

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 25/2, 24/5 and 25/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged inspection and consequent suspension of the Foreign Contribution (Regulation) Act (FCRA) registration of Lawyers Collective for six months** and the limiting effect this measure has on the rights to freedom of expression and association.

Ms. **Indira Jaising** is a prominent women human rights defender and lawyer. She is director of Lawyers Collective (LC), who works on the issue of gender discrimination, including women's right to property, sexual harassment at the workplace and domestic violence. She worked for the National Commission for Women, organised workshops and published reports on women's issues. She assisted in the drafting of Protection of Women from Domestic Violence Act 2005. Ms. Jaising was a member of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee. She was the first woman to be designated as a Senior Advocate by the High Court of Bombay, and was conferred with the Rotary Manav Seva Award in recognition of her services to the nation in fighting corruption and promoting minority rights. She was given the Padma Shree by the President of India in 2005 for her service to the cause of public affairs.

Mr. **Anand Grover** is a human rights defender and lawyer. As co-director of Lawyers Collective, he advocates against the criminalisation of homosexuality; the rights of persons living with HIV; and access to medicine and healthcare. Mr. Grover was a member of the United Nations AIDS Reference Group on HIV and he previously served as United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health from 2008 to 2014. He has argued several landmark cases in the field of public interest and human rights law, mass eviction, LGBTI rights and patent law for life-saving drugs. With the Lawyers Collective, Mr. Grover led the Naz Foundation's legal case for the repeal of Section 377 of the Indian Penal Code, which was a law criminalizing homosexuality in India.

The Foreign Contribution (Regulation) Act (FCRA) has been the subject of a previous communication sent by various Special Rapporteurs on 18 June 2015 see A/HRC/31/79, case no. IND 7/2015. We acknowledge your Excellency's Government's response on 17 August 2015, and reiterate our concerns in the context of the information

below. In September 2015, the Government cancelled the FCRA registration of Greenpeace India and suspended the FCRA registration of Sabrang Trust for six months.

According to the information received:

On 23 October 2000, Lawyers Collective (LC) registered under section 6(1) of the 1976 Foreign Contribution (Regulation) Act (FCRA), a legislation that was later replaced by the 2010 FCRA.

On 5 November 2015, LC received a letter and standard questionnaire from the monitoring unit of the Ministry of Home Affairs (MHA) pertaining to the 2010 FCRA.

On 20 and 21 November 2015, information that would usually be treated confidentially by MHA was leaked to the media, in which it was reported that LC had been served a notice for violating FCRA by the MHA.

On 22 November and 5 December 2015, LC wrote letters to the MHA inquiring about the alleged notice that was publicised in the media, but which it had not received. On 11 December 2015, LC received a reply from the MHA stating that it had not issued any notice concerning LC.

On 4 January 2016, LC submitted to MHA a reply to the standard questionnaire along with other documents requested.

About two months after the media coverage of the leaked information, on 12 January, LC received a notice of inspection under section 23 of the 2010 FCRA. A week later, between 19 and 23 January 2016, the accounts of LC were inspected by a team of officers designated by the MHA.

On 29 February 2016, LC received observations of the inspection, in which it was alleged that the provision of the FCRA had been violated.

On 30 March 2016, LC submitted its reply to the inspection report, rejecting all the allegations, in both fact and law. The MHA reportedly responded that the reply from LC had not been satisfactory and hence rejected it.

Allegations raised by the inspection and responses from the Lawyers Collective in that connection included, inter alia, the following:

- Ms. Jaising was alleged to have received foreign contribution of Rs 96 lakhs (approximately USD 14,500) from foreign funders, including reportedly from UN Women and other funders, while serving as ASG. The LC response stated that Ms. Jaising was a public servant and not a government servant, when she received foreign contributions. Therefore, the bar under section 3 of FCRA did not apply.
- Mr. Grover was alleged to have availed foreign contribution for his activities related to his functions as the UN Special Rapporteur, including foreign travel and that those were used for personal benefits. The LC response stated that

those funds rather pertained to reimbursements for the expenses incurred for activities carried out by Mr. Grover for LC itself.

- It is alleged that LC spent foreign contribution on awareness, workshops, and meetings on HIV/AIDS and women's empowerment, which are unrelated to 'social' issues. The LC response stated that the funds LC has spent on mobilizing communities were received from local sources or UN agencies, which is not considered illegal. Moreover, the community mobilization was restricted to organizing people living with HIV/AIDS, which cannot be considered a 'political activity'.
- It is alleged that LC transferred foreign contribution outside India. The LC response stated that it had not transferred any foreign contribution to any persons abroad. LC reimbursed expenditures incurred by organisations in Hungary and Malaysia towards the regional conferences on the right to health that LC organized, in accordance with the purpose of the foreign contribution received. There is no prohibition in the 2010 FCRA to spend foreign contribution abroad for the specific activities for which it was received.
- It is alleged that LC violated visa norms and spent foreign contribution on organising conferences in foreign countries. The LC response stated that it did not violate any visa norms when engaging with professionals, including some foreign nationals, who worked in India. Expenses for foreign travel for Mr. Grover and other associates were covered in connection with the regional conferences on right to health, which LC organized in other countries.
- It is alleged that LC spent foreign contribution on advocacy with media and MPs and organised dharnas/rallies, in violation of letter and spirit of the 2010 FCRA. The LC response stated that there is no prohibition in the 2010 FCR, to meet with MPs or raising their awareness on legal issues. No money was spent on rallies or dharnas having any political hue or colour. Furthermore, some of the activities took place before the 2010 FCRA came into force on 1 May 2011, when Section 8 or any provision similar to Section 8 did not exist. Moreover, expenses for rest of the activities in 2011 and 2014 were borne from the money received from the United Nations, which is not foreign contribution within the meaning of FCRA.

