

# India's Foreign Contribution Regulation Act: A Tool to Silence Indian Civil Society Organizations

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A Briefing Paper

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The ICJ in this Q and A briefing paper examines the Foreign Contribution (Regulation) Amendment Act, 2020 (FCRA 2020), the Foreign Contribution (Regulation) Act, 2010 (FCRA 2010), the Foreign Contribution (Regulation) Rules, 2011 (FCRA Rules 2011) and the Foreign Contribution (Regulation) (Amendment) Rules, 2020 (FCRA Amendment Rules 2020) <sup>1</sup> in relation to international law and standards. The analysis, particularly, focuses on FCRA's application against non-governmental organizations, but also looks at their application to the government and to political parties.<sup>2</sup>

The ICJ considers that the implementation of the FCRA is severely shrinking the terrain of civil space in India and is posing unwarranted obstacles to human rights defenders and other civil society organizations in carrying out their critical work.

The ICJ is not alone in its assessment.

On 20 October 2020, UN High Commissioner for Human Rights, Michelle Bachelet, issued a statement, expressing concern at the "tightening of space for human rights NGOs" in India. She referred to the FCRA as "vaguely worded and overbroad in its objective", and said that the law has "a detrimental impact on the right to freedom of association and expression of human rights NGOs, and as a result on their ability to serve as effective advocates to protect and promote human rights in India."<sup>3</sup>

In 2016, the UN Special Rapporteurs on the rights to freedom of peaceful assembly and association, the situation of human rights defenders, and freedom of opinion and expression, jointly called on the Government of India to repeal the FCRA 2010, stating that it was being used to "obstruct" access to foreign funding and "fails to comply with international human rights standards."<sup>4</sup>

At the UN Human Rights Council's Universal Periodic Review of India in 2017, a process wherein each State's human rights record is evaluated every four

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<sup>1</sup> FCRA refers to the full legislative package of FCRA 2010, FCRA 2020 and FCRA Rules.

<sup>2</sup> See International Commission of Jurists, "India: FCRA Amendment 2020 will undermine the work of Civil Society", September 24, 2020, <https://www.icj.org/india-fcra-amendment-2020-will-undermine-the-work-of-civil-society/>; International Commission of Jurists, "India: Authorities must stop harassment of Lawyers Collective and repeal Foreign Contribution (Regulation) Act", July 11 2019, <https://www.icj.org/india-authorities-must-stop-harassment-of-lawyers-collective-and-repeal-foreign-contribution-regulation-act/>

<sup>3</sup> U.N. Office of the High Commissioner for Human Rights, "Bachelet dismayed at restrictions on human rights NGOs and arrests of activists in India", October 20 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26398&LangID=E>

<sup>4</sup>U.N. 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 16 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E>

years by the Council's Member States, more than ten countries, including Germany, Norway, South Korea, United States of America, Ireland, Switzerland, Czech Republic and Australia, expressly criticized the FCRA 2010 for its adverse human rights consequences.<sup>5</sup>

This paper discusses the FCRA 2020, the FCRA 2010, the FCRA Rules 2011 and the FCRA Amendment Rules 2020 and assesses the extent of their compliance with international human rights law and India's international legal obligations. It shows the detrimental impact of this legislative package on the functioning of civil society organizations within the broader pattern of a clampdown on human rights organizations in India.

## **Q. 1) What is the Foreign Contribution Regulation Act? How does it affect NGOs?**

The Foreign Contribution (Regulation) Act 2010 (FCRA 2010) regulates access to foreign funds for persons, associations, companies and prohibits the receipt of foreign funds for "*any activities detrimental to the national interest.*"<sup>6</sup>

Non-governmental organizations are required to apply to the Indian Ministry of Home Affairs (MHA) for an FCRA certificate to receive foreign funding, and upon receipt of the certificate, are required to comply with burdensome procedural requirements on reporting, disclosure, transfer of funds, use of funding and other matters. Under Section 48 of FCRA 2010, FCRA Rules 2011 have been promulgated that provide guidelines for implementation of the Act.

In 2020, the FCRA 2010 was further amended to effectively restrict access to foreign funding, particularly, for public servants<sup>7</sup> and smaller non-governmental organizations.<sup>8</sup> The FCRA Amendment, 2020, added governmental oversight, additional regulations and certification processes, while simultaneously reducing the limit of administrative expenditure of NGOs that can be allocated to foreign contributions to 20 percent from the previous 50 percent ceiling.<sup>9</sup> The FCRA Amendment Rules 2020 provided for further regulation, including by raising the bar for eligibility criteria for registration.

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<sup>5</sup> U.N. Working Group on the Universal Periodic Review, "Report of the Working Group on the Universal Periodic Review: India", UN Doc. A/HRC/36/10 (2017).

<sup>6</sup> The Foreign Contribution (Regulation) Act, 2010, Preamble.

<sup>7</sup> The Foreign Contribution (Regulation) Amendment Act, 2020 : Section 2 - Amendment of section 3, amending Section 3 of The Foreign Contribution (Regulation) Act, 2010.

<sup>8</sup> The Foreign Contribution (Regulation) Amendment Act, 2020 : Section 3 - Prohibition to transfer foreign contribution to other person, substituting Section 7 of The Foreign Contribution (Regulation) Act, 2010.

<sup>9</sup> See International Commission of Jurists, "India: FCRA Amendment 2020 will undermine the work of Civil Society", September 24 2020, <https://www.icj.org/india-fcra-amendment-2020-will-undermine-the-work-of-civil-society/>.

The FCRA was originally enacted in 1976 with the aim of ensuring that political associations, parliamentary institutions, and other important groupings in the national life function in a manner “consistent with the values of a democratic republic”,<sup>10</sup> and to that end introduced a complete prohibition on the acceptance of foreign funds by political parties.<sup>11</sup> The FCRA 1976 was replaced with the FCRA 2010. However, the series of amendments to the FCRA 2010 brought in through the Finance Acts of 2016 and 2018 created a number of exceptions easing political parties receipt of foreign funds.<sup>12</sup>

The overriding concern about the impact of the FCRA on NGOs, as discussed in the paper, is that the imprecise and overbroad language in the FCRA leaves the law open to abusive and arbitrary application, falling afoul of the principle of legality. It prohibits civil society organizations from accessing an FCRA certificate based on prohibition on receipt of foreign funds for organizations of a “political nature” and activities against “public interest”, “economic interest” or “security”, where these terms are not defined or defined overly broadly. The categories of persons and organizations prohibited from receiving foreign funds are overbroad; the restrictions are not tightly connected to, much less necessary, to achieve any legitimate aim of the law; and they are not proportionate to the aims of the law.

