

## BRIEFER – INDIA FOREIGN CONTRIBUTION (REGULATION) ACT (FCRA)

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# India’s Foreign Contribution (Regulation) Act (FCRA): The 2020 Amendments and Threats to Free Association

### Introduction

The ability of non-governmental organizations (NGOs) and other associations to access resources is well-established as a protected and essential component of the right to free association under international law. In India, the Foreign Contribution (Regulation) Act (“FCRA”), 2010 mandates that every non-governmental organization (NGO) receiving foreign funds register and receive prior permission before accepting such funds. The FCRA in its original form was enacted over four decades ago and has undergone a significant transformation over the years in response to shifting government priorities and the changing political landscape in India. This transformation—both in the substance of the law itself and in its utilization by the government—has had profound impacts on Indian civil society, particularly on its ability to access resources and operate. Although the FCRA has long drawn criticism from United Nations (UN) bodies, civil society, and others for undermining the freedom of association, its impacts have perhaps never been starker than in the context of the COVID-19 pandemic and India’s disastrous ‘second wave.’ While the framework put in place by the 2010 FCRA was already considered draconian,<sup>1</sup> the amendments enacted in 2020 were even more restrictive, and have dealt a lethal blow to many NGOs.<sup>2</sup>

The most recent amendments to the FCRA were passed in India’s parliament in September 2020 via the Foreign Contribution (Regulation) Amendment Bill, 2020 (“2020 Amendments”), four days after the bill was tabled and without any stakeholder

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<sup>1</sup> See, e.g. Quartz India, *India has been hostile to NGOs for decades. Modi made it worse*, May 2019, <https://qz.com/india/1611326/india-has-been-hostile-to-ngos-for-decades-modi-made-it-worse/>; Times of India, *Doing good in India gets harder: Philanthropy should be regulated by an independent regulator, not by the home ministry*, Nov. 2020, <https://timesofindia.indiatimes.com/blogs/men-and-ideas/doing-good-in-india-gets-harder-philanthropy-should-be-regulated-by-an-independent-regulator-not-by-the-home-ministry/>

<sup>2</sup> The Morning Context, *Why NGOs want to help but can’t*, May 2021, <https://themorningcontext.com/chaos/why-ngos-want-to-help-but-cant>

consultation.<sup>3</sup> The amendments include a complete prohibition on subgranting,<sup>4</sup> a 20% cap on any administrative expenses drawn from foreign funds, and a requirement that organizations open a bank account to receive foreign funds only at one particular branch of the State Bank of India, among other burdensome provisions. The significant restrictions imposed by the 2020 Amendments have presented tremendous—and in many cases insurmountable—obstacles to NGOs delivering a variety of services as part of India’s COVID relief efforts,<sup>5</sup> which intensified in response to a second wave of infections that killed approximately 170,000 people in April and May of 2021 alone.<sup>6</sup> India’s official total death toll from the virus as of July 7, 2021 was approximately 404,000, although the official numbers are said to grossly underestimate the reality on the ground.<sup>7</sup> The 2020 Amendments effectively impaired civil society’s ability to utilize foreign funding and engage in COVID response during India’s second wave. In contrast, during India’s first wave of the virus before the 2020 FCRA amendments went into effect, NGOs were able to receive foreign contributions and played a critical role in pandemic relief efforts.<sup>8</sup> Even beyond the COVID-19 pandemic, the FCRA poses a significant and enduring obstacle to the ability of NGOs in India to access critical resources and to operate, and thus continues to pose a serious threat to the freedom of association. Such regulatory burdens also impede progress toward a variety of development goals, including the Sustainable Development Goals, in which civil society is a key partner.

## History of the FCRA

The FCRA was introduced in 1976, but the origins of the law date back to the 1967 general election,<sup>9</sup> held amidst the backdrop of the Cold War.<sup>10</sup> Following the national emergency declared by Indira Gandhi in 1975, which lasted for 21 months and led to a

<sup>3</sup> International Commission of Jurists, *India: FCRA Amendment 2020 will undermine the work of Civil Society*, Sept. 2020, <https://www.icj.org/india-fcra-amendment-2020-will-undermine-the-work-of-civil-society/>

<sup>4</sup> Previously, under the 2010 Act, subgrants to other FCRA-registered organizations were allowed.

<sup>5</sup> The Morning Context, *Why NGOs want to help but can't*, May 2021, <https://themorningcontext.com/chaos/why-ngos-want-to-help-but-cant>

<sup>6</sup> Reuters, *India orders unapproved COVID shots as it reels from devastating second wave*, June 2021, <https://www.reuters.com/world/india/india-signs-deal-with-domestic-vaccine-maker-biological-e-300-mln-doses-2021-06-03/>

<sup>7</sup> New York Times, *Tracking Coronavirus in India: Latest Map and Case Count*, July 2021, <https://www.nytimes.com/interactive/2021/world/india-covid-cases.html>

<sup>8</sup> New York Times, *India's Strict Rules on Foreign Aid Snarl Covid Donations*, May 2021, <https://www.nytimes.com/2021/05/12/business/india-covid-donations.html>

<sup>9</sup> The Indian National Congress party retained its power and Indira Gandhi retained her position as Prime Minister, but allegations surfaced after the election that the US Central Intelligence Agency (CIA) had provided funds to some candidates, leading to debate in Parliament about the introduction of a new law. See e.g., Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, 2<sup>nd</sup> ed., Nov. 2021, p. 21, <https://sanjayaditya.com/wp-content/uploads/AccountAble-Handbook-FCRA-2010.pdf>; India Today, *Foreign funds to play vital role in Lok Sabha polls*, March 2015, <https://www.indiatoday.in/magazine/cover-story/story/19791231-foreign-funds-to-play-vital-role-in-lok-sabha-polls-818037-2015-03-31>

<sup>10</sup> Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, 2<sup>nd</sup> ed., Nov. 2021, p. 21, <https://sanjayaditya.com/wp-content/uploads/AccountAble-Handbook-FCRA-2010.pdf>

suspension of elections and a curbing of civil liberties, the FCRA was passed in Parliament in 1976.<sup>11</sup> The initial focus of the FCRA was on political actors; NGOs were allowed to receive foreign funding without restrictions, but were required to report the funds received and spent annually.<sup>12</sup> In 1984, the FCRA's focus began to shift away from political parties towards NGOs and civic activists, with an amendment that required NGOs to register and receive prior permission before accepting foreign funds.<sup>13</sup> In 2001, the Congress party came to power once again and a draft bill was released and debated in 2005; the bill remained in limbo until it was reintroduced in Parliament and passed in 2010, and the Act and its accompanying rules came into force in 2011.<sup>14</sup>