On 1 June 2016, LC received an order dated 31 May, suspending its FCRA registration for six months. A notice to cancel the registration of LC was subsequently put up on MHA's website. LC stated that it had not received this document.

Serious concern is expressed about the alleged inspection and consequent suspension of FCRA registration of Lawyers Collective for six months, which appears to be directly related to the discharge by Ms. Indira Jaising and Mr. Anand Grover of their professional duties as human rights lawyers and the exercise of their rights to freedom of expression and association. Further concern is expressed about leaked confidential information to the media before it was communicated to LC, and that this action had a stigmatising effect on the reputation of LC long before the inspection began.

Broader concern is expressed at the increasing limitation placed on civil society associations, including limitations on their access to foreign funding and the undue suspension of their registration on the basis of burdensome administrative requirements imposed to those organizations in receipt of foreign funds. Concern is expressed that such reporting and registration requirements may potentially amount to censorship of expression on issues that are perceived as controversial or sensitive. Further concern is expressed about the possible “chilling effect” such intimidation may have on human rights defenders, civil society and on the independence of lawyers in India, especially with regard to those who defend the most vulnerable and marginalized section in society.

In connection with the above alleged facts and concerns, please refer to the **Reference to International Law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or any comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the legal basis for initiating the inspection and for the decision to suspend the registration of Lawyers Collective by the Ministry of Home Affairs, despite LC’s cooperation in providing evidence rebutting all allegations. Please also explain how those measures comply with the India’s obligations under international human rights law.
3. Please provide information about how the FCRA is compatible with international human rights standards, in particular with article 19 of the ICCPR, particularly in the way in which its enforcement limits the right to freedom of expression.
4. Please explain why and how confidential information was leaked to the media pertaining to the enquiry initiated by the FCRA concerning Lawyers Collective.
5. Please indicate what measures have been taken by the Indian Government to ensure that legislation and policies to monitor funding transactions to associations do not adversely impact on the associations’ and human rights defenders’ ability to access the funds.
6. Please indicate what measures have been taken to ensure that human rights defenders, including human rights lawyers, in India are able to carry out their legitimate work in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any sort.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the

investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

It is our intention to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government to clarify the issue/s in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Maina Kiai

Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst

Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to the rights to freedom of expression and opinion and freedom of association, as per article 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR), which India acceded on 10 April 1979. We would like to remind your Excellency's Government that any limitation to the right to freedom of expression must comply with the high threshold established under article 19(3) of the ICCPR. As stated by the Human Rights Committee, article 19(3) must never be invoked as a justification for the muzzling of human rights and for unduly limiting the free flow of ideas.(CCPR/C/GC/34). We would in this regard highlight that extensive registration regulations may in some occasions amount to censorship, which is incompatible with article 19. Consequently, society as a whole may not be able to access important information and issues that some may consider as sensitive or controversial. We would like to reiterate that the right to freedom of opinion and expression, as well as to access information is of central importance in the effective functioning of a democracy.

We would like to further refer to the information note issued by the Special Rapporteur on the rights to freedom of peaceful assembly and of association on 20 April 2016 on the compatibility of the 2010 FCRA with international human rights norms and standards. In this note, the Special Rapporteur concludes that “the Foreign Contribution Regulation Act and Regulations appear to contravene the Union of India's obligations under the ICCPR to ensure the rights of all under its jurisdiction to free association because it imposes a total ban on associations' access to foreign funding on vaguely defined grounds for a broad purpose not included in the ICCPR's enumerated list of legitimate aims”.¹

In addition, in his report (A/HRC/23/39), the Special Rapporteur on the rights to freedom of peaceful assembly and of association called upon States “to ensure that associations – registered and unregistered – can seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without prior authorization or other undue impediments, including from individuals; associations, foundations or other civil society organizations; foreign Governments and aid agencies; the private sector; the United Nations and other entities.”

We would also like to refer your Excellency's Government to the fundamental principles set forth in 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, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and

¹ Information note available here: <http://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteIndia.pdf>

realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

Furthermore, we would like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

- articles 5 (b), which provides for the right to form, join and participate in non-governmental organizations, associations or groups;

- article 9 (c), which provides for the right to offer and provide professionally qualified legal assistance in defending human rights and fundamental freedoms; and

- article 13, which provides for the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.

We would also like to refer to Human Rights Council resolution 22/6, which indicates that domestic law should create a safe and enabling environment for the work of human rights defenders (PPs 10-13). Moreover, we would also like to refer to Human Rights Council resolution 22/6, which urges States to ensure that laws affecting human rights defenders are "clearly defined, determinable and non-retroactive"(OP 11).

Finally, the above-mentioned facts also seem to be in contravention of the Basic Principles on the Role of Lawyers, in particular principle 16, which stipulates that Governments must ensure that lawyers can perform their professional functions without intimidation, hindrance, harassment or improper interference, and that they do not suffer, or be threatened with, prosecution or other sanctions, and principle 23 that provides that lawyers like other citizens are entitled to freedom of expression, belief, association and assembly.