## **Q. 2) Which prohibitions in the FCRA are of concern to NGOs?**

Under the FCRA 2010, persons, associations or companies of a “political nature”<sup>13</sup> are prohibited from accepting “foreign contribution”.<sup>14</sup>

The Government may identify an organization as having a “political nature” based on its activities, ideology, programme, or its association with a political party.<sup>15</sup> (Section 5, FCRA 2010) Further, the FCRA Rules 2011 purportedly provide guidelines for the Indian Government to declare an organization to be of a “political nature”. However, the Rules 2011 do not provide clarity. Rather, they include a number of vague and overbroad grounds for declaring an organization to be of political nature (Rule 3) such as:

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<sup>10</sup> The Foreign Contribution (Regulation) Act, 1976, Preamble.

<sup>11</sup> The Foreign Contribution (Regulation) Act, 1976, Section 4(1)(e) : Candidate for election, etc., not to accept foreign contribution - 1) No foreign contribution shall be accepted by any (e) political party or office-bearer thereof.

<sup>12</sup> See Answer 7 of this paper.

<sup>13</sup> The Foreign Contribution (Regulation) Act, 2010 : Section 3(1)(f) - Prohibition to accept foreign contribution.

<sup>14</sup> The Foreign Contribution (Regulation) Act, 2010 : Section 2(1)(h) - Definition of foreign contribution.

<sup>15</sup> The Foreign Contribution (Regulation) Act, 2010, Section 5(1) - Procedure to notify an organization of a political nature.

- any voluntary action group with “objectives of a political nature” or which participates in “political activities”,<sup>16</sup> or
- “organisation of farmers, workers, students, youth... whose objectives... or activities ...include steps towards advancement of political interests of such groups”, or
- “any organization... which habitually engages itself in or employs common methods of political action like ‘bandh’ or ‘hartal’, ‘rasta roko’, ‘rail roko’ or ‘jail bharo’ in support of public causes”.<sup>17</sup>

The FCRA Amendment Rules 2020 has amended the FCRA Rules partially in relation to the criteria by which an organization may be designated to be of a political nature, in line with the Supreme Court judgment in *INSAF v. Union of India* (2020). Under the amended rules, organizations which engage in “common methods of political action,” such as strikes, roadblocks, government shut downs, and “organizations of farmers, workers, students, youth...whose objectives ... or activities ... include steps towards advancement of political interests of such groups” will be considered to be of political nature only if they participate in active politics or party politics. However, despite the amendment, the guidelines continue to be vague and overbroad, as other organizations covered by the FCRA Rules, but not coming under this 2020 revision, may still be identified as organizations of a “political nature”.

Further, any person or organization can be prohibited from accepting any foreign contribution, or be refused an FCRA certificate, if the Government believes that the foreign contribution is likely to affect the “sovereignty and integrity of India”, “public interest”, “freedom or fairness of election to any Legislature”, “friendly relations with any foreign State” or “harmony between religious, racial, social, linguistic or regional groups, castes or communities”.<sup>18</sup> However, these terms and categories are not further defined or described, leaving their meaning and interpretation subjective and wholly elastic.

In 2020, FCRA 2010 was amended further by the Foreign Contribution (Regulation) Amendment Act, 2020 (FCRA 2020). The UN High Commissioner on Human Rights expressed the view that this Act would likely create “even more administrative and practical hurdles for [] advocacy-based NGOs.”<sup>19</sup> FCRA 2020 prohibits the transfer of foreign contribution by recipients to other organizations; restricts an overly broad category of individuals under the

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<sup>16</sup> The Foreign Contribution (Regulation) Rules 2011 : Rule 3(iii) - Guidelines for declaration of an organisation to be of a political nature, not being a political party.

<sup>17</sup> The Foreign Contribution (Regulation) Rules 2011 : Rule 3 (vi) - Guidelines for declaration of an organisation to be of a political nature, not being a political party.

<sup>18</sup> The Foreign Contribution (Regulation) Act, 2010 : Section 9(a) - Power of Central Government to prohibit receipt of foreign contribution, etc., in certain cases. Also see Section 12(4)(f) - Grant of certificate of registration.

<sup>19</sup> UN Office of the High Commissioner for Human Rights, “Bachelet dismayed at restrictions on human rights NGOs and arrests of activists in India”, October 20 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26398&LangID=E>

definition of public servants in the Indian Penal Code from accessing foreign funds; and increases regulations as well as governmental oversight, for instance by putting limits on the use of foreign funds for defraying administrative expenses to 20 percent from the earlier 50 percent ceiling.<sup>20</sup> FCRA Amendment Rules 2020 also raised the bar for eligibility criteria for registration, as the NGO now needs to be “in existence for three years and have spent a minimum amount of rupees fifteen lakh on its core activities for the benefit of society during the last three financial years.” This some is an increase from the earlier ten lakh (13,500 US dollars) required to be spent over the last three financial years. The Rules also make it clear that upon expiry of the FCRA certificate the NGO cannot receive or utilize foreign contributions until its registration is renewed. The NGO now has to make additional disclosures, including the provision of information as to whether any functionary has been prosecuted or convicted. In addition, if there is any change in the appointment of key members, the change has to be communicated to the Ministry of Home Affairs within 15 days, and the Ministry then has to give its approval.<sup>21</sup>

### **Q. 3) What do the Indian Courts say about the overbroad restrictions on the receipt of foreign funds for NGOs in the FCRA?**

Earlier, in 2020 in *Indian Social Action Forum v. Union of India*, the Supreme Court determined that for certain NGOs that have no connection with party politics or active politics they cannot be denied access to foreign funds and the scope of “political nature” cannot be expanded beyond “active politics” and “party politics”.<sup>22</sup> In justification of this outcome, the Court held that the term, “political interests” used in Rule 3(v), FCRA Rules 2011, was excessively “vague” and “susceptible to misuse”. It also agreed that legitimate means of “political action” like *bandh*, *hartal* used in Rule 3(vi) are protected and the FCRA must not be invoked to deprive an organization of its legitimate right of receiving foreign contribution.

The NGO Indian Social Action Forum had appealed in the Supreme Court after dismissal by the Delhi High Court of its writ petition arguing that the provision related to organizations identified as being of a “political nature”<sup>23</sup> violates a

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<sup>20</sup> The Foreign Contribution (Regulation) Amendment Act, 2020. See International Commission of Jurists, “India: FCRA Amendment 2020 will undermine the work of Civil Society”, September 24, 2020, <https://www.icj.org/india-fcra-amendment-2020-will-undermine-the-work-of-civil-society/>.

