IN THE SUPREME COURT OF INDIA

EXTRAORDINARY CIVIL WRIT JURISDICTION

WRIT PETITION (C) NO. 566/2021

IN THE MATTER OF:

NOEL HARPER & ORS ... PETITIONER

VERSUS

UNION OF INDIA AND ORS. ... RESPONDENT

with connected
W.P. (C) No. 634/2021, and
W.P. (C) No. 751/2021

COMMON PRELIMINARY AFFIDAVIT ON BEHALF OF THE RESPONDENTS NO. 1 & 2

FILED BY : AK SHARMA

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I, Sumant Singh, S/o Harinam Singh, aged about 46 years presently working as Joint Secretary (Foreigners) Ministry of Home Affairs, Government of India, do hereby solemnly affirm and state as follows:

1. That in my official capacity I am acquainted with the facts of these cases, I have perused the record and am competent and authorized to swear this affidavit on behalf of the Union of India.

2. I state and submit that since I am filing this affidavit in reply as is necessary for the purpose of opposing, entertaining and grant of any interim order. I reserve liberty to file a further and a detailed affidavit hereinafter as and when I am so advised. I hereby deny and dispute all the facts stated, contentions raised and grounds urged in the petitions except those which are specifically and unequivocally admitted in this reply.

3. It is submitted that before presenting a detailed response, the Respondent seeks to outline the major points and challenges made in these three petitions and prayers made therein. It is submitted that out of the three Writ Petitions two writ petitions (W.P.(C) No. 566/2021, and W.P.(C) No. 751/2021) have mainly assailed the

amendments carried out in the Foreign Contribution (Regulation) Act, 2010 by the Foreign Contribution (Regulation) Amendment Act, 2020. On the other hand, one Writ Petition (W.P.(C) No. 634/2021) has taken a different position and prayed for stricter enforcement of amended and other provisions of the Foreign Contribution (Regulation) Act, 2010 (the Act).

4. That the petitioners in W.P.(C) No. 566/2021 have prayed that:

> *"In the premises aforesaid, it is most respectfully prayed that Your Lordships would be pleased to admit this application, call for the records, issue a rule calling upon the respondents to show cause as to why appropriate writs, orders or directions shall not be issued and upon hearing the parties on the cause/causes that may be shown and on perusal of record, be pleased to make the rule absolute by granting to the petitioners the following relief/reliefs:*
>
> a. *To hold and declare that the impugned Sections 7, 12A, 12(1A) and 17, as inserted in the FCRA, 2010 by the Foreign Contribution (Regulation) Amendment Act, 2020 are ultra vires Articles 14,19 & 21 of the Constitution of India and the same be struck down as unconstitutional;*
> b. *A writ in the nature of certiorari and / or any other writ, order or direction of like nature setting aside and quashing the impugned public notice dated 13th October, 2020 issued by the Respondent No.2 as illegal and unconstitutional;*
> c. *To direct the Respondents not to interfere with the acceptance and utilization of foreign contribution, operation of the existing bank accounts in the scheduled banks and function of the petitioners and its bonafide members; and*
> d. *Pass such other order/orders as Your Lordships may deem fit and proper in the facts and circumstances of the case."*

That the petitioners in W.P.(C) No. 751/2021 have prayed that:

> *"The Petitioners therefore pray that in the facts and circumstances of the present case, this Hon'ble Court may be pleased to issue:*
>
> *a. A writ of mandamus or any other writ/order declaring that Section 17 of the FCRA is violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution, in so far as it requires that the primary FCRA account is to be opened exclusively in a branch of the State Bank of India, New Delhi, as notified by the Respondent No. 1*
> *b. A writ of certiorari or any other writ/order quashing the MHA notification No. S.O. 3479 (E) dated 7 October 2020 issued by*

Respondent No. 1 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution

c. *A writ of certiorari or any other writ/order quashing the public notice bearing F.No.II/21022/23/(35)/2019-FCRA-III dated 13 October 2020 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution*
d. *A writ of certiorari or any other writ/order quashing the public notice bearing II/21022/36(58)/2021-FCRA-III dated 18 May 2021 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution*
e. *Any other orders as deemed fit in the interests of justice."*

That the petitioner in W.P.(C) No. 634/2021 has prayed that:

"In the light of the aforementioned, it is therefore most respectfully prayed that this Hon'ble Court may be pleased to:

A. *Issue a Peremptory Writ of Mandamus directing Respondent No. 1 not to grant any further extension to the NGOs from complying with the mandate of the FCRA (Amendment) Act, 2020.*
B. *Direct Respondent No. 1 and Respondent No. 2 to maintain a register of all NGOs who are involved in the receiving of funds received under FCRA, particularly during Covid times.*
C. *Direct the Respondent No. 3 to place on record all information about the steps taken by it with regard to the FCRA violation by NGOs, in the context of Child Rights.*
D. *Pass such other Order or directions as this Hon'ble Court may deem fit in the facts and circumstances of the case for doing complete justice in the matter.*

And For this fact of Kindness, the Petitioner as in duty bound, shall ever pray."

5. It is submitted that before making detailed preliminary objections and submissions, it is necessary to highlight certain aspects of the matter at hand. It is submitted that various provisions, inter alia, sections 7, 12(1A), 12A and 17 of the Act, which have been challenged in the writ petition, have been amended/inserted by the Foreign Contribution (Regulation) Amendment Act, 2020 (33 of 2020). A copy of the Foreign Contribution (Regulation) Amendment Act, 2020 is attached herewith and marked as **ANNEXURE R - 1**.

6. For easy reference, the following chart is a comparative picture of amendments brought about by the 2020 amendment to the FCRA, 2010 :

UNAMENDED PROVISION	AMENDED PROVISION
Section 3(c): "Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government"	**Section 3(c):** "public servant, Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government"
Section 3: "Explanation. – In clause (c) and section 6, the expression "corporation" means a corporation owned or controlled by the Government and includes a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956)"	**Section 3**: "Explanation 1.—For the purpose of clause (c), "public servant" means a public servant as defined in section 21 of the Indian Penal Code. Explanation 2.—In clause (c) and section 6, the expression "corporation" means a corporation owned or controlled by the Government and includes a Government company as defined in clause (45) of section 2 of the Companies Act, 2013."
Section 7: "*Prohibition to transfer foreign contribution to other person*. – No person who– (a) is registered and granted a certificate or has obtained prior permission under this Act; and (b) receives any foreign contribution, shall transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior	**Section 7:** "No person who— (a) is registered and granted a certificate or has obtained prior permission under this Act; and (b) receives any foreign contribution, shall transfer such foreign contribution to any other person."

UNAMENDED PROVISION	AMENDED PROVISION
permission under this Act: Provided that such person may transfer, with the prior approval of the Central Government, a part of such foreign contribution to any other person who has not been granted a certificate or obtained permission under this Act in accordance with the rules made by the Central Government."	
Section 8(1)(b): (b) shall not defray as far as possible such sum, not exceeding **fifty per cent** of such contribution, received in a financial year, to meet administrative expenses: Provided that administrative expenses exceeding fifty per cent of such contribution, may be defrayed with prior approval of the Central Government.	**Section 8(1)(b)**: (b) shall not defray as far as possible such sum, not exceeding **twenty per cent** of such contribution, received in a financial year, to meet administrative expenses: Provided that administrative expenses exceeding [twenty per cent] of such contribution, may be defrayed with prior approval of the Central Government.
Section 11(2): (Changes to proviso) Provided that if the person referred to in sub-sections (1) and (2) has been found guilty of violation of any of the provisions of this Act or the Foreign Contribution (Regulation) Act, 1976 (49 of 1976), the unutilised or unreceived amount of foreign contribution shall not be utilised or received, as the case may be, without the prior	**Section 11(2):** Provided that the Central Government, on the basis of any information or report, and after holding a summary inquiry, has reason to believe that a person who has been granted prior permission has contravened any of the provisions of this Act, it may, pending any further inquiry, direct that such person shall not utilise the unutilised foreign contribution or receive the remaining portion of foreign contribution which has not been received or, as the case may be, any additional foreign contribution, without prior approval of the Central Government:

UNAMENDED PROVISION	AMENDED PROVISION
approval of the Central Government.	Provided further that if the person referred to in sub-section (1) or in this sub-section has been found guilty] of violation of any of the provisions of this Act or the Foreign Contribution (Regulation) Act, 1976 (49 of 1976), the unutilised or unreceived amount of foreign contribution shall not be utilised or received, as the case may be, without the prior approval of the Central Government.
New Addition	**Section 12:** (1A) Every person who makes an application under sub-section (1) shall be required to open "FCRA Account" in the manner specified in section 17 and mention details of such account in his application.
New Addition	**Section 12A:** Power of Central Government to require Aadhaar number, etc., as identification document.—Notwithstanding anything contained in this Act, the Central Government may require that any person who seeks prior permission or prior approval under section 11, or makes an application for grant of certificate under section 12, or, as the case may be, for renewal of certificate under section 16, shall provide as identification document, the Aadhaar number of all its office bearers or Directors or other key functionaries, by whatever name called, issued under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016), or a copy of the Passport or Overseas Citizen of India Card, in case of a foreigner
Section 13: (1) Where the Central Government, for reasons to be recorded in writing, is satisfied that pending consideration of the question of cancelling the	**Section 13:** (1) Where the Central Government, for reasons to be recorded in writing, is satisfied that pending consideration of the question of cancelling the certificate on any of the grounds mentioned in sub-section (1) of section 14, it is

UNAMENDED PROVISION	AMENDED PROVISION
certificate on any of the grounds mentioned in sub-section (1) of section 14, it is necessary so to do, it may, by order in writing, suspend the certificate for such period not exceeding one hundred and eighty days as may be specified in the order.	necessary so to do, it may, by order in writing, suspend the certificate [for a period of one hundred and eighty days, or such further period, not exceeding one hundred and eighty days, as may be specified] in the order.
New Addition	**Section 14A:** Surrender of certificate. — On a request being made in this behalf, the Central Government may permit any person to surrender the certificate granted under this Act, if, after making such inquiry as it deems fit, it is satisfied that such person has not contravened any of the provisions of this Act, and the management of foreign contribution and asset, if any, created out of such contribution has been vested in the authority as provided in sub-section (1) of section 15.]
Section 15: (1) The foreign contribution and assets created out of the foreign contribution in the custody of every person whose certificate has been cancelled under section 14 shall vest in such authority as may be prescribed.	**Section 15:** (1) The foreign contribution and assets created out of the foreign contribution in the custody of every person whose certificate has been cancelled under section 14 [or surrendered under section 14A] shall vest in such authority as may be prescribed.
New Proviso	**Section 16(1):** Provided that the Central Government may, before renewing the certificate, make such inquiry, as it deems fit, to satisfy itself that such person has fulfilled all conditions specified in sub-section (4) of section 12.
Section 17: Foreign contribution through scheduled bank–(1) Every person who has been granted a	**Section 17:** Foreign contribution through scheduled bank—(1) Every person who has been granted certificate or prior permission under section 12 shall receive