The 2010 FCRA,<sup>15</sup> which replaced its 1976 predecessor, placed a greater focus on NGOs. The FCRA falls under the purview of the Ministry of Home Affairs (MHA), and its stated purpose is “to regulate the acceptance and utilisation of foreign contribution...by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest.”<sup>16</sup> The Minister of Home Affairs stated in Parliament that, “the present Bill is introduced in the context of increased security concerns and resultant imperatives. The objective is to provide a framework for more effective and transparent regulation of foreign contribution for prevention of activities detrimental to national interest.”<sup>17</sup>

Whereas registration under the 1976 FCRA was only required once and considered permanent, the 2010 FCRA introduced a requirement that registration had to be renewed every five years. The 2010 FCRA also imposed a prohibition on subgranting to organizations not registered under the Act, instituted a cap of 50% on the use of foreign funds for administrative expenses, and shifted the focus of the FCRA from political parties to

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<sup>11</sup> Pursuant to the speculation over foreign interference in the 1967 election, in 1973 a bill was tabled and referred to a Joint Parliamentary Committee, which submitted its report in January 1976. Prior to this, on June 25, 1975, Indira Gandhi's government had declared a national emergency in response to Jaiprakash Narayan's 'Citizens for Democracy' movement, which had set its sights on Indira Gandhi's resignation. When the FCRA went to Parliament, many opposition leaders had been arrested or were in hiding. See Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, p. 21; News 18, *The Emergency of 1975: How Former PM Indira Gandhi Led Country to Chaos, What Followed*, June 2019, <https://www.news18.com/news/india/the-emergency-of-1975-how-former-pm-indira-gandhi-led-country-to-chaos-what-followed-2202657.html>

<sup>12</sup> Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, p. 21

<sup>13</sup> In 1982, after the Congress party had lost and then regained power, it set up a one-person commission known as the Kudal Commission to look into the sources of funds for the Citizens for Democracy movement; the Commission's eventual 1600-page report came out over several years and resulted in the 1984 ordinance. Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, p. 21. The possibility of further amendments to the FCRA was revisited over the next decade, but failed to come to fruition.

<sup>14</sup> *Id.* at p. 22.

<sup>15</sup> All forthcoming references to the FCRA refer to the 2010 Act.

<sup>16</sup> The Foreign Contribution (Regulation) Act, 2010, Act No. 42 of 2010, Sept. 2010, <https://legislative.gov.in/sites/default/files/A2010-42.pdf>

<sup>17</sup> Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, p. 273

“organizations of a political nature.”<sup>18</sup> Notably, the Indian Supreme Court in its 2020 judgment in *Indian Social Action Forum (INSAF) v. Union of India*—in which an NGO challenged the constitutionality of several provisions of the FCRA, including on the basis of freedom of association<sup>19</sup>—found that:

Support to public causes by resorting to legitimate means of dissent like bandh, hartal, etc. cannot deprive an organisation of its legitimate right of receiving foreign contribution. Any organisation which supports the cause of a group of citizens agitating for their rights without a political goal or objective cannot be penalised by being declared as an organisation of a political nature.<sup>20</sup>

Increasingly over the past decade, the FCRA has come to be used as a tool of repression against civil society.<sup>21</sup> In 2015, 10,000 organizations had their FCRA licenses cancelled by the Home Ministry.<sup>22</sup> In 2016, the UN Special Rapporteurs on Human Rights Defenders, on Freedom of Expression, and on Freedom of Association and Peaceful Assembly, called on the Indian government to repeal the FCRA, claiming it was “being used more and more to silence organisations involved in advocating civil, political, economic, social, environmental or cultural priorities, which may differ from those backed by the Government.”<sup>23</sup> In 2016, the government rejected the FCRA renewal applications of 25 NGOs, including human rights advocacy groups, on the basis of their activities not being in the “national interest.”<sup>24</sup> Organizations from Compassion International and other charities and faith-based groups, to the Delhi-based Lawyer’s Collective, Greenpeace India,<sup>25</sup> and Amnesty International have faced crackdowns under the FCRA, with

<sup>18</sup> <https://www.thehindu.com/opinion/lead/Time-to-repeal-the-FCRA/article16946222.ece>

<sup>19</sup> Supreme Court Observer, *Revisiting FCRA Judgment*, June 2020, <https://www.scoobserver.in/beyond-the-court/challenge-to-fcra-judgment-in-plain-english>

<sup>20</sup> Law Times Journal, *Organization cannot be deprived of its right to receive foreign funding merely because it uses legitimate means of dissent for public causes*: SC, March 2020, <https://lawtimesjournal.in/organization-cannot-be-deprived-of-its-right-to-receive-foreign-funding-merely-because-it-uses-legitimate-means-of-dissent-for-public-causes-sc/>

<sup>21</sup> See, e.g. Human Rights Watch, *Human Rights Watch Letter to Prime Minister Manmohan Singh of India*, April 2008, <https://www.hrw.org/news/2008/04/10/human-rights-watch-letter-prime-minister-manmohan-singh-india>; Civicus, *7 More Csos Refused Fcra Licenses In India*, Feb. 2016, <https://monitor.civicus.org/updates/2016/12/16/7-more-csos-refused-fcra-licenses-india/>; Human Rights Watch, *India: Rights Groups Harassed Over Foreign Funding: Dubious Criminal Allegations Against Lawyers Collective*, June 2019, <https://www.hrw.org/news/2019/06/26/india-rights-groups-harassed-over-foreign-funding>; Human Rights Watch, *India: Foreign Funding Law Used to Harass 25 Groups: Stop Invoking FCRA to Restrict Peaceful Association*, Speech, Nov. 2016, <https://www.hrw.org/news/2016/11/08/india-foreign-funding-law-used-harass-25-groups>

<sup>22</sup> *Id.*

<sup>23</sup> United Nations Office of the High Commissioner for Human Rights, *UN Rights Experts Urge India to Repeal Law Restricting NGO’s Access to Crucial Foreign Funding*, June 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E>

<sup>24</sup> Human Rights Watch, *India: Foreign Funding Law Used to Harass 25 Groups*, Nov. 2016, <https://www.hrw.org/news/2016/11/08/india-foreign-funding-law-used-harass-25-groups>

<sup>25</sup> Economic Times, *Greenpeace India shuts two offices, cuts staff after donations row*, Feb. 2019, <https://economictimes.indiatimes.com/news/politics-and-nation/greenpeace-india-shuts-two-offices-cuts-staff-after-donations-row/articleshow/67807792.cms?from=mdr>

Amnesty International forced to shut down their operations in India after having their bank accounts frozen pursuant to allegations of financial wrongdoing under the Act.<sup>26</sup> International donors, including Ford Foundation, the World Movement for Democracy, the National Endowment for Democracy, and the Open Society Foundations, have further been placed on watchlists requiring prior clearance from the Home Ministry to send any foreign funds to India.<sup>27</sup>