<sup>21</sup> The Foreign Contribution (Regulation) (Amendment) Rules, 2020 : Rules 9(1)(f), 12(5)(6)(6A), 17(A); Form FC-3A(8).

<sup>22</sup> *Indian Social Action Forum (INSAF) v Union of India*, Civil Appeal No.1510 of 2020 (Arising out of SLP (C) No.33928 of 2011, March 6, 2020, paras 19-22.

<sup>23</sup> The Foreign Contribution (Regulation) Act, 2010 : Sections 5(1) and 5(4) - Procedure to notify an organization of a political nature; The Foreign Contribution (Regulation) Rules 2011 : Rules 3 (i), 3 (v) and 3 (vi) - Guidelines for declaration of an organisation to be of a political nature, not being a political party.

number of rights protected in the Constitution. These include the fundamental rights of equality, freedom of speech and expression, the right to form associations and unions, and the rights to life and liberty. In the Delhi High Court, the organization had unsuccessfully argued that the provision and related rules were overbroad, vague, unreasonable and gave arbitrary discretion to the authorities, which would result in abuse of the power.<sup>24</sup>

In the appeal, the Supreme Court upheld the Delhi High Court's determination that the language in the provision in the FCRA 2010, while expansive, was not vague or uncertain.<sup>25</sup> The Supreme Court, however, agreed that the term "political interests" used in Rules 3(v), FCRA Rules is "vague" and "susceptible to misuse" and must be interpreted very narrowly, though it were not on its face unconstitutional. It also agreed that legitimate means of "political action" like *bandh*, *hartal* are protected and the FCRA Rules must not be invoked to deprive an organization of its legitimate right of receiving foreign contribution as long as they are not connected to "active politics" or "party politics". The Court held that certain voluntary organizations that have no connection with party politics or active politics must not be denied access to foreign contribution and the scope of "political interests" or "political action" cannot be expanded beyond "active politics" and "party politics".<sup>26</sup>

#### **Q. 4) Is the FCRA compliant with India's obligations under international human rights law?**

The FCRA 2010, FCRA 2020, and FCRA Rules assessed in relation to international human rights law and standards, and in particular in relation to India's international legal obligations under international treaties to which India is a party, on their face and as applied, are not compliant with India's obligation to respect and protect the right to freedom of association. In addition, the FCRA poses undue interferences to the enjoyment of other rights, in particular the rights of freedom of expression, freedom of assembly, and the right to take part in public affairs. The FCRA places undue obstacles to the essential work of human rights defenders and efforts by Indian and international stakeholders to engage in international cooperation and assistance on human rights.<sup>27</sup>

Notably, the FCRA does not provide for a grievance system for redress or any appellate authority. Thus, the only legal recourse available to NGOs is to

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<sup>24</sup> *Indian Social Action Forum (INSAF) v Union of India*, Civil Appeal No.1510 of 2020 (Arising out of SLP (C) No.33928 of 2011, March 6, 2020, paras 1-3.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, paras 19-22.

<sup>27</sup> See Special Rapporteur on the rights to freedom of peaceful assembly and of association, Info Note: Analysis of International Law, Standards and Principles Applicable to the Foreign Contribution Regulation Act 2010 and Foreign Contribution Regulation Rules 2011, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteIndia.pdf>

approach the Court to ask for the Government's decision to be struck down. There are over 100 pending cases in High Courts across the country concerning the cancellation of FCRA licenses.<sup>28</sup>

## **A. Access to Resources as Part of Right to Freedom of Association**

Article 22(1) ICCPR provides "Everyone shall have the right to freedom of association with others...". The UN Human Rights Committee, the supervisory body responsible for clarifying the content of ICCPR obligations, while evaluating laws on funding NGOs, has affirmed that access to funding is a part of the right to freedom of association.<sup>29</sup>

Further, 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, adopted by the UN General Assembly with the consensus of India and all other States, provides in Article 13 of the Declaration that everyone has the right "individually and in association with others" to "solicit, receive and utilize resources" for protecting human rights.<sup>30</sup> Notably, it makes no distinction between funding from domestic and foreign sources. The UN Human Rights Council, in its Resolution 22/6 on Protecting Human Rights Defenders has made clear that "no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding".<sup>31</sup> The UN Special Rapporteur on human rights defenders has also noted with concern the increasing restrictions on the access of NGOs to foreign funds. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on human rights

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<sup>28</sup> Centre for Social Impact and Philanthropy, "Advocacy, Rights and Civil Society: The Opportunity for Indian Philanthropy", *Ashoka University*, (2019), page 25, <https://www.sdphilanthropy.org/system/files/2019-01/Advocacy%2C%20Rights%20%26%20Civil%20Society%3A%20The%20Opportunity%20for%20Indian%20Philanthropy.pdf>

<sup>29</sup> See U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Egypt, U.N. Doc. CCPR/CO/76/EGY (2002), para 21, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument) and U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Ethiopia, U.N. Doc. CCPR/C/ETH/CO/1 (2011), para. 25, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/448/95/PDF/G1144895.pdf?OpenElement>. Access to resources acquired through cooperation and assistance is an important component of NGO's right to freedom of association and other human rights, U.N. Special Representative of the Secretary-General on human rights defenders, Hina Jilani, Report: Human Rights Defenders, U.N. Doc. A/59/401 (2004), para 48, <https://undocs.org/en/A/59/401>

<sup>30</sup> Article 13, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. (1999).

<sup>31</sup> U.N. Human Rights Council, Protecting Human Rights Defenders: Resolution, adopted by the Human Rights Council, UN Doc. A/HRC/RES/22/6 (2013).

defenders have stated that NGOs should have access to foreign funds to the “same extent” as the Government.<sup>32</sup>

The UN Special Rapporteur on the rights to freedom of assembly and of association has highlighted that access to resources is important for NGOs not only for the very existence of associations, but also to guarantee the enjoyment of other human rights of those who benefit from the work of the organizations. In this connection, undue restrictions on funding necessarily will adversely affect the full range of civil, cultural, economic, political and social rights the State is bound to protect.<sup>33</sup>

While the right to freedom of association is not absolute, the State may impose limitations on civil society organizations only in narrow circumstances and subject to strict conditions.

