilson – Academic, activist, member of Committee for Release of Political Prisoners, involved with legal defence for GN Saibaba

(g) Second Round of Arrests

On 28 August 2018, homes of nine activists raided by the Police and the next set of following five arrests affected:

1. Sudha Bharadwaj – Trade unionist, human rights lawyer, national secretary of the People’s Union for Civil Liberties
2. Arun Ferreira – Lawyer for Dalit and tribal rights activists.
3. Vernon Gonsalves – Trade unionist, academic, Dalit, tribal and prisoner rights activist.
4. Varavara Rao – Telugu poet, communist ideologue.
5. Gautam Navlakha – Academic, writer, human rights activist, particularly in Kashmir and Chhattisgarh, former secretary of People’s Union for Democratic Rights

(h) Bhima Koregaon case in the Supreme Court

By a 2:1 majority, the Supreme Court declines a plea for a Special Investigation Team (SIT) to investigate the case. Justice DY Chandrachud dissents from the majority judgment.

(i) First Chargesheet

On 15 November 2018, first chargesheet in the case, against the five activists arrested in June 2018, is filed in the special court. The chargesheet contained references to unsigned, unverified letters recovered from Wilson and Gadling’s devices discussing the assassination plot against Prime Minister Modi. The activists are alleged to be working for the Communist Party of India (Maoist) group. All accused had by this time already been denied bail, the case being a UAPA case.

(j) Supplementary Chargesheet

On 21 February 2019, supplementary chargesheet is filed, against the activists arrested in August 2018. In addition to similar claims about letters, the supplementary charge sheet focuses on additional claims about the conspiracy, including that the IAPL – which Gonsalves, Ferreira and Bharadwaj were associated with, and which had successfully defended several of those accused of Maoist links in the past – was a Maoist front.

(k) New government in Maharashtra Reviews the Investigation

In December-January 2020, following the state elections, a new coalition government comes to power in Maharashtra consisting of an alliance between the Shiv Sena, the Nationalist Congress Party (NCP) and the Congress. NCP Chief Sharad Pawar says an SIT is required to assess the probe into the Bhima Koregaon case. On 23 January 2020, Maharashtra Deputy Chief Minister, Ajit Pawar and state Home Minister, Anil Deshmukh met senior police officials to review the Bhima Koregaon case.

(l) Case Transferred to NIA

On 24 January 2020, one day after the review meeting, the Centre transfers the investigation of the case from Pune Police to the National Investigation Agency (NIA) which falls under the jurisdiction of Ministry of Home Affairs, Government of India. No reasons were specified for handing over the case to NIA after a period of 2 years.

(m) Anand Teltumbde and Gautam Navlakha surrender to NIA

The Supreme Court refuses to extend the interim relief from arrest provided to Anand Teltumbde and Gautam Navlakha. They surrender to the NIA on 14 April 2020.

(n) Arrest of Hany Babu

On 28 July 2020, Hany Babu, Associate Professor, Delhi University is arrested by the NIA. His house had been raided twice earlier, and he was summoned to the NIA office for questioning earlier in the month.

(o) Kabir Kala Manch Members arrested

On 8 September 2020, Sagar Gorkhe, Ramesh Ghaichor and Jyoti Jagtap, members of the Kabir Kala Manch are arrested by the NIA. NIA claims that they made provocative speeches at the Elgaar Parishad meeting on 31 December 2017 and that they conspired with Maoists to instigate the violence that followed.

(p) Arrest of Stan Swamy

On 7 October 2020, the NIA arrests 83-year-old Stan Swamy from Ranchi. Swamy is a Jesuit priest who has worked for tribal rights in the state for decades.

(q) Supplementary Chargesheet Filed

On 10 October 2020, two days after Stan Swamy's arrest, the NIA files supplementary chargesheet, against Anand Teltumbde, Gautam Navlakha, Hany Babu, Sagar Gorkhe, Ramesh Ghaichor, Jyoti Jagtap and Milind Teltumbde.

The supplementary charge sheet claims that all eight persons conspired with the other accused to further the ideology of the banned CPI (Maoist) organisation. Anand Teltumbde is supposed to have helped organise the Elgaar Parishad. Babu is supposed to have arranged visits for foreign journalists to Maoist areas, and tried to secure the release of GN Saibaba. Navlakha is accused of "uniting intellectuals against the Indian government forces to defeat them both physically and otherwise" and recruiting new members. Swamy is alleged to be "actively involved" in CPI (Maoist) activities, with literature and propaganda material of the outfit allegedly recovered from his possession. The NIA also claims that the Persecuted Prisoners Solidarity Committee, which he is a part of, is a front for the Maoists.

Events of 2021

The aforesaid events being the background, the developments that took place in the Bhima Koregaon case during 2021 are described below:

(a) Forensic Analysis of Rona Wilson's Device Reveals Planting of False Incriminating Material on the Device

A report dated 8 February 2021, authored by Arsenal Consulting, a US-based digital forensics firm, show that Rona Wilson's laptop was subjected to persistent malware attack over a two year period prior to his arrest in June 2018. During this time at least 10 incriminating documents were planted on Wilson's computer. The said forensics analysis was commissioned by Rona Wilson's defence team. The Washington Post on 10 February 2021 broke the story on the Arsenal report.⁶³ The Arsenal Report noted the following in this behalf:

“The attacker responsible for compromising Mr. Wilson's computer had extensive resources (including time) and it is obvious that their primary goals were surveillance and incriminating document delivery. Arsenal has connected the same attacker to a significant malware infrastructure which has been deployed over the course of approximately four years to not only attack and compromise Mr. Wilson's computer for 22 months, but to attack his co-defendants in the Bhima Koregaon case and defendants in other high-profile Indian cases as well.”⁶⁴

On 10 February 2021, Rona Wilson preferred a Writ Petition before the Bombay High Court pleading new material in the form of Arsenal Report. The petition asked for an independent inquiry headed by a retired judge of the High Court/Supreme Court into the planting of fake incriminating material on his device; sought compensation for the agony and harassment suffered by him during this period; and quashing of the FIR against the HDRs. The Writ Petition remains pending.

(b) Varavara Rao granted Medical Bail

On 22 February 2021, the Bombay High Court granted medical bail to 81-year-old Varavara Rao for six months. The bail was granted on account of his worsening medical condition. The Bombay High Court referred to *Najeeb* case while considering Article 21 considerations noted the following:

83. As we have noted above, in a given case, the fundamental rights guaranteed in Part III of the Constitution of India to prisoners languishing in four walls of prisons could be asserted on the basis of appropriate material to show that to recognise such rights, particularly the right guaranteed under Article 21 of the Constitution of India, the walls of the prison would have to be breached, subject of course, to imposition of appropriate conditions. Imposition of conditions would be in the nature of a safety net to ensure that the undertrial/accused is made to face proceedings before the trial court. The Supreme Court in *K.A. Najeeb*¹⁰, has categorically held in the context of sufferings of undertrials where the proceedings before the trial court take years to be completed, that the rigours of provisions pertaining to grant of bail found in special statutes like the UAPA will melt down where there is no likelihood of the trial being completed within a reasonable time. Therefore, such a position of law is now well recognised and it can be relied upon where on facts, the court comes to a conclusion that continued incarceration of an accused like the undertrial in the present case,

⁶³ <https://www.washingtonpost.com/context/new-forensics-report-concludes-evidence-was-planted-in-case-against-indian-activists/1fb9874f-0f32-44fc-b9e9-0e59b69e9200/>

⁶⁴ <https://context-cdn.washingtonpost.com/notes/prod/default/documents/b19a6f2e-55a1-4915-9c2d-5fae0110418c/note/b463d38b-2384-4bb0-a94b-b1b17223ffd0>

would violate his right under Article 21 of the Constitution, considering the precarious health condition of such an accused. Even otherwise, in the present case also, the respondents have conceded that at least 200 witnesses will be examined by the prosecution. The charge-sheet itself runs into thousands of pages. The charge is not framed yet, and consequently, the trial is yet to commence and, even after commencement of trial, it may take a long time to complete since the prosecution intends to examine at least 200 witnesses.

(c) Stan Swamy Dies in Custody

On 7 October 2020, Stan Swamy became the last person to be arrested in the Bhima Koregaon case. This was almost after two years after the first arrest. Most curiously, the NIA after arresting did not seek his custody for interrogation, and he was remanded to judicial custody. Moreover, two days later, on 10 October 2020 chargesheet against him was filed. This begs the question as to the necessity of his arrest as he was clearly not needed for interrogation. It also shows that the chargesheet was already prepared in advance and they only needed to show the arrest to support the narrative contained in the chargesheet.

Stan Swamy applied for bail on health grounds which was dismissed by the NIA Court on 22 October 2020. The bail application cited his age, pre-existing comorbidities and the COVID-19 pandemic: Swamy was suffering from Parkinson's disease, substantial loss of hearing in both ears and had suffered multiple falls in the prison. Apart from that, he had also been operated for hernia twice and complained of pain in his lower abdomen.

Thereafter, Stan Swamy moved an application before the NIA Court that he be allowed to use a straw and sipper in prison to drink water, as he cannot hold a glass because of Parkinson's disease. The National Investigation Agency sought 20 days to file a reply to this application. The application was filed on 6 November 2020, and it was to be finally heard on 4 December 2020 before which he was provided a sipper.⁶⁵

Seeking Bail before NIA Court: On 22 March 2021, the NIA Court dismissed bail application made by Stan Swamy on merits and health grounds. Bail petition was moved sometime in January, wherein worsening health condition of the applicant was also brought on record. His application read - "He has undergone two hernia operations and is still suffering from abdomen pain. He suffers intense pain due to lumbar spondylosis i.e. the tear and wear of the lumbar disc and tremors in both hands due to Parkinsons. Infact, he has been shifted to the prison hospital and is being taken care of by other inmates." The NIA Court took four months to dispose of bail application even though the application canvassed such crippling health condition.

