

REPORT SUMMARY

How India's FCRA Amendments Violate Free Association and Impede COVID-19 Pandemic Response

In February 2021, a brutal second wave of COVID hit India. While many civil society organizations (CSOs) struggled to secure critical aid – oxygen tanks, PPE, and more – they also faced draconian restrictions on receiving foreign aid. CSOs found themselves unable to legally accept donations, deliver oxygen tanks to hospitals, or provide support to grassroots and community organizations reaching the most vulnerable.

These restrictions are rooted in the 2020 Foreign Contribution (Regulation) Act (“FCRA”) Amendments and have presented tremendous obstacles to delivering critical COVID relief services. The amendments restricted the ability of Indian civil society organizations to receive foreign funding, prohibited all sub-granting of foreign funds, reduced the percentage of foreign funds that can be utilized for administrative expenses, and imposed a level of oversight and regulatory compliance so burdensome as to bring the activities of many CSOs to a halt.

The new FCRA Amendments were reportedly driven by security concerns and aimed at particular organizations and groups. They have, however, effectively shackled all groups receiving any foreign funding, diverting aid and humanitarian resources away from India altogether or into unaccountable institutions like the PM CARES relief fund.

This crisis makes it clear that measures like the FCRA not only harm civil society, but the communities they serve.

Violating Freedom of Association

The ability of organizations to access resources is a critical component of the freedom of association. The 2020 amendments restrict the ability of Indian CSOs to access resources, and therefore to associate, and have hampered their ability to serve their

communities and carry out essential work. International experts and entities have recognized the serious threat the FCRA poses to freedom of association. The 2020 Amendments go even further, raising the following concerns:

PROHIBITION ON TRANSFERS OF FOREIGN FUNDS (SUBGRANTING) CUTS OFF FUNDING FOR MANY NGOS: Many smaller NGOs working at the local level rely heavily on resources from larger NGOs that receive foreign funding. The prohibition on all subgranting among FCRA-registered organizations stops this flow of resources, impeding smaller groups' ability to operate. This kind of blanket prohibition, even if prescribed by law and ostensibly for the purpose of protecting national security, is likely to fail the test established by Article 22 of the International Covenant on Civil and Political Rights (ICCPR) requiring that restrictions on free association be necessary and proportionate to achieving the purported aim of the law.

REDUCTION ON ADMINISTRATIVE EXPENSES CAP LIMITS OPERATIONS: The new amendments lower the cap on administrative expenses covered by foreign funding from 50% to 20%. The cap is neither necessary nor proportionate, limiting an organization's ability to do their work and representing an interference in their private affairs and association rights.

REQUIRED STATE BANK OF INDIA ACCOUNT HINDERS ASSOCIATION AND CONTRAVENES GOOD REGULATORY PRACTICE: The new amendments require all organizations receiving foreign funds to open accounts at one designated bank branch. This is neither necessary nor proportionate to the purported aim of FCRA. Furthermore, it creates an administrative nightmare for the branch in question and for the organizations required to open an account. The requirement essentially suspends the ability of thousands of NGOs to operate, contrary to good regulatory practice, and likely in violation of international law.

RESTRICTION OF UN-UTILIZED FOREIGN CONTRIBUTIONS IS OVERBROAD AND LACKS SAFEGUARDS: The government may restrict usage of un-utilized foreign contributions if they have reason to believe someone has contravened any provisions of the Act. 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 violated parts of the FCRA. This invites arbitrary and subjective decision-making. At a minimum, there must be procedural safeguards in place and an opportunity for appeal.

EXTENSION OF REGISTRATION SUSPENSION COULD RENDER ORGANIZATIONS DEFUNCT: The new amendments allow the government to suspend an organization's registration for an additional 180 days, on top of the 180 days already provided for in the current FCRA, while they determine whether the registration should be cancelled on the ground that "...it is necessary in the public interest" or that the registration holder has violated any provisions under the Act. The suspension of an organization's

registration for 360 days—or even 180 days—could render it defunct or unable to continue its operations.

CONDITIONS ON THE RENEWAL OF FCRA REGISTRATION COULD LEAD TO ABUSE: The government can condition the renewal of an FCRA certificate on an inquiry to ensure the person applying is not fictitious or anonymous, has not been prosecuted or convicted for “creating communal tension,” engaged in “activities aimed at religious conversion,” and has not been found guilty of misuse of funds. The terms “creating communal tension” and “activities aimed at religious conversion” are overbroad, unclear, and vague. There are significant concerns around how this provision may be implemented, as it could lead to the refusal to renew an organization’s registration, barring them from accessing foreign funds and curtailing their ability to operate.

CONDITIONING SURRENDER OF FCRA REGISTRATION HAS IMPLICATIONS FOR FREE ASSOCIATION AND DISPOSAL OF RESOURCES: A FCRA certificate may 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*. What this means practically is that if an organization wants to surrender its registration under the FCRA but has previously used foreign funds to build a school or hospital, it would need to relinquish control of these assets to the government, which essentially amounts to government seizure of property. The provision applies even if only a portion of FCRA funds were involved in creating those assets. This is both unnecessary and disproportionate to achieving the purported aim, and thus inconsistent with international law standards.

Conclusion

At a minimum, India should suspend the FCRA Amendments, at least for the duration of the pandemic. The Amendments are a disproportionate and unwarranted restriction on Indian civil society, and they have only served to debilitate the global, national, and local response to COVID-19. Institutions like the Financial Action Task Force have called upon governments to “ensure that legitimate [non-profit organization] NPO activity is not unnecessarily delayed, disrupted or discouraged” during the pandemic; yet the FCRA Amendments do exactly this. The FCRA should be amended to be in line with international law. This would allow India’s dynamic civil society sector to continue to carry out its essential work, to the benefit of all.