Under Article 22(2), ICCPR, any restriction on freedom of association must a) be prescribed by law, b) have a legitimate aim limited to protecting either “national security”, “public safety”, “public order”, “public health or morals” or the “rights and freedoms of others”, and c) be strictly necessary and proportionate to that aim (emphasis added).<sup>34</sup> These same conditions apply to certain other fundamental freedoms protected under the ICCPR, including freedom of expression, freedom of assembly, and freedom of movement.

### ***(i) Prescribed by law***

The UN Human Rights Committee has clarified that to meet the requirement of legality, the restrictions in the law on funding would need to be expressed with a degree of precision that would enable an individual or an organization to regulate their conduct accordingly. The UN Human Rights Committee affirmed in respect of restrictions on freedom of expression that a law limiting a right must not confer on those who implement it “unfettered discretion” to restrict the right.<sup>35</sup> This principle is reinforced by the UN Special Rapporteur on

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<sup>32</sup> Margaret Sekaggya, Special Rapporteur on the situation of human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/67/292 (2012), para 49 and Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20.27 (2012), para 69.

<sup>33</sup> Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/23/29 (2013), para 9.

<sup>34</sup> See also Article 17, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 (1999), which says that limitations on rights and freedoms provided in the Declaration will only be limited to “applicable international obligations and ...determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

<sup>35</sup> U.N. Human Rights Committee, General Comment No. 34, Article 19 - Freedoms of opinion and expression, General Comments under article 40, paragraph 4, of the

human rights defenders who says that laws regulating public safety and public order should contain “clearly defined provisions”.<sup>36</sup> This analysis does no more than reinforce the general principle of legality, applicable to all laws, which requires that laws be precise and clear.

The FCRA denies access to funding to organizations of a “political nature” as well as to those that prejudicially impact “sovereignty and integrity of India” or “public interest”.<sup>37</sup> However, the law does not define, describe or circumscribe these terms, which by their nature are highly elastic and indeterminate. While the FCRA Rules give examples of “political nature”, it uses undefined terms like “political goals”, “political activities”, “political action”, and “political interests” in the examples. The Indian Supreme Court in 2020 in *Indian Social Action Forum (INSAF) v. Union of India* held that the term “political interests” is “vague” and “susceptible to misuse”. It further said that for certain NGOs that have no connection with “party politics” or “active politics”, they cannot be denied access to foreign funds, and affirmed that the scope of “political nature” must not be expanded beyond “active politics” and “party politics”.<sup>38</sup> In response to this, the FCRA Amendment Rules 2020 have partially amended the Rules such that certain organizations which engage in “common methods of political action” such as strikes, roadblocks, government shut downs etc and “organization of farmers, workers, students, youth...whose objectives ... or activities ... include steps towards advancement of political interests of such groups” will be considered to be of political nature only if they participate in active politics or party politics and not otherwise.

Further, the FCRA outrightly disqualifies organizations from receiving foreign funds that may impact the “economic interest” or the “public interest” of the State but does not define or describe these terms.<sup>39</sup>

In effect, the law confers upon the executive exceedingly wide discretionary power to apply the law as officials see fit, i.e., in an arbitrary manner, in violation of India’s obligations under the ICCPR.

## **(ii) Legitimate Aim**

Article 22(2), ICCPR provides that the freedom of association, which includes access to funding can, where necessary, be restricted based on “national

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International Covenant on Civil and Political Rights, adopted by the Committee at 102nd session, U.N. Doc. CCPR/C/GC/34 (2011), para. 25.

<sup>36</sup> Margaret Sekaggya, Special Rapporteur on the situation of human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/67/292 (2012), para 86.

<sup>37</sup> The Foreign Contribution (Regulation) Act, 2010 : Section 9 - Power of Central Government to prohibit receipt of foreign contribution, etc., in certain cases.

<sup>38</sup> *Indian Social Action Forum (INSAF) v Union of India*, Civil Appeal No.1510 of 2020 (Arising out of SLP (C) No.33928 of 2011, March 6, 2020. See Answer 3 of this briefing paper.

<sup>39</sup> The Foreign Contribution (Regulation) Act, 2010 : Section 12 - Grant of certificate of registration.

security”, “public safety”, “public order”, “public health or morals”, and “protection of the rights and freedom of others”. The FCRA 2010 states the purpose for enacting the law is based on “national interest”.<sup>40</sup> “National interest” is far broader than “national security” and not an identified ground in Article 22. It is also indefinitely broad since virtually all laws and government conduct are notionally taken in the “national interest”. In addition, other grounds mentioned by FCRA as grounds for prohibiting receipt of foreign funds such as “public interest”, “economic interest”, “strategic...interest” “political nature”, are also not enumerated grounds for restrictions in the ICCPR.<sup>41</sup> The purposes of restrictions in the FCRA, therefore, do not appear to be for a “legitimate aim”.

### ***(iii) Necessity and proportionality***

Even if the restrictions were directed toward a legitimate purpose, they could not be deemed to be necessary and proportionate to that purpose. The restrictions need to be necessary and proportionate (“necessary in a democratic society”), that is, the State is required to apply the least intrusive instrument to achieve the legitimate aim.<sup>42</sup> However, under the FCRA, the Indian State can apply a complete ban on foreign funding for organizations engaged in activities of a “political nature”, or those engaged in activities deemed contrary to “economic interest” or “public interest”, which cannot be necessarily proportionate even to the already overbroad purpose of “national interest”.<sup>43</sup>

The UN Human Rights Committee has clarified that the grounds for restriction in Art. 22(2), ICCPR, require strict interpretation. For instance, when restricting access based on a threat to national security or public order, the precise nature of the threat must be demonstrated by the State.<sup>44</sup> This requirement is reinforced in the UN Human Rights Council Resolution on Human Rights Defenders.<sup>45</sup> However, India has not shown specific threats for any legitimate ground and instead has used vague and overbroad language, which violates

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<sup>40</sup> The Foreign Contribution (Regulation) Act, 2010: Preamble.

<sup>41</sup> Article 22(2), ICCPR. See also, “National, political, government interest is not synonymous with national security or public order”, U.N. Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66 (2016), para 31.

<sup>42</sup> U.N. Human Rights Committee, General Comment No. 27 : Article 12 (Freedom of Movement), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, adopted by the Committee at 67th session, U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999) at para. 14; See also *Arslan v. Turkey*, App. No. 23462/94, Eur. Ct. H.R. (1999), para. 46, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271>.

<sup>43</sup> See Answer 2 of this briefing paper.

<sup>44</sup> *Mr. Jeong-Eun Lee v. Republic of Korea*, U.N. Human Rights Committee, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 at para. 7.3 (2005).