Seeking Bail in High Court: This application was heard by the High Court in the midst of COVID-19 pandemic. It bears noting that Taloja jail where Stan Swamy was imprisoned had three ayurvedic doctors, none trained in allopathy; it is overpopulated by 48 per cent of its capacity. By this time Stan Swamy, who was 84 years old, with advancing Parkinson's disease was finding it difficult to physically cope inside jail.

Stan Swamy filed an appeal before the Bombay High Court against the rejection of bail by the NIA Court. This application pressed for bail on merits as also on health grounds. On 19 May 2021, the Bombay High Court directed the dean of JJ Hospital to form an expert committee to examine Swamy's medical condition and submit a report by 21 May. The bench on 21 May 2021 also spoke to him over video conferencing, where he pleaded before the

⁶⁵ <https://thewire.in/rights/stan-swamy-given-straw-sipper-taloja-jail>

court for interim bail, and opposed being kept in hospital. The full conversation that took place over video conference on 21 May 2021 is reproduced below:⁶⁶

Justice Kathawalla first asked Swamy if he was taken to JJ Hospital. Throughout the entire interaction, a person sitting beside Swamy explained to him what the court was asking. Stan Swamy said:

I am Stan Swamy. Yesterday, I was examined in several places. But what I want to say is that I was brought here eight months ago. When I came to Taloja, whole systems of my body were very functional, but during these eight months there has been a steady by slow regression of whatever my body functions were.

Eight months ago, I would eat by myself, do some writing, walk, I could take bath by myself, but all these are disappearing one after another. So Taloja Jail has brought me to a situation where I can neither write nor go for a walk by myself. Someone has to feed me. In other words, I am requesting you to consider why and how this deterioration of myself happened. Yesterday I was taken to JJ Hospital, so I got an opportunity to explain what I should be given. **My deterioration is more powerful than the small tablets that they give.**

After Swamy vehemently refused to get admitted to JJ Hospital, Justice Kathawalla asked if he would agree to get admitted to any other hospital.

His lawyer Mihir Desai said that Swamy is probably assuming to he will be taken to a government hospital, he submitted, *“He is in the prison hospital since 6 months. The problem with prison hospital is that they don't have anything - no medical practitioner, no facility.”*

But Swamy said he was only asking the judiciary to consider interim bail. He said:

Only one thing that I would request the judiciary is to consider for interim bail. That is the only request.

Desai tried to explain to Swamy that the question of bail would be decided later. Desai said, *“Right now, it may not be possible to send you to Ranchi. If you could agree to get admitted to, say Holy Family Hospital, then we can see.”*

Swamy replied:

I don't think it would make any difference. Whatever happens to me, I would like to be with my own.

In its order the court noted:

We have also spoken to Mr Swamy and we have observed that he has severe hearing problem. He is unable to hear even the person sitting next to him. He could hear only when the person sitting next to him conveyed.

We keep the matter on June 7. Till then Taloja Jail is directed to strictly follow the recommendations of the JJ Hospital committee as well as the facilities mentioned.

The Bombay High Court through an order dated 27 May 2021 asked the Maharashtra government to transfer Stan Swamy to Holy Family hospital in view of his worsening health. However, NIA argued that shifting Swamy to Holy Family hospital may not be necessary as

⁶⁶ <https://www.livelaw.in/top-stories/stan-swamy-interacts-with-bombay-hc-for-interim-bail-bhima-koregaon-case-174477>

state-run JJ Hospital has all facilities to treat him and that an order from the bench allowing admission to the private hospital may undermine the government hospital's capabilities and set a "wrong precedent".⁶⁷ The High Court passed the following order:

It is not in dispute that the appellant's age is 84 years and according to findings recorded by a team of doctors from JJ hospital, he needs treatment. However, due to the present pandemic situation, and influx of patients, it may not be possible to give attention to the appellant in JJ hospital.

As the bench comprising Justices SS Shinde and NJ Jamadar took up Stan Swamy's bail application at around 2.30 PM, 5 July 2021, the treating doctor addressed the court:

It is with a very heavy heart I have to inform you that Father Stan Swamy has passed away", Dr Dsouza of Holy Family hospital Mumbai told the bench. Stan Swamy passed away on 5 July 2021 at 1.30 PM, a month after he was admitted to Holy Family hospital following court's orders. He had suffered pulmonary infection, post COVID19 complications in the lungs, and pneumonia.

Father Stan Swamy was arrested on 8 October 2020. Father Stan was the founder of Bagaicha, an organisation dedicated to empowering Adivasis. The NIA has claimed that Bagaicha is connected with Vistapan Virodhi Jan Vikas Andolan (VVJVA) and the latter is also a frontal organisation of the CPI (Maoist).

It is noteworthy that the 84-year-old Stan Swamy, when breathed last, his interim bail plea was still pending in the Bombay High Court.

Interestingly, when an associate of the counsel appearing for co-accused of Stan Swamy wrote an op-ed piece (27 May 2021) criticizing the High Court's decision to not grant him bail, the Court objected to the lawyers going to media in cases where they are representing the accused. The counsel reminded the court that Stan Swamy was not his client, and it is his right to express himself outside of court, and seek justice before the Court.⁶⁸

Bail Granted to Sudha Bharadwaj

On 1 December 2021, the Bombay High Court granted statutory bail to Sudha Bharadwaj. By this time, she had spent more than 3 years in the prison.⁶⁹

Sudha Bharadwaj and other co-accused pressed for statutory bail [under Section 167(2) of the CrPC read with Section 43-D(2), UAPA] on the ground that the Judge, who extended the period for investigation under Section 43-D(2) of UAPA from 90 days to 180 days, and took cognizance of the offences, was not legally empowered to grant such extension. If the order of court extending the period of investigation is quashed, and the extension itself becomes a nullity, in that event as a result of non-filing of chargesheet within the stipulated time, the court ought to release the accused on statutory bail under Section 167(2) of the CrPC read

⁶⁷ <https://thewire.in/rights/stan-swamy-death-covid-19-judicial-inquiry>

⁶⁸ <https://www.livelaw.in/top-stories/bombay-high-court-takes-objection-lawyers-article-criticizing-handling-stan-swamy-bail-case-175185>; the op-ed is available at <https://indianexpress.com/article/opinion/columns/elgaar-parishad-bombay-high-court-stan-swamy-bail-uapa-case-7331759/>

⁶⁹ *Sudha Bharadwaj v. National Investigation Agency*, Criminal Bail Application No. 2024/2021, Bombay High Court, Judgment delivered on 1.12.2021

with Section 43-D(2), UAPA. In the present case, the legality of extension order was under challenge before the High Court.

The High Court noted that Additional Sessions Judge, who extended the detention of Sudha by order dated 26 November 2018 and took cognizance of the offences by order dated 21 February 2019 was never appointed as Special Judge/Additional Special Judge under Section 11/22, NIA Act and, therefore, had no jurisdiction to deal with the Scheduled Offences under the NIA Act. Resultantly, the orders dated 26 November 2018 and 21 February 2019 passed by Additional Sessions Judge lacked jurisdiction and legal authority and thus are null and void.

The court noted the statutory position that as per Sections 13 and 22 of the NIA Act, every Scheduled Offence, shall be tried only by the Special Court within whose local jurisdiction it was committed. Since the Special Courts were already constituted by the State Government under Section 22 of the NIA Act in Pune District, vide Notifications dated 11 July 2017, 29 June 2018 and 5 March 2019, the orders extending period of detention and taking cognizance were a nullity in the eye of law.

The High Court relied on the Supreme Court judgment in *Bikramjit Singh v. State of Punjab*⁷⁰ wherein the Supreme Court held that the Special Court alone had jurisdiction to extend detention upto 180 days under the provisions of Section 43-D(2)(b) of UAPA.

Tale of Two Supreme Court Judgments

Two significant judgments rendered by the Supreme Court in 2021 dealt with the issue of statutory bail in UAPA cases, both of which had a direct bearing on Sudha Bharadwaj's bail plea. Both the decisions have been dealt with in detail in the High Court judgment.

The Supreme Court in *Sadique v. State of M.P.*⁷¹ (judgment pronounced on 7 September 2021) expressed agreement with *Bikramjit Singh* (para 26), and in doing so reinforced the position of law that so far as the offences under UAPA are concerned, the Magistrate's jurisdiction to extend the time under Section 43-D(2) is non-existent; the only competent authority to consider such request for extension of time to complete investigation would be "the Court" as specified in the proviso to Section 43-D(2)(b), UAPA i.e. the special court. Thus construed, it stands reinforced that where a Special Court is constituted under Section 22 of the NIA Act, by the State Government, the jurisdiction to extend the period of detention exclusively vests with the Special Court so constituted.

In *Naser Bin Abu Bakr Yafai v. State of Maharashtra*,⁷² decided by the Supreme Court on 20 October 2021, the Court noted (para 44, 47) that the principles enunciated in *Bikramjit Singh* would not apply to Naser's case as there existed no Special Courts in the State of Maharashtra designated under Section 22 of the NIA Act, at the relevant point of time.

The High Court in Sudha Bharadwaj's case ruled that there is a crucial distinction between the facts in the case of *Naser Bin Abu Bakr Yafai* and the instant case: that the Special Courts constituted by the State Government under Section 22 of the NIA Act, did exist at Pune when the application for extension of period of detention was entertained by the learned Additional Sessions Judge.

