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RAJIV GANDHI INSTITUTE FOR CONTEMPORARY STUDIES
JAWAHAR BHAWAN, DR. RAJENDRA PRASAD ROAD, NEW DELHI-110001

RGICS LEGISLATIVE BRIEF

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**The Fugitive Economic Offenders Bill,
2018**

Prepared by Manas Raturi

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KEY MESSAGES

- The Fugitive Economic Offenders Bill, 2018 was introduced in the Lok Sabha on March 12, 2018. The objective of the Bill is to deter potential fugitive economic offenders from evading the process of law in India by allowing for confiscation and disposal of their properties both in India and abroad.
- Several concerns have been raised regarding some crucial provisions of the Bill, such as blanket disentitlement from defending civil claims, the burden of proof on third parties, inconsistencies between Indian and international laws, etc.
- Most importantly, the Bill does little to ease the cumbersome process of extradition and strengthen the mechanisms through which fugitive economic offenders are brought back within the jurisdiction of the Indian courts. Therefore, it may not achieve the objective of deterring potential offenders.

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PART I. INTRODUCTION

The Government introduced the Fugitive Economic Offenders Bill, 2018 in the Lok Sabha on March 12, 2018. The draft Bill was approved by the Union Cabinet on March 1, 2018, in response to the criticism levelled against the Government for the Punjab National Bank (PNB) fraud wherein Nirav Modi and Mehul Choksi, the two accused, failed to appear before enforcement agencies, instead fleeing the country. The Bill allows the government powers to attach assets of offenders who have left the country and refuse to return to India to face prosecution even after an arrest warrant has been issued.

Although the Government says this Bill is yet another strong measure to reduce corruption and white collar crime, several concerns have been raised regarding some crucial provisions of the Bill, some of which could be used to challenge the law in courts. Further, the Bill does not address structural issues such as the cumbersome process of extradition and disparity between Indian and international laws for confiscation of foreign property of the fugitive economic offender.

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PART II. MAJOR PROVISIONS OF THE BILL

Following are the details of the procedure followed by authorities under the Bill:

Sections in the Bill	Actions taken by the authorities
Section 4	The Director, ⁱ or any other authorised officer, may file an application in the Special Court ⁱⁱ on the basis of material evidence that an individual is a fugitive economic offender.
Section 5	The Director, or any other authorised officer, with the permission of the Special Court, may attach the individual's property which is believed to be proceeds of crime.
Section 10	The Special Court shall issue notice to an individual who is alleged to be a fugitive economic offender and to any other person who has any interest in the property mentioned in the application.
Section 12	Once the Special Court declares an individual as a fugitive economic offender, it may order that any property which is the proceeds of the specified crime in India or abroad (whether or not such property is owned by the fugitive economic offender) and any other property or benami property in India or abroad, owned by the fugitive economic offender, stands confiscated to the Central Government.

• **Section 4:** Allows for the authorities to file an application in the Special Court identifying an individual to be a fugitive economic offender, on the following grounds:

- (a) reasons for the belief that an individual is a fugitive economic offender;
- (b) any information available as to the whereabouts of the fugitive economic offender;
- (c) a list of properties or the value of such properties believed to be the proceeds of crime, including any such property outside India for which confiscation is sought;

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(d) a list of properties or benami property owned by the individual in India or abroad for which confiscation is sought; and

(e) a list of personsⁱⁱⁱ who may have an interest in any of the properties listed under clauses (c) and (d).

• **Section 5:** Allows the authorities, with the permission of the Special Court, to attach any property mentioned in the application under section 4 by an order in writing on the following grounds:

(a) for which there is a reason to believe that the property is proceeds of crime, or is a property owned by an individual who is a fugitive economic offender; and

(b) which is being or is likely to be dealt with in a manner which may result in the property being unavailable for confiscation:

• **Section 12:** If the Special Court finds an individual guilty of being a fugitive economic offender, it may order that any of the following properties stand confiscated to the Central Government:

(a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and

(b) any other property or benami property in India or abroad, owned by the fugitive economic offender

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PART III: KEY ISSUES

• **Rationale behind the Bill:**

(i) There is a list of scheduled offences in the Bill which also includes fraud, and violation of laws governing taxes, black money, benami properties, financial sector and corruption. These offences are already covered under the Indian Penal Code and fourteen existing legislations. For instance, the provision for confiscation of property in cases of economic offences is already present in legislations such as the Prevention of Money Laundering Act, 2002, Foreign Exchange Regulation Act, 1973, Smugglers and Foreign Exchange Manipulation Act, 1976. Therefore, it is not clear how this particular Bill seeks to strengthen the legislative vacuum that allows economic offenders to evade the process of Indian law by remaining outside the jurisdiction of Indian courts.