<sup>45</sup> U.N. Human Rights Council, Protecting Human Rights Defenders: Resolution, adopted by the Human Rights Council, UN Doc. A/HRC/RES/22/6 (2013).

the requirement of necessity and proportionality for restricting freedom of assembly.

In addition, the FCRA has increased reporting requirements, federal control and oversight, and limited administrative expenses that can be sourced through foreign funds for NGOs both in 2010 and 2020.<sup>46</sup> Governments can justify some narrowly tailored regulation on the exercise of freedom of association based, for example, on the need for greater transparency and accountability, to combat fraud, corruption, and money laundering. However, these must not impair the essence of the right and the means used to restrict the right needs to be proportionate to the objective of the law.<sup>47</sup> Laws that unduly restrict the ability of organizations to access funds and conduct their business affairs are not compliant with international law and standards.<sup>48</sup>

## B. Right to Assembly

The right to peaceful assembly is protected under Article 21, ICCPR. Protected assembly consists of, among other things, open debates concerning public affairs, meetings, rallies, strikes, and demonstrations, including either criticizing or supporting the Government.<sup>49</sup> The ability to actually hold peaceful assemblies is a fundamental and integral component of the multifaceted right to freedom of peaceful assembly.<sup>50</sup> It is vital to the work of NGOs that promote the realization of human rights as it enables them to publicly voice their message.

The only limitations to this right are the same as in respect of freedom of association. Thus, the prohibition on NGOs that engage in common methods of political action like *bandh* or *hartal* in support of public causes from accessing foreign funds will typically constitute an arbitrary and unlawful interference into their right to freedom of assembly and also hinders the freedom of assembly of those who would participate in these events. In 2020, the Indian Supreme Court appropriately held that that legitimate means of

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<sup>46</sup> See Answer 2 of this briefing paper.

<sup>47</sup> Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/23/29 (2013), para 35.

<sup>48</sup> *Ibid.* The Human Rights Council Resolution has called upon states to ensure that procedures governing the registration of civil society organizations are “transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal and avoid requiring re-registration”. It has also said that reporting requirements should not inhibit functional autonomy or impose discriminatory restrictions on sources of funding and that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto. U.N. Human Rights Council, Protecting Human Rights Defenders: Resolution, adopted by the Human Rights Council, UN Doc. A/HRC/RES/22/6 (2013), paras 8 and 9

<sup>49</sup> Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/23/29 (2013), paras 44-45.

<sup>50</sup> *Ibid.*

political expression like *bandh* and *hartal* are protected and the FCRA Rules must not be invoked to deprive an organization of its legitimate right of receiving foreign contribution as long as they are not connected to active politics or party politics.<sup>51</sup>

### C. Freedom of Expression

Freedom of Expression is protected under Article 19, ICCPR, and the grounds for limitation are the same as for freedom of association and freedom of assembly.<sup>52</sup> The Special Rapporteur on the rights to freedom of peaceful assembly and association has reiterated that the restrictions set out in the FCRA are not in compliance with international law and standards and risk being used by the Indian government “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”.<sup>53</sup>

### D. Right to take part in political affairs

Article 25, ICCPR guarantees to citizens the right to take part in the conduct of public affairs, which includes “exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.”<sup>54</sup> This right is also interrelated with other fundamental freedoms, including the rights to freedom of assembly, expression and association.<sup>55</sup>

Under the FCRA 2010, NGOs that engage in or organize political debate can be classified as being of a “political nature” and thus prevented from accessing foreign funds. This prohibition imposes an arbitrary interference with the protections of Article 25, ICCPR as it unduly restricts the right of citizens working in or participating in public debates about political affairs in the country which is organized by such NGOs.

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<sup>51</sup> *Indian Social Action Forum (INSAF) v Union of India*, Civil Appeal No.1510 of 2020 (Arising out of SLP (C) No.33928 of 2011, March 6, 2020. See Answer 3 of this briefing paper.

<sup>52</sup> See also U. N. Human Rights Committee, General Comment 34: Article 19 - Freedoms of opinion and expression, General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, adopted by the Committee at its 102<sup>nd</sup> session, U.N. Doc. CCPR/C/GC/34 (2011).

<sup>53</sup> Maina Kiai, Info Note : Analysis On International Law, Standards And Principles Applicable To The Foreign Contributions Regulation Act 2010 And Foreign Contributions Regulation Rules 2011 by The United Nations Special Rapporteur On The Rights To Freedom Of Peaceful Assembly And Of Association, United Nations Office of the High Commissioner for Human Rights, (2016), para 6, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteIndia.pdf>

<sup>54</sup> U.N. Human Rights Committee, General Comment 25: Article 25 (Participation in Public Affairs and the Right to Vote) - The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, adopted by the Committee at 57<sup>th</sup> session, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 8.

<sup>55</sup> *Ibid.*

In 2020, the Indian Supreme Court held that certain voluntary organizations that have no connection with “party politics” or “active politics” must not be denied access to foreign contribution and the scope of “political nature” cannot be expanded beyond “active politics” and “party politics”.<sup>56</sup> The FCRA Rules have been partially changed such that certain organizations including those that engage in “common methods of political action” such as strikes, roadblocks, government shut downs and “organization of farmers, workers, students, youth...whose objectives ... or activities ... include steps towards advancement of political interests of such groups” will be considered to be of political nature only if they participate in active politics or party politics and not otherwise. However, the Rules remain overbroad as organizations as under the same rule, trade unions whose objectives include “promoting political goal” or organizations with “political objectives” in its Memorandum of Association can be identified by the executive as having a political nature.

## **Q. 5) How have civil society organizations been targeted or adversely impacted by the FCRA?**

The Government has indicated that it has cancelled the FCRA license of at least 19,000 NGOs in India since 2014.<sup>57</sup> These include well-known organizations such as the Lawyers Collective, Greenpeace India, People’s Watch, Compassion International, and Public Health Foundation of India.<sup>58</sup> Reasons for these cancellations are said to include non-compliance of reporting requirements and activities which are deemed to be “political” or against “national interest” and “economic security”.<sup>59</sup>

These cancellations were reported to be given impetus by a June 2014 report from India’s Intelligence Bureau that was leaked to the media. The report alleged that foreign-funded NGOs were “serving as tools for foreign policy interests of Western governments” and were “using people centric issues to create an environment which lends itself to stalling development projects”.<sup>60</sup>

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<sup>56</sup> *Indian Social Action Forum (INSAF) v Union of India*, Civil Appeal No.1510 of 2020 (Arising out of SLP (C) No.33928 of 2011, March 6, 2020. See Answer 3 of this paper.