Bail not granted to the other co-accused

⁷⁰ *Bikramjit Singh v. State of Punjab*, 2020 SCC OnLine SC 824 (decided on 12.10.2020)

⁷¹ (2022) 6 SCC 339

⁷² (2022) 6 SCC 308

As regards the bail claim of other 8 co-accused who were before the High Court (Sudhir Prahlad Dhawale, Rona Wilson, Surendra Gadling, Dr. Shoma Sen, Mahesh Raut, P. Varavara Rao, Vernon Gonsalves and Arun Ferreira), the Court denied them statutory bail stating that they had failed to press for statutory bail before the expiry on 90 days period. The Court said the following in this regard:

We have seen that where the accused fails to apply for default bail when the right accrues to him and subsequently a charge-sheet is filed before the Magistrate, the right to default bail would get extinguished as it cannot be said that the accused 'availed of' his right to be released on default bail.

The Bombay High Court in denying relief to the co-accused on a technicality has adopted a mechanical view of the law, not keeping to the spirit of the principle enunciated in *Bikramjit Singh*. It is inequitable to penalize the co-accused for apparently not filing an application in time to claim a substantive Article 21 right of statutory bail. It needs to be considered whether a substantive liberty entitlement can be so easily frustrated by a so-called default in the manner the remedy was sought by the accused person.

8. Use of UAPA in Jammu and Kashmir

In the aftermath of revocation of Article 370 in Jammu and Kashmir on 5 August 2019, state unleashed a widespread crackdown on political leaders, HRDs and activists. The severity of clampdown was unprecedented even by the standards of the region which has witnessed violations and persecutions for a very long time now.

Since 2019, the Jammu and Kashmir administration has booked over 2,300 people in more than 1,200 cases under the Unlawful Activities (Prevention) Act, and 954 people under the Public Safety Act (PSA). Of these, 46 per cent of those booked under UAPA and about 30 per cent of those detained under PSA are still in jail, both inside and outside J&K.

According to data reviewed by *The Indian Express*, 699 people were detained under PSA in 2019, and 160 in 2020. In 2021, 95 people were detained under PSA till July-end. Of these, 284 continue to remain under detention. In the first 30 days after the revocation at least 290 people were booked under PSA, including former Chief Ministers Farooq Abdullah, Omar Abdullah and Mehbooba Mufti. According to government sources, at least 250 people booked under this law were from Kashmir region.

Of the 2,364 people arrested under UAPA, 918 were held in 437 cases in 2019, 953 people in 557 cases in 2020, and 493 in 275 cases till July-end of 2021 (249 cases in Kashmir, 26 in Jammu). Of these, 1,100 continue to remain in custody.⁷³

(a) Arrest of Khurram Parvez, prominent HRD from Kashmir

On 22 November 2021, NIA, assisted by the local police, conducted simultaneous raids on the house of Khurram Parvez and the JKCCS office in the city of Srinagar, in Jammu and Kashmir. The raids started in the early morning hours and lasted for approximately 14 hours, until about 6:00 pm. Parvez's mobile phone, laptop, and several books were seized during the raids. As per the arrest memo and the FIR, Mr. Parvez was arrested on charges under the

⁷³ <https://indianexpress.com/article/india/2300-booked-under-uapa-in-jk-since-2019-nearly-half-still-in-jail-7438806/>

Indian Penal Code (IPC)⁷⁴ and the Unlawful Activities (Prevention) Act (UAPA).⁷⁵ Parvez's family members were then told that he would be transferred to Delhi the following day. However, he was not taken to Delhi until two days later, on November 24, 2021.

Parvez has been active in human rights work in the Kashmir Valley region since 1996. He has worked relentlessly to expose human rights violations in Jammu and Kashmir, documenting cases of enforced disappearances and investigating unmarked graves.⁷⁶ In 2000, Mr. Parvez co-founded the Jammu Kashmir Coalition of Civil Society (JKCCS), which documents human rights violations committed in Jammu and Kashmir, such as enforced disappearances, torture, extrajudicial killings, sexual violence, and freedom of expression violations, and including those violations committed by security forces. He currently serves as JKCCS Program Coordinator. Mr. Parvez is also the Chairperson of Asian Federation Against Involuntary Disappearances (AFAD), an international human rights organization which provides assistance to victims of enforced disappearances across Asia. Mr. Parvez is also the Coordinator of the Association of Parents of Disappeared Persons (APDP), an organization advocates for an end to the practice and crime of involuntary and enforced disappearances at local, national and international platforms. His work has been cited by various governments, including in the United States Department of State's Country Reports on Human Rights Practices,⁷⁷ and the United Nations (UN), such as Office of the High Commissioner for Human Rights (OHCHR) Report on the Situation of Human Rights in Kashmir.⁷⁸ The UN Special Rapporteur on the Situation of HRDs has explicitly stated, "He's not a terrorist, he's a human rights defender" in response to his November 2021 arrest.⁷⁹

(b) Arrest of Politician Waheed-Ur-Rehman Parra

Waheed-Ur-Rehman Parra, President of the youth wing of Peoples Democratic Party (PDP), was arrested in Kashmir on 25 November 2020 by the National Intelligence Agency (NIA) on alleged terrorist charges. He was granted bail on 9 January 2021 but was never released from jail and was arrested by the Criminal Investigation (Kashmir Wing) of the Jammu and Kashmir Police. On 31 March 2021, UN Special Rapporteur on Torture and others raised concerns about Parra's alleged arbitrary detention and torture in custody. Parra remains in custody at the end of the year.⁸⁰

⁷⁴ Section 120B ("criminal conspiracy"), Section 121 ("waging war against the government of India"), and Section 121A ("punishment for conspiracy to wage war against the government of India") of the IPC

⁷⁵ Section 17 ("raising funds for terror activities"), Section 18 ("punishment for conspiracy"), Section 18B ("recruiting any person or persons for commission of a terrorist act"), Section 38 ("offence relating to membership of a terrorist organization"), and Section 40 ("offence of raising funds for terrorist organisations") of the UAPA

⁷⁶ <https://www.amnesty.org/en/latest/news/2022/04/india-human-rights-defender-khurram-parvez-marks-150-days-arbitrarily-detained-on-baseless-charges/>

⁷⁷ OHCHR, Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan, <http://www.ohchr.org/sites/default/files/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf>.

⁷⁸ United States Department of State, 2019 Country Reports on Human Rights Practices: India, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/india/>; United States Department of State, 2020 Country Reports on Human Rights Practices: India, <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/india/>.

⁷⁹ <https://twitter.com/marylawlorhrds/status/1462821562566987781>

⁸⁰ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26181>; <https://article-14.com/post/arrested-denied-bail-and-allegedly-tortured-the-story-of-a-kashmiri-politician-who-had-no-problem-being-indian--610b52ba2c1c2>

Theme III. Actions against Journalists/Press

1. Killing of Sulabh Srivastava (ABP News/ABP Ganga)

On the evening of 13 June 2021, Sulabh Srivastava, a reporter with ABP News and ABP Ganga, was declared dead at a hospital in Pratapgarh, Uttar Pradesh. His body was found by local laborers near a brick kiln.⁸¹

The day before his death, Srivastava had filed a complaint to police over threats he received in response to his June 9 reporting on a liquor mafia.⁸² In his complaint addressed to the Additional Director General of Police, Prayagraj zone, Srivastava stated that he was being followed and that he had heard from his sources that a criminal group was planning to harm him for his reporting. Renuka Srivastava, the journalist's wife, also said that he had received threats in the days leading to his death.⁸³ Police initially said that he died in a motorcycle accident, later it was reported that other angles too are being investigated.⁸⁴

2. Killing of Chennakeshavalu (EV5 Channel)

On 8 August 2021, in Kurnool district, Andhra Pradesh, Chennakeshavalu, a 35 years old reporter for channel EV5, was stabbed by two men.⁸⁵ Chennakeshavalu, died later that day of his injuries. According to reports, police have arrested the suspects, identified as a police officer, Venkata Subbaiah, and his brother, identified as Nani, for suspected murder.

It has been reported that the victim had recently exposed the ugly nexus of Venkata Subbaiah, a constable at Nandyal II town Police Station, with matka gamblers and tobacco smugglers which subsequently led to the latter's suspension.

3. Killing of Manish Kumar Singh (Sudarshan TV)

Manish Kumar Singh, a reporter with news channel Sudarshan TV, went missing in East Champaran, Bihar on 8 August 2021. Local police said the body of Manish Kumar Singh was recovered from a local pond on 10 August.⁸⁶

The journalist's father told the outfit *Committee to Protect Journalists* that he suspects his son was killed due to his reporting on a local criminal group, saying that Singh's "body and

⁸¹ https://www.ndtv.com/india-news/up-journalist-sulabh-shrivastava-day-after-flagging-mafia-threat-up-journalist-dies-cops-say-accident-2463222?pfrom=home-ndtv_bigstory

⁸² <https://www.thehindu.com/news/national/other-states/uttar-pradesh-scribe-who-expressed-threat-to-life-by-liquor-mafia-dies-in-road-accident/article34810018.ece>

⁸³ <https://www.aninews.in/news/national/general-news/up-police-files-fir-against-unknown-persons-in-connection-with-death-of-scribe20210614191055/>

⁸⁴ <https://thewire.in/media/up-journalist-found-dead-days-after-receiving-threats-from-liquor-mafia>

⁸⁵ <https://timesofindia.indiatimes.com/city/vijayawada/andhra-pradesh-local-news-reporter-murdered-by-suspended-cop-and-his-brother-in-kurnool/articleshow/85177601.cms>

⁸⁶ <https://theprint.in/india/sudarshan-tv-journalist-kidnapped-murdered-in-bihar-went-out-with-friends-never-returned/713888/>

belongings [were] found in the area that this criminal group operates from.”⁸⁷ It is reported that the victim was also a RTI activist.