UNAMENDED PROVISION	AMENDED PROVISION
certificate or given prior permission under section 12 shall receive foreign contribution in a single account only through such one of the branches of a bank as he may specify in his application for grant of certificate: Provided that such person may open one or more accounts in one or more banks for utilising the foreign contribution received by him: Provided further that no funds other than foreign contribution shall be received or deposited in such account or accounts. (2) Every bank or authorised person in foreign exchange shall report to such authority as may be specified– (a) prescribed amount of foreign remittance; (b) the source and manner in which the foreign remittance was received; and (c) other particulars, in such form and manner as may be prescribed.	foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf: Provided that such person may also open another "FCRA Account" in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his "FCRA Account" in the specified branch of State Bank of India at New Delhi: Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his "FCRA Account" in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account" in a scheduled bank of his choice: Provided also that no funds other than foreign contribution shall be received or deposited in any such account. (2) The specified branch of the State Bank of India at New Delhi or the branch of the scheduled bank where the person referred to in sub-section (1) has opened his foreign contribution account or the authorised person in foreign exchange, shall report to such authority as may be specified— (a) the prescribed amount of foreign remittance; (b) the source and manner in which the foreign remittance was received; and

UNAMENDED PROVISION	AMENDED PROVISION
	(c) other particulars, in such form and manner as may be prescribed.]

7. It is submitted that it is pertinent to mention here that in exercise of the powers conferred by sub-section (2) of section 1 of the Foreign Contribution (Regulation) Amendment Act, 2020, the Central Government has appointed the 29th September, 2020 as the date on which the provisions of the Foreign Contribution (Regulation) Amendment Act, 2020 came into force. A copy of the notification vide S.O. 3395(E), dated 29th September, 2020 is attached herewith marked as **ANNEXURE R - 2**.

8. It is submitted that the section 7 of the Act has been amended by section 3 the Foreign Contribution (Regulation) Amendment Act, 2020. It is submitted that the amended section 7 prohibits transfer of foreign contribution from a recipient NGO/entity to another NGO/person/entity. It is submitted that a new sub-section (1A) of section 12 of the Act has been inserted by section 6 of the Foreign Contribution (Regulation) Amendment Act, 2020 and it is an enabling provision for section 17 as amended by the Foreign Contribution (Regulation) Amendment Act, 2020. It is submitted that section 12A has been inserted by section 7 of the Foreign Contribution (Regulation) Amendment Act, 2020 and relates to the power of the Central Government to obtain Aadhaar Number, etc. as identification documents. It is submitted that sections 17 and 12 of the Act have been partially amended to provide for a designated/exclusive FCRA Account.

9. It is submitted that the answering Respondent has also been taking proactive efforts in facilitating petitioner and other NGOs to enable their smooth transition to the new FCRA regime and have allowed relaxations to FCRA registered associations and associations holding FCRA prior permissions or registration to receive foreign contribution in the existing FCRA account upto 31.03.2021 through the Public Notice

dated 13th October, 2020, which was further extended from 31st March, 2021 till June, 2021 vide Public Notice No. II/21022/36(58)/2021-FCRA-III, dated 18th May, 2021.

10. It is respectfully submitted that the Act has been amended by the Foreign Contribution (Regulation) Amendment Act, 2020. It is submitted that the Foreign Contribution (Regulation) Amendment Act, 2020 does not bar any person who falls within the above criteria to seek FCRA registration or prior permission. It is submitted that as for amended section 7, it only restricts transfer of Foreign Contribution to other persons/NGOs once the foreign contribution is received in India by any "person" as defined in the Act. It is submitted that entity/NGO has to utilize it for the purposes for which it has been given a certificate of registration or prior permission by Government and there is no discrimination against any NGO in receipt of foreign contribution from any foreign donors.

11. It may further be noted that in fact in the connected Writ Petition (Civil) No. 634/2021, one petitioner has taken a divergent view vis-a-vis other two Writ Petitions and rather questioned the Respondent's relaxations in extending compliance dates facilitating NGOs for receipt of foreign contribution alleging that taking the shield of Covid pandemic and their relief work, several NGOs and individuals are actually misusing the FCRA regime to siphon of funds obtained from abroad for purposes other than those permitted under the Act. The Petitioner in this writ petition has prayed for rather stricter enforcement of amended and other provisions of the Foreign Contribution (Regulation) Act, 2010. This Petitioner has requested this Hon'ble Court for issuance of a Peremptory writ of mandamus directing answering Respondents not to extend the dates for compliance with FCRA requirement any further without impugning the amendments in the Act through the Foreign Contribution (Regulation) Amendment Act, 2020 and other executive orders issued thereafter.

12. It is submitted that the Respondent respectfully seeks to raise certain preliminary objections before submitting a detailed response to the petitions.

PRELIMINARY SUBMISSIONS/OBJECTIONS

No fundamental right to unbridled foreign contribution

13. It is submitted that at the outset, it is clear that the Petitioners have claimed fundamental rights under Article 14, 21 and Article 19(1)(c) and Article 19(1)(g). It is submitted that unequivocally submitted that there exists no fundamental right to receive unbridled foreign contributions without any regulation. It is submitted that in fact, there exists no fundamental right under which any right, legal or otherwise, can be said to include the purported right to receive foreign contributions. It is submitted that Parliament, representing the will of the people, has enacted the Foreign Contribution (Regulation) Act, 2010, thereby laying down a clear legislative policy of strict controls over foreign contributions for certain activities in the country. It is submitted that there exits no right to receive any foreign contribution outside the framework designed by the parliament and implemented by the executive. It is submitted that the regime in place which enables receiving of foreign contribution envisages certain regulations and procedural preconditions and compliances for accepting foreign contributions. It is submitted that no part of any purported right to receive foreign contributions can be said to be a part of the fundamental rights granted to citizens. It is submitted that further, there is no question of fundamental rights being violated through controls of acceptance of foreign contribution by certain type of organisations as the said organisations or individuals are always open to operate with locally secured funds and achieve their aforestated objectives. It is submitted that foreign contributions, considering their nature and vast expanse of abuse, are a tightly regulated and controlled means and the Respondent, is well within its rights to make the impugned changes in order to effectively implement the objects of the Parliament. It is submitted that in the absence of any violation of a fundamental right, the present set of petitions, claiming a moonshine fundamental right of

"received unbridled foreign contributions" are not maintainable under Article 32 and therefore, on this ground alone, the petitions deserve to be dismissed.

Analysis of the changes - Prohibition on transfer of Foreign Contribution

14. It is submitted that amendments of the Act are within the legislative domain of the Union of India and are in furtherance of the object and scope of the Act and its spirit as submitted hereinbefore. The permission to receive Foreign Contribution is granted to persons for a definite cultural, economic, educational or social programme meant for the benefit of the society (and not for personal gain) as mandated in sections 11 and 12 of the Act. Therefore, any person may seek registration or prior permission of Central Government to receive and utilize foreign contribution. The Foreign Contribution (Regulation) Amendment Act, 2020 does not bar any person who falls within the above criteria to seek FCRA registration or prior permission. As for amended section 7, it only restricts transfer of Foreign Contribution to other persons/NGOs once the foreign contribution is received in India by a particular NGO/person. The petitioners or any entity/NGO has to utilise it for the purposes for which it has been given a certificate of registration or prior permission by Government and hence such a ban on transfer is not discriminatory. It may be also submitted that the object and purpose of the Act is to regulate the "acceptance" and "utilisation" of foreign contribution by certain individuals or associations or companies. During the implementation of the FCRA, 2010 it was increasingly noted that certain NGOs were involved primarily only in routing of foreign contribution. In other words, rather than "receiving" and "utilising" it — as is the intent of the Act — the NGOs were only receiving the foreign contribution and transferring it to other NGOs. Thus, establishing a principal-client relationship. It is submitted that taking the advantage of the erstwhile provision of 'transfer', certain NGOs had adopted the 'transfer' of foreign contribution as their principal activity. It may be reiterated that basic intent of FCRA, 2010 is to allow "receipt" and "utilisation". As is detailed in the

subsequent paras, such large-scale transfers of foreign contribution created several operational difficulties and malpractices that threatened to defeat the very purpose of the Act. It was becoming difficult to monitor the ultimate utilisation of the Foreign Contribution by the transferee. In order to prevent such violations and malpractices, it was considered necessary to stop the transfer of Foreign Contribution in order to fix the accountability and thus ensure that the recipient organization itself actually utilizes the Foreign Contribution that it receives.

15. It is submitted that Chapter II of the Act provides registration process for receipt of foreign contribution. As per section 11 of the Act, no person having definite cultural, economic, education, religious or social programme shall accept foreign contribution unless such person obtains a certification of registration or prior permission to receive foreign contribution for a specific purpose from foreign source. Section 12 stipulates broad conditions for obtaining registration or prior permission. A combined reading of sections 11 and 12 of the Act makes it amply clear that the FCRA registration is supposed to be given to such an Association that has its own definite programme to spend the foreign contribution on purposes useful to society. It is submitted that transfer on the other hand amounts to 'routing' and 'mediating' rather than spending the foreign contribution as envisaged by the Act.

16. It is submitted that every NGO is registered under the FCRA or granted prior permission only for a definite programme or project in a particular area like education, economic, social, cultural or religious spheres. It receives foreign contribution and it is supposed to utilize it only for such programme. However, owing to erstwhile provision of transfer, 'transfer of foreign contribution' became the principal activity of several NGOs. Such a trend is fraught with the possibility of foreign contribution potentially being diverted from one area of activity to another area, leading to misuse of the funds. Such a provision of transfer also has potential of transfer of foreign contribution to such NGOs whose activity/programme could be entirely different from the programmes/activity of the transferor. With restriction on transfer, each NGO would now be responsible and accountable for utilisation of the

foreign contribution received by it from donors for the particular purpose for which it is registered or granted prior permission by Central Government.

17. It is further submitted that the provision of transfer under erstwhile section 7 allowed even the transferee to further transfer it to another association and that transferee could transfer it even further. This would potentially allow endless chain of transfers and create a layered trail of money, thus making it difficult to trace the flow & utilization of foreign contribution. This creates serious vulnerability for misuse and diversion of foreign contribution.