<sup>57</sup> The Foreign Contribution (Regulation) Amendment Bill, 2020, introduced in Lok Sabha, Statement of Objects and Reasons, para 3, [https://www.prsindia.org/sites/default/files/bill\\_files/FCRA%20Amendment%202020.pdf](https://www.prsindia.org/sites/default/files/bill_files/FCRA%20Amendment%202020.pdf)

<sup>58</sup> G. Bhatnagar, “Home Ministry Cancels FCRA Licences of 20,000 NGOs”, *The Wire*, December 27 2016,

<https://thewire.in/government/home-ministry-cancels-fcra-licences-20000-ngos>

<sup>59</sup> PTI, “Registration of 10,000 NGOs cancelled in last 3 years: Government” *The Economic Times*, April 12, 2017,

<https://economictimes.indiatimes.com/news/politics-and-nation/registration-of-10000-ngos-cancelled-in-last-3-years-government/articleshow/58146080.cms?from=mdr>

<sup>60</sup> A. Ranjan, “Foreign-aided NGOs are actively stalling development, IB tells PMO in a report”, June 7 2014, *The Indian Express* at

The Report calculated that the NGOs led to a loss of two to three percent GDP per year.<sup>61</sup> The Report targeted, in particular, Greenpeace India, saying that “it is assessed to be posing a potential threat to national economic security...” and aims to “pressure India to use only renewable energy”.<sup>62</sup>

In the case of Lawyers Collective, a criminal complaint was registered on 13 June 2019 by the Central Bureau of Investigation (CBI)<sup>63</sup> against the Lawyers Collective and its Director, Anand Grover, “unknown office-bearers”, “private individuals”, and “public servants” associated with Lawyers Collective. The complaint alleged violations of the FCRA 2010,<sup>64</sup> as well as crimes including criminal conspiracy,<sup>65</sup> criminal breach of trust,<sup>66</sup> cheating and dishonestly inducing delivery of property,<sup>67</sup> and false statement made in declaration.<sup>68</sup> The criminal complaint also alleged criminal misconduct by a public servant under the Prevention of Corruption Act 1988.<sup>69</sup> This led to the suspension and eventual cancellation of the FCRA registration of the NGO, which is presently under appeal in the Bombay High Court.<sup>70</sup>

The UN Special Rapporteurs on the situation of human rights defenders; on freedom of opinion and expression; and on the rights to freedom of peaceful assembly and of association issued a statement on 16 June 2016. The three UN Special Rapporteurs expressed concern at the suspension of the FCRA license of Lawyers Collective, as reportedly being “politically motivated” to silence Lawyers Collective “for their litigation and criticism of the Government’s

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<https://indianexpress.com/article/india/india-others/foreign-aided-ngos-are-actively-stalling-development-ib-tells-pmo-in-a-report/>

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Central Bureau of Investigation is the main investigation agency in India under the jurisdiction of the Ministry of Personnel, Public Grievances and Pensions.

<sup>64</sup> Foreign Contribution Regulation Act, 2010 : Section 33 - Making of false statement, declaration or delivering false accounts; Section 35 - Punishment for contravention of any provision of the Act; Section 39 - Penalty for offences where no separate punishment has been provided (Section 37) and Offences by Companies.

<sup>65</sup> Indian Penal Code, 1860 : Section 120B - Punishment of criminal conspiracy.

<sup>66</sup> Indian Penal Code, 1860 : Section 406 - Punishment for criminal breach of trust.

<sup>67</sup> Indian Penal Code, 1860 : Section 420 - Cheating and dishonestly inducing delivery of property.

<sup>68</sup> Indian Penal Code, 1860 : Section 199 - False statement made in declaration which is by law receivable as evidence.

<sup>69</sup> Prevention of Corruption Act, 1988 : Sections 13 - Criminal misconduct by a public servant.

<sup>70</sup> On 25 July 2019, the Bombay High Court granted temporary relief to Lawyers Collective and directed the CBI to not take any coercive steps against the Lawyers Collective until the next hearing on 19 August 2019. The case was adjourned on 19 August 2019 and the next hearing date has not yet been set. In October 2019, the CBI filed a Special Leave Petition in the Supreme Court against the protection order that Ms. Jaising and Mr. Grover were granted by the Bombay High Court. However, the petition has not been listed by the Supreme Court.

policies”.<sup>71</sup> They noted procedural anomalies in the handling of the case by the Government, which included leaking information to the media, before informing the NGO. The UN Special Rapporteurs asked the Indian Government to ensure that human rights defenders and NGOs are able to function without increased restrictions on their access to foreign funding and without undue suspension of their registration.<sup>72</sup>

People’s Watch, which works on education but also challenges nuclear energy plants being set up in Kudankulam (seen by the Intelligence Bureau as an anti-developmental activity), had its FCRA license canceled.<sup>73</sup> The National Human Rights Commission of India in November 2016 questioned the non-renewal of FCRA license of People’s Watch stating, “[p]rima-facie it appears FCRA license non-renewal is neither legal nor objective”.<sup>74</sup> The Indian Government also cancelled the FCRA license of Sabrang Trust and Citizens for Justice and Peace on charges of embezzlement. Both organizations are headed by Teesta Setalvad and worked with survivors of the 2002 Gujarat riots, and have been critical of the current prime minister and then Gujarat chief minister Narendra Modi.<sup>75</sup>

In addition to the action taken against organizations such as those indicated above, it is highly likely that many other organizations have been adversely affected, as they may have been “chilled” from seeking or accepting funds from foreign sources, including in cases where it is not clear whether they would be running afoul of the FCRA. There is also a risk that banks may be more reluctant to want NGOs as customers.