Police has arrested three people suspected to have been involved in Singh’s death, including two journalists, Amrendra Kumar and Ashlaj Alam, and a third person whose name has not been released.⁸⁸

4. Killing of Raman Kashyap (Sadhna Plus TV)

Raman Kashyap, an freelance journalist who contributed to the Madhya Pradesh-based news channel Sadhna Plus TV, was found dead on 4 October 2021, from injuries he sustained while covering farmers protest the previous day.⁸⁹

Kashyap was covering a farmer’s protest in Lakhimpur Kheri on 3 October that turned into violent clashes when a convoy of three SUVs ran over a group of protesting farmers, killing four farmers and possibly him. It has been reported that the convoy was of Ajay Kumar Mishra, the Minister of State in Ministry of Home affairs, Government of India.⁹⁰

Kashyap’s family found his body at a local morgue on October 4, after he failed to return home, according to news website *The Print*. Eight people, including Kashyap, were killed in the violence. On 9 October police arrested Mishra’s son, Ashish Mishra, who allegedly drove the car, along with two other suspects.

Two FIRs were registered after the violence: one in connection with the death of the four farmers while the second FIR was lodged in connection with the violence during which four others, including two BJP workers, a journalist and the driver of the car, which allegedly mowed down the farmers, were killed.⁹¹

According to *NewsLaundry*, Kashyap’s family claimed they were pressured by police and Mishra’s supporters to say that the journalist was beaten to death by protesting farmers and did not die after being crushed by the official’s car. Kashyap’s father Ram Dulare Kashyap told *NewsLaundry*, “My son was not beaten up. I saw the body.” Kashyap’s brother Pawan told news website *The Print* that the journalist’s clothes were torn, and had injury marks on his body as a result of being dragged on the road.⁹²

On 16 November, the district court of Lakhimpur Kheri rejected the bail application of Ajay Mishra’s son Ashish Mishra, who is the prime accused in the October 3 incident. The court also rejected the bail applications of two other accused — Luv Kush Rana and Ashish Pandey.

So far, 13 people have been arrested over the deaths of four farmers and a journalist. Police have also arrested four persons for the deaths of two BJP workers and the driver.

⁸⁷ <https://cpj.org/data/people/manish-kumar-singh/>

⁸⁸ <https://www.thehindu.com/news/national/other-states/journalists-body-found-in-bihars-east-champaran-district-two-arrested/article35851951.ece>

⁸⁹ <https://www.thequint.com/news/politics/journalist-raman-kashyap-killed-in-lakhimpur-kheri-unrest>

⁹⁰ <https://www.newslaundry.com/2021/10/14/as-we-celebrate-the-maria-ressas-of-the-world-lets-not-forget-the-raman-kashyaps>

⁹¹ <https://www.hindustantimes.com/india-news/lakhimpur-kheri-family-of-journalist-killed-in-violence-seeks-fir-against-union-minister-son-101636483215416.html>

⁹² <https://mojostory.com/first-person/my-brother-died-in-lakhimpur-truth-about-his-death-is-still-not-out/>

5. Killing of Avinash Jha (BNN News)

Avinash Jha, a reporter with the news website *BNN News*, based in the village of Benipatti, Madhubani district Bihar, went missing on the night of November 9 and was found dead on November 12. His partially burnt body was recovered in a sack from Urain village.

Jha, also an RTI activist, has been highlighting illegally running private nursing homes and hospitals in his news-reports.

According to BNN News Chief Editor Kanhaiya Kashyap who spoke to the *Committee to Protect Journalists*, Jha not only reported on those clinics for the news outlet, but also filed complaints about them with authorities.⁹³ Kashyap also said that he believed Jha was targeted for his journalism. On 7 November, Jha had announced on his Facebook page that he would initiate a new campaign against illegal clinics on November 15.⁹⁴

On 14 November 2021, the police arrested six suspects in the killing, identified as Roshan Kumar, Bittu Kumar, Deepak Kumar, Pawan Kumar, Manish Kumar, and Purna Kala Devi.

6. Charges filed against Senior Journalists

In January 2021, FIRs against six journalists was registered by the police in Uttar Pradesh, Madhya Pradesh, Delhi and Haryana. Rajdeep Sardesai (India Today), Mrinal Pande (National Herald), Zafar Agha (Qaumi Awaz), Vinod Jose, Paresh Nath, and Anant Nath (all three journalists are with Caravan) were booked for sedition, criminal conspiracy, and promoting enmity for reporting and tweeting the death of a protester during the Republic Day tractor rally organised by farmers protesting against the farm laws.⁹⁵

In their tweets it was suggested that one of the protestors was likely shot by the police. Later on, when reports emerged that the protestor died after his tractor overturned, the journalists deleted the tweets and also broadcasted police's denial. In response to this reporting, serious charges including sedition were put on the journalists.⁹⁶

Anand Kumar Sahay, secretary general of the Press Club of India in a response said, "The government is sending a message that while on paper we're a democracy, we are behaving like several undemocratic states of the world... Even if a reporter has made a mistake, it's not a crime. To say something unknowingly which is 100 percent not right is not a crime and, therefore, governments can't use that as a pretext to bring these dangerous laws like sedition against journalists." The Supreme Court granted the individuals a stay against arrest on 9 February 2021.

⁹³ <https://cpj.org/data/people/avinash-jha/>; Also see <https://thewire.in/media/bihar-rti-activist-journalist-buddhinath-jha-illegal-clinics-murdered>

⁹⁴ <https://www.indiatoday.in/india/story/love-triangle-murder-journalist-bihar-madhubani-police-arrests-1876723-2021-11-14>

⁹⁵ <https://www.thehindu.com/news/cities/Delhi/delhi-gurugram-police-file-fir-against-tharoor-senior-scribes/article33706276.ece>

⁹⁶ <https://www.newslaundry.com/2021/01/31/a-mistake-is-not-a-crime-press-fraternity-protests-sedition-firs-against-six-journalists>

7. Actions against journalists in Jammu and Kashmir

- (a) On 5 March 2021, journalists Shafat Farooq and Saqib Majeed stated that they were beaten by police during a protest in Srinagar.
- (b) In another incident, on 17 July 2021, Kashmiri journalist Aakash Hassan was allegedly assaulted by police.
- (c) In the month of August 2021, Jammu and Kashmir police detained and questioned journalist Irfan Malik concerning tweets critical of the Jammu Kashmir government's film promotion policy.
- (d) In July 2021, photojournalist Masrat Zahra, who relocated to Germany after UAPA charges were filed against her, alleged her parents were beaten by Jammu and Kashmir police because of her work.
- (e) On 7 April 2021, Jammu and Kashmir Police Inspector General Vijay Kumar issued a warning that police would file criminal charges against journalists who approached ongoing police counter-terrorism operations, on the grounds that such reporting was "likely to incite violence" or promote "antinational sentiment." The Editors Guild of India criticized the prohibitions as "draconian and undemocratic."
- (f) In February 2021, the Kashmir Press Club stated that security agencies had routinely deployed intimidation tactics such as threats, arbitrarily summoning journalists, and physical attacks on journalists in Jammu and Kashmir. On 8 February, police summoned journalists Naseer Ganai and Haroon Nabi, where they were questioned for reporting on a statement by the Jammu Kashmir Liberation Front.
- (g) In June 2021, the Jammu and Kashmir government released *Media Policy – 2020*, a policy which authorizes the Directorate of Information and Publication Relations to "examine" the content of print, electronic, and other forms of media for "fake news, plagiarism, and unethical or antinational activities" in the name of law and order. Under the new media policy, government action could range from legal proceedings against journalists for "indulging in fake news, unethical or antinational activities, or plagiarism" to withholding advertisements from any media that "incite or tends to incite violence, question sovereignty and the integrity of India, or violate the accepted norms of public decency and behavior."

8. Income Tax Raids on offices of *Dainik Bhaskar* newspaper

On 22 July 2021, the Income Tax Department searched 32 office and residential locations affiliated with the Dainik Bhaskar Group, publisher of *Dainik Bhaskar*, the country's second-most-read Hindi language newspaper. The Income Tax Department also raided the offices of Hindi language television station Bharat Samachar. Government sources asserted the raids were a result of alleged tax evasion by the media groups. The media groups claimed that the raids were conducted as retaliation for investigative reporting during the second wave of the COVID-19 pandemic.

9. Actions of Uttar Pradesh Police

- (a) On 15 June, Uttar Pradesh police filed charges against Twitter, online news platform *The Wire*, journalists Rana Ayyub, Saba Naqvi, and Mohammad Zubair, and Congress leaders Salman Nizami, Masqoor Usmani, and Sama Mohammad, for “stoking communal unrest” by posting video footage of the assault of an elderly Muslim man.
- (b) On 13 June, Uttar Pradesh authorities charged *Scroll.in* Executive Editor, Supriya Sharma for a news report critical of the COVID-19 lockdown; she was charged with violating the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and Sections of the Indian Penal Code for printing defamatory matter and negligent acts likely to spread infection of disease dangerous to life. On 26 August 2021, the Allahabad High Court granted Sharma protection from immediate arrest in the case but allowed the investigation to continue.

10. Andhra Pradesh Police files sedition charges against news channels

On 14 May 2021, Andhra Pradesh police filed sedition charges against Telugu news channels TV5 and ABN Andhra Jyothi for broadcasting the speeches and statements of Member of Parliament K. Raghuram Raju that allegedly “promoted enmity and hatred among different communities.” Police arrested Raju and filed sedition charges against him also. On 21 May 2021, the Supreme Court granted bail to the lawmaker; on 31 May, the Supreme Court forbid Andhra Pradesh police from acting against the two channels.

- 11.** On 24 March 2021, *Syandan Patrika* journalist, Bikash Das was assaulted in Tripura while covering a story on corruption. A group of assailants attacked Das, inflicting serious injuries before he was able to escape.

Theme IV. Asserting Right to Free Speech and Expression

1. Repression around COVID

Media reported various instances where criminal charges were filed against individuals who posted requests seeking urgent help (such as oxygen supply) on social media during the second wave of the COVID pandemic.