18. It is submitted that the potential of successive multiple chain of transfer not only creates a layered trail of money but also leads to substantive portion of foreign contribution being utilised as administrative expenditure as each recipient could potentially claim its own allowance for administrative expenditure that was permitted upto fifty per cent of total foreign contribution received. It has now been reduced to twenty per cent of the total foreign contribution received. The unamended provisions obviously leave much lesser amount of resources for the core activities of the NGO for the direct benefit of society as envisaged under the Act, in case multiple transfers are allowed as each transfer would entail additional 20% administrative expenditure.

19. That it is significant that the Act is a sovereignty and integrity legislation where the overriding purpose is to ensure that foreign money does not dominate public life as well as political and social discourse in India. This becomes even more imperative in view of the fact that some foreign powers and foreign state and non-state actors continue to take up activities that amount to interference in the internal polity of the country with ulterior designs. The restrictions on transfer aim to prevent and counter such acts of ulterior motives. Therefore, for effective monitoring and for ensuring the accountability of the recipient association, the transfer of foreign contribution has been prohibited. It is expected that NGOs would grow on the strength of their own genuine work undertaken for fulfilling specific needs of society.

Insertion of a new sub-section (1A) in section 12 of the FCRA, 2010 for giving details of "FCRA Account" as required specified in section 17

20. It is submitted that the sub-section (1A) of section 12 provides that every person who makes an application for grant of certificate or giving prior permission under sub-section (1) shall be required to open "FCRA Account" in the manner specified in section 17 and mention details of such account in his application. This is an amendment aimed to bring compatibility with other provision.

Insertion of a new section 12A to require Aadhaar Number, etc. as identification document

21. It is submitted that section 12A empowers the Central Government to obtain Aadhaar Number issued under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 or a copy of the Passport or Overseas Citizen of India Card, in case of a foreigner. The Hon'ble Supreme Court of India has held in the matter of ***K.S. Puttaswamy vs. Union of India*** **supra**, that any intrusion into the privacy of a person has to be backed by a law and for such a law to be valid it has to pass the test of legitimate aim which it should serve and also proportionality. The Aadhaar numbers of the office bearers, key functionaries and members would facilitate proper identification of person and associations with which the persons are connected for facilitating monitoring of activities of associations which should not be detrimental to the national interest and hence the restrictions are reasonable and proportionate. Therefore, the amendment is just, reasonable and proportional keeping in view the object of the Act. It is submitted that provision of sub-clause (i) of clause (a) of sub-section (4) of section 12 already mandated that the person/NGO must not be "fictitious or benami". The existing law itself mandates that benami or fictitious activities are to be prevented under the FCRA, 2010. Hence in order to fulfil that mandate proper identity of functionaries of FCRA NGOs is essential. Hence the need for Aadhaar number.

Amendment to section 17(1) for receipt of foreign contribution in designated "FCRA Account" in State Bank of India (SBI)

22. It is submitted that the amended section 17(1) of the Act *inter alia* provides that every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as 'FCRA Account' by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in a branch of the State Bank of India at New Delhi specified by the Central Government. The proviso to section 17(1) also provides that such person may also open another FCRA Account in any of the Scheduled Bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his FCRA Account in the specified branch of State Bank of India at New Delhi. Accordingly, the Central Government has notified the State Bank of India (SBI), New Delhi Main Branch (NDMB), 11, Sansad Marg, New Delhi-110001 as the branch for the purpose section 17 vide S.O. 3479 (E), dated 7th October, 2020. A copy of the notification dated 7th October, 2020 is attached herewith and marked as **ANNEXURE R - 3**.

23. It is submitted that as per mandate of the Foreign Contribution (Regulation) Amendment Act, 2020, the Respondent No. 1 issued Public Notice No. II/21022/23(35)/2019-FCRA-III, dated 13th October, 2020 providing for procedure and operation of the designated "FCRA Account" as provided under amended section 17(1) of the FCRA, 2010. The Public Notice also allowed FCRA registered associations and associations holding FCRA prior permissions to receive foreign contribution in their existing FCRA account till 31st March, 2021. The Respondent No. 1 also informed all FCRA registered associations through SMS and e-mail on their registered mobile number and e-mail addresses about the Public Notice dated 13th October, 2020 for opening and operating FCRA Account in SBI, NDMB. A copy of the Public Notice dated 13th October, 2020 is attached herewith and marked as **ANNEXURE R - 4**.

24. It is submitted that the time allowed by the Public Notice dated 13th October, 2020 for FCRA registered associations and associations holding FCRA prior permissions to receive foreign contribution in their existing FCRA account till 31st March, 2021 was further extended upto 30th June, 2021 vide Public Notice No. II/21022/36(58)/2021-FCRA-III, dated 18th May, 2021. A copy of the Public Notice dated 18th May, 2021 is attached herewith and marked as **ANNEXURE R - 5**.

25. That in view of the amendments in the Foreign Contribution (Regulation) Amendment Act, 2020, The Foreign Contribution (Regulation) Rules, 2011 (henceforth FCRR) along with statutory forms were also amended *vide* GSR 695(E), dated 10th November, 2020. A copy of the notification dated 10th November, 2020 is attached herewith and marked as **ANNEXURE R - 6**.

26. That the Respondent No. 3 issued Standard Operating Procedure (SOP) to open the "FCRA Account" as provided under amended section 17(1) of the Foreign Contribution Regulation Act, 2010 for ensuring hassle-free opening and operation of "FCRA Account". A copy of the SOP is attached herewith and marked as **ANNEXURE R - 7**.

27. It is a settled law that individual hardship cannot be the basis for granting relief in matters of policy. Reliance is placed on ***Laxmi Khandsari v. State of U.P.*** **(1981) 2 SCC 600** and ***All India Council for Technical Education v. Surinder Kumar Dhawan,*** **(2009) 11 SCC 726** wherein Hon'ble Supreme Court has held that in case of individual hardships court must refrain from interfering with policy matters.

28. The Foreign Contribution (Regulation) Act, 2010 mandates MHA to regulate the receipt and utilisation of foreign contribution in the country. Regulation of this receipt and utilisation of foreign contribution involves multiple steps including audit, inspection and filing of annual return and monitoring of fund flow. Hence a systematic monitoring of the FCRA Bank account is an essential part of this regulation. It is submitted that presently there are about 22,600 NGOs holding registration or prior permission for specific project/programme as provided under

sections 11 and 12 of the Act. As per the erstwhile section 17 of the Act, all these NGOs could receive foreign contribution in an exclusive bank account of their choice in any bank in India. As these FCRA accounts were opened in hundreds of branches spread across the country, massive difficulty was being experienced in monitoring of inflow & outflow of foreign contribution from these accounts and also during audit process. It is submitted that though the details of inward remittances and their further utilization are disclosed by the NGOs in the Annual Return which can be filed within nine months after the end of each Financial Year, yet inflow and outflow details at a particular point of time, association-wise as well as cumulatively for all the organizations could not be gathered and monitored due to scattered distribution of these FCRA accounts across the country.

29. In view of above, section 17 of the Act was amended and vide Notification issued under S.O. 3479, dated 7th October, 2020 it has been mandated that all such organizations would open an "FCRA Account" in the State Bank of India, New Delhi Main Branch to receive foreign contribution from any "foreign source". This FCRA Account (designated FCRA Account) would serve as the first point of entry of any foreign contribution in India from any foreign source. However, considering the convenience of FCRA NGOs, they were also given the choice of opening another FCRA Account in any bank branch of their choice. In addition they were further allowed by the amended provision to open as many FCRA utilisaton bank accounts as they wish in any bank branches of their choice.

LEGAL SUBMISSIONS – CONSTITUIONAL ANALYSIS

Legislative policy of strict controls

30. It is submitted that further, the assertion of the Petitioners with regard to the usefulness of the law or the requirement of foreign contributions to the organisations of the Petitioner is misconceived and impinges upon the Parliamentary wisdom and legislative policy of the Respondent. It is submitted that the object that the law seeks

to achieve and the activities that it seeks to curb, exists in the country and merely because the conditions of compliance with the law are onerous, does not bring to the fore any ground of unconstitutionality. It is submitted that that the object that the law seeks to achieve and the activities that it seeks to curb also have become more sophisticated with the advent of time. It is submitted that the questions as to the needs or the requirement of a law are taken on a variety of factors which are deeply embedded in the body politic of the country. It is submitted that such questions, on which some scholars may have divergent views, are not relevant considerations for exercising judicial review under Article 13 of the Constitution of India.

31. It is submitted that the Foreign Contribution (Regulation) Act, 1976 (49 of 1976) and its successor, i.e., The Foreign Contribution (Regulation) Act, 2010 were enacted with a view to ensure that foreign contribution does not adversely impinge upon the functioning of Parliamentary institutions, political associations and academic and other voluntary organizations as well as individuals in India. The Foreign Contribution (Regulation) Act, 2010 (hereinafter referred to as "the Act") improved upon the provisions of previous Act of 1976 in regulating the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies. The legislation has also prohibited acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. The Preamble of the 1976 Act read as under :

> *"An Act to regulate the acceptance and utilisation of foreign contribution or* ***foreign hospitality by certain persons or associations, with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic****, and for matters connected therewith or incidental thereto."*

32. It is submitted that over the course of time, numerous amendments were made to the 1976 Act in order to effectuate such orders a purpose. It is submitted that one

such change was brought about in 1985 through an amendment, the objects and purpose of the said amendment are as under :

> *"The Foreign Contribution (Regulation) Act, 1976, seeks to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain categories of persons or associations. To remove certain inadequacies and practical difficulties in the administration of the Act, a Bill to amend the Act was introduced in the Rajya Sabha in May 1984. The Bill was passed by the Rajya Sabha with certain amendments. But it could not be passed by the Lok Sabha before it adjourned at the end of its Monsoon Session and the Bill has now lapsed. As it was considered necessary to give effect to the provisions of the Bill as passed by the Rajya Sabha urgently, the Foreign Contribution (Regulation) Amendment Ordinance, 1984, was promulgated by the President on the 20th October, 1984. The said Ordinance, inter alia, made the following amendments in the Act, namely:-*
>
> > *(i) The definition of "foreign contribution", as contained in the Act, included only the donation, delivery or transfer made by any foreign source. It did not include donation or contribution received by an organisation from another organisation from out of foreign contribution received by the latter organisation. The definition was enlarged to include such contributions also for the purpose of tracing the utilisation of foreign contribution down the line.*
> >
> > *(ii) The definition of "political party", as contained in the Act, did not include political parties in the State of Jammu and Kashmir and political parties which are not covered by the Election Symbols (Reservation and Allotment) Order, 1968. The Ordinance amended this definition to include such political parties also.*
> >
> > *(iii) Section 6(1) of the Act provided that every association having a definite cultural, economic, educational, religious or social programme, may receive foreign contribution, but was required to send intimation regarding such receipt to the Central Government within such time and in such manner to be prescribed by the rules made under the Act. It had been observed that a number of associations had not sent such intimation. In order to effectively monitor the receipt of foreign contribution, this sub-section was amended to provide that associations referred to therein shall accept foreign contribution only after they are registered with the Central Government specifically for the purpose and accept such contributions only through a specified branch of a bank. They would, however, be required to give, within such time and in such manner as may be prescribed, intimation to the Central Government as to the amount of foreign contribution received by*

them, the source from which and the manner in which such foreign contribution was received by them, etc. Where any registered association does not accept foreign contribution through the specified branch of a specified bank or does not submit intimations, etc., in time, the Central Government has been empowered to direct that such association shall not accept foreign contribution without the prior permission of the Central Government. A new sub-section (1-A) had also been included in this section to provide that an association not so registered with the Central Government shall obtain prior permission of the Central Government before accepting any foreign contribution and also give intimation to the Central Government as to the amount of contribution received by it.