(ii) Only those cases where the total value involved in such offence is Rs. 100 crores or more will fall under the purview of the Bill. Again, there is no clarity as to why the figure of Rs. 100 crore has been chosen. Some questions that the Government needs to be asked are: Why discriminate between economic offenders by creating a cut off of Rs. 100 crore and above? What steps would the Government take in cases where the total value of offences is marginally less than Rs. 100 crore – for instance, 99.5 crores? Does the Government agree that existing laws are sufficient to deal with such cases? If yes, what makes these cases different when the value touches or crosses Rs. 100 crores?

• **Blanket disentitlement:** Section 14 of the Bill states that once a person has been “declared” as a fugitive economic offender, any Court or tribunal in India, in any civil proceeding before it may disallow such individual from putting forward or defending any civil claim. With this move the government hopes to protect itself and its officers from legal suits. Further, experts note that this blanket disentitlement from pursuing or defending any civil claim should be clarified and made reasonable, lest the Bill, once it becomes a law, gets challenged on the grounds of violation of the basic tenets of fair play.^{iv}

• **Burden of proof on third parties:** Section 12(7) of the Bill states that while making the confiscation order, the Special Court may exempt from confiscation any property which is a “proceed of crime”^v in which any other person – a third party (persons other than the fugitive economic offender) – has an interest. However, under Section 16(2), the burden of proof to show that the property was acquired in a bonafide manner (without knowledge of the fact that such

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property constitutes proceeds of crime) falls on the third party – the legal maxim of ‘innocent until proven guilty’ turned upside down.

This also implies that legal buyers will now need a far deeper due diligence process before they buy or sell a property. Additionally, it may put at risk a large number of people who have invested their life-savings in a property and will now be expected to undergo the legal and administrative procedures to prove their innocence.

- **Defining ‘property’:** It is unclear as to what exactly constitutes ‘property’ under the Bill. If it is assumed that ‘property’ is restricted to assets such as land or housing, it may create circumstances where those who plan to evade the banks/government shift their investment focus to a different asset class which may not be so easily confiscated by the state – for example gold, jewellery etc., or others which lie totally outside the purview of the government, such as bitcoins.

- **Parity between Indian and International Law:** The Bill also provides for confiscation of property (proceeds of crime) outside India. However, it is unclear as to what will happen if inconsistencies arise between Indian and international laws.

For instance, under the Bankruptcy Code of the United States, once a business (debtor) files for bankruptcy, the commencement of the case creates an “estate,” which technically becomes the temporary legal owner of all of the debtor's property – consisting of “all legal or equitable interests” of the debtor, including property owned by another person in which the debtor has an interest.^{vi} If the case is under Chapter 11 of the Code, the “debtor in possession” is allowed to operate the business (with some constraints) and reorganise the debt through negotiations. However, if the case is under (or is converted to) Chapter 7, the “debtor in possession” ceases to exist and a trustee is appointed to liquidate the business.^{vii} Similarly, in the United Kingdom, under the Insolvency Code, 1986, a bankrupt's “estate” vests in an appointed trustee, while the bankrupt loses any rights to the estate apart from a few exceptions.^{viii}

Therefore, it is unclear how the Indian government will confiscate the foreign property of a fugitive economic offender if s/he files for bankruptcy under the US or the UK Code. This is significant since the PNB fraud accused Nirav Modi's international jewellery business Firestar Diamond Inc., has already filed for bankruptcy under Chapter 11 of the US Bankruptcy Code in the New York Southern Bankruptcy Court.^{ix}

- **Extradition:** As legal experts argue, the Bill does little to strengthen the complex and time-taking extradition process between India and other countries. A host of issues act as impediments in the extradition process. For instance, there have been cases where courts in the UK have rejected

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extradition requests on the ground that the “jail condition in India is inhumane” and “accused can’t be guaranteed a fair prosecution.”^x In November 2017, a British court rejected two extradition requests by the Indian authorities. The reasons stated by the court included “inhuman or degrading treatment” in prison, “lack of medical provisions,” “overcrowding,” etc.^{xi} India and Britain have had an extradition treaty since 1992, but so far only one extradition has taken place – that of Samirbhai Vinubhai Patel.

• **Disposal of confiscated property:** The Bill remains silent on the procedure of disposal of confiscated property. It is unclear that which section of creditors would be prioritised over others for the payment of dues. Would employees – the collateral targets in these cases – be put under the category of “creditors” and paid their salaries and other dues? A case in point is that of Kingfisher Airlines, which, according to media estimates, owes its nearly 3,000 former employees payment of over Rs. 300 crores in unpaid salary, provident fund, gratuity, etc.^{xii}

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PART IV. CONCLUSION

As is clear, there is ambiguity surrounding a number of important provisions in the Bill. Issues such as what constitutes ‘property,’ blanket disentitlement to defend civil claims, burden of proof, inconsistencies between Indian and international laws, etc., need to be clarified by the Government.