- (a) On 28 April 2021, police in Amethi, Uttar Pradesh, filed charges against 26-year-old Shashank Yadav for tweeting a plea for oxygen for his grandfather.⁹⁷
- (b) In an online meeting on 25 April 2021, Uttar Pradesh, Chief Minister Adityanath asked the administrative leadership to “crack down” on hospitals that discharge patients on the grounds of shortage of oxygen or “complain” about shortages to the media. After this meeting, state’s Additional Director General of Police, issued a letter to all police officials in the state stating that “misleading” social media posts on the COVID-19 situation in the state must be penalised.⁹⁸
- (c) On 22-23 April 2021, acting on a request made by the Government of India, the Twitter withheld from public view around 50 tweets. Most of these tweets criticised the manner in which the Narendra Modi government had handled the pandemic. At this point, India was in the midst of ‘second wave’ that was inflicting heavy damage to its population, with the civic administration crumbling under the pressure of disease. Twitter’s filings with the Lumen database⁹⁹ gave details of the affected tweets that were taken down. Many tweets came from verified accounts such as politicians like the Congress’s Revanth Reddy and Pawan Khera, and Minister in the West Bengal Government, Moly Ghatak. Tweets put out by filmmaker Avinash Das and filmmaker Vinod Kapri were also removed from public view in India.¹⁰⁰ It also appeared that only a few of these tweets may have been spreading fake news.
- (d) On 30 April 2021, the Supreme Court took cognizance of the various instances of State Governments and the Central Government taking action against citizens raising voices against mis-management of COVID. The Supreme Court directed the Central Government and State Governments to notify all Chief Secretaries and Director Generals of Police that any clampdown on information on social media or harassment caused to individuals seeking/delivering help on any platform will attract a coercive exercise of jurisdiction by this Court.¹⁰¹

2. Arrest of Comic Munawar Faruqui

On 1 January, Madhya Pradesh police arrested stand-up comedian Munawar Faruqui and four other persons for offending religious sentiments with jokes he allegedly planned to perform.

⁹⁷ <https://thewire.in/government/amethi-up-police-arfa-khanum-sherwani-oxygen-smriti-irani>

⁹⁸ <https://thewire.in/government/covid-19-the-adityanath-government-has-moved-from-denial-to-intimidation>; https://www.telegraphindia.com/amp/india/coronavirus-outbreak-yogi-orders-crack-down-on-hospitals-flagging-oxygen-shortage/cid/1813775?__twitter_impression=true

⁹⁹ A transparency initiative run by Harvard University’s Berkman Klein Centre which tracks content removal requests.

¹⁰⁰ <https://thewire.in/tech/as-covid-19-crisis-deepens-twitter-takes-down-tweets-criticising-modi-government>

¹⁰¹ In Re: Distribution of Essential Supplies and Services during Pandemic, Suo Motu Writ Petition (Civil) No.3 of 2021, Supreme Court

The Supreme Court granted Faruqui bail in February 2021, stating the allegations against him were vague.

3. On 24 July 2021, Tamil Nadu police arrested Father George Ponnaiah, a Catholic priest, for alleged hate speech against the Prime Minister and Home Minister. The priest was attending a meeting honoring deceased tribal rights activist, Father Stan Swamy. The court remanded Ponnaiah to judicial custody for 15 days. The Madras High Court granted him conditional bail on August 10.

4. Twitter Accounts Blocked during Farmer's Protests

In an aggressive censorship effort aimed at blocking commentary around Farmer's protests, hundreds of twitter accounts were ordered to be blocked by the Ministry of Electronics and Information Technology, Government of India. These twitter accounts were faulted with propagating pro-farmer protests position.

On 1 February, it was reported that multiple twitter account were blocked by Twitter in response to a legal demand made by the Ministry of Electronics and Information Technology under Section 69A of the Information Technology Act.¹⁰² It appeared that more than 250 such accounts, many of them tweeting with the #ModiPlanningFarmerGenocide hashtag were blocked. These also included accounts of prominent commentators, journalists and even news magazines.

Vinod K. Jose, executive editor, Caravan India, tweeted that the magazine's official handle was "withheld". Likewise, twitter account of actor Sushant Singh, who has been supporting the cause of the farmers, was also withheld. Accounts of political parties were also suspended - CPI(M) Polit Bureau member and former Rajya Sabha member Mohammad Salim's account and the party's Puducherry's verified accounts were withheld. The account of Preeti Sharma Menon, Aam Aadmi Party's National Executive member, and that of Aarti, member of the AAP's social media team, were also taken down.¹⁰³ The official handle of the Kisan Ekta Morcha and the Bharatiya Kisan Union-Ekta (Ugrahan) were also suspended.

The Samyukta Kisan Morcha, an umbrella body of farmers' unions, issued a statement on Twitter's action:

The government does not want facts to reach the protesting farmers," it said. "It is fearful of the coordinated work of the farmers' unions across different protest sites...this is undemocratic and illegal.

Most accounts were restored later in the evening. There were also reports of the Twitter contesting the government's demand. Twitter said, "Pending our discussions with the regulatory authorities, we temporarily withheld these accounts in India under our Country Withheld Content policy in response to a valid legal request from MEITY."

Subsequently, on February 3, the Ministry had sent another notice to Twitter to fall in line. The notice referred to Twitter's obligations as an intermediary and clarified the powers of the

¹⁰² <https://scroll.in/latest/985648/twitter-withholds-accounts-of-caravan-kisan-ekta-morcha-and-others-in-response-to-legal-request>.

¹⁰³ <https://www.thehindu.com/news/national/twitter-blocks-several-accounts-posting-messages-in-support-of-farmers-stir-restores-most-of-them-later/article33717312.ece>

government that flow from Section 69A of the Information Technology Act, 2000 and asked Twitter to either comply with the earlier order in its entirety or face criminal proceedings.¹⁰⁴ Ministry followed up the said notice with another communication sent on 8 February, which listed 1,178 accounts which the government demanded to be suspended.¹⁰⁵ Actions of the Ministry extended to blocking accounts of certain journalists. These efforts clearly tantamount to censorship.

The said notice issued under Section. 69A, the Information Technology Act, 2000 reeked of secrecy and lack due process. It appears that there was no prior notice issued to “show cause” or a hearing being afforded to present their stance. Most of these account holders were not even intimidated of the action being taken against them. The Supreme Court upheld the constitutionality of Section 69A, inter alia, on the ground that the provision inhered due process guarantees and permitted judicial review if need arises. The Court has held that the suspension order should be a reasoned order such that the same is amenable to challenge under Article 226. In the above instance, neither were the content creators provided pre-decisional hearing nor the order could be considered to be reasoned order or such an order was at all put in public domain. It bears noting this not only violates free speech rights of the content creator but also right of the members of the public for being arbitrarily estopped from viewing intended material, without a good cause. Both the rights of the content creator and the general public are protected by the Supreme Court.¹⁰⁶

5. Internet Blackouts during Farmer Protests

Massive farmers' protest rocked Delhi on the Republic Day (26 January 2021). In response, on 26 January, the government ordered internet shutdown from 12 noon to midnight in Tikri, Singhu, Gazipur, Mukarba Chowk and Nangloi. Government also reduced mobile internet services to 2G in the entire Delhi circle.¹⁰⁷ Following the lead, the government of Haryana ordered suspension of mobile internet services in Sonipat, Jhajjar and Palwal districts. These districts are in close proximity of Delhi. On 29 January 2020, it extended the suspension to 14 other districts. There are a total of 22 districts in the state.

The Haryana Government, on 31 January further extended the suspension of mobile internet services in these 14 districts till 5 pm on 1 February to "prevent any disturbance of peace and public order" amid farmers protests. In some districts, the suspension orders were in force even till February 3.¹⁰⁸

The notification states that the Additional General of Police, CID has been informed that “provocative misinformation and fake news on social media regarding ongoing farmers agitation has been rampant across in various districts of Haryana” and “there is likelihood of disturbance of law and order and public peace and tranquillity”. The notification further

¹⁰⁴ <https://www.indiatoday.in/india/story/government-issues-notice-twitter-remove-contents-related-narendra-modi-farmer-genocide-1765493-2021-02-03>; <https://indianexpress.com/article/india/twitter-withholds-multiple-accounts-following-direction-from-it-ministry-7170134/>

¹⁰⁵ <https://economictimes.indiatimes.com/tech/technology/farmer-protests-govt-sends-fresh-notice-to-twitter-on-accounts-flagged/articleshow/80738857.cms>

¹⁰⁶ Furthermore, it is in breach of the directions of the Supreme Court in *Shreya Singhal v. UOI*, (2015) 5 SCC 1 paras 117, 118, & 119; *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637 paras 15, 16, 17, & 18

¹⁰⁷ <https://economictimes.indiatimes.com/news/politics-and-nation/mobile-internet-suspended-in-3-haryana-districts-for-24-hours-as-delhi-witnesses-violent-protests/articleshow/80469169.cms?from=mdr>

¹⁰⁸ <https://thewire.in/government/farmers-protest-mobile-internet-sms-services-suspended-in-17-haryana-districts>

suggests potential “misuse of internet services by way of spread of inflammatory material and false rumours” and “to stop the spread of disinformation and rumors and divisive propaganda through various social media platforms such as whatsapp , facebook, twitter etc” for “facilitation and mobilization of mobs of agitators and demonstrators who can cause serious loss of life and damage to public and private properties”¹⁰⁹

The suspension of internet services extended to 2G/3G/4G/CDMA/GPRS services, SMS services (only bulk SMS) and all dongle services, etc. provided on mobile networks except the voice calls in the territorial jurisdiction of the 14 districts.

It is also to be borne in mind that the COVID norms were still incentivizing work from home format for many professional, and the schooling was still in online mode. The arbitrary and overbroad infliction of internet blockades brought the day-to-day lives of ordinary people to a screeching halt.