(iv) The Act only enabled the Central Government to inspect the accounts of certain persons or associations. It did not provide for any power to audit the accounts of any organisation if it is considered necessary to do so. The Ordinance amended the Act by inserting a new Section 15-A, to take specific power to audit the accounts of certain persons, organisations or associations, if the prescribed returns are not furnished in time by such persons, organisations or associations or the returns so furnished by them are not in accordance with law or their scrutiny gives room for suspicion that the provisions of the Act have been contravened.

(v) A new Section 25-A had also been inserted in the Act to provide that where any person is convicted of an offence relating to the acceptance or utilisation of foreign contribution for a second time, he shall be prohibited from accepting any foreign contribution for a period of three years from the date of the second conviction.

2. The Bill seeks to replace the aforesaid Ordinance."

33. It is submitted that thereafter, in order replace the 1976 Act, a Bill titled the Foreign Contribution (Regulation) Bill, 2006 was drafted. The relevant objects and reasons behind the said Bill are as under :

"STATEMENT OF OBJECTS AND REASONS

The Foreign Contribution (Regulation) Act, 1976 was enacted to regulate the acceptance and utilisation of foreign contribution or hospitality with a view to ensuring that our parliamentary institutions, political associations, academic and other voluntary organisations as well as individuals working in important areas of national life may function in a manner consistent with the values of a sovereign democratic republic. The Act was amended in 1984 to

extend the provisions of the Act to cover second and subsequent recipients of foreign contribution and to the members of higher judiciary, besides introducing the system of grant of registration to the associations receiving foreign contribution.

2. Significant developments have taken place since 1984 such as change in internal security scenario, an increased influence of voluntary organisations, spread of use of communication and information technology, quantum jump in the amount of foreign contribution being received, and large scale growth in the number of registered organisations. This has necessitated large scale changes in the existing Act. Therefore, it has been thought appropriate to replace the present Act by a new legislation to regulate the acceptance, utilisation and accounting of foreign contribution and acceptance of foreign hospitality by a person or an association.

3. The Foreign Contribution (Regulation) Bill, 2006 provides, inter alia, to —

(i) consolidate the law to regulate, acceptance and utilisation of foreign contribution or foreign hospitality and prohibit the same for any activities detrimental to the national interests;

(ii) prohibit organisations of political nature, not being political parties from receiving foreign contribution;

(iii) bring associations engaged in production or broadcast of audio news or audio visual news or current affairs through any electronic mode under the purview of the Bill;

(iv) prohibit the use of foreign contribution for any speculative business;

(v) cap administrative expenses at fifty per cent. of the receipt of foreign contribution;

(vi) exclude foreign funds received from relatives living abroad;

(vii) make provision for intimating grounds for refusal of registration or prior permission under the Bill;

(viii) provide arrangement for sharing of information on receipt of foreign remittances by the concerned agencies to strengthen monitoring;

(ix) make registration to be valid for five years with a provision for renewal thereof, and also to provide for cancellation or suspension of registration;

(x) make provision for compounding of certain offences.

4. The Bill seeks to achieve the above objects."

34. It is submitted that the said Bill was referred to the Department-Related Parliamentary Standing Committee on Home Affairs. The said Committee published that One Hundred and Thirty Fourth Report on the Foreign Contribution (Regulation) Bill, 2006. A copy of the One Hundred and Thirty Fourth Report on the Foreign Contribution (Regulation) Bill, 2006 is attached herewith and marked as **ANNEXURE R - 8**.

35. It is submitted that thereafter, the Foreign Contribution (Regulation) Act, 2010 was enacted bringing about a new regime in order to match the pace of times. It is submitted that the objects and reasons behind the same are as under :

> *"**It has been noticed that some of the foreign countries were funding individuals, associations, political parties, candidates for elections, correspondents, columnists, editors, owners, printers or publishers of newspapers. They were also extending hospitality. The effects of such funding and hospitality were noticeable and to have some control over such funding and hospitality and to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that Parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic the Foreign Contribution (Regulation) Act, 1976 (49 of 1976) was enacted.***
> *Since its enactment in 1976 several deficiencies had been found and it was proposed to enact a fresh law on the subject by repealing the Act 49 of 1976. Accordingly the Foreign Contribution (Regulation) Bill was introduced in the Parliament."*

36. It is submitted that this Hon'ble Court in ***Indian Social Action Forum (INSAF) v Union of India*, 2020 SCC Online SC 310**, noted as under :

> *"**5.** It is imperative to refer to the statutory regime. The Foreign Contribution (Regulation) Act, 1976 (hereinafter referred to as 'the 1976 Act') was enacted to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain persons or associations with a view to ensure that parliamentary institutions, political associations, academic and other voluntary organisations as well as other individuals*

working in important areas of national life may function in a manner consistent with the values of a sovereign democratic republic and the matters connected therewith and incidental thereto. The background in which the 1976 Act was made has been succinctly stated by the High Court of Delhi in Association for Democratic Reforms v. Union of India, [3] *as follows:*

> *"It can be safely gathered that amidst a spate of subversive activities sponsored by the Foreign Powers to destabilize our nation, the Foreign Contribution (Regulation) Act, 1976 was enacted by the Parliament to serve as a shield in our legislative armoury, in conjunction with other laws like the Foreign Exchange Regulation Act, 1973, and insulate the sensitive areas of national life like - journalism, judiciary and politics from extraneous influences stemming from beyond our borders."*

6. *In view of several deficiencies in the 1976 Act, a fresh law in the shape of the Foreign Contribution (Regulation) Act, 2010 was made by repealing the 1976 Act. The introduction of the Act is as under:*

> *"It had been noticed that some of the foreign countries were funding individuals, associations, political parties, candidates for elections, correspondents, columnists, editors, owners, printers or publishers of newspapers. They were also extending hospitality. The effects of such funding and hospitality were quite noticeable and to have some control over such funding and hospitality and to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that Parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic the Foreign Contribution (Regulation) Act, 1976 (49 of 1976) was enacted."*

7. *The long title of the 2010 Act indicates that it is made to consolidate the law to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. Section 3 of the Act prohibits acceptance of foreign contribution by the following:*

(a) candidate for election;

(b) correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;

(c) Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government;

(d) member of any Legislature;

(e) political party or office-bearer thereof;
(f) organisation of a political nature as may be specified under sub-section (1) of section 5 by the Central Government;
(g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause
(r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000) or any other mode of mass communication;
(h) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (g).

37. It is submitted that thereafter, the amendments made in 2020 were brough about in order to ensure that the necessary object of the Act is achieved efficiently. It is submitted that the objects and reasons of the amendment in 2020 are quoted as under :

"The Foreign Contribution (Regulation) Act, 2010 was enacted to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.

2. The said Act has come into force on the 1st day of May, 2011 and has been amended twice. The first amendment was made by section 236 of the Finance Act, 2016 and the second amendment was made by section 220 of the Finance Act, 2018.

3. The annual inflow of foreign contribution has almost doubled between the years 2010 and 2019, but many recipients of foreign contribution have not utilised the same for the purpose for which they were registered or granted prior permission under the said Act. Many of them were also found wanting in ensuring basic statutory compliances such as submission of annual returns and maintenance of proper accounts. This has led to a situation where the Central Government had to cancel certificates of registration of more than 19,000 recipient organisations, including non-Governmental organisations, during the period between 2011 and 2019. The criminal investigations also had to be initiated against dozens of such non-Governmental organisations which indulged in outright misappropriation or mis-utilisation of foreign contribution.

4. Therefore, there is a need to streamline the provisions of the said Act by strengthening the compliance mechanism, enhancing transparency and accountability in the receipt and utilisation of foreign contribution worth thousands of crores of rupees every year and facilitating genuine non-Governmental organisations or associations who are working for the welfare of the society.

5. The Foreign Contribution (Regulation) Amendment Bill, 2020, inter alia, seeks to provide for—

(a) amendment of clause (c) of sub-section (1) of section 3 to include "public servant" also within its ambit, to provide that no foreign contribution shall be accepted by any public servant;

(b) amendment of section 7 to prohibit any transfer of foreign contribution to any association/person;

(c) amendment of sub-section (1) of section 8 to reduce the limit for defraying administrative expenses from existing "fifty per cent." to "twenty per cent.";

(d) insertion of a new section 12A empowering the Central Government to require Aadhaar number, etc., as identification document;

(e) insertion of a new section 14A enabling the Central Government to permit any person to surrender the certificate granted under the Act;

(f) amendment of section 17 to provide that every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" which shall be opened by him in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify and for other consequential matters relating thereto.

6. The Bill seeks to achieve the above objects."

38. At the outset it is submitted that the Act cannot be equated with any other general legislation. It was enacted with a clear objective to insulate the democratic polity and public institutions and individuals working in the national democratic space from the undue influence of foreign contribution or foreign hospitality received from any foreign source. Therefore, sovereignty and integrity of India including public order and public interest is an essential dimension of the Act since its inception.

