

Can Indian NGOs bank on banks?

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Across the world, governments are seemingly in a hurry to introduce legislation that regulates and monitors civil society organisations. Globally more than a 100 laws have been proposed or enacted by governments aimed at restricting the registration, operation, and most notably funding of NGOs, in a context where the majority of human rights activists have little support from funders in their own countries.

This global trend resonates in India where freedom of association has been under attack for just under a decade, and the government has accused huge swathes of Indian civil society of noncompliance with NGO registration and foreign funding laws. Since 2006 over 13,000¹ non-governmental organisations (NGOs) have had their licenses to operate cancelled. A report submitted by the Central Bureau of Investigation to the Supreme Court in September 2015 has stated that there are over² 3 million NGOs operational in India, one for almost every two policemen in the country. The report claims that only 10 per cent of these 3 million NGOs have fulfilled mandatory requirements as set out under the Societies Registration Act, 1961 to submit accounts of their funding and expenditure to the authorities. Apart from non-compliance, other charges that have been thrown in the face of Indian civil society include being corrupt, being anti-national and being funded by ‘foreign hands’ to perpetuate conflict and economic stagnation. As a result, public perception of NGOs in India is at an all-time low.

There are a number of drivers behind the closing of space for NGOs including the State’s interest in silencing dissenting voices that highlight economic, social and cultural exclusions. This article focuses on one particular contributor which is little-known and rarely discussed: the impact on Indian civil society of the Indian government’s implementation of counter-terrorism financing standards.

Why the tightening of government monitoring and supervision of the NGO sector in India?

Part of the answer to this question lies in the response of international agencies to the global ‘war on terror’. In the immediate aftermath of the 9/11 attacks in the US, the Financial Action Task Force (FATF), a body originally set up by the G7 in the 1980s to develop global standards to combat money laundering, was tasked with creating international standards to counter the financing of terrorist groups. Currently over 180 countries, including India, are required to introduce legislation and policies to implement FATF standards at the national level. While neither the FATF nor its standards has any legal standing, there are powerful incentives for compliance. States that comply are deemed to be a safe bet for foreign investment and trade, while states that are partially compliant are subjected to intensive scrutiny and evaluations. States that fail to comply are effectively placed on an international credit black list.

While the FATF standards apply to a number of sectors, including the banking and legal professions, they also apply to NGOs, with NGOs seen by FATF as being “particularly vulnerable” to being used as a conduit for funds to terrorist groups. FATF’s Recommendation 8 states that Non Profit Organisations

¹ <http://www.hindustantimes.com/india/home-ministry-cancels-registration-of-9-000-foreign-funded-ngos/story-UpnVtwpwSrSjzqEdYygiJN.html>

² <http://epaperbeta.timesofindia.com/Article.aspx?eid=31808&articlexml=NGOs-outnumber-cops-21-19092015011009>

(NPO) are:³⁴ *vulnerable to abuse by terrorists for a variety of reasons. NPOs enjoy the public trust, have access to considerable sources of funds, and are often cash-intensive. Furthermore, some NPOs have a global presence that provides a framework for national and international operations and financial transactions, often within or near those areas that are most exposed to terrorist activity*". This rationale, which is based on minimal evidence, has provided governments, including India, with the legitimacy to overregulate the NGO sector in the name of countering terrorism and preserving national security.

India and FATF

India was evaluated by the FATF at the end of 2009 and the report concluded that India was non-compliant with Recommendation 8. On the basis of this, the FATF recommended that India undertake a comprehensive NGO sector review including: an evaluation of the adequacy of domestic laws directed at the sector; a detailed risk assessment of the sector for terrorist financing; a comprehensive outreach to the NGO sector; an introduction of requirements to ensure that NGOs maintain information on the identity of the persons who own, control or direct their activities including senior officials, board members and trustees; a demonstration that appropriate sanction measures are in place; and the implementation of measures to ensure that all NGOs are licensed and/or registered.

The Indian government was quick to act and introduced the Foreign Contribution Regulation 2010 Act (FCRA 2010) and Foreign Contribution Rules Act Rules 2011 (FCRA Rules 2011), which remedied some of the lacunae including the absence of a central registry and regular registration and documentation of the chief functionaries of the organisations in question. Using the opportunity of 'reform' the government also introduced a number of significant clauses which were not related to curtailing funding to terrorist organisations. The exact reasons for introducing these amendments to the law have not yet been clarified, the most problematic among which include:

- 1) Preventing organisations of a 'political nature' from receiving foreign funding. However the concept of 'political activity' is ill-defined and allows investigating officials to define any social mobilisation as political activity, thus allowing for executive discretion which, in many cases, has been used to muzzle citizen dissent.
- 2) Prohibiting the acceptance and utilisation of foreign contribution for activities that are detrimental to national interest. 'National interest' too remains undefined in the present law. The government invited the wrath of the High Court of Delhi in a 2015 case when a Greenpeace activist was forcibly offloaded from a flight for allegedly perpetuating anti-national views. The Court was categorical in its review and warned government representatives that holding a different opinion to the government does not constitute being 'anti-national'.
- 3) Placing a cap of 50 per cent on the administrative expenses of an organisation receiving foreign funding. In a country like India, where local philanthropy has not emerged to meet the demands of Indian civil society, such a restriction contradicts the UN Declaration on Human Rights Defenders, which guarantees the right to access resources for the purpose of protecting human rights, including the receipt of funds from abroad.