6. Restoration of 4G Mobile Internet Services in J&K after 550 days of Communication Blockade

On 5 February 2021, the Jammu and Kashmir Government announced restoration of 4G mobile internet services in all the districts of the region. The announcement affected the lifting of the most severe imposition of communication blockade anywhere in the country since independence, i.e. a sweeping blackout lasting 550 days.

A complete communication blackout was enforced in the region on 5 August 2019 right after the abrogation of Article 370 of the Constitution. The blanket communication blockade extended to mobile telephony, mobile internet services, landlines, voice calls, SMS services, land line internet and cable television networks.

While hearing a challenge to the said communication blackout, the Supreme Court in a judgment dated 10 January 2020 laid down extensive guidelines as regards the necessity and proportionality of internet restrictions and directed the government to review its internet shutdown orders.¹¹⁰ This led to limited relaxation in parts of the region although internet speed was only permitted at 2G speed.

In another round of litigation before the Supreme Court on the same subject-matter, the Court established a Special Committee headed by the Secretary of the Ministry of Home Affairs to examine the internet restrictions in the state.¹¹¹ After protracted litigation, 4G mobile internet was restored in two districts (Ganderbal and Udhampur) on 16 August 2020.

Subsequently, the Private School Association of Jammu and Kashmir which represents over 3800 member schools in the region filed another Writ Petition before the Supreme Court challenging the prolonged internet restrictions as violative of the fundamental right to education. The Petitioner points out that the slow internet speed is preventing children of Jammu and Kashmir from continuing their education as they cannot use online tools such as Zoom or Google Classrooms which are available to students in other parts of the country.¹¹²

¹⁰⁹ Notification dt. 29.1.21, No. 2/1/2021 – 1H(C), passed under Rule 2 of the Temporary Suspension of Telecom Services (Public Emergency & Public Safety) Rules, 2017, Government of Haryana, Department of Home Affairs

¹¹⁰ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637

¹¹¹ *Foundation for Media Professionals v. State (UT OF J&K)*, (2020) 5 SCC 746

¹¹² <https://www.livelaw.in/top-stories/private-schools-association-moves-sc-again-seeking-4g-restoration-jammu-kashmir-168840?from-login=577583>

Before the Supreme Court could the case finally, the government announced the much awaited restoration. The imposition of blanket and prolonged extinguishment of communication services on the 13.6 million strong population of the Jammu and Kashmir lasted for more than 1.5 years.

7. Right to Privacy of an Actor on Internet Platforms

On 23 August 2021, in *X v. YouTube*,¹¹³ the Delhi High Court upheld an actor's right to privacy under Article 21, and directed internet intermediaries as well as websites to take down the explicit videos of the actor which had been uploaded on multiple video-sharing platforms without her consent. The actor sued Youtube and other platforms who had failed to remove multiple explicit clips of her, which were originally filmed for the purposes of a potential lead role in a web series. While the producer of the videos took down his footage soon after the actor complained, the defendants did not – which the actor argued was in breach of her right to be forgotten and, more broadly, her right to privacy.

Although the Court noted lack of statutory recognition of one's right to be forgotten, it held that that the relief sought by the actor is otherwise covered under right to privacy. The Supreme Court in *Justice KS Puttaswamy (Retd.) v. Union of India*¹¹⁴ (*Puttaswamy*) has recognized right to privacy as an essential and intrinsic part of the Article 21 guarantee. The Court finally held the following in this regard:

18. In the circumstances and in view of the fact that the plaintiff is entitled “to be left alone” and “to be forgotten”, she is entitled to protection from invasion of her privacy by strangers and anonymous callers on account of such publication/streaming/transmission of the suit videos by the defendants.

8. Right of an Acquitted Accused to be Forgotten

On 12 April 2021, the Delhi High Court by way of an interim order gave protection to an acquitted accused to forbid internet intermediaries from exhibiting legal documents on their websites which according to him were causing harm to his reputation.¹¹⁵

The Petitioner prayed for removal of the judgment in CrI. A. No. 14/2013 titled “*Custom v. Jorawar Singh Mundy*” from Google, Indian Kanoon and vLex.in. The case of the Petitioner is that he is a professional of Indian origin but an American citizen by birth. When he travelled in 2009 to India, a case under the Narcotics Drugs and Psychotropic Substances Act, 1985, was lodged against him, wherein he was acquitted of all charges by the Trial Court. The High Court also upheld the acquittal. The Petitioner claimed that despite him having had a good academic record, he is unable to get employment up to his expectations on account of the prejudice caused by the availability of said judgments online.

The Court went into the question as to whether a Court order can be removed from online platforms on account of the potential harm caused to the right to privacy of the Petitioner on the one hand, and the right to information of the public and maintenance of transparency in judicial records on the other hand.

¹¹³ CS(OS) 392/2021, Delhi High Court,

¹¹⁴ (2017) 10 SCC 1

¹¹⁵ *Jorawar Singh Mundy v. Union of India*, W.P.(C) 3918/2021

The Court granted relief to the Petitioner and forbade the platforms from displaying the relevant judicial records. The Court noted the following:

11. It is the admitted position that the Petitioner was ultimately acquitted of the said charges in the case levelled against him. Owing to the irreparable prejudice which may be caused to the Petitioner, his social life and his career prospects, inspite of the Petitioner having ultimately been acquitted in the said case via the said judgment, prima facie this Court is of the opinion that the Petitioner is entitled to some interim protection, while the legal issues are pending adjudication by this Court. 12. Accordingly, Respondent Nos. 2 and 3 are directed to remove the said judgment dated 29th January 2013 in CrI.A.No. 14/2013 titled Custom v. Jorawar Singh Mundy from their search results. Respondent No.4 – Indian Kanoon is directed to block the said judgement from being accessed by using search engines such as Google/Yahoo etc., till the next date of hearing. Respondent No.1 to ensure compliance of this order.

9. Caste Laden Political Speech

On 22 February 2021, the Madras High Court refused to quash criminal prosecution against RS Bharathi (a senior Member of Parliament, DMK) arising from a speech he made on 15 February 2020.¹¹⁶ He was being prosecuted for a speech in which he had allegedly made disrespectful comments about the appointment of members of the Scheduled Castes and Scheduled Tribes as judges of the Madras High Court. The Court, prima facie, found that the offence against him was made out. The Court ordered the trial court to determine whether the offense met the requisite thresholds set out in the provisions.

In a large public meeting in 2020, Bharathi allegedly remarked that persons belonging to the Scheduled Caste community were elevated to the High Court of Madras due to the alms rendered by the late Chief Minister of Tamil Nadu. This led to a filing of a criminal case under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

The High Court dealing with Bharathi's petition seeking dismissal of the criminal case, prima facie noted that statements were "targeted against Scheduled Caste" and were not made in "good taste"; but the court restrained "itself from expressing any views as to whether such utterance attracts the offence or not." The Court finally held the following dismissing Bharathi's petition:

Herein, remarks have been made in public view and not only against the persons holding high posts but also some other retired Judges stating that they have become judges only at the alms rendered by the Dravidian Progressive Federation, which prima facie insult and humiliate such people. Therefore, this Court is of the view that it is not a fit case to exercise the 10/12 <https://www.mhc.tn.gov.in/judis/CRL.O.P.No.20070> of 2020 power under Section 482 Cr.P.C., to quash the proceedings. Accordingly, this Criminal Original Petition is dismissed. The trial Court shall strictly follow the provisions under Section 309 of the Code of Criminal Procedure and the guidelines given by the Hon'ble Supreme Court in Vinod Kumar vs. State of Punjab [2015 (1) MLJ (crI) 288] and complete the trial on day-to-day basis expeditiously without any further delay.

¹¹⁶ *RS Bharathi v. State*, CrI. O.P. No.20070 of 2020

10. Protocol for Privacy of Victims of Sexual Harassment Law in Court Processes

In a judgment dated 24 September 2021, the Bombay High Court in *P v. A*¹¹⁷, laid down extensive guidelines to effectively secure privacy rights stemming from the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, and Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013. The Court noted the guidelines to be the *minimum* steps necessary to implement the statutory mandate.

The Court devised detailed protocols for each of the following stages of such a case:

Publication of Orders of the Court

In all orders, the endeavour will be to anonymize the identities of the parties. Therefore, in the order sheets, the names of the parties will not be mentioned. The orders will read “A v B”, “P vs D” etc.

Protocol for Filing Documents in Court

Except for verification of identity for which the Registry may ask for production of an identity document to establish the identity of the deponent, no copy of any such document is to be retained on file.

Access to Court Documents

The Registry will not permit anyone other than the Advocate-on-Record with a current and valid vakalatnama to take inspection or copies of any filing or order.

Hearings

All hearings will only be in Chambers or in-camera and there will be no online or hybrid facility for hearings.

Public Access

If any order is to be released into the public domain, this will require a specific order of the Court.

The Court dealt with the aforementioned subjects and other relevant heads of the lifecycle of a case and noted that any breach of the judgement would amount to Contempt of Court.

11. Facebook Oversight Board overruling Facebook’s Decision to Block Content

In a peculiar case, the Facebook Oversight Board¹¹⁸ through a decision rendered on 29 April 2021, overturned Facebook’s decision of removing a post containing content which was found to be objectionable. Facebook removed user’s Facebook post which contained a video interview with Professor Manjit Singh, a social activist. The post also otherwise criticized Rashtriya Swayamsevak Sangh (RSS), a Hindu nationalist organization, India’s ruling party

¹¹⁷ Suit No 142 of 2021, Bombay High Court, Judgment delivered on September 24, 2021

¹¹⁸ Facebook Oversight Board, a self-regulatory body appointed by the Facebook Company, describes itself in following terms (see <https://www.oversightboard.com/>):

The board is a separate entity from the Facebook company and will provide its independent judgment on both individual cases and questions of policy. Both the board and its administration are funded by an independent trust.