#### FCRA AND THE FINANCIAL ACTION TASK FORCE (FATF)

The 2010 FCRA was passed in the context of the post-9/11 international regulatory environment, in which countering the financing of terrorism became a major priority for the Financial Action Task Force (FATF), an intergovernmental organization tasked with combatting money laundering and terrorist financing worldwide.<sup>28</sup> FATF Recommendations against money laundering and countering terrorist financing (AML/CT) – particularly Recommendation 8 pertaining to non-profit organizations (NPOs) – have served as an underlying justification for India’s regulatory framework for NGOs, including via the FCRA and the Unlawful Activities (Prevention) Act (UAPA).<sup>29</sup>

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<sup>26</sup> See e.g., Indian Express, *SC to hear CBI plea in Lawyers Collective FCRA violation case today*, Nov. 2019, <https://indian-express.com/article/india/sc-to-hear-cbi-plea-in-lawyers-collective-fcra-violation-case-today-6109070/>; Deccan Herald, *No more foreign funds for Indira Jaising’s NGO*, June 2016, <https://www.deccanherald.com/content/550013/no-more-foreign-funds-indira.html>; <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E>; New York Times, *Amnesty International Shuttters Offices in India, Citing Government Attacks*, Dec. 2020, <https://www.ny-times.com/2020/09/29/world/asia/india-amnesty-international.html>

<sup>27</sup> See, e.g., Rahul Tripathi, *Three American NGOs, including one patronised by George Soros, put on government watch list*, Economic Times, June 2016, [https://economictimes.indiatimes.com/news/politics-and-nation/three-american-ngos-including-one-patronised-by-george-soros-put-on-government-watch-list/articleshow/52644876.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/three-american-ngos-including-one-patronised-by-george-soros-put-on-government-watch-list/articleshow/52644876.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>28</sup> Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, p. 23

<sup>29</sup> For example, a report by the Rajya Sabha Parliamentary Standing Committee On Home Affairs stated regarding the 2012 amendments to the UAPA (which among other things, expanded the definition of ‘person’ to include associations and expanded the definition of ‘terrorist activities’ to include those that threaten the country’s economic security) were introduced “...to comply with the guidelines of Financial Action Task Force (FATF)...” See The Gazette of India, Ministry of Law and Justice, Jan. 2013, [https://www.mha.gov.in/sites/default/files/The%20Unlawful%20Activities%20%28Prevention%29%20Amendment%20Act%2C%202012%20%28English%29\\_0.pdf](https://www.mha.gov.in/sites/default/files/The%20Unlawful%20Activities%20%28Prevention%29%20Amendment%20Act%2C%202012%20%28English%29_0.pdf); Parliament of India, Rajya Sabha, Department-Related Parliamentary Standing Committee On Home Affairs One Hundred And Sixtieth Report On The Unlawful Activities (Prevention) Amendment Bill, 2011, March 2012, [https://www.prsindia.org/sites/default/files/bill\\_files/SCR Unlawful Activities Prevention Amendment Bill 2011.pdf](https://www.prsindia.org/sites/default/files/bill_files/SCR%20Unlawful%20Activities%20Prevention%20Amendment%20Bill%202011.pdf). Also of note is that, when the Committee inquired as to whether the state governments had been consulted on the amendments, the Home Secretary’s reply specifically referred to the amendments sought by FATF, stating:

“So far as FATF amendments are concerned, they wanted to include threats from terrorism to international organizations or inter-governmental bodies to be included. That is something which pertains to the Union Government. Then, they wanted an insertion therein providing for confiscation of not only the proceeds of terrorism or the funds meant for financing terrorism, but also the equivalent value thereof. Then, they also wanted to bring in various bodies, which can be used to funnel terrorist funds, also to be brought in. We said that that is already included in the juridical definition of person. But they wanted explicit mentioning of those bodies, NGOs, etc.” See Parliament of India, Rajya Sabha, Department-Related Parliamentary Standing Committee On Home Affairs One Hundred And Sixtieth Report On The

As a member of FATF's Asia Pacific Group (APG), as well as FATF's Eurasian Group (EAG), India was first evaluated by FATF/APG in 2010. APG found India to be non-compliant in the area of non-profit regulation, with no effective outreach to or review of the non-profit organization (NPO) sector.<sup>30</sup> FATF recommended that India undertake a comprehensive NPO sector review, as well as a detailed risk assessment of the sector for terrorist financing.<sup>31</sup> The US government was also increasingly impatient with India's progress on AML/CT issues, adding pressure to FATF's recommendations and supporting the enactment of the 2010 FCRA.<sup>32</sup> Following a March 2011 US report which mentioned India's slow progress in updating the FCRA, the FCRA Rules went into force in May 2011.<sup>33</sup>

Today, FATF and AML/CT narratives continue to be used by the Indian government to justify the existence of the FCRA. The Indian government's FCRA website currently includes as part of its "Charter for Associations Applying for Grant of Prior Permission /Registration Under The Foreign Contribution (Regulation) Act, 2010" a list of "Good practice Guidelines to the Non-Profit Organisations (NPOs) to ensure compliance with FATF requirements," indicating some linkage between the FCRA and FATF.<sup>34</sup>

In practice, NPOs are at very low risk of terrorist financing (TF), especially in comparison with other sectors, and there is minimal evidence of any involvement in illicit financial or TF activity by the vast majority of all Indian NGOs, most of whom are involved in service delivery, education, health, or advocacy. FATF guidelines require governments to take a "targeted...risk-based approach" to assessing risk in the non-profit sector and to tailor any measures to those NPOs that may have been identified as being vulnerable to terrorist financing.<sup>35</sup> In the absence of this identification, broad-

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Unlawful Activities (Prevention) Amendment Bill, 2011, March 2012, [https://www.prsindia.org/sites/default/files/bill\\_files/SCR\\_Unlawful\\_Activities\\_Prevention\\_Amendment\\_Bill\\_2011.pdf](https://www.prsindia.org/sites/default/files/bill_files/SCR_Unlawful_Activities_Prevention_Amendment_Bill_2011.pdf)

Additionally, a report of the Financial Intelligence Unit of the Government of India, set up as per a FATF recommendation, explicitly mentions that the 2019 amendments to the UAPA were made to comply with FATF, stating that: "The legislative measures for combating financing of terrorism in India are contained in the Unlawful Activities (Prevention) Act, 1967 (UAPA). UAPA criminalizes terrorist acts and raising of funds for terrorist acts. The Act was amended from 1st February, 2013 to make it more effective in preventing unlawful activities and meet the standards of the Financial Action Task Force." Government of India, Department of Revenue, Financial Intelligence Unit, *Annual Report 2018-2019*, <https://fiuindia.gov.in/pdfs/downloads/AnnualReport2018-19.pdf>

<sup>30</sup> APG, Mutual Evaluation Report on India, June 25, 2010, p 218, <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20India%20full.pdf>.

<sup>31</sup> *Id.* at p 218.

<sup>32</sup> See, e.g., Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, p. 23 and [https://wikileaks.org/plusd/cables/08NEWDELHI2671\\_a.html](https://wikileaks.org/plusd/cables/08NEWDELHI2671_a.html).