⁴In 2013, after consultation with civil society groups, FATF made significant revisions to the Best Practices Paper that provides guidance to governments on how to implement Recommendation 8. The

³ http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁴ http://civicus.org/images/SOCS2015_ESSAY9_AntiTerroristFinancingEffectsOnCS.pdf

revised paper took a more constructive approach. Important principles and findings in this revision include:

1. Clear language on the need to safeguard freedom of association and expression;
2. Caution that Recommendation 8 should not be misused to suppress CSOs;
3. The stipulation that oversight by governments and measures taken by financial institutions should be “flexible, effective and proportional to the risk of abuse.”
4. Recognition that civil society self-regulatory mechanisms can play a role in protecting the sector, and that measures to strengthen such self-regulation should be encouraged.

The government has paid no heed to these revisions and has clearly chosen the route of using an iron hand cloaked in secrecy and relying on the ambiguous wording of the law to further its agenda of suppression of dissenting voices. At no point since 2013 has the previous or current government undertaken outreach with the NGO sector or conducted an evidence-based risk assessment of which NGOs, if any, are vulnerable to being used to direct funds to terrorist groups. While the language of FATF is used frequently by the Home Affairs Ministry to justify restrictions in the media, successive governments have failed to make the link between the FATF standards and the introduction of the FCRA 2010 explicit to Indian civil society or the public. As a result NGOs have been kept in the dark both on the drivers behind these restrictions, and on the recent opportunities to hold the government accountable on how it is implementing Recommendation 8.

In a letter to the Prime Minister of India in May 2015, many prominent civil society organisations and representatives stated that they stand fully behind the drive for transparency and accountability in terms of both government and NGO practice. The same letter however warned the government against using compliance as a garb to target organisations/individuals whose opinion they disagreed with and pleaded for the removal of all provisions that are amenable to subjective interpretation. This plea seems to have fallen on deaf ears as illustrated in an official document⁵ that lists the most common reasons for rejection of NGO applications for registration. Some of the reasons cited include: “If the credibility of any member of the governing body is *in doubt*”; “If the acceptance of foreign contribution by the association is likely to be prejudicial to (c) *public interest*”.

To the government’s credit, efforts have been made to share information on its website more regularly than earlier and in June 2015, a circular was sent out proposing monthly meetings with the Director of the FCRA department to address grievances. This much-needed grievance platform however needs to be made available not just at the national- but also at the state-level for it to actually benefit local NGOs who do not have the resources to travel to and stay in Delhi for prolonged periods of time, and does not constitute best practice as outlined by FATF.

Impact on access to financial services for the NPO sector

An added impact of the FATF Recommendations has been the increasing challenge NGOs, particularly those who provide aid to conflict areas, are facing in accessing financial services. There is a growing body of evidence that shows that banks’ risk-averse behaviour – due to fear of sanctions when not abiding by the FATF standard, which may include the withdrawal of their banking license, freezing of

⁵ http://mha1.nic.in/fcra/intro/FCRA-Rejection_grounds.pdf

assets, hefty fines – has resulted in the withdrawal of bank services to civil society active in conflict areas, with Syria, Iraq and Somalia particularly affected. In India, the situation seems to have gone one step further, with the government instrumentalising banks to carry out the job of intelligence agencies and closely monitor and report on NGO activities and finances.

In June 2015, the Ministry of Home Affairs announced proposals to amend the 2010 Act and FCRA 2011 rules. One of the amendments proposed that every bank should: *“report to the Central Government in forty eight hours any transaction in respect of receipt and utilization of any foreign contribution, by any person, registered or granted permission, whether in designated foreign contribution bank account or utilization account under the Act, in such form, format or periodicity as specified by the Central Government from time to time”*. In addition section 13 (b) of the proposed amendments also suggested: *“a person receiving foreign contributions will place details of foreign contribution received within 7 days of its receipt on its declared website or on the website as prescribed by the Central Government”*.

Subjecting an already overburdened banking sector to these onerous requirements and additional paperwork is likely to deter banks, particularly those in rural and remote areas, from providing critical financial-service access to the NGO sector. The government’s solution, which is to provide NGOs training to meet reporting requirements, also ignores the fundamental question of the limited access small NGOs and CSOs have to electricity, human and financial resources.