Bharatiya Janata Party (BJP) and Prime Minister Narendra Modi. The post also included a description mentioning RSS and BJP:

“RSS is the new threat. Ram Naam Satya Hai. The BJP moved towards extremism.”

The content was initially uploaded during a mass farmer’s protest and supported the protestors. Facebook found the post to be in breach of the platform’s “Dangerous Individuals and Organizations Community Standard” and removed the said content. The Oversight Board concluded that the Facebook’s restriction of the user’s account was inconsistent with the company’s “Community Standards”. It noted that the post highlighted the concerns of minority and opposition voices in India that were allegedly discriminated against by the government.

The Oversight Board noted with concern that Facebook had declined to “provide specific answers to the Board’s questions regarding possible communications from Indian authorities to restrict content around the farmer’s protests, content critical of the government over its treatment of farmers, or content concerning the protests” [p. 12]. The Board also found the Facebook’s decision-making on content regulation opaque and overturned Facebook’s original decision. The Board also urged Facebook to make available the “Community Standards” and “Internal Implementation Standards” in Punjabi language.

Theme V. Technology and Surveillance

1. Surveillance through Pegasus Spyware

On 18 July 2021, a consortium of media organizations comprising of 17 media outlets from around the world, including “the Wire” from India, revealed a list of 50,000 mobile numbers which were allegedly infiltrated by Pegasus software. These mobile numbers were put on surveillance, which was made possible by the technology supplied by the NSO Group, an Israeli spyware company. The company’s signature spyware, known as Pegasus, has been allegedly deployed by national governments against dissidents, journalists, business persons, diplomats and members of the clergy. NSO Group’s clients included Saudi Arabia, the United Arab Emirates, Hungary, India – a client list that span the entire world, from Hungary and Azerbaijan in Europe to Togo and Rwanda in Africa.

It was reported that, allegedly, around 300 of these phone numbers belonged to Indian journalists, doctors, political figures and court functionaries. *The Wire* cited forensic analysis conducted by Amnesty International on phone numbers that showed signs of either attempted or successful infiltration. It was further reported that those targeted included two serving Ministers in the Narendra Modi government, three Opposition leaders, one constitutional authority, several journalists and business persons. The Press Club of India and Editor’s Guild of India issued strong statements of concern on the development and asked government “to come clean on this front and clarify”.

A Writ Petition was filed in the Supreme Court of India against the Government of India praying for an independent investigation into the allegations of unlawful surveillance, and breach of privacy of these Indian citizens. Senior journalists N Ram and Sashi Kumar were amongst the Petitioners in this case.

The Supreme Court through a reasoned order dated 27 October 2021, constituted a three member “technical” committee comprising of experts in cyber-security and digital forensics, whose functioning would be overseen by Justice R.V. Raveendran, former Judge, Supreme Court of India.

The Court in fashioning the extraordinary relief noted the broad consensus in the positions taken by the Government of India and the Petitioners as regards the illegality of unlawful surveillance. The Court noted the following:

54. Different forms of surveillance and data gathering by intelligence agencies to fight terrorism, crime and corruption in national interest and/or for national security, are accepted norms all over the world. The Petitioners do not contend that the State should not resort to surveillance/collection of data in matters of national security. The complaint of the Petitioners is about the misuse or likely misuse of spyware in violation of the right to privacy of citizens. The Respondent-Union of India also does not contend that its agencies can resort to surveillance/collection of data relating to its citizens where national security and national interest are not involved. The apprehension of the Respondent-Union of India is that any inquiry in this behalf should not jeopardize national security and the steps taken by it to protect national security. There is thus a broad consensus that unauthorized surveillance/accessing of stored data from the phones and other devices of citizens for reasons other than nation's security would be illegal, objectionable and a matter of concern.

In a cautious listing of the material circumstances which found favour with the court in granting the relief to the Petitioner, the court noted the following:

58. The compelling circumstances that have weighed with us to pass such an order are as follows:

- i.** Right to privacy and freedom of speech are alleged to be impacted, which needs to be examined.
- ii.** The entire citizenry is affected by such allegations due to the potential chilling effect.
- iii.** No clear stand taken by the Respondent-Union of India regarding actions taken by it.
- iv.** Seriousness accorded to the allegations by foreign countries and involvement of foreign parties.
- v.** Possibility that some foreign authority, agency or private entity is involved in placing citizens of this country under surveillance.
- vi.** Allegations that the Union or State Governments are party to the rights' deprivations of the citizens.
- vii.** Limitation under writ jurisdiction to delve into factual aspects. For instance, even the question of usage of the technology on citizens, which is the jurisdictional fact, is disputed and requires further factual examination.

The Supreme Court tasked the Expert Committee to opine on the use of Pegasus software in illegal surveillance, and the breach of law occasioned by such unsanctioned surveillance. The Court also requested the Expert Committee to submit recommendations on the need for safeguards or reform of law on surveillance, cyber security, and protection of citizens' right to privacy et al.

This order of the Supreme Court built on privacy rights jurisprudence enunciated in *Puttaswamy*. The Court has made a start, in providing a mechanism to gather basic facts. Through this order, the Supreme Court has made tentative steps in subjecting the panoply of surveillance to rule of law.

2. Introduction of Intermediary Rules, 2021 that impede privacy and encryption on the Internet

On 25 February 2021, the Government of India promulgated the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (2021 Rules).¹¹⁹ The 2021 Rules have fundamentally rewritten the system architecture of internet in India. For the autonomous existence of the internet as a network and a platform, it is essential for the intermediaries¹²⁰ to operate, by design, with minimal invasiveness and least control over its users. The way for the government to control the user experience is through exercising

¹¹⁹ The 2021 Rules have been passed by the Ministry of Electronics and Information Technology under Section 87 of the Information Technology Act, 2000.

¹²⁰ See Section 2 (1) (w), The Information Technology Act, 2000. Intermediaries are entities that store or transmit data on behalf of other persons, and include telecom and internet service providers, online marketplaces, search engines, and social media sites.

control over the intermediary platform where the user is partaking in the online experience. The 2021 Rules allow the Government precisely this.¹²¹ The 2021 Rules severely undermine free expression and privacy, and use of internet as a platform to organize and mobilize for effectively contesting government. The 2021 Rules, therefore, make internet an unsafe space for HRDs and activists to operate mainly by virtue of the following provisions:

Content Filtering Mandate

Rule 4(4) requires the intermediaries to review the content of communications such that the content can be “filtered”. This in effect breaches the end-to-end encryption design of the messaging services. The Rule also requires the intermediaries “to deploy technology-based measures,” including automated tools to “proactively identify information” forbidden under the Rules. By compelling the intermediaries to equip themselves of such technological ability, the 2021 Rules is essentially building the infrastructure of censorship. Rule(4)4 is even more insidious, as it ends up applying a model of cracking down on the so-called difficult thoughts and ideas not only to police public discourse, but even to curb private messages between two people.

Rule 3(1)(d) requires the intermediary to proactive takedown or block any material that is “prohibited under any law,” including specifically laws for the protection of “the sovereignty and integrity of India”, “security of the State”, “public order”, “decency or morality”, “in relation to contempt of court”, “defamation”, and “incitement to any such act”. Clearly, the scope of this provision is overbroad and arbitrary. The provision is inimical of independent acts done with human rights motivations, as these would be very capable of being dubbed as offending activities under the national security laws such as the UAPA. This overbroad mandate will have the chilling effect on expression of dissent, and all manner of political activity.

It is also noteworthy that this Rule is requiring of pre-emptive suppression of the so-called offending content which is an egregious violation of basic right of not only expression but even of informational autonomy i.e. the right to entertain thoughts and hold political opinions, even without acting on them.

Traceability Mandate

Rule 4(2) requires a messaging services provider to “enable the identification of the first originator of the information on its computer resource” in response to a court order or a decryption request.

There are draconian implications of requiring intermediaries to identify the origins of messages. For the messaging services, such as WhatsApp, to acquire the ability to identify the origin of message, it would have to forego the assurance of encryption in its design. To implement the Rule, the intermediary has to arm itself with the ability to break the encryption. Further, the Rule would require the service provider to single out the original provider from amongst the many messages. To implement the traceability mandate would be the end of promise of end-to-end encryption as the founding feature of internet privacy. Instead, the internet would become a medium for the government to mount surveillance on its citizens.

¹²¹ <https://www.hindustantimes.com/india-news/twitter-loses-legal-protection-fails-to-comply-with-new-it-rules-official-101623817509418.html>

Both the traceability and content filtering requirements fundamentally compromise encryption, as they would require the intermediaries to store information about the content of messages which otherwise would remain private as part of the encryption design. Riana Pfefferkorn, Research Scholar at the Stanford Internet Observatory, made the following comment on the implication of the new Rules:

When intermediaries employ end-to-end encryption, that means stronger security for communities, businesses, government, the military, institutions, and individuals—all of which adds up to the security of the nation. But the new traceability and filtering requirements may put an end to end-to-end encryption in India. The revised intermediary rules put the whole country's security at risk. Amid a global backsliding for internet freedom, the proposal may offer an example for other would-be authoritarians to follow.¹²²

The 2021 Rules also add onerous due diligence obligations. As per the new mandate, intermediaries are required to make sure the users do not “host, display, upload, modify, publish, transmit, store, update or share” any of the restricted types of contents. This is nothing but a model of proactive monitoring of content. This pushes the intermediaries to align themselves with the surveillance objectives of the government. In fact, the Rules promotes the business model of these companies to partake the role of subsidiary to the government rather than custodians of internet independence. This will bring about, in due course, a new digital culture and new players who are proponents of a new technocratic governmentality, an eco-system which actively purges political activity done with autonomous and independent motives.

