

## SUMMARY ANALYSIS

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# India's FCRA Supreme Court Judgment and the Freedom of Association

## Background

In September 2020, amendments to India's Foreign Contribution (Regulation) Act (FCRA) were passed in India's Parliament just days after the bill was tabled and without any stakeholder consultation.<sup>1</sup> The 2020 Amendments introduced a number of changes to the FCRA that significantly impaired civil society's ability to utilize foreign funding and engage in COVID-19 response during India's second wave, and which have continued to drastically hinder the sector's ability to operate. Please contact [asia@icnl.org](mailto:asia@icnl.org) for a copy of ICNL's complete analysis of the 2020 FCRA amendments.<sup>2</sup>

## The Supreme Court Challenge and Judgment

On April 8, 2022, a three-judge bench of the Supreme Court of India issued its 132-page judgment in *Noel Harper v. Union of India*. The case arose from three writ petitions filed by representatives of FCRA-registered non-profit organizations and trusts. One of these petitions was filed by Noel Harper, trustee of "The Care and Share Charitable Trust," Nigel Mills, social worker and trustee of the same, and two trustees of the National Worker Welfare Trust; the Care and Share Charitable Trust works to improve the lives of children in the state of Andhra Pradesh, including children living on the street and orphans.

The petitions disputed the validity of **Section 7** (prohibiting transfers of foreign contributions, or "sub-granting"), **Section 12A** (requiring NGO officeholders to produce Aadhaar cards for FCRA registration), and **Sections 12(1A)** and **17(1)** (requiring organizations seeking FCRA registration to open a bank account at a particular New Delhi branch of the State Bank of India (SBI)) of the 2020 Amendments. Specifically, the petitions challenged the provisions as "...being manifestly arbitrary, unreasonable and impinging upon the fundamental rights guaranteed to the petitioners under Articles 14,

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<sup>1</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>2</sup> This analysis examines the 2020 Amendments in light of both international law around the freedom of association and guidelines issued by the Financial Action Task Force (FATF), which have been used to justify the FCRA.

19 and 21 of the Constitution.”<sup>3</sup> The primary relief prayed for by the petitioners was that Sections 7, 12A, 12(1A), and 17(1) be struck down as unconstitutional.

The Court concluded that the 2020 Amendments—namely, to Sections 7, 12(1A), 12A and 17 of the 2010 Act—were constitutional and within the authority of the 2010 Act.<sup>4</sup> In reaching this conclusion, the court relied heavily on the legislative history and intent of the FCRA, as well as on domestic case law, while excluding international law from consideration.

Key highlights from the Court’s reasoning include the following:

- **Negative influence of foreign contributions on national sovereignty** - The Court’s analysis included a lengthy discussion of the legislative history of the FCRA, as well as the intention of the original act and subsequent amendments. In its discussion of the role of foreign contributions, the Court emphasized the potential negative influence of such contributions, noting that, “...free and uncontrolled flow of foreign contribution has the potentials of impacting the sovereignty and integrity of the nation, its public order and also working against the interests of the general public.”<sup>5</sup>
- **No right to foreign funding** - The Court concluded that there is no right to receive foreign funding, saying, “In short, no one can be heard to claim a vested right to accept foreign donation, much less an absolute right.”<sup>6</sup> The court further stated that, “The argument that this Court in the case of *INSAF*, while dealing with the provisions of the 1976 Act had recognised the absolute right to receive foreign contribution is misplaced and misreading of that decision.”<sup>7</sup>
- **Prohibition against transfers of foreign funding upheld, while introducing some ambiguity around permissibility of subgranting** – In upholding the prohibition of transfers under the 2020 Amendments, the Court noted that, previously, some organizations simply acted as intermediaries to receive and route foreign funds, and so, “To overcome this mischief, it became

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<sup>3</sup> In the Supreme Court of India Civil Original Jurisdiction Writ Petition (Civil) No. 566 of 2021 Judgment (“Judgment”), Paragraph 1. Article 14 of the Indian Constitution articulates the right of equality before the law and equal protection of the law; Article 19 the right to freedom of speech and expression, the right to assemble peacefully, and the right to form associations and unions; and Article 21 the right to life and personal liberty.

<sup>4</sup> The one partial victory by the petitioners was with regard to Section 12A (requiring Indian office bearers’ Aadhaar cards for registration), where the Court concluded that since foreigners were able to provide their passports for FCRA registration, Indian nationals should also be able to provide their passports in place of their Aadhaar cards.