39. Most recently, in this regard, this Hon'ble Court, in ***Rajeev Suri v. Union of India*, 2021 SCCOnline 7**, held as under :

> ***570. Before we part, we feel constrained to note that in the present case, the petitioners enthusiastically called upon us to venture into territories that are way beyond the contemplated powers of a constitutional court. We are compelled to wonder if we, in the absence of a legal mandate, can dictate the government to desist from spending money on one project and instead use it for something else, or if we can ask the government to run their offices only from areas decided by this Court, or if we can question the wisdom of the government in focusing on a particular direction of development. We are equally compelled to wonder if we can jump to put a full stop on execution of policy matters in the first instance without a demonstration of irreparable loss or urgent necessity, or if we can guide the government on moral or ethical matters without any legal basis. In light of the settled law, we should be loath to venture into these areas. We need to say this because in recent past, the route of public/social interest litigation is being increasingly invoked to call upon the Court to examine pure concerns of policy and sorts of generalised grievances against the system. No doubt, the Courts are repositories of immense public trust and the fact that some public interest actions have generated commendable results is noteworthy, but it is equally important to realise that Courts operate within the boundaries defined by the Constitution. We cannot be called upon to govern. For, we have no wherewithal or prowess and expertise in that regard.***
>
> ***571. The constitutionally envisaged system of "checks and balances" has been completely misconstrued and misapplied in this case. The principle of "checks and balances" posits two concepts - "check" and "balance". Whereas the former finds a manifestation in the concept of judicial review, the latter is derived from the well enshrined principle of separation of powers [As restated in Dr. Ashwani Kumar v. Union of India and Anr., 2019 SCC OnLine SC 1144- paras 8 to 19, 22 to 37, 43 and 44]. The political issues including regarding development policies of the Government of the day must be debated in the Parliament, to which it is accountable. The role of Court is limited to examining the constitutionality including legality of the policy and Government actions. The right to development, as discussed above, is a basic human right and no organ of the State is***

> ***expected to become an impediment in the process of development as long as the government proceeds in accordance with law."***

40. It is submitted that it may be relevant to note the dictum from the American Supreme Court, during what is now termed as the *Lochner* era, wherein the said constitutional court regularly held state and federal statutes regulating economic activity unconstitutionally impaired the substantive due process rights of citizens by interfering with their liberty of contract, citing ***Lochner v. New York*, 198 U.S. 45, 56–58, 25 S.Ct. 539, 49 L.Ed. 937**. The judges who championed this are also known as the "Four Horsemen" consisting of Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter. As per a "standard estimate" it is said that the Court invalidated 197 state and federal statutes pursuant to the Due Process Clause between 1899 and 1937)

41. In ***New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932)**, for example, the Court invalidated a state law prohibiting a person from manufacturing ice without a permit. The majority wrote as under :

> *"a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment."*

The Court further observed that

> *"nothing is more clearly settled than that it is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations."*

42. In Liebmann *supra*, the minority opinion of J. Brandies, is extremely relevant. The Learned judge noted as under :

> *"**The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error.** In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social*

> *and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise.* ***There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.***
> ***To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country****. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."*

43. Fundamentally recalibrating the balance between private liberty and public power in ***West Coast Hotel v. Parrish,*** **300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937)**, the Court held that the liberty protected by the Fourteenth Amendment was not an unfettered freedom of contract, but one bound up in the social contract:

> *"The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."*

44. It is submitted that extending its holding the next year in ***United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)**, the Court wrote that "*regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators*".

45. It is submitted that J. Frankfurter in ***Am. Fed'n of Labor, Ariz State Fed'n of Labor v. Am. Sash & Door Co*, 335 U.S. 538, 553–57, 69 S. Ct. 260, 265–67, 93 L. Ed. 222 (1949)**, held as under:

> *"**Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error.[10] That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people.** If the proponents of union-security agreements have confidence in the arguments addressed to the Court in their 'economic brief,' they should address those arguments to the electorate. Its endorsement would be a vindication that the mandate of this Court could never give. That such vindication *554 is not a vain hope has been **266 recently demonstrated by the voters of Maine, Massachusetts, and New Mexico.[11] And although several States in addition to those at bar now have such laws,[12] the legislatures of as many other States have, sometimes repeatedly, rejected them.[13] What one State can refuse to do, another can undo.*
>
> ***But there is reason for judicial restraint in matters of policy deeper than the value of experiment: it is fonded on a recognition of the gulf of difference between sustaining and nullifying legislation. This difference is theoretical in that the function of legislating is for legislatures who have also taken oaths to support the Constitution, while the function of courts, when legislation is challenged, is merely to make sure that the legislature has exercised an allowable judgment, and not to exercise their own judgment, whether a policy is within or without 'the vague***

contours' of due process. *Theory is reinforced by the notorious fact that lawyers predominate in American legislatures.[14] In practice also the difference is wide. In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body'[15] and 'independent of the nation itself.'[16] The Court is not saved from being oligarchic *556 because it professes **267 to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace.[17] Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the 'press conference.' But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself.*

*Our right to pass on the validity of legislation is now too much part of our constitutional system to be brought *557 into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court should be indifferent to public temper and popular wishes. Mr. Dooley's 'th' Supreme Coort follows th' iliction returns' expressed the wit of cynicism, not the demand of principle. A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable.* ***Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of***

feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."

46. The Lochner doctrine was finally discarded in ***Ferguson v. Skrupa*, 372 U.S. 726, 728–33, 83 S. Ct. 1028, 1030–32, 10 L. Ed. 2d 93 (1963)**, where the American Supreme Court held as under:

> *"Both the District Court in the present case and the Pennsylvania court in Stone adopted the philosophy of Adams v. Tanner, and cases like it, that it is the province of courts to draw on their own views as to the morality, *729 legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process.* ***Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.*** *In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), outlawing 'yellow dog' contracts, Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), setting minimum wages for women, Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), and fixing the weight of loaves of bread, Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924).* ***This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis.*** *Dissenting from the Court's invalidating a state statute which regulated the resale price of **1031 theatre and other tickets, Mr. Justice Holmes said,*
> *'I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.'[4]*

*730 And in an earlier case he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good.'[5]

The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. **We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.** As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.'[6] **Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'[7] It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do *731 not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'[8]**

In the face of our abandonment of the use of the 'vague contours'[9] of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on Adams v. Tanner is as mistaken as would be adherence to Adkins v. Children's Hospital, overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937). Not only has the philosophy of Adams been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having 'clearly undermined' Adams.[10] We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. **We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,'[11] and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'[12]** Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.[13] The Kansas debt adjusting

> *statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.[14]* ***Nor is the statute's exception of lawyers a denial of equal protection of the laws to nonlawyers. Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution.[15] The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act—advice which a nonlawyer cannot lawfully give him. If the State of Kansas wants to limit debt adjusting to lawyers,[16] the Equal Protection Clause does not forbid it. We also find no merit in the contention that the Fourteenth Amendment is violated by the failure of the Kansas statute's title to be as specific as appellee thinks it ought to be under the Kansas Constitution****."*

47. Therefore, the doctrine that prevailed in *Lochner* that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. The American Supreme Court has returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. The said aspect of legislative policy and the contours of judicial review have been dealt with in the following cases in India. In ***Union of India v. Indian Radiological & Imaging Assn.*****, (2018) 5 SCC 773**, this Hon'ble Court held as under :

> *"16. Parliament which has the unquestioned authority and legislative competence to frame the law considered it necessary to empower the Central Government to frame rules to govern the qualifications of persons employed in genetic counselling centres, laboratories and clinics.* ***The wisdom of the legislature in adopting the policy cannot be substituted by the court in the exercise of the power of judicial review. Prima facie the judgment of the Delhi High Court has trenched upon an area of legislative policy****. Judicial review cannot extend to reappreciating the efficacy of a legislative policy adopted in a law which has been enacted by the competent legislature. Both the Indian Medical Council Act, 1956 and the PCPNDT Act are*

enacted by Parliament. Parliament has the legislative competence to do so. The Training Rules, 2014 were made by the Central Government in exercise of the power conferred by Parliament. Prima facie, the Rules are neither ultra vires the parent legislation nor do they suffer from manifest arbitrariness."

48. It is submitted that this Hon'ble Court in ***State of H.P. v. Satpal Saini*, (2017) 11 SCC 42**, held as under :

"6. The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court under Article 226 (or this Court under Article 32) on the ground that the law lacks in legislative competence or has been enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. ***Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy.*** *The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law — as did the Himachal Pradesh High Court — is a plain usurpation of a power entrusted to another arm of the State. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review under Article 226 by issuing the above directions to the State Legislature to amend the law. The Government owes a collective responsibility to the State Legislature. The State Legislature is comprised of elected representatives. The law enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we*

will briefly recapitulate the principles which emerge from the precedent on the subject."

49. It is submitted that this Hon'ble Court in ***Ravindra Ramchandra Waghmare v. Indore Municipal Corpn.*, (2017) 1 SCC 667**, held as under :

*"46. In Union of India v. Deoki Nandan Aggarwal, this Court has laid down that courts cannot supply omissions to a statute and a court cannot invoke the principle of affirmative action to avoid discrimination so as to modify the **legislative policy**. In Padma Sundara Rao v. State of T.N., this Court held when casus omissus cannot be supplied by the Court. Reliance has also been placed upon the decisions in Jones v. Wrotham Park Settled Estates, Inco Europe Ltd. v. First Choice Distribution and Singareni Collieries Co. Ltd. v. Vemuganti Ramakrishan Rao which are the cases in which the Court has supplied omissions, the same is based upon the principle of true intent of the legislature and in order to give effect to the said intent, the courts can supply words which appear to be accidentally omitted or if the literal construction would in fact do violence to the legislative objective. For that, three conditions must be satisfied before this course can be adopted:*

(i) that the intended purpose of the statute is not being achieved by literal construction of the statute;

(ii) that by inadvertence the draftsmen and Parliament failed to give effect to that purpose in the provision; and

(iii) the substance of the provision Parliament would have made an (sic can) be known with precision, though not in exact language, had the error in the Bill been noticed.

There is no dispute with the principles laid down by this Court in the aforesaid dictums. However the language of Section 305 is plain, simple and clear. In our opinion there is no defect in the phraseology used. The exigencies when the notice can be issued including the vesting part and deeming fiction are very clear. In view of aforesaid discussion, we do not find any deficiency in the phraseology used in Section 305 of the 1956 Act, as such we do not venture to add, subtract, amend or by construction make up the deficiencies. We find that there is no omission or lacunae, much less casus omissus as submitted, in the provisions contained in Section 305 of the 1956 Act."