## **Q. 6) Is there a pattern of Indian Government targeting NGOs, lawyers and human rights defenders?**

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<sup>71</sup> UN 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 16 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E>

<sup>72</sup> *Ibid.*

<sup>73</sup> R. Guhambika, “NGOs thrown out of gear by FCRA”, *The Hindu*, May 4 2017, <https://www.thehindu.com/news/cities/Madurai/ngos-thrown-out-of-gear-by-fcra/article18385305.ece>

<sup>74</sup> National Human Rights Commission, “NHRC issues notice to the Union Home Ministry on allegations of draconian approach over renewal of FCRA license to NGOs of Human Rights Defenders”, November 16 2016, <http://nhrc.nic.in/press-release/nhrc-issues-notice-union-home-ministry-allegations-draconian-approach-over-renewal>

<sup>75</sup> S. Das et al, “FCRA licences of Greenpeace, Teesta Setalvad NGOs cancelled: Home ministry”, *Live Mint*, December 15 2016, <https://www.livemint.com/Politics/xpJltBJOe0sLRWJp6qzRIJ/FCRA-licences-of-Greenpeace-Teesta-Setalvad-NGOs-cancelled.html>

The restrictions imposed through the FCRA are no doubt part of a larger pattern of threats and harassment faced by civil society, human rights defenders and lawyers. In addition to restricting the ability of NGOs to access funds, the Government has used overbroad laws like the Unlawful Activities Prevention Act, the National Security Act and provisions of Indian Penal Code such as sedition laws, criminal defamation laws to arbitrarily arrest human rights defenders and has also sought to restrict human rights defenders from traveling outside India.

Amnesty International India has been forced to cease operations since 29 September 2020, due to freezing of bank accounts, on charges of money laundering, after two years of harassment by the Government, particularly the Enforcement Directorate (financial investigation agency under the Ministry of Finance). In August 2020, Amnesty International India released reports on the situation of human rights in Jammu and Kashmir and an investigation of Delhi riots. On 10 September 2020, all of Amnesty International India's bank accounts were completely frozen, forcing it to halt operations.<sup>76</sup>

Several human rights defenders - who are activists, academics and poets - are in prison and others continue to be charged under the Unlawful Activities (Prevention) Act and the Indian Penal Code, following a public rally which led to clashes with supporters of the ruling Bharatiya Janata Party (BJP), popularly called the Bhima Koregaon case.<sup>77</sup>

Several human rights defenders continue to be detained for criticizing the citizenship laws in the country. They have been held on charges of rioting and unlawful assembly, and charges under Unlawful Activities (Prevention) Act, National Security Act, among others.<sup>78</sup> Five UN Special Rapporteurs on 26 June 2020 have expressed concern about Indian human rights defenders who have been arrested for protesting against changes to the nation's citizenship laws, saying "...their arrest seems clearly designed to send a chilling message to India's vibrant civil society that criticism of government policies will not be tolerated".<sup>79</sup> They have called on the Government to "immediately release all

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<sup>76</sup> Amnesty International India, "Amnesty International India Halts Its Work On Upholding Human Rights In India Due To Reprisal From Government Of India", 29 September 2020, <https://amnesty.org.in/news-update/amnesty-international-india-halts-its-work-on-upholding-human-rights-in-india-due-to-reprisal-from-government-of-india-2/>

<sup>77</sup> *Ibid.* See also, "What is the Bhima Koregaon 12 (BK12) Campaign?", <https://indiacivilwatch.org/what-is-the-bhima-koregaon-12-bk12-campaign/>; and <https://free-them-all.net/category/persecuted/profiles/individuals/>

<sup>78</sup> Taran Deol, "CAA protesters' arrest 'designed to send chilling message': UN asks India to free activists", *The Print*, 26 June 2020, <https://theprint.in/india/caa-protesters-arrest-designed-to-send-chilling-message-un-asks-india-to-free-activists/449401/>

<sup>79</sup> UN Office of the High Commissioner for Human Rights, "UN experts urge India to release protest leaders", June 26 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26002&LangID=E>

human rights defenders who are currently being held in pre-trial detention without sufficient evidence, often simply on the basis of speeches..."<sup>80</sup>

At present, many of the detained human rights defenders are in pre-trial detention, without clarity regarding when the trials will start, without access to lawyers, family members, and without access to medical help.<sup>81</sup>

In addition, nearly 55 journalists have faced "arrest, registration of FIRs, summons or show causes notices, physical assaults, alleged destruction of properties and threats" for reporting on COVID-19 or exercising freedom of opinion and expression during the COVID related national lockdown from 25 March to 31 May 2020.<sup>82</sup>

These actions contribute to a deteriorating environment in which human rights defenders, lawyers and critics of government policy are at great risk to their personal safety and security. India has appeared seven out of ten times in the UN Secretary General Annual Reports among the States where reprisals have allegedly been committed against human rights defenders from 2010-2020.<sup>83</sup>

## **Q. 7) How does the Government apply the prohibition on political parties receiving foreign funding?**

Section 3(1)(e), FCRA prohibits "political party or office-bearer thereof" from accepting foreign contributions.

However, the Indian Parliament has made several retrospective amendments to the FCRA 2010 so as to change the definition of "foreign source". Companies with more than 50 percent of their share capital in foreign investment were previously treated as a "foreign source". The amendments now retrospectively allow these to be treated as a non-foreign source, as long the companies have complied with the Foreign Exchange Management Act. The first amendment to FCRA 2010 was brought about in 2016 in the Finance Act,<sup>84</sup> and was made

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<sup>80</sup> *Ibid.*

<sup>81</sup> See International Commission of Jurists, "Joint Open Letter to the Indian Government calling for the release Of human rights defenders at risk", May 27 2020, <https://www.icj.org/joint-open-letter-to-the-indian-government-calling-for-the-release-of-human-rights-defenders-at-risk/>.

<sup>82</sup> Rights and Risks Analysis Group, "India: Media's Crackdown During COVID- 19 Lockdown" (2020), pages 4-8, <http://www.rightsrisks.org/wp-content/uploads/2020/06/MediaCrackdown.pdf>.

<sup>83</sup> See UN Secretary General Reports, Reporting mandate of the Secretary-General on intimidation and reprisals for cooperation with the UN in the field of human rights, <https://www.ohchr.org/EN/Issues/Reprisals/Pages/Reporting.aspx>

<sup>84</sup> The Finance Act, 2016 : Section 236 - In the Foreign Contribution (Regulation) Act, 2010, in section 2, in sub-section (1), in clause (j), in sub-clause (vi), the following proviso shall be inserted and shall be deemed to have been inserted with effect from the 26th September, 2010, namely:— "Provided that where the nominal value of share

retrospective from 2010.<sup>85</sup> In 2018, the Indian Parliament amended the FCRA 2010 again, making the 2016 amendment retrospective to 1976.<sup>86</sup> The goal has been to make it possible for political parties to both prospectively accept donations from companies previously excluded without being in violation of the FCRA, and also to negate liability for such foreign funding taken since 1976. The reason for shielding political parties from liability of FCRA violations as of 1976 is that this was the year of the FCRA's original enactment.<sup>87</sup>

In a pending case in the Supreme Court, *Association for Democratic Reforms v. Union of India*, the petitioner has argued that the retrospective amendments made to the FCRA 2010 creates avenues of foreign contribution to Indian political parties. The Election Commission of India in its affidavit has also stated that the amendment "would allow unchecked foreign funding of political parties in India which could lead to Indian policies being influenced by foreign companies."<sup>88</sup> The Supreme Court, however, stated that it needs an "indepth hearing"<sup>89</sup> and that has not been listed since the past two and a half years.