Apart from the Bill, a related step that the Government has taken to deter potential economic offenders from fleeing the country is making it mandatory for borrowers taking loans above Rs. 50 crores to provide passport details to the banks. This, the Government argues, is to help the banks take timely action and inform the relevant authorities to prevent flight of potential economic offenders.^{xiii} However, this decision seems to be based on a presumption of guilt, where the Government flags anyone borrowing above Rs. 50 crores as a potential fugitive economic offender. This presumption of guilt is also reflected in the Bill in at least two provisions: disallowing individuals identified as fugitive economic offenders to pursuing or defending civil claims; and putting the burden of proof on third parties in cases of their interest in the property possibly sourced from the fugitive’s proceeds of crimes. These provisions make the Bill vulnerable to be challenged in courts on the grounds of violating the legal maxim of ‘innocent until proven guilty.’

In the final analysis, the Government needs to withdraw the Bill and look at bringing in a well framed legislation that will meet the objective of deterring economic offenders planning to flee the country and also ensure that it is in sync with the basic tenets of justice and fair-play. More importantly, the Government needs to work with other countries towards easing the process of extradition and strengthening the mechanisms through which fugitive economic offenders are brought back within the jurisdiction of the Indian courts.

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PART V. REFERENCES

ⁱ According to Section 2(1)(e), “Director” means as defined in the Prevention of Money-laundering Act, 2002.

ⁱⁱ According to Section 2(1)(n), “Special Court” means a Court of Sessions designated as a Special Court in the Prevention of Money-laundering Act, 2002.

ⁱⁱⁱ According to Section 2(1)(i), “persons” include, inter alia, an individual; a Hindu Undivided Family; a company; a trust; a partnership; a limited liability partnership, etc.

^{iv} Upadhyay, J. (2018, March 5). Fugitive Economic Offenders Bill needs tweaks: Analysts. *Livemint*. Retrieved from <http://www.livemint.com/Companies/fjzxN4pbr0JSTPM2tdBSjL/Fugitive-Economic-Offenders-Bill-needs-tweaks-Analysts.html> on March 16, 2018.

^v Section (2)(1)(k) defines “proceeds of crime” as: any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a Scheduled Offence, or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

^{vi} Bankruptcy Basics. *United State Courts*. Retrieved from <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> on March 16, 2018.

^{vii} Appointment of a Chapter 11 Trustee in a Business Bankruptcy Case. *Robleto Law, PLLC*. Retrieved from <https://www.robletolaw.com/appointment-of-chapter-11-trustee-bankruptcy/> on March 16, 2018.

^{viii} Section 306, Insolvency Act, 1986. Retrieved from http://www.legislation.gov.uk/ukpga/1986/45/pdfs/ukpga_19860045_en.pdf on March 16, 2018.

^{ix} Bloomberg. (2018, February 27). PNB fraud: Nirav Modi’s Firestar Diamond files for bankruptcy in the US. *Livemint*. Retrieved from <http://www.livemint.com/Companies/0HmWIXEkNSz99WVf4BTo7H/Nirav-Modiowned-Firestar-Diamond-affiliates-file-for-bankr.html> on March 16, 2018.

^x Ghosh, U. (2018, March 12). Will the Fugitive Economic Offenders Bill of any real use? *Rediff*. Retrieved from <http://www.rediff.com/business/report/pnb-scam-will-the-fugitive-economic-offenders-bill-of-any-real-use/20180312.htm> on March 16, 2018.

^{xi} TNN. (2017, November 5). UK rejects two Indian extradition requests. *The Times of India*. retrieved from <https://timesofindia.indiatimes.com/nri/other-news/uk-rejects-two-indian-extradition-requests/articleshow/61516020.cms> on March 16, 2018.

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^{xii} Dey, A. (2017, April 20). On a wing and a prayer: What former Kingfisher Airlines employees make of Vijay Mallya's arrest. *Scroll*. Retrieved from <https://scroll.in/article/835071/on-a-wing-and-a-prayer-what-former-kingfisher-airlines-employees-make-of-vijay-mallyas-arrest> on March 16, 2018.

^{xiii} PTL. (2018, March 10). Passport details must for loans of Rs 50 cr and above. *The Hindu Business Line*. Retrieved from <https://www.thehindubusinessline.com/money-and-banking/passport-details-must-for-loans-of-rs-50-cr-and-above/article23029587.ece> on March 16, 2018.