50. It is submitted that this Hon'ble Court in ***State of H.P. v. H.P. Nizi Vyavsayik Prishikshan Kendra Sangh*, (2011) 6 SCC 597**, held as under :

> *"21. The High Court has lost sight of the fact that education is a dynamic system and courses/subjects have to keep changing with regard to market demand, employability potential, availability of infrastructure, etc. No institute can have a legitimate right or expectation to run a particular course forever and it is the pervasive power and authority vested in the Government to frame policy and guidelines for progressive and legitimate growth of the society and create balances in the arena inclusive of imparting technical education from time to time. Inasmuch as the institutions found fit were allowed to run other courses except the three mentioned above, the doctrine of legitimate expectation was not disregarded by the State. Inasmuch as ultimately it is the responsibility of the State to provide good education, training and employment, it is best suited to frame a policy or either modify/alter a decision depending on the circumstance based on relevant and acceptable materials.* ***The courts do not substitute their views in the decision of the State Government with regard to policy matters****. In fact, the court must refuse to sit as appellate authority or super legislature to weigh the wisdom of legislation or policy decision of the Government unless it runs counter to the mandate of the Constitution."*

51. It is submitted that the question of the need to frame a law with regard with regard to the present subject matter within a country is solely within the domain of Parliament elected by the people. It is submitted that the question of policy efficacy or the requirement of the law is based on factors which clearly fall outside the judicial realm. It is submitted that such decision are based on factors which not justiciable and merely because as per the limited understanding of the Petitioners, the present amendment pose an onerous requirement, the same does not become a ground for unconstitutionality. The question as to the requirement or the need of a law in the nature of FCRA and the impugned amendments, is inherently a political question and cannot be adjudicated before the Hon'ble Courts. It is submitted that Hon'ble Courts in jurisdictions across the world have denied adjudicating upon such political questions.

52. It is submitted that this Hon'ble Court, in a recent judgment in ***Dr. Ashwani Kumar v. Union of India and Anr.*, 2019 SCC OnLine SC 1144**, in the context of a similar prayer, has held as under :

"26. Legislating or law-making involves a choice to prioritise certain political, moral and social values over the others from a wide range of choices that exist before the legislature. It is a balancing and integrating exercise to give expression/meaning to diverse and alternative values and blend it in a manner that it is representative of several viewpoints so that it garners support from other elected representatives to pass institutional muster and acceptance. Legislation, in the form of an enactment or laws, lays down broad and general principles. It is the source of law which the judges are called upon to apply. Judges, when they apply the law, are constrained by the rules of language and by well identified background presumptions as to the manner in which the legislature intended the law to be read. Application of law by the judges is not synonymous with the enactment of law by the legislature. Judges have the power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject matter of interpretation or challenge before the courts.

27. Legislature, as an institution and a wing of the Government, is a microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity and accountability. Legislature uses in-built procedures carefully designed and adopted to bring a plenitude of representations and resources as they have access to information, skills, expertise and knowledge of the people working within the institution and outside in the form of executive.[31] Process and method of legislation and judicial adjudication are entirely distinct. Judicial adjudication involves applying rules of interpretation and law of precedents and notwithstanding deep understanding, knowledge and wisdom of an individual judge or the bench, it cannot be equated with law making in a democratic society by legislators given their wider and broader diverse polity. The Constitution states that legislature is supreme and has a final say in matters of legislation when it reflects on alternatives and choices with inputs from different quarters, with a check in the form of democratic accountability and a further check by the courts which exercise the power of judicial review. It is not for the judges to seek to develop new all-embracing principles of law in a way that reflects the stance and opinion of the individual judges when the society/legislators as a whole are unclear and substantially

divided on the relevant issues[32]. In Bhim Singh v. Union of India[33], while observing that the Constitution does not strictly prohibit overlapping of functions as this is inevitable in the modern parliamentary democracy, the Constitution prohibits exercise of functions of another branch which results in wresting away of the regime of constitutional accountability. Only when accountability is preserved, there will be no violation of principle of separation of powers. Constitution not only requires and mandates that there should be right decisions that govern us, but equal care has to be taken that the right decisions are made by the right body and the institution. This is what gives legitimacy, be it a legislation, a policy decision or a court adjudication.

28. It is sometimes contended with force that unpopular and difficult decisions are more easily grasped and taken by the judges rather than by the other two wings. Indeed, such suggestions were indirectly made. This reasoning is predicated on the belief that the judges are not directly accountable to the electorate and, therefore, enjoy the relative freedom from questions of the moment, which enables them to take a detached, fair and just view.[34] The position that judges are not elected and accountable is correct, but this would not justify an order by a court in the nature of judicial legislation for it will run afoul of the constitutional supremacy and invalidate and subvert the democratic process by which legislations are enacted. For the reasons stated above, this reasoning is constitutionally unacceptable and untenable."

53. It is submitted that one of the earliest pronouncements on the subject came from this Court in ***Rustom Cavasjee Cooper* v. *Union of India*** **[(1970) 1 SCC 248]** (commonly known as "*Bank Nationalisation case*") wherein this Court held that it is not the forum where conflicting policy claims may be debated; it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories. The Court observed as under:

"*63.* ***This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural sector, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration,***

> ***whether the Government administration will eschew the profit-motive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to consider the relative merits of the different political theories or economic policies.*** *Parliament has under List I Entry 45 the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto: it has the power to legislate for acquiring the undertaking of the named banks under List III Entry 42. Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws, results could be achieved which it is the object of the Act to achieve, is, in our judgment, not relevant in considering whether the Act amounts to abuse of legislative power.* ***This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organisation serving large sectors of industry****."*

54. In ***R.K. Garg*** **[(1981) 4 SCC 675]** this Hon'ble Court even observed that greater judicial deference must be shown towards a law relating to economic activities due to the complexity of economic problems and their fulfilment through a methodology of trial and error. As noted above, it was also clarified that the fact that an economic legislation may be troubled by crudities, inequities, uncertainties or the possibility of abuse cannot be the basis for striking it down. The following observations which refer to a couple of American Supreme Court decisions are a limpid enunciation on the subject:

> *"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been*

said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [1 L Ed 2d 1485 : 354 US 457 (1957)] where Frankfurter, J. said in his inimitable style:

> *'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility.* ***The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events—self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.'"***

55. Similarly in ***Premium Granites*** **v.** ***State of T.N.*** **[(1994) 2 SCC 691]** this Hon'ble Court clarified that it is the validity of a law and not its *efficacy* that can be challenged. This Hon'ble court, noted as under :

> *"54.* ***It is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right****."*

56. In ***Delhi Science Forum*** **v.** ***Union of India*** **[(1996) 2 SCC 405]** a Bench of three learned Judges of this Court, while rejecting a claim against the opening up of the telecom sector reiterated that the forum for debate and discourse over the merits

and demerits of a policy is Parliament. It restated that the services of this Hon'ble Court are not sought till the legality of the policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions. It held as under :

> *"7. **What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in court of law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies**."*

57. In ***BALCO Employees' Union* v. *Union of India*** **[(2002) 2 SCC 333]** this Court further pointed out that the Court ought to stay away from judicial review of efficacy of policy matters, not only because the same is beyond its jurisdiction, but also because it lacks the necessary expertise required for such a task. Affirming the previous views of this Court, the Court observed that while dealing with economic legislations, the Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all. The Court went on to emphasise that unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In ***BALCO* supra**, this Hon'ble Court took notice of the judgment in ***Peerless General Finance and Investment Co. Ltd.* v. *RBI*** **[(1992) 2 SCC 343]** and observed that some matters like price fixation are based on such uncertainties and dynamics that even experts face difficulty in making correct projections, making it all the more necessary for this Hon'ble Court to exercise non-interference:

> *"31. **The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts**."*

58. On an environmental issue, this Hon'ble Court in ***State of M.P.* v. *Narmada Bachao Andolan*** **[(2011) 7 SCC 639]**, held that the judiciary cannot engage in an exercise of comparative analysis over the fairness, logical or scientific basis, or wisdom of a policy. It specifically held as under:

> *"36. **The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power."***

59. It is submitted that therefore, merely because as a matter of policy the Petitioners feel that the impugned amendments may affect their operations to a limited extent, the same would not be a ground for unconstitutionality of the provision.

Purported breach of Article 14

60. It is submitted that the assertions of the Petitioners with regard to the breach of Article 14 are misconceived. It is respectfully submitted that equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the legislature no longer

has the power of distinguishing and classifying persons or things for the purposes of legislation. It is humbly submitted that the only requirement prior to making a particular classification or a special legislation is that the legislative classification must not be based on any arbitrary classification and should be based on an intelligible differentia having a reasonable relation to the object which the legislature seeks to attain. It is submitted that if the classification on which the legislation is founded fulfils the above said requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the subject matter of legislation cannot be regarded as a denial of the equal protection of the law.

61. It is submitted that even after the authoritative pronouncement in ***Shayara Bano v. Union of India*** reported in **2017 (9) SCC 1** (Para 101), the "*twin test of classification*", would be applicable in matters of classification. It is submitted that the present is a case of classification between Indian citizens and foreigners which cannot be doubted on any count. It is well-established that Article 14 forbids class legislation but does not forbid classification. Permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the statute in question. It is submitted that there exists a clear intelligible differentia between local contributions to the sector and foreign contributions. It is submitted that the jurisprudence laid down in the initial years by this Hon'ble Court, still holds the field on the subject.