<sup>33</sup> Agarwal, S., *Accountable Handbook FCRA 2010: Theory and Practice*, p. 23

<sup>34</sup> [https://fcraonline.nic.in/home/PDF\\_Doc/fc\\_notice\\_29012021.pdf](https://fcraonline.nic.in/home/PDF_Doc/fc_notice_29012021.pdf)

<sup>35</sup> FATF Recommendations, INTERPRETIVE NOTE TO RECOMMENDATION 8 (NON-PROFIT ORGANISATIONS), Feb 2012, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>, page 58 (2).

based measures that apply to the entire NPO sector and significantly hamper civil society are not in line with FATF standards.

## The 2020 FCRA Amendments

The 2020 Amendments introduced nine changes to the FCRA, including a complete prohibition on transfers of foreign funds (subgranting);<sup>36</sup> a further reduction on the percentage of foreign funds that may be spent on administrative expenses (including expenses such as salaries and utilities) from 50% to 20%;<sup>37</sup> the requirement of establishing a bank account with one designated Delhi branch of the State Bank of India;<sup>38</sup> and the possibility of an FCRA suspension for up to one year (the Act previously allowed for a 180 day suspension).<sup>39</sup> Although the MHA has refused to reveal why the FCRA was amended, some suspect that the legislation was a response to the Citizenship Amendment Act protests and fears around foreign funding of groups critical of the government.

Regardless of their underlying trigger, the amendments have had far-reaching and devastating consequences for Indian civil society. They have garnered international attention in the context of the tremendous obstacles they pose to COVID aid and response, as well as to the obliteration of reliable sources of funding for thousands of NGOs.<sup>40</sup> In India, larger NGOs often bring in substantial funding from foreign sources, and then subgrant funds to thousands of smaller NGOs that provide the critical last-mile service delivery and on-the-ground work.<sup>41</sup> The 2020 Amendments' blanket subgrant prohibition curtailed the ability of organizations to share resources in India's catastrophic second wave of the COVID-19 pandemic, preventing organizations from being able to both receive and transfer donations and vital supplies such as oxygen tanks, masks, and protective gear to hospitals, NGOs, and other organizations providing direct services.<sup>42</sup> Only a minority of FCRA NGOs had been able to establish a State Bank of India (SBI) bank account and receive the required MHA approval to receive funds at the beginning of the second wave, leading to an enormous backlog of accounts

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<sup>36</sup> The Gazette of India, *The Foreign Contribution (Regulation) Amendment Act, 2020, No. 33 of 2020*, para. 3, Sept. 2020, [https://prsindia.org/files/bills\\_acts/bills\\_parliament/Foreign%20Contribution%20\(Regulation\)%20Amendment%20Act.%202020.pdf](https://prsindia.org/files/bills_acts/bills_parliament/Foreign%20Contribution%20(Regulation)%20Amendment%20Act.%202020.pdf)

<sup>37</sup> *Id.* at para. 4

<sup>38</sup> *Id.* at para 12.

<sup>39</sup> *Id.* at para. 8

<sup>40</sup> New York Times, *India's Strict Rules on Foreign Aid Snarl Covid Donations*, May 2021, <https://www.nytimes.com/2021/05/12/business/india-covid-donations.html>

<sup>41</sup> The Morning Context, *Why NGOs want to help but can't*, May 2021, <https://themorningcontext.com/chaos/why-ngos-want-to-help-but-cant>

<sup>42</sup> BBC, *India Covid: How law stops NGOs distributing essential aid*, May 2021, <https://www.bbc.com/news/world-asia-india-57095591>; New York Times, *India's Strict Rules on Foreign Aid Snarl Covid Donations*, May 2021, <https://www.nytimes.com/2021/05/12/business/india-covid-donations.html>

to be processed by the sole Delhi SBI branch, and international funds with no place to go.<sup>43</sup>

The prohibition on transfers of foreign funding was particularly damaging for many smaller civil society and grassroots organizations, completely eliminating their primary source of funding and thwarting their ability to continue to operate. Such barriers to an organization's ability to access funding and operate violate the freedom of association under international law, both by impeding the ability to access resources and by consequently impeding the ability to associate. Only after some NGOs petitioned the Delhi Court to challenge the original deadline for opening of FCRA accounts did the Ministry of Home Affairs extend this deadline by three months to June 30, 2021.<sup>44</sup> The Ministry of Home Affairs also extended the validity of registration for NGOs whose certificates were set to expire between September 29, 2020 and September 30, 2021 to the latter date.<sup>45</sup> However, these minor concessions fail to address the overall impact of the 2020 amendments on civil society.

While the ability of Indian non-profits to access foreign funds has been severely impeded, crippling civil society's ability to respond and mediate crises like COVID and other national disasters, the government has facilitated its own access—and that of certain political actors—to foreign funding, with few safeguards against corruption, money laundering, or terrorist financing. Several national “relief funds,” most notably the Prime Minister's Citizen Assistance and Relief Fund (“PM CARES” Fund), established in March 2020 to channel COVID-19 relief, are exempt under the FCRA,<sup>46</sup> and have been declared not subject to disclosure or transparency rules regarding their use.<sup>47</sup> While restricting tax exemptions to NGOs, donations to funds like PM CARES receive 100% tax deductions and can also fulfill companies' CSR requirements.<sup>48</sup> Such government funds have thus had the effect of further limiting NPOs' access to resources and channeling money away from the sector, into unaccountable political funds.<sup>49</sup>

<sup>43</sup> See, e.g., The Hindu, *Most NGOs don't have SBI account*, May 2021, <https://www.thehindu.com/news/national/most-ngos-dont-have-sbi-account/article34545936.ece>; The Diplomat, *COVID-19 Second Wave Highlights India's Barriers to Global Aid*

<https://thediplomat.com/2021/05/covid-19-second-wave-highlights-indias-barriers-to-global-aid/>

<sup>44</sup> Times of India, *Government extends FCRA registration date for NGOs still September 30*, May 2021, <https://timesofindia.indiatimes.com/india/government-extends-fcra-registration-date-for-ngos-till-september-30/articleshow/82778112.cms>

<sup>45</sup> *Id.* It is important to note that 80% of NGO FCRA certifications are due to expire in 2021.