<sup>5</sup> Judgment, Page 79

<sup>6</sup> Judgment, Page 106

<sup>7</sup> Judgment, Page 111

necessary to amend the provisions for effective regulatory and control measures in respect of receipt and utilisation of foreign contribution.”<sup>8</sup>

Notably, however, the judgment introduced some ambiguity with regard to whether subgranting is always prohibited under the 2020 Amendments. This ambiguity stems from the distinction made by the Court between the “transfer” of foreign funds from the FCRA-certified recipient to another entity (which poses a risk of this entity not using the funds for the intended activities for which they were granted, and is thus explicitly prohibited) and the “utilization” of foreign funds by the FCRA-certified recipient itself, which could encompass the FCRA-certified recipient of the foreign funds outsourcing services in support of its FCRA-funded activities to a third party.<sup>9</sup>

In this way, the judgment seems to leave open the possibility of subgranting funds to a third party where it is done for the specific purpose of implementing the program/activities for which the FCRA certificate was granted; however, reliance on such interpretation may be risky without further clarity from the Court or the Ministry of Home Affairs.

- **Remaining provisions upheld on basis of security, sovereignty, or public order** – The challenges to Section 12(IA) and Section 17(1) mandating the opening of an FCRA account at a particular New Delhi branch of the State Bank of India (SBI), and on the validity of Section 12A (requiring Indian office bearers’ Aadhaar cards for registration), were respectively upheld on the basis of “being a matter of security of the State, public order and in the interests of the general public,”<sup>10</sup> and “...necessitated to safeguard the sovereignty and integrity of the country, and public order, including in the interests of the security of the State and of the general public.”<sup>11</sup>

With regard to the latter provision, the Court found that since foreigners were able to provide their passports for FCRA registration, Indian nationals should

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<sup>8</sup> Judgment, Page 16

<sup>9</sup> Judgment, Page 101-102: “In other words, Section 7 may be attracted [implicated] if the utilisation is not for the definite or permitted purposes for which the certificate of registration or permission under the Act has been granted by the competent authority. Indeed, if the recipient of foreign contribution engages services of some third party or outsources its certain activities to third person, whilst undertaking definite activities itself and had to pay therefor, it would be a case of utilisation.”

“The transfer within the meaning of Section 7, therefore, would be a case of per se (simpliciter) transfer by the recipient of foreign contribution to third party without requiring to engage in the definite activities of cultural, economic, educational or social programme of the recipient of foreign contribution, for which the recipient had obtained a certificate of registration from the Central Government.”

<sup>10</sup> Judgment, Page 124

<sup>11</sup> Judgment, Page 130

also be able to provide their passports in place of their Aadhaar cards, and on this basis avoided evaluating the requirement of Section 12A as being a violation of privacy.

## International Law regarding the Freedom of Association

In seemingly dismissing a right to foreign funding and not thoroughly examining how the 2020 Amendments undermine Indians' freedom of association by creating significant barriers to accessing foreign contributions, the Supreme Court's decision runs counter to 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. International law creates a presumption against any state regulation that would amount to a restriction of recognized rights. 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 under ICCPR Article 22 *only* if the restriction is: prescribed by law, pursued in the interest of one of the specified grounds,<sup>12</sup> and necessary in a democratic society.

In his most recent report of May 2022, the Special Rapporteur on the right to freedom of peaceful assembly and of association stated that:

“The right of associations to freely access human, material and financial resources – from domestic, foreign, and international sources - is inherent to the right to freedom of association and essential to the existence and effective operations of any association...**The Committee has recognized that funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with Article 22** [emphasis added].”<sup>13</sup>

The Special Rapporteur noted regarding the FCRA specifically that:

The Act has been the subject of several communications and statements by special procedure mandate holders for failing to meet the “the stringent test for allowable restrictions” on the right to freedom of association and for obstructing civil society organizations' access to foreign funding. The special procedure mandate holders raised their concerns that the prior authorization

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<sup>12</sup> The exhaustive grounds specified in Article 22 are national security, public safety, public order, protection of public health or morals, or protection of the rights and freedoms of others.

<sup>13</sup> United Nations Human Rights Council, A/HRC/50/23, “Report of UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule” May 10, 2022, para. 9, <https://undocs.org/en/A/HRC/50/23> f

regime under the Foreign Contribution (Regulation) Act was incompatible with the international human rights obligations of India and was being used “to silence organizations involved in advocating civil, political, economic, social, environmental or cultural priorities, which may differ from those backed by the Government.”<sup>14</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>15</sup>

In upholding the FCRA Amendments and failing to recognize access to foreign funding as an inherent component of the freedom of association, the Supreme Court decision runs counter to international law. The Court’s judgment neglected to evaluate the legitimacy of the restrictions imposed with regards to their impact on the freedom of association in conformity with the standard set out in Article 22’s three-part test. From an international law perspective, any analysis of the FCRA or its amendments should include a rigorous analysis of its impact on the freedom of association.

## Conclusion

As a party to the ICCPR, India is obligated to follow the provisions of the Convention. The Supreme Court judgment upheld key restrictions embraced by the 2020 Amendments and seemingly announced that there is no right to receive foreign funding; however, the judgment failed to actually examine how these restrictions interact with the ability to access resources as a key component of the freedom of association under international law. As such, the Supreme Court judgment is likely to reinforce a government approach to foreign funding that violates the freedom of association protected by international law.

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<sup>14</sup> *Id.*, para 20. See also, 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>15</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>