62. It is submitted that the presence of "*twin test of classification*" would give content to the otherwise untrammelled expanse of "*manifest arbitrariness*". It is submitted that the "*twin test of classification*" was laid down by bench of higher combinations than ***Shayara Bano*** *supra*. The "*twin test of classification*" states that Article 14 forbids class legislation but does not forbid classification. It is submitted that it postulates that permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from

others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the statute in question. It is submitted that the jurisprudence laid down in the initial years by this Hon'ble Court, still holds the field on the subject and the 'doctrine of manifest arbitrariness' cannot exist outside the law settled by numerous constitution benches of this Hon'ble Court. The following is a brief table on the subject :

SR. NO.	NAME OF THE CASE	IMPORTANT OBSERVATIONS
1.	***Chiranjit Lal Chowdhuri v. Union of India*, 1950 SCR 869** **[5 judges]**	J. Fazl Ali – Para 8 – 11, 20 J. Sashtri – Para 29-31 J. Mukherjea – Para 63-67
2.	***State of Bombay v. F.N. Balsara*, 1951 SCR 682** **[5 judges]**	J. Fazl Ali – Para 37-42, 47, 62 All judges agreed with J. Fazl Ali.
3.	***Kathi Raning Rawat v. State of Saurashtra*, 1952 SCR 435** **[7 judges]**	J. Patanajli Sastri – Para 7 J. Fazl Ali – Para 19 J. Mukherjea – Para 32-36 J. S.R. Das – Para 44-47
4.	***Gurbachan Singh v. State of Bombay*, 1952 SCR 737** **[5 judges]**	J. B.K. Mukherjea – Para 3-4,5,6, 8
5.	***State of Punjab v. Ajaib Singh*, 1953 SCR 254** **[5 judges]**	J. B.K. Mukherjea, Para 22
6.	***Habeeb Mohamed v. State of Hyderabad*, 1953 SCR 661** **[5 judges]**	J. B.K. Mukherjea – Para 4-6
7.	***Kedar Nath Bajoria v. State of W.B.*, 1954 SCR 30** **[5 judges]**	J. Patanjali Shastri - Para 7 - 17
8.	***Harman Singh v. Regional Transport Authority Calcutta Region*, 1954 SCR 371** **[5 judges]**	J. M.C. Mahajan – Para 7
9.	***Baburao Shantaram More v. Bombay Housing Board*, 1954 SCR 572** **[5 judges]**	J. S.R. Das – Para 6
10.	***Sakhawant Ali v. State of Orissa*, (1955) 1 SCR 1004** **[6 judges]**	J. N.H. Bhagwati – Para 9 - 10
11.	***Budhan Choudhry v. State of Bihar*, (1955) 1 SCR 1045**	J. S.R. Das – Para 5, 7 and 9

SR. NO.	NAME OF THE CASE	IMPORTANT OBSERVATIONS
	[7 judges]	
12.	***D.P. Joshi v. State of M.B.,*** **(1955) 1 SCR 1215 [5 judges]**	J. V. Venkatarama – Para 14 - 16
13.	***Hans Muller of Nurenburg v. Superintendent, Presidency Jail,*** **(1955) 1 SCR 1284 [4 judges]**	J. Vivian Bose – Para 13, 23 and 24
14.	***Kishan Singh v. Th. Ther Singh,*** **(1955) 2 SCR 531 [5 judges]**	J. T.L. Vekatarama Aiyar – Para 3-5
15.	***P. Balakotaiah v. Union of India,*** **1958 SCR 1052**	J. T.R. Venkatarama Aiyar – Para 12 (IIa)
16.	***Ram Krishna Dalmia v. Justice S.R. Tendolkar*****, 1959 SCR 279**	J. S.R. Das – Para 11-17
17.	***Express Newspaper (P) Ltd. v. Union of India,*** **1959 SCR 12**	J. N.H. Bhagwati - Para 77-84
18.	***Khandige Sham Bhat v. Agrl. ITO,*** **(1963) 3 SCR 809**	J. K. Subba Rao – Para 7-9
19.	***Raja Bira Kishore Deb v. State of Orissa,*** **(1964) 7 SCR 32**	J. Wanchoo – Para 5

63. It is submitted that while the said arguments may be relevant for the policy purpose, the same cannot be a matter of constitutionality challenge. It is submitted that the submissions of the Petitioners on the classification not be clear on based on unintelligible factors is misconceived. It is settled law that a 'mathematical nicety' or 'perfect equality' are not required as per Article 14. Further, the constitutionality of a statute cannot be questioned on the basis of fortuitous circumstances arising out of peculiar situations. The Respondent seeks to rely on the following cases for the said purpose:

A. ***Kedar Nath Bajoria v. State of W.B.*****, 1954 SCR 30 [5JB – J. Patanjali Sastri]**

> *"**7.** Now it is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply all that*

is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all-embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose. The real issue, therefore, is whether having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and provisions as summarised above, the classification of the offences, for the trial of which the Special Court is set up and a special procedure is laid down, can be said to be unreasonable or arbitrary and therefore, violative of the equal protection clause.

...

9. *Mr Chatterjee argues that the offences listed in the schedule do not necessarily involve the accrual of any pecuniary gain to the offender or the acquisition of other property by him or any loss to any Government, and that the classification cannot, therefore, be said to be based on that consideration. Counsel referred in particular to the offences included in the fifth paragraph, namely, forgery, making and possessing counterfeit seals, falsification of accounts, etc., as instances in point. It may, however, be observed that Section 9(1), which makes it obligatory on the Special Court to impose on persons tried and convicted by it an additional compensatory fine of the kind mentioned above, indicates that only those offences, which, either by themselves or in combination with others mentioned in the schedule, are suspected to "have resulted in such pecuniary gain or other advantage and, therefore, to merit the compensatory fine, are to be allotted to a Special Court for trial. It is well known that acts which constitute the offences mentioned in para 5 are often done to facilitate the perpetration of the other offences specified in the schedule, and they may well have been included as ancillary offences.* ***Article 14 does not insist that legislative classification should be scientifically perfect or logically complete and we cannot accept the suggestion that the classification made in the Act is based on no intelligible principle and is, therefore, arbitrary.****"*

B. ***Ganga Ram v. Union of India,*** **(1970) 1 SCC 377 [6JB – J. I.D. Dua]**

*"**2.** The right of equality is guaranteed by Articles 14 to 16 of our Constitution. The petitioners rely on Articles 14 and 16(1). Article 14 is an*

injunction to both the legislative and the executive organs of the State and other subordinate authorities not to deny to any person equality before the law or the equal protection of the laws. Article 16 is only an instance of the general rule of equality laid in Article 14. Sub-article (1) of Article 16 guarantees to every citizen equality of opportunity in matters of public employment thereby serving to give effect to the equality before the law guaranteed by Article 14. The equality of opportunity in the matter of services undoubtedly takes within its fold all stages of service from initial appointment to its termination including promotion but it does not prohibit the prescription of reasonable rules for selection and promotion, applicable to all members of a classified group. ***Mere production of inequality is not enough to attract the constitutional inhibition because every classification is likely in some degree to produce some inequality. The State is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in services and the classification need not be scientifically perfect or logically complete.*** *In applying the wide language of Articles 14 and 16 to concrete cases a doctrinaire approach should be avoided and the* ***matter considered in a practical way,*** *of course, without whittling down the equality clauses. The classification, in order to be outside the vice of inequality, must, however, be founded on an intelligible differentia which on rational grounds distinguishes persons grouped together from those left out. The differences which warrant a classification must be real and substantial and must bear a just and reasonable relation to the object sought to be achieved. If this test is satisfied then the classification cannot be hit by the vice of inequality. It is in the background of this broad principle that the petitioners' grievance is to be considered."*

C. *Anant Mills Co. Ltd. v. State of Gujarat*, (1975) 2 SCC 175

*"**24.** Apart from the above, we are of the opinion that classification by treating decided cases as belonging to one category and pending cases as belonging to another category is reasonable and not per se offensive to Article 14.*

25. *It is well-established that Article 14 forbids class legislation but does not forbid classification. Permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the statute in question.* ***In permissible classification mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If there is equality and***

uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. *Taxation law is not an exception to this doctrine.* ***But, in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways*** *(see Ram Krishna Dalmia v. Justice S.R. Tendolkar [AIR 1958 SC 538 : 1959 SCR 279] and Khandige Sham Bhat v. Agricultural Income Tax Officer, Kasaragod [AIR 1963 SC 591 : (1963) 3 SCR 809 : (1963) 48 ITR 21]) Keeping the above principles in view, we find no violation of Article 14 in treating pending cases as a class different from decided cases. It cannot be disputed that so far as the pending cases covered by clause (i) are concerned, they have been all treated alike. ...."*

D. Mohan Kumar Singhania v. Union of India, **1992 Supp (1) SCC 594 [3JB – J. Ratnavel Pandian]**

*"**127.** We shall now bestow our judicious thought over this matter and carefully examine the rival contentions of the parties in the light of the guiding principles, lucidly laid down by this Court in a series of decisions, a few of which we have already referred to hereinbefore. The selections for IAS, IFS and IPS Group 'A' services and Group 'B' service are made by a combined competitive examination and viva voce test. There cannot be any dispute that each service is a distinct and separate cadre, having its separate field of operation, with different status, prospects, pay scales, the nature of duties, the responsibilities to the post and conditions of service etc. Therefore, once a candidate is selected and appointed to a particular cadre, he cannot be allowed to say that he is at par with the others on the ground that all of them appeared and were selected by a combined competitive examination and viva voce test and that the qualifications prescribed are comparable. In our considered view, the classification of the present case is not based on artificial inequalities but is hedged within the salient features and truly founded on substantial differences. Judged from this point of view, it seems to us impossible to accept the submission that the classification rests on an unreal and unreasonable basis and that it is arbitrary or absurd.*

130. *Article 14 declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The cherished principle underlying the above article is that there should be no discrimination between one person and another if as regards the subject matter of the legislation, their position is the same. (vide Chiranjit Lal Chowdhuri v. Union of India [1950 SCR 869 : AIR 1951 SC 41] or in other words its action must not be arbitrary, but must be based on some valid principle, which in itself must not be irrational or discriminatory (vide Kasturi Lal Lakshmi Reddy v. State of J&K [(1980) 4 SCC 1] . As ruled by this Court in Ameerunissa Begum v. Mahboob Begum [1953 SCR 404 : AIR 1953 SC 91] and Gopi Chand v. Delhi Administration [AIR 1959 SC 609 : 1959 Supp 2 SCR 87] that differential treatment does not per se constitute violation of Article 14 and it denies equal protection only when there is no rational or reasonable basis for the differentiation.* ***Thus Article 14 condemns discrimination and forbids class legislation but permits classification founded on intelligible differentia having a rational relationship with the object sought to be achieved by the Act/Rule/Regulation in question. The government is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in services and the classification need not scientifically be perfect or logically complete. As observed by this Court more than once, every classification is likely in some degree to produce some inequality.***"

***E. Venkateshwara Theatre v. State of A.P.*, (1993) 3 SCC 677 [2JB – S.C. Agrawal]**

"***20.*** *Article 14 enjoins the State not to deny to any person equality before the law or the equal protection of the laws. The phrase "equality before the law" contains the declaration of equality of the civil rights of all persons within the territories of India. It is a basic principle of republicanism. The phrase "equal protection of laws" is adopted from the Fourteenth Amendment to the U.S. Constitution. The right conferred by Article 14 postulates that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Since the State, in exercise of its governmental power, has, of necessity, to make laws operating differently on different groups of persons within its territory to attain particular ends in giving effect to its policies, it is recognised that the State must possess the power of distinguishing and classifying persons or things to be subjected to such laws. It is, however, required that the classification must satisfy two conditions, namely, (i) it is founded on an intelligible differentia which distinguishes those that are*

grouped together from others; and (ii) the differentia must have a rational relation to the object sought to be achieved by the Act. ***It is not the requirement that the classification should be scientifically perfect or logically complete. Classification would be justified if it is not palpably arbitrary****. (See : Re, Special Courts Bill, 1978[(1979) 1 SCC 380 : (1979) 2 SCR 476, 534-36] .) If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. (See : Khandige Sham Bhat v. Agricultural I.T.O. [(1963) 3 SCR 809, 817 : AIR 1963 SC 591 : (1963) 48 ITR 21])*

21. ***Since in the present case we are dealing with a taxation measure it is necessary to point out that in the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.*** *(See: East India Tobacco Co. v. State of A.P.[(1963) 1 SCR 404, 411 : AIR 1962 SC 1733 : (1962) 13 STC 529] , P.M. Ashwathanarayana Shetty v. State of Karnataka [1989 Supp (1) SCC 696 : 1988 Supp (3) SCR 155, 188] , Federation of Hotel & Restaurant Association of India v. Union of India [(1989) 3 SCC 634 : (1989) 2 SCR 918, 949] , Kerala Hotel & Restaurant Association v. State of Kerala [(1990) 2 SCC 502 : 1990 SCC (Tax) 309 : (1990) 1 SCR 516, 530] and Gannon Dunkerley and Co. v. State of Rajasthan[(1993) 1 SCC 364, 397] .)*

22. *Reference, in this context, may also be made to the decision of the U.S. Supreme Court in San Antonio Independent School District v. Rodriguez [411 US 1, 41 : 36 L Ed 2d 16 (1973)] wherein Justice Stewart, speaking for the majority has observed:*

"No scheme of taxation, whether the tax is imposed on property, income or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause."