<sup>46</sup> [https://www.pmcare.gov.in/en/web/page/about\\_us](https://www.pmcare.gov.in/en/web/page/about_us)

<sup>47</sup> BBC, *Coronavirus: Secrecy surrounds India PM Narendra Modi's '\$1bn' Covid-19 fund*, June 2020,

<https://www.bbc.com/news/world-asia-india-53151308>

<sup>48</sup> [https://www.pmcare.gov.in/en/web/page/about\\_us](https://www.pmcare.gov.in/en/web/page/about_us)

<sup>49</sup> See, e.g. BBC, *Coronavirus: Secrecy surrounds India PM Narendra Modi's '\$1bn' Covid-19 fund*, June 2020,

<https://www.bbc.com/news/world-asia-india-53151308>; The Quint, *PM CARES Gets Most Of CSR Funding: Other NGOs Struggling For Funds*, Aug. 2020, <https://www.thequint.com/news/india/pm-cares-receives-csr-fund-marks-50-cut-in-ngos-funding>; Devex, *In India, prime minister's relief fund for COVID-19 jeopardizes NGO sector*, July 2020, <https://www.devex.com/news/in-india-prime-minister-s-relief-fund-for-covid-19-jeopardizes-ngo-sector-97706>

Moreover, contrary to the original intentions of the 1976 FCRA, the foreign funding of political parties has since been legalized with the 2016 Finance Bill.<sup>50</sup> Taken together, these developments reveal the extent to which civil society has been weakened in India, and represent a severe constriction of civic freedoms. The following analysis provides further details on the 2020 FCRA Amendments and their incompatibility with international law.

## Analysis - The 2020 FCRA Amendments and Violations of Freedom of Association

### THE RIGHT TO FREEDOM OF ASSOCIATION IN INTERNATIONAL LAW

The right to freedom of association is enshrined in international law, including in Article 20 of the Universal Declaration of Human Rights (UDHR) and Article 22 of the International Covenant on Civil and Political Rights (ICCPR), to which India acceded in 1979. Article 22 of the ICCPR states:

*Everyone shall have the right to freedom of association with others... No restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.*

It is the state's obligation to demonstrate that any interference in the ability of individuals and organizations to associate is justified. Any restriction to the freedom of association is lawful *only* if the restriction is:

1. "Prescribed by law," meaning it is introduced by a legislative body, not an administrative order;<sup>51</sup> and is sufficiently precise for an NGO to foresee violations;
2. Pursued only in the interests of national security, public safety, public order, protection of public health or morals, or protection of the rights and freedoms of others; and

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<sup>50</sup> The Hindu, *Lok Sabha passes Bill to exempt political parties from scrutiny on foreign funds, without debate*, March 2018, <https://www.thehindu.com/news/national/lok-sabha-passes-bill-to-exempt-political-parties-from-scrutiny-on-foreign-funds-without-debate/article23285764.ece>

<sup>51</sup> United Nations Human Rights Council, Special Rapporteur on situation of human rights defenders, Margaret Sekaggya, "Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" July 2011, at 44, <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>

3. “Necessary in a democratic society,” meaning that restrictions are proportional to the interests listed above<sup>52</sup> and do not harm “pluralism, tolerance and broadmindedness.”<sup>55</sup>

International law creates a presumption against any state regulation that would amount to a restriction of recognized rights. The ICCPR lists only four permissible grounds for state interference; those grounds are an exhaustive list, and it is the state’s obligation to demonstrate that any interference is justified according to the three-part test above. The ICCPR’s implementing body, the Human Rights Committee, has stated in its General Comment 31(6):

Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.<sup>54</sup>

In order to comply with the requirements of the ICCPR, blanket restrictions on the rights of individuals to associate must be avoided, as these are not considered lawful.<sup>55</sup>

#### ABILITY TO ACCESS RESOURCES AS A COMPONENT OF FREE ASSOCIATION

The Special Rapporteur on the right to freedom of peaceful assembly and of association has stated that:

...access to resources, including foreign funding, is a fundamental part of the right to freedom of association under international law, standards, and principles, and more particularly part of forming an association. Therefore, any restriction on access to foreign funding must meet the stringent test for allowable restrictions for the right to

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<sup>52</sup> United Nations International Covenant on Civil and Political Rights Human Rights Committee (hereinafter “ICCPR Human Rights Committee”), CCPR/C/21/Rev.1/Add.1326, “General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant” May 26, 2004, para. 6, <http://docstore.ohchr.org/Self-Services/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqk7yhsiYoiCfMKolRv2FVaVzRkMjTniRO%2Bfud3cPVrcM2YR0iW6Txaxgp3f9kUfpWq%2F>

<sup>53</sup> United Nations Human Rights Council, A/HRC/20/27, “Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai” May 21, 2012, para. 32, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf)

<sup>54</sup> ICCPR Human Rights Committee, CCPR/C/21/Rev.1/Add.1326, “General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant” May 26, 2004, para. 6.

<sup>55</sup> United Nations Human Rights Council, A/HRC/20/27, “Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai” May 21, 2012, para. 54, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf)

association developed by the international human rights bodies.<sup>56</sup>

Any association, whether registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, NGOs, governments and international organizations.<sup>57</sup> While governments themselves do not have an obligation to provide funding, they do have an obligation to create an enabling environment for organizations to seek funding. Particularly as domestic funding in many countries is limited or non-existent, associations must be able to rely on foreign funding to continue their operations, and “governments must allow access by NGOs to foreign funding as part of international cooperation, to which civil society is entitled to the same extent as Governments.”<sup>58</sup> To this effect, best practice legislation “...does not prescribe the approval of the authorities before receiving domestic and foreign funding.”<sup>59</sup> Requirements such as “...the requirement of obtaining a prior authorization from the authorities,”<sup>60</sup> would not be aligned with such best practices.

Furthermore, although states have an obligation to address money-laundering and terrorism, “...this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work.”<sup>61</sup> Measures adopted to counter money-laundering and terrorism—rather than targeting civil society—should “...promote transparency and engender greater confidence in the sector.”<sup>62</sup>

With regard to the FCRA, the former Special Rapporteur on the situation of human rights defenders specifically articulated her concerns with the 2010 Act and its requirements of renewal of registration every five years and prior permission before accepting foreign funds, noting that “...such provisions may lead to abuse by the authorities when reviewing applications of organizations which were critical of authorities.”<sup>63</sup> The Special Rapporteur recommended a critical review and amendment or repeal of the Act, and that the National Human Rights Commission “...intervene on the issue of the

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<sup>56</sup> Office of The High Commissioner for Human Rights, Info Note By The United Nations Special Rapporteur On The Rights To Freedom Of Peaceful Assembly And Of Association Maina Kiai, “Foreign Contributions Regulation Act 2010 And Foreign Contributions Regulation Rules 2011, April 2016, para. 6, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteIndia.pdf>

<sup>57</sup> *Id.* at 68.

<sup>58</sup> United Nations Human Rights Council, A/HRC/20/27, “Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai” May 21, 2012, para. 69, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf)

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at para. 70

<sup>62</sup> *Id.* at para. 70

<sup>63</sup> United Nations Human Rights Council, A/HRC/19/55/Add.1, “Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya” Feb. 2012, para. 146, <https://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf>

Foreign Contribution Regulation Act and...monitor the denial of registration and permission to receive foreign funding for NGOs.”<sup>64</sup>

## The 2020 Amendments – Violations of the Freedom of Association

Based on international law and good regulatory practices relating to the freedom of association, there are multiple concerns with the 2020 amendments. Indeed, in the context of the broader environment for civil society in India, the 2020 amendments pose significant barriers to free association.