In August 2015, The Fund for Global Human Rights carried out a survey to gauge whether NGOs were facing problems with their banks that could be traced to the government’s agenda against NGOs. The survey questionnaire was translated to Hindi and also sent to the grantees/partners of The Fund for Global Human Rights, the American Jewish World Service and the Holdeen India program. The survey was shared with 108 organisations out of which 48 (44 per cent) responded.

35 per cent of the respondents said that they had experienced problems with banking services for their operations. Three specific issues highlighted were:

- Delays in transfers of payments from international sources (64.3 per cent)
- Requests for further information before proceeding with a transaction (50.0 per cent)
- Denial or blocking of international transfers (7.1 per cent)

While the primary reason for delays appeared to be internet connectivity (which exposes the challenges both banks and NGOs will face when complying with the new bank reporting rules), another reason emerging was the lack of knowledge amongst bank employees of recent amendments in the Foreign Contribution Regulatory Act (FCRA). Many respondents agreed that there continues to be a lack of clarity on procedures and processes to be followed by/between the banks, Income Tax Departments and NGOs.

The response from Sangama, an LGBTI organisation that banks with Corporation Bank captures the new layer of bureaucracy that is causing delays and concern: *“For the last three months, the banks are asking for a letter/email from the organisation that receives foreign funds. In the letter we have to state the name of the funder; their address and then give a statement that the said funder is not an organisation banned by the government of India. We usually used to get a notification of fund receipt within a couple of days after funds were transferred. For the last month we are not getting any notification. In late*

July/August, banks were given a software which directly informs the FCRA department in Delhi /and Ministry of Home Affairs about the inward remittances of funds from foreign origin”.

Thoughtworks Foundations, a client of Axis Bank describes how banks are now able to disrupt the flow of vital funds for its activities: “For receiving any foreign fund we have to now provide a declaration to the bank stating purpose of funds etc. When we know of a fund transfer we inform the bank and send them the declaration. But when a fund transfer is made by a donor without prior information the bank has denied the transfer and the amount has been returned to the donor. This has happened on two occasions”.

The situation is no different on the donor side. In January 2015, a memo circulated on the Reserve Bank of India website revealed that the government had put 14 foreign donors in the “prior approval” category. The blacklisted donors included six from the United States, four from the Netherlands, two Danish International NGOs and one Canadian.

Hivos was one of the four Dutch NGOs blacklisted, but according to Ingrid Srinath, CEO, Hivos India Advisory Services Pvt. Ltd, trouble had been brewing for almost a year before that. Her organisation is registered as an Indian for-profit company, jointly owned by Hivos in the Netherlands and South Africa. “We approached more than four banks between May and October 2014 to open an account to begin our operations. The bank representatives were most receptive and enthusiastic in the first few interactions, assigning relationship managers and what not. But in a few weeks we were informed that we cannot open a bank account with them. No reasons were given, and definitely none in writing.” The banks approached include HSBC, Standard Chartered, ING Vysa and Kotak Mahindra. The memo that miraculously surfaced in January 2015 which included Hivos’ name on it, suggests that any transaction they make through Indian banks will need Home Ministry clearance. The banks however, in this case, did not follow the clearance-obtaining route and instead chose to decline doing business with Hivos.

The Hivos India Regional Alliance office has been operational in India for over twenty years and has offered grant support to the tune of four to eleven million euros every year to a range of organisations working on issues including non-pesticide management, sustainable agriculture, informal sector worker rights, LGBT rights, etc. It was forced to wind up its operations in India by the end of December 2015. Says Ingrid Srinath, “I have spent a good part of 2015 approaching the concerned authorities to understand what the problem has been and the only answer that we have received has been stone-cold silence and an elusive reference to classified intelligence reports. The lack of willingness of this government to facilitate a level playing field for civil society organisations and follow due process is a clear sign of the breakdown of all democratic rights”.

The Special Rapporteur on Freedom of Association and Assembly has raised concerns that denial of banking facilities, including bank accounts and fund-transfer facilities, without reasonable proof that the targeted organization or transaction constitutes support of terrorism or money-laundering, is incompatible with the right to freedom of association.

Looking ahead

In April 2016, 20,000-odd organisations will wait to receive the registration certificates that allow them to continue to seek foreign funds for their work. If the recent past serves as an example, it is likely that

an increasing number of organisations – especially those working in the areas of human rights and natural-resource rights – will get entangled in the FCRA’s web. The irony of starting the Pradhan Mantri Jan-Dhan Yojana, a national mission to promote financial inclusion and access to banking services, when the same banks are increasingly refusing to bank with NPOs is not lost on any one of the civil society organisations facing the brunt. If the real intent is the promotion and demonstration of transparency and accountability in the sector, the government needs to imbibe the same spirit in letter and approach in its own functioning.