Government led Grievance Redressal Committee

The Rules envisage the establishment of a government-led Grievance Appellate Committee to hear appeals against the Grievance Officer's decisions. The Committee would have the power to sit in appeal over the content moderation decisions taken by the intermediaries. It bears noting that the Committee is essentially a bureaucratic body appointed by the Government and not an independent judicial forum. This is in gross violation of Manila Principles that advocate for content removal based on only decisions taken by an independent judicial body.¹²³

Rules 2021 are in Breach of International Law

The 2021 Rules are also in breach of international law and constitutional law guarantees enshrined in the municipal law. The Supreme Court has held that a restriction on speech, in order to be reasonable, must be narrowly tailored so as to restrict only what is absolutely necessary.¹²⁴ It also held that a speech can be limited on the grounds under the Constitution when it reaches the level of incitement. Other forms of speech even if offensive or unpopular remain protected under the Constitution.

As pointed out by the former UN Special Rapporteur on freedom of expression and opinion in his report on content moderation, “States should refrain from adopting models of

¹²² <https://www.brookings.edu/techstream/new-intermediary-rules-jeopardize-the-security-of-indian-internet-users/>

¹²³ <https://manilaprinciples.org/index.html>

¹²⁴ See *Shreya Singhal* and *Puttaswamy*

regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression.”¹²⁵

First, the relevant restrictions provided in the Rules are extremely generic, incapable of a focused interpretation. For instance, Rule 3(1)(b) would fail the requirement of ‘sufficient precision’. As stated earlier, terms such as ‘racially and ethnically objectionable’, and ‘threatens the unity of India’ are too general and vague and are open license for the government to justify curtailment of a very wide category of inconvenient material. The measures adopted in the Rules such as proactive and automated review and filtering would also be hit for being disproportionately severe measures for the objectives stated. As clarified by the General Comment 34,¹²⁶ even restrictions under Article 20 (2) of the ICCPR - which requires States to prohibit ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence’ - must still satisfy the cumulative conditions of legality, necessity and legitimacy.

Three UN Special Rapporteurs—the Rapporteurs for Freedom of Expression, Privacy, and Association— noted that the 2021 Rules has the potential for the government to contain free speech and inconvenient political action. They have said the following in this regard:

Noting that the Ministry of Electronics and Information Technology directed Twitter to shut down over 1,000 accounts under Section 69A of the Information Technology Act, on 31 January 2021, on grounds that these accounts were spreading misinformation about farmers’ protests, we worry that the new Rules may provide the authorities with the power to censor journalists who expose information of public interest and individuals who report on human rights violations in an effort to hold the government accountable. We would like to emphasize that the respect for diversity, pluralism and independent information is a necessary condition for the functioning of any democratic society.¹²⁷

Certain Parts of Rules 2021 Stayed by the High Courts

On 10 March 2021, the Kerala High Court restrained coercive action under Part III of the 2021 Rules in the case of *Live Law Media (P) Ltd. v. Union of India*.¹²⁸

Hearing a challenge to the constitutional validity of the 2021 Rules, the Bombay High Court on 14 August 2021 stayed the operation of Rules 9(1) and 9(3).¹²⁹ The High Court, prima facie, observed that the said provisions infringe the fundamental right to freedom of speech under Article 19(1)(a) and also go against the substantive provisions of the Information Technology Act 2002. The Court observed the following in this regard:

29. Dissent in democracy is vital. It is, however, the checks and balances that make a democracy work. There can be no two opinions that a healthy democracy is one which has developed on criticism and acceptance of contra views. Opinion based on criticism reinforces its acceptance in a democratic society. For proper administration of the State, it is healthy to invite criticism of all those who are in public service for the nation to have a structured growth but with the 2021 Rules in place, one would have to think twice before criticizing any such personality, even if the

¹²⁵ A/HRC/38/35, paragraph 68.

¹²⁶ General Comment 34, para 50.

¹²⁷ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26385>

¹²⁸ WP(C) No.6272 of 2021, Kerala High Court, Order dt. 10 March 2021

¹²⁹ *Agij Promotion of Nineteenonea Media Pvt. Ltd. v. Union of India*, WP (L.) NO.14172/2021, Bombay High Court, Order dt. 14.8.2021

writer/editor/publisher may have good reasons to do so without resorting to defamation and without inviting action under any other provision of law. Allowing the operation of the 2021 Rules in its form and substance to operate would result in the writer/editor/publisher standing the risk of being punished and sanctioned, should the inter-departmental committee be not in favour of criticism of any public figure. It is, therefore, quite possible that the writer/editor/publisher on contravention of the provisions of clause (1) of Rule 9 of 2021 Rules, but without even transgressing the boundaries set by clause (2) of Article 19 of the Constitution, may expose himself/itself to punishment/sanction under the 2021 Rules. The indeterminate and wide terms of the Rules bring about a chilling effect qua the right of freedom of speech and expression of writers/editors/publishers because they can be hauled up for anything if such committee so wishes. The 2021 Rules are, thus, manifestly unreasonable and go beyond the IT Act, its aims and provisions.

Likewise, the Madras High Court hearing a challenge to the validity of the 2021 Rules, *prima facie*, observed that an “oversight mechanism to control the media by the government may rob the media of its independence and fourth pillar, so to say, of democracy may not at all be there.”¹³⁰ The Court noted that in light of the Bombay High Court stay which will have a pan-country effect, there is no need to stay the operation of Rule 9.

¹³⁰ WP(C) No.6272 of 2021, Order dt. 16.9.2021

Theme VI. Right to Associate

The Constitution of India under Article 19 provides for freedom of association. For the citizens to effectively associate, mobilize, and towards that end, gather resources, the municipal law has to permit necessary freedom for non-government formations to find financial resources. Government's increased policing of funds that NGOs are raising from abroad causes serious concern.

The Foreign Contribution Regulation Act (FCRA), 2010 was amended by the Central Government in 2020. The Amendment Act of 2020 imposed severe restrictions on the non-profit sector relying on foreign aid. Many of these organizations work on broad spectrum of human rights subjects such as poverty, civil liberties, health, education, climate change, livelihoods etc. Key concerns with the 2020 amendment have been the following:

- (i) Prohibiting a recipient to "transfer such foreign contribution to any other person". This prohibits the organization receiving funding to partner with other persons or grassroots formations in the field to canvass the relevant issues. This provision severely truncates the ability of funded organization to work in the field.
- (ii) Suspending the FCRA license on mere suspicion ("reason to believe") and "pending any further inquiry". The provision does not permit a prior hearing or an opportunity to be heard. This is a draconian power in the hands of department amenable to arbitrary use.
- (iii) The period of suspension of license extended from 180 days to 360 days.
- (iv) The amended law also stipulates that organisations receiving foreign funds would not be able to use more than 20% of them for administrative purposes. This limit was 50% earlier.

In 7 June 2021, the Ministry of Home Affairs suspended the licence of CHRI for 180 days. The suspension was later extended on December 1 for another 180 days.

CHRI has challenged the suspension order before the Delhi High Court. The petition assails the order dated 7 June 2021 passed under Section 13 of the FCRA. It has been argued by CHRI that the suspension order was passed without any enquiry having been initiated and no Show Cause Notice contemplating initiation of enquiry was ever issued to the CHRI. On 29 July 2021, the High Court noted that the CHRI has made out a "prima facie case for being permitted to utilize 25% of the amounts lying in its custody as foreign contribution to meet its expenses towards payment of salaries of its employees and other personnel engaged by them in any project(s) which had commenced before the passing of the said suspension order". In another hearing held on 25 October 2021, the Ministry of Home Affairs argued to the contrary and volunteered to produce the original record, in response the Court granted time to department to produce the record. However on 6 December 2021, the Ministry changed tune and sought to claim privilege on the original record, and conveyed they are opposed to showing the relevant documents to the Court and the petitioner. The matter remains pending with the High Court.

Oxfam India's application for FCRA licence renewal was rejected in December 2021. Oxfam India in a statement has said that the government's decision to refuse renewal of its FCRA licence will severely affect the organisation's ongoing humanitarian and social work in 16 states, including, "setting up of oxygen plants, providing life-saving medical and diagnostic equipment, such as oxygen cylinders and ventilators, and delivery of food to the most vulnerable communities during the Covid pandemic."

Other NGOs and organisations whose licences have now expired include Jamia Millia Islamia, the Indian Medical Association, the Leprosy Mission, the Tuberculosis Association of India, the Indira Gandhi National Centre for Arts, and the India Islamic Cultural Centre.

Refusing FCRA clearance has been listed by critics of the government as its way of suppressing organisations whose work or officials are not considered supportive enough of the state. It has been reported that FCRA licences of 5,933 NGOs lapsed on 31 December 2021. This number included those who failed to apply for renewal before the due date or the Ministry of Home Affairs rejecting their applications.¹³¹

The uncertainty prevailing around the renewal applications of those NGOs who have applied is stark. The ministry has been extending the validity of the licences in an *ad hoc* fashion, many times bulk extensions and reprieves coming at the last moment. It first extended the validity of FCRA registrations expiring on 29 September 2020 until 31 May 2021. It was then extended to September 30, 2021. It was further extended to 31 December 2021 and thereafter, it was extended until 31 March 2022.¹³²

In 2021, various NGOs challenged the 2020 Amendments at both High Courts and the Supreme Court for placing arbitrary and unconstitutional limits on their functioning. Arguments were concluded and case was reserved for judgment by the Supreme Court on 9 November 2021.¹³³

¹³¹ <https://indianexpress.com/article/india/ima-iit-delhi-jamia-millia-among-6000-entities-fcra-licence-7701140/>

¹³² <https://www.thehindu.com/news/national/oxfam-india-jamia-millia-islamia-among-nearly-6000-ngos-whose-fcra-registration-has-ended/article38085623.ece>

¹³³ *Noel Harper v. Union of India*, W.P.(C) No. 566/2021, Order dt. 9.11.2021