As a threshold matter, applying the three-part test of Article 22, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has stated regarding the FCRA that:

[R]estricting access to foreign funding for associations based on notions such as “political nature”, “economic interest of the State” or “public interest” violates the right [to association] because these terms or definitions are overly broad, do not conform to a prescribed aim, and are not a proportionate response to the purported goal of the restriction. Such stipulations create an unacceptable risk that the law could be used to silence any association involved in advocating political, economic, social, environmental or cultural priorities which differ from those espoused by the government of the day. These restrictions as defined by the Foreign Contribution Regulation Act (2010) and Rules (2011), do not meet the obligations of the Union of India under international law, standards and principles.<sup>65</sup>

The Special Rapporteur has emphasized that “...any restriction on a CSO’s access to foreign funding must be precisely drafted so as to eliminate the possibility of arbitrary or overly-broad interpretations of its terms.”<sup>66</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> Office of The High Commissioner for Human Rights, Info Note By The United Nations Special Rapporteur On The Rights To Freedom Of Peaceful Assembly And Of Association Maina Kiai, “Foreign Contributions Regulation Act 2010 And Foreign Contributions Regulation Rules 2011, April 2016, para. 6, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteIndia.pdf>

<sup>66</sup> *Id.* at para. 23.

## PROHIBITION ON TRANSFERS OF FOREIGN FUNDS (SUBGRANTING)

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The 2020 amendments' introduction of a complete prohibition on transfers of foreign contributions presents a significant constraint on the ability of organizations to operate. As aforementioned, in the Indian context, many NGOs working on the ground at the local and community level rely heavily on resources from larger NGOs that bring in funding from foreign sources; indeed, during the first wave of the COVID-19 pandemic in India, this ability of larger NGOs to subgrant to smaller NGOs helped facilitate NGO collaboration and make the NGO response extremely effective.<sup>67</sup> With the new blanket prohibition on subgranting of foreign funds, many smaller organizations have had their primary or only source of funding eliminated, which has impeded their ability to continue operating. Indeed, the prohibition on transfers from foreign sources extends not only to funding, but to other resources such as equipment. In the context of the COVID-19 pandemic, this has been seen in the inability of organizations to transfer vital supplies such as oxygen tanks to hospitals, NGOs, and other organizations providing direct services.<sup>68</sup>

Although the prohibition against subgranting is prescribed by law and is ostensibly for the purpose of protecting national security,<sup>69</sup> it is likely to fail the third prong of the Article 22 test requiring that restrictions on free association be proven as necessary and proportionate to achieving the purported aim.<sup>70</sup> A complete prohibition on the ability of organizations who are registered under FCRA from granting funds to other organizations, can neither be said to be necessary nor proportionate. A blanket prohibition on subgranting so severely limits access to resources that it almost certainly amounts to a violation of the freedom of association. Moreover, the limitation on the ability of organizations registered under the FCRA and receiving foreign funds to transfer these funds would likely also result in violations of their other rights under international law, including the right dispose of their natural wealth and resources under Article 1 of the

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<sup>67</sup> The Morning Context, *Why NGOs want to help but can't*, May 2021, <https://themorningcontext.com/chaos/why-ngos-want-to-help-but-cant>

<sup>68</sup> BBC, *India Covid: How law stops NGOs distributing essential aid*, May 2021, <https://www.bbc.com/news/world-asia-india-57095591>

<sup>69</sup> The stated purpose of the FCRA is to "regulate the acceptance and utilization of foreign contribution...by certain individuals or associations...and to prohibit acceptance and utilization of foreign contribution...for any activities detrimental to the national interest..." Section 12(4) of the FCRA goes on to elaborate that registration under the FCRA may be granted where it is not likely to prejudicially affect: the sovereignty and integrity of India; the security, strategic, scientific or economic interest of India; the public interest; freedom or fairness of election to any Legislature; or friendly relations with any foreign State, and acceptance of the contribution will not lead to incitement of an offense or endanger the life or safety of any person. The Foreign Contribution (Regulation) Act, 2010, Act No. 42 of 2010, Sept. 2010, <https://legislative.gov.in/sites/default/files/A2010-42.pdf>

<sup>70</sup> United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 17, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf)

International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>71</sup> Even prior to the 2020 amendments' expansion of the prohibition on subgranting to include other organizations registered under the FCRA, the prohibition under the 2010 Act on subgranting to organizations not registered under the FCRA placed an undue limitation on the ability of organizations to access resources. Ostensibly, many small, volunteer-driven NGOs with limited resources lack the bandwidth to register under the FCRA, and thus even prior to the 2020 amendments, would have been unable to receive critical donations from larger organizations.

Ostensibly, the prohibition of subgranting is aimed at addressing money-laundering and terrorism; however, efforts to address money-laundering and terrorism must be narrowly tailored and should never be used to target the ability of certain organizations to associate or as a justification to undermine the credibility of NGOs, nor to unduly impede them in legitimate work.<sup>72</sup> NGOs are at minimal risk of money laundering and are over-regulated in comparison to the private sector, in which most money laundering activity is concentrated.<sup>73</sup> FATF recommendation 8 also only pertains to terrorist financing (not money-laundering); it requires states to conduct broad outreach and consultation with civil society to determine CSO vulnerability to terrorist financing, and that states take a targeted, risk-based approach to law and policy around these issues, something which has not been done in the Indian context. Policies that subjectively target the ability of certain organizations to access funding or are not risk-based in their approach to countering money-laundering and terrorism run counter to international law and standards, as well as good regulatory practice.

#### LIMITATION ON PERCENTAGE OF FOREIGN FUNDS USED FOR ADMINISTRATIVE EXPENSES

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The 2020 amendments reduced the percentage of foreign funds that may be spent by an organization on administrative expenses from 50% to 20%. As has been pointed out by members of civil society, administrative expenses are critical to the ability of NGOs to carry out their work, and the funding for such expenses often comes primarily from foreign sources, since private sector donations often only allow for 5%-7% of the budget to be allocated for overhead costs, and are insufficient to fulfill additional organizational needs, such as hiring more staff.<sup>74</sup> Thus, the 20% cap on administrative expenses greatly limits the ability of NGOs to carry out their operations.

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<sup>71</sup> As with the ICCPR, India became a party to the ICESCR in 1979.

<sup>72</sup> United Nations Human Rights Council, A/HRC/20/27, "Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai" May 21, 2012, para. 70, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf)

<sup>73</sup> ICNL can provide additional resources and guidance on FATF/AML/CT regulations for non-profits.