Notably, in 2017-2018, 91.58 percent of total donations received by the

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capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made thereunder, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source".

<sup>85</sup> This was in response to the 2014 Delhi High Court Judgment in *Association for Democratic Reforms v. Union of India*. The Delhi High Court had found both political parties Indian National Congress and Bharatiya Janata Party in violation of FCRA for accepting donations from foreign sources and had directed the Ministry of Home Affairs and the Election Commission of India to "relook and re-appraise the receipts of the political parties... identify foreign contributions received by foreign sources.. and... take action as contemplated by law...within a period of six months..." Both parties appealed against the Delhi High Court Judgment in the Supreme Court in 2016, stating that since the definition of "foreign source" was retroactively amended in 2016, the case was infructuous, however, it was pointed out that the unlawful donation was taken in 2009 and hence it was FCRA 1976 (repealed since FCRA 2010 came into effect) that was the relevant law in 2009. Both the parties withdrew their appeals. The Delhi High Court issued a contempt notice against the Union of India and the Election Commission for their inaction.

<sup>86</sup> The Finance Act, 2018, S. 220: Amendment to Act 28 of 2016 - In the Finance Act, 2016, in section 236, in the opening paragraph, for the words, figures and letters "the 26th September, 2010", the words, figures and letters "the 5th August, 1976" shall be substituted, <http://egazette.nic.in/writereaddata/2018/184302.pdf>

<sup>87</sup> PTI "Lok Sabha passes Bill to exempt political parties from scrutiny on foreign funds, without debate" March 18, 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>88</sup> Supreme Court of India, *Association for Democratic Reforms v. Union of India*, WRIT PETITION (CIVIL) NO. 333 OF 2015, April 12 2019, para. 8.

<sup>89</sup> *Ibid*, para. 11.

Bharatiya Janata Party was through corporate funding.<sup>90</sup> The retroactive exclusion of particular companies from being treated as foreign sources in FCRA 2010 in addition to finance campaign reforms in 2017 has eased restrictions on political parties in accepting foreign funding. However, simultaneously the Indian parliament made amendments to FCRA 2010 in 2020 increasing the restrictions in access to foreign contributions for NGOs. This suggests that FCRA is being utilized to selectively target NGOs, as opposed to political parties.

The UN Special Rapporteur on rights to freedom of peaceful assembly and association has pointed out that “it is paradoxical that some of the States stigmatizing foreign-funded associations in their own countries are receiving foreign funding themselves (in the form of loans, financing or development assistance), often in substantially greater amounts than that flowing to CSOs in their country.”<sup>91</sup>

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<sup>90</sup> A. Mohan, “Data shows BJP bagged 92% of corporate donations to political parties”, *Business Standard*, January 17, 2019, [https://www.business-standard.com/article/economy-policy/data-shows-bjp-bagged-92-of-corporate-donations-to-political-parties-119011701405\\_1.html](https://www.business-standard.com/article/economy-policy/data-shows-bjp-bagged-92-of-corporate-donations-to-political-parties-119011701405_1.html)

[https://www.business-standard.com/article/economy-policy/data-shows-bjp-bagged-92-of-corporate-donations-to-political-parties-119011701405\\_1.html](https://www.business-standard.com/article/economy-policy/data-shows-bjp-bagged-92-of-corporate-donations-to-political-parties-119011701405_1.html)

<sup>91</sup> Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/23/29 (2013), para 29.

## CONCLUSION AND RECOMMENDATIONS

The FCRA is not compliant with international law and standards, particularly those protecting the rights to freedom of association, freedom of assembly, freedom of expression and the right to take part in political affairs. In the words of the UN High Commissioner, it is being “used to deter or punish NGOs for human rights reporting and advocacy.”<sup>92</sup> It imposes undue restrictions and burdens on the legitimate activities of human rights defenders and activists while placing them at great risk. Those most at risk in India have been individuals and organizations that voice critical views of the Government.

The ICJ makes the following recommendations to the Indian authorities:

1. The Indian Parliament should set up an independent committee to review the FCRA with a view to ensuring that it complies with India’s constitutional provisions and its international human rights obligations, specifically those that guarantee freedom of association, freedom of assembly, freedom of expression, and the right to participate in political affairs of the country. In the view of the ICJ, the review should result in action aimed at repealing or amending at least 6 legislative provisions and related rules:
  - a. Section 5, FCRA 2010 and Rule 3, FCRA 2011 should be repealed or amended in its entirety so that they only cover activities in connection with “active politics” or “party politics” with clear definitions of these terms. Organizations that are not connected to “active politics” or “party politics” should not be subject to denial of access to foreign funds on the grounds under these provisions.
  - b. Repeal or amend Section 9 and Section 12, FCRA 2010 so as to specifically and narrowly define “prejudicial” impact on “public interest” by the person/class of persons. Further, amend Section 9 and Section 12, FCRA 2010 to modify other classificatory terms used in the provisions, including prejudicial impact on “sovereignty and integrity of India”; “freedom or fairness of election to any Legislature”; “friendly relations with any foreign State”; and “harmony between religious, racial, social, linguistic or regional groups, castes or communities.” These revisions should bring any such classifications in line with the principles of legality and the requirement of a legitimate purpose.
  - c. Repeal Section 2. FCRA 2020 amending Section 3, FCRA 2010 restricting access to foreign funding for public servants, which as written includes an overbroad classification affecting a number of individuals.

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<sup>92</sup> U.N. Office of the High Commissioner for Human Rights, “Bachelet dismayed at restrictions on human rights NGOs and arrests of activists in India”, 20 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26398&LangID=E>

- d. Repeal Section 3, FCRA 2020 amending Section 7, FCRA 2010 prohibiting the transfer of foreign funding by registered organizations to others.
- e. Repeal Section 12, FCRA 2020 substituting new Section 17, FCRA 2010 requiring that persons making an application for an FCRA certificate open an "FCRA Account" in State Bank of India, New Delhi
- f. Repeal Section 4, FCRA 2020 amending Section 8, FCRA 2010 reducing limits on the use of foreign funds for defraying administrative expenses to 20 percent from the previous 50 percent.