<sup>74</sup> The Morning Context, *Why NGOs want to help but can't*, May 2021, <https://themorningcontext.com/chaos/why-ngos-want-to-help-but-cant>

The 20% cap on administrative expenses can neither be deemed necessary nor proportionate to achieving the purported aim. This level of control represents an interference in the private affairs and association rights of NGOs, and governments do not need or benefit from this level of control to achieve other legitimate objectives (such as AML/CT compliance). Furthermore, the limitation on the ability of NGOs to use funds for administrative expenses is unduly burdensome and often counterproductive. Such a limitation fails to acknowledge the diversity of NGOs, whereby some organizations necessarily have higher administrative expenses than others due to the nature of their mission (e.g. an organization that is predominantly engaged in community awareness-raising activities may have expenditures primarily comprised of staff salaries), and may be largely impeded from carrying out their goals and activities. Additionally, administrative expenses are essential to ensuring sound organizational management, compliance with applicable rules and regulations, and cost-effective delivery of services and programs. Limits on administrative expenses can thus undermine the accountability of civic organizations where they are not able to allocate the necessary resources to management, compliance, and institutional development.

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**REQUIREMENT THAT FOREIGN CONTRIBUTIONS ONLY BE ACCEPTED INTO ACCOUNT OPENED AT SINGLE BRANCH OF STATE BANK OF INDIA**

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With the provisions introduced by the 2020 amendments have come new regulatory hurdles and red tape that have proved to be a tremendous obstacle to the ability of NGOs to operate. Specifically, the requirement that organizations receiving funds under the FCRA get affidavits and notary stamps,<sup>75</sup> and open a bank account at one designated branch of the State Bank of India in Delhi—tasked with processing approximately 22,000 applications—has posed an insurmountable administrative hurdle for many organizations, compounded by the pandemic.<sup>76</sup> According to a statement released by the State Bank of India on May 17, approximately 13,729 FCRA accounts had already been opened;<sup>77</sup> however according to one source, as of the end of May, only approximately 3,600 of the 22,500 NGOs eligible to receive FCRA funds had confirmed that their State Bank of India accounts were operational, while another 5,000 were not clear whether their accounts were operational or not.<sup>78</sup> Only after attention was drawn to the issue, including via multiple court cases, were more accounts successfully operationalized (in some cases, too late to receive donations that came in at the beginning of the

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<sup>75</sup> New York Times, *India's Strict Rules on Foreign Aid Snarl Covid Donations*, May 2021, <https://www.nytimes.com/2021/05/12/business/india-covid-donations.html>

<sup>76</sup> The Morning Context, *Why NGOs want to help but can't*, May 2021, <https://themorningcontext.com/chaos/why-ngos-want-to-help-but-cant>

<sup>77</sup> The Hindu, *Deadline for NGOs to open SBI account to get foreign funds extended*, May 2021, <https://www.thehindu.com/news/national/mha-extends-deadline-for-ngos-opening-ac-with-sbi/article34595521.ece>

<sup>78</sup> The Morning Context, *Why NGOs want to help but can't*, May 2021, <https://themorningcontext.com/chaos/why-ngos-want-to-help-but-cant>

second wave).<sup>79</sup> According to a civil society source, only around 50% of organizations had bank accounts that had been approved by the Home Ministry and were operational by the June 30 deadline. Once again, applying Article 22’s three-part-test, the requirement that all organizations receiving funds registering under FCRA must open accounts at one designated bank branch is neither necessary nor proportionate to achieving the purported aim, in addition to creating an administrative nightmare for the branch in question and for the thousands of organizations required to open an account. The practical effect of the provision is to suspend the ability of thousands of NGOs to operate, contrary to good regulatory practice, and likely in violation of international law.

#### ABILITY OF GOVERNMENT TO RESTRICT USAGE OF UN-UTILIZED FOREIGN CONTRIBUTIONS FOR PERSONS FOUND TO HAVE CONTRAVENED THE ACT

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The 2020 amendments introduce a provision allowing the government to restrict usage of un-utilized foreign contribution for persons who have been granted prior permission to receive such contribution if, based on a summary inquiry, the government has reason to believe that a person who was granted prior permission has contravened any provisions of the Act.<sup>80</sup> This provision is overly broad, and grants an unreasonable level of discretion to the government to determine whether it “has reason to believe” a person has contravened any provisions of the FCRA, inviting arbitrary and subjective decision-making. At a minimum, there must be procedural safeguards in place including notice, opportunity for a hearing before an independent court, and the opportunity to appeal against any adverse decision. Without procedural safeguards, the government could ostensibly conduct a summary inquiry based on dubious allegations of contravention of the Act by an organization that has been critical of it, and on this basis freeze access to their funding. This has been seen frequently in India, where NGOs whose members have protested against the government have had their FCRA registrations cancelled.<sup>81</sup>

#### EXTENSION OF POSSIBLE SUSPENSION OF REGISTRATION BY ADDITIONAL 180 DAYS

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The 2020 amendments introduce the possibility of extending the suspension of registration of an organization for an additional 180 days, on top of the 180 days already provided for under the Act. The implication is that the registration of an NGO could be

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<sup>79</sup> See, e.g., Business Insider, *Ensure FCRA accounts opened for NGOs in 10 days of MHA approval: HC to SBI*, May 2021, [https://www.business-standard.com/article/finance/ensure-fcra-accounts-opened-for-ngos-in-10-days-of-mha-approval-hc-to-sbi-121052000852\\_1.html](https://www.business-standard.com/article/finance/ensure-fcra-accounts-opened-for-ngos-in-10-days-of-mha-approval-hc-to-sbi-121052000852_1.html)

<sup>80</sup> The Gazette of India, Ministry of Law and Justice (Legislative Department), The Foreign Contribution (Regulation) Amendment Act 2020, Sept. 2020, para. 5, [https://prsindia.org/files/bills\\_acts/bills\\_parliament/Foreign%20Contribution%20\(Regulation\)%20Amendment%20Act.%202020.pdf](https://prsindia.org/files/bills_acts/bills_parliament/Foreign%20Contribution%20(Regulation)%20Amendment%20Act.%202020.pdf)

<sup>81</sup> BBC, *India Covid: How law stops NGOs distributing essential aid*, May 2021, <https://www.bbc.com/news/world-asia-india-57095591>

suspended for an entire year, while the government determines whether its registration should be cancelled on the basis that “...it is necessary in the public interest,”<sup>82</sup> or that the registration holder has violated any provisions under the Act,<sup>83</sup> among other grounds. The suspension of an organization’s registration for 360 days—or even 180 days—could render the organization defunct and unable to continue its operations.

Allowing for an organization’s registration to be suspended for an additional 180 days cannot be said to be necessary or proportionate to achieving the purported end under the third prong of Article 22’s test. Moreover, the underlying ground of being “necessary in the public interest” for cancellation of an organization’s registration is vague and overbroad and, as such, would likely fail the requirement to be “prescribed by law.” To meet the “prescribed by law” requirement, the law in question must be formulated with sufficient precision to enable individuals and authorities to know precisely which forms of expression are permitted and which are prohibited in order to regulate conduct appropriately.<sup>84</sup> According to a parliamentary reply in February 2021, since 2011, the FCRA registrations of over 26,000 NGOs have been cancelled, including 1,810 since 2018,<sup>85</sup> reinforcing concerns over the overbroad language of the provision and the potentially fatal effect of a one-year FCRA registration suspension on NGOs. At a minimum, organizations must have the right to a judicial appeal of the decision to suspend their registration.

#### CONDITIONING OF RENEWAL OF FCRA REGISTRATION

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The 2020 amendments also give the government the ability to condition renewal of an FCRA certificate on the government conducting an inquiry to ensure the person applying is not fictitious or anonymous, has not been prosecuted or convicted for creating communal tension or engagement in activities aimed at religious conversion, and has not been found guilty of diversion or misuse of funds.<sup>86</sup>

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<sup>82</sup> The Gazette of India, Ministry of Law and Justice (Legislative Department), The Foreign Contribution (Regulation) Amendment Act 2020, Sept. 2020, para. 14(c), [https://prsindia.org/files/bills\\_acts/bills\\_parliament/Foreign%20Contribution%20\(Regulation\)%20Amendment%20Act.%202020.pdf](https://prsindia.org/files/bills_acts/bills_parliament/Foreign%20Contribution%20(Regulation)%20Amendment%20Act.%202020.pdf)

<sup>83</sup> The Gazette of India, Ministry of Law and Justice (Legislative Department), The Foreign Contribution (Regulation) Amendment Act 2020, Sept. 2020, para. 14(d), [https://prsindia.org/files/bills\\_acts/bills\\_parliament/Foreign%20Contribution%20\(Regulation\)%20Amendment%20Act.%202020.pdf](https://prsindia.org/files/bills_acts/bills_parliament/Foreign%20Contribution%20(Regulation)%20Amendment%20Act.%202020.pdf)

<sup>84</sup> United Nations Human Rights Council, A/HRC/20/27, “Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai” May 21, 2012, para. 16, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf)

<sup>85</sup> Business Today, *Registration certificates of over 20,000 NGOs cancelled in last 10 years*, Feb. 2021, <https://www.businesstoday.in/current/economy-politics/registration-certificate-of-over-20000-ngos-cancelled-in-last-10-years/story/431009.html>

<sup>86</sup> The Gazette of India, Ministry of Law and Justice (Legislative Department), The Foreign Contribution (Regulation) Amendment Act 2020, Sept. 2020, para. 11, [https://prsindia.org/files/bills\\_acts/bills\\_parliament/Foreign%20Contribution%20\(Regulation\)%20Amendment%20Act.%202020.pdf](https://prsindia.org/files/bills_acts/bills_parliament/Foreign%20Contribution%20(Regulation)%20Amendment%20Act.%202020.pdf)

The term “creating communal tension” is overbroad and vague, and it is unclear what could be interpreted as “activities aimed at religious conversion.” Thus, there are significant concerns around how this provision may be implemented. For example, religious minorities might be targeted by the government through prosecution, and even without conviction, this may subsequently justify the government’s refusal to renew their FCRA registration. This overbreadth is concerning in light of ongoing persecution of religious minorities in India, including a failure on the part of authorities to intervene—or active participation by authorities—in attacks against Muslims.<sup>87</sup> Spurious accusations relating to “creating communal tension” or engagement in “activities aimed at religious conversion” could potentially lead to the refusal to renew an organization’s registration under the FCRA, barring them from accessing foreign funds and therefore from operating, in violation of the freedom of association under international law.

#### CONDITIONING OF SURRENDER OF FCRA REGISTRATION & PROPERTY SEIZURE

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Where previously the FCRA did not provide for the voluntary relinquishing of FCRA registration status, the 2020 amendments allow for an FCRA certificate to be surrendered if it is determined that no provisions of the Act have been contravened, and *the management of FCRA foreign assets have been vested in an authority prescribed by the government*.<sup>88</sup> The latter requirement that management of foreign assets be vested in an authority prescribed by the government has potential implications for both free association and the ability of individuals to dispose of their resources. This would be problematic even with regard to foreign assets currently being held by an NGO in a bank account, but this provision raises further concerns in presenting the possibility of the government requiring organizations to relinquish control over assets that were previously acquired using foreign funds. For example, an organization which wants to surrender its registration under the FCRA, but which has previously used foreign funds to build a school, or a church, or perhaps even a hospital would need to relinquish control of these assets to the government – even if only a portion of FCRA funds were involved in creating those assets. Subsequently these assets could be sold or otherwise disposed of by the government.<sup>89</sup> This provision amounts to government seizure of property, with little justification, and raises numerous concerns around both the confusion it has created among FCRA-registered entities, as well as its incompatibility with

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<sup>87</sup> Human Rights Watch, “Shoot the Traitors” Discrimination Against Muslims under India’s New Citizenship Policy, April 2020, <https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy>

<sup>88</sup> The Gazette of India, Ministry of Law and Justice (Legislative Department), The Foreign Contribution (Regulation) Amendment Act 2020, Sept. 2020, para. 9, [https://prsindia.org/files/bills\\_acts/bills\\_parliament/Foreign%20Contribution%20\(Regulation\)%20Amendment%20Act.%202020.pdf](https://prsindia.org/files/bills_acts/bills_parliament/Foreign%20Contribution%20(Regulation)%20Amendment%20Act.%202020.pdf), *emphasis added*.

<sup>89</sup> See, e.g. Times of India, FAQs on the FCRA Act 2020, Oct. 2020, <https://timesofindia.indiatimes.com/blogs/developing-contemporary-india/faqs-on-the-fcra-act-2020/>; U.S. Department of State, 2019 Report on International Religious Freedom: India, <https://www.state.gov/reports/2019-report-on-international-religious-free-dom/india/>

international law and the potential for abuse where the government seizes the assets of religious minorities, including places of worship. Once again, when applying Article 22's three-part test to this provision, it likely fails the third prong of the test, in that requiring an organization voluntarily surrendering its FCRA registration to vest management of its foreign assets with the government neither seems necessary nor proportionate to achieving the purported aim.

## Conclusion

The 2020 amendments have introduced significant—and in many cases insurmountable—barriers in addition to the burdensome restrictions already established by the 2010 FCRA, further impeding civil society's operations and hampering its ability to respond to the second COVID-19 wave. The restrictions have had devastating effects on the beneficiaries of Indian NGOs: the Indian people. The additional loss of life caused by preventing the smooth operation of civil society assisting in pandemic response is a stark reminder of the real-life impacts of regressive NGO legislation.

Rather than provide piecemeal deadline extensions, there is substantial justification for the government to adopt measures similar to those taken in the aftermath of the 2001 Gujarat earthquake and to suspend FCRA requirements so that NGOs may accept and transfer foreign funding, and so relief can reach those most in need. A more profound response would be to roll back the 2020 amendments and undertake a reexamination of the FCRA in consultation with civil society to bring the Act's provisions into compliance with FATF standards and with international standards relating to the freedom of association and other relevant rights.