23. ***Just as a difference in the treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i.e. differently placed, are treated similarly****.* ***In such a case failure on the part of the legislature to classify the persons who are dissimilar in separate categories and applying the same law, irrespective of the differences, brings about the same consequence as in a case where the law makes a***

distinction between persons who are similarly placed. A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law.

29. *In the instant case, we find that the legislature has prescribed different rates of tax by classifying theatres into different classes, namely, air-conditioned, air-cooled, ordinary (other than air-conditioned and air-cooled), permanent and semi-permanent and touring and temporary. The theatres have further been categorised on the basis of the type of the local area in which they are situate. It cannot, therefore, be said that there has been no attempt on the part of the legislature to classify the cinema theatres taking into consideration the differentiating circumstances for the purpose of imposition of tax. The grievance of the appellants is that the classification is not perfect. What they want is that there should have been further classification amongst the theatres falling in the same class on the basis of the location of the theatre in each local area. We do not think that such a contention is well founded.*

F. ***Ombalika Das v. Hulisa Shaw*, (2002) 4 SCC 539 [2JB – J. R.C. Lahoti]**

*"**11.*** ***It is well settled that classification for the purpose of legislation cannot be done with mathematical precision. The legislature enjoys considerable latitude while exercising its wisdom taking into consideration myriad circumstances, enriched by its experience and strengthened by people's will. So long as the classification can withstand the test of Article 14 of the Constitution, it cannot be questioned why one subject was included and the other left out and why one was given more benefit than the other****."*

G. ***Dharam Dutt v. Union of India*, (2004) 1 SCC 712 [2JB – J. R.C. Lahoti]**

*"**56.*** *Article 14 of the Constitution prohibits class legislation and not reasonable classification for the purpose of legislation. The requirements of the validity of legislation by reference to Article 14 of the Constitution are: that the subject-matter of legislation should be a well-defined class founded on an intelligible differentia which distinguishes that subject-matter from the others left out, and such differentia must have a rational relation with the object sought to be achieved by the legislation. The laying down of intelligible differentia does not, however, mean that the legislative classification should be* ***scientifically perfect or logically complete****."*

H. ***Basheer v. State of Kerala,* (2004) 3 SCC 609 [2JB – J. B.N. Srikrishna]**

> *"**20.** **Merely because the classification has not been carried out with mathematical precision, or that there are some categories distributed across the dividing line, is hardly a ground for holding that the legislation falls foul of Article 14, as long as there is broad discernible classification based on intelligible differentia, which advances the object of the legislation, even if it be class legislation. As long as the extent of overinclusiveness or underinclusiveness of the classification is marginal, the constitutional vice of infringement of Article 14 would not infect the legislation**.*
>
> *....*
>
> ***23.*** *Thus, in our view, the Rubicon indicated by Parliament is the conclusion of the trial and pendency of appeal. In the cases of pending trials, and cases pending investigation, the trial is yet to conclude; hence, the retrospective mollification of the rigour of punishment has been made applicable. In the cases where the trials are concluded and appeals are pending, the application of the amended Act appears to have been excluded so as to preclude the possible contingency of reopening concluded trials. In our judgment, the classification is very much rational and based on clearly intelligible differentia, which has rational nexus with one of the objectives to be achieved by the classification. There is one exceptional situation, however, which may produce an anomalous result. If the trial had just concluded before 2-10-2001, but the appeal is filed after 2-10-2001, it cannot be said that the appeal was pending as on the date of the coming into force of the amending Act, and the amendment would be applicable even in such cases. **The observations of this Court in Nallamilli case [(2001) 7 SCC 708] would apply to such a case. The possibility of such a fortuitous case would not be a strong enough reason to attract the wrath of Article 14 and its constitutional consequences. Hence, we are unable to accept the contention that the proviso to Section 41 of the amending Act is hit by Article 14.**"*

64. It is respectfully submitted that the scope, expanse and width of application of Article 14 and the corresponding power of the Legislatures to make a reasonable classification which has a clear nexus with the object of an enactment, varies as per the subject matter of the classification. It is respectfully submitted that Courts have repeatedly held that in matters concerning foreign policy, economic policy, national interest, etc., wider latitude for classification is available to the

Parliament/Legislature considering the subject matters of the challenge and the nature of the field which the Legislature seeks to deal with.

65. It is submitted that the object of the Act is to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individual or associations or companies and to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.

66. It is submitted that during implementation of the Act, a need was felt to streamline some of its provisions to achieve the desired objective of the Act to improve compliance mechanism, enhancing transparency and accountability in the receipt and utilisation of foreign contribution through effective monitoring and facilitating genuine non-Governmental organisations or associations who are working for the welfare of the society so that maximum donated resources reach the intended population.

67. It is submitted that by prohibiting transfer of the foreign contribution under section 7 of the Foreign Contribution (Regulation) Act, 2010, all the registered associations have been brought on the equal footing and may approach foreign donor directly for receipt of foreign contribution. Therefore, prohibiting the transfer of foreign contribution has a clear nexus with the objects sought to be achieved. Further, each transfer of foreign contribution also entails proportionate 20% administrative expenses. Hence, stoppage of such transfer would also spare substantial additional resources for the activities/programmes for direct benefit of society by curtailing wasteful administrative expenditure at multiple stages of transfer potentially permissible under section 8 of the Act. The amendments in section 17(1) of the Foreign Contribution (Regulation) Act, 2010 read with Notification dated 7th October, 2020 mandate receipt of foreign contribution only in a designated "FCRA Account" in the State Bank of India, New Delhi Main Branch (NDMB) to facilitate access of data of the foreign contribution from one source for effective monitoring of fund flow

received through foreign contribution. However, section 17(1) also provides that the petitioners and other NGOs/persons have an option to open and operate another FCRA account and any number of utilisation accounts in any bank/branch of their choice anywhere in the country. They can link these two accounts and transfer the foreign contribution received in the NDMB of SBI into their "other FCRA bank account" of their choice anywhere in India for transfer of foreign contribution on real time basis through digital banking.

Purported breach of Article 19(1)(c) and Article 19(1)(g)

68. It is submitted that in this regard, it is submitted that there exists no right to seeks foreign contribution without regulation. It is submitted that further, the FCRA, 2010 or the impugned amendments, do not seek to prohibit the foreign contributions or the right form the associations itself or the right to practice any profession rather merely seeks to provide efficacy to the already present regulatory regime regarding foreign contributions to such associations. It is submitted that the rights under Article 19(1)(c) and Article 19(1)(g) remain unaffected and untouched by the amendments. It is submitted that the right to form associations and the right to freedom of trade and profession cannot include the right to receive unbridled, unregulated foreign contributions. Without prejudice to the non-existence of the rights under Article 19, it is submitted that impugned amendments are clearly protected under the wide expanse of Article 19(4) and Article 19(6).

69. It is submitted that as far as Article 19(1)(c) and its interplay with Article 19(4) is concerned, the impugned amendments are clearly protected under the umbrella terms of "sovereignty and integrity of India" and "public order". It is submitted that as stated above, and as is clear from the objects and reasons, the present amendments further the objectives of the Act which is in tune with "sovereignty and integrity of India" and "public order". It is necessary to understand the purport of the terms occurring in Article 19(4) and this Hon'ble Court, in ***O.K. Ghosh v. E.X. Joseph*, 1963**

Supp (1) SCR 789, which interpreting Article 19(4), in the context of meaning of "public order", held as under :

> *"**9.** That takes us to the question about the validity of Rule 4-B. The High Court has held that the impugned rule contravenes the fundamental right guaranteed to the respondent by Article 19(1)(c). The respondent along with other Central Government servants is entitled to form Associations or Unions and in so far as this right is prejudicially controlled and adversely affected by the impugned rule, the said rule is invalid. The learned Solicitor-General contends that in deciding the question about the validity of the rule, we will have to take into account the provision of clause (4) in Article 19. This clause provides that Article 19(1)(c) will not affect the operation of any existing law in so far as it imposes, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause. The argument is that the impugned rule does nothing more than imposing a reasonable restriction on the exercise of the right which is alleged to have been contravened and, therefore, the provision of the rule is saved by clause (4).*
>
> ***10.** This argument raises the problem of construction of clause (4). Can it be said that the rule imposes a reasonable restriction in the interests of public order? There can be no doubt that Government servants can be subjected to rules which are intended to maintain discipline amongst their ranks and to lead to an efficient discharge of their duties. Discipline amongst Government employees and their efficiency may in a sense, be said to be related to public order. But in considering the scops of clause (4), it has to be borne in mind that the rule must be in the interests of public order and must amount to a reasonable restriction. **The words "public order" occur even in clause (2), which refers, inter alia, to security of the State and public order. There can be no doubt that the said words must have the same meaning in both clauses (2) and (4). So far as clause (2) is concerned, security of the State having been expressly and specifically provided for, public order cannot include the security of State, though in its widest sense it may be capable of including the said concept. Therefore, in clause (2), public order is virtually synonymous with public peace, safety and tranquility. The denotation of the said words cannot be any wider in clause (4).** That is one consideration which it is necessary to bear in mind. **When clause (4) refers to the restriction imposed in the interests of public order, it is necessary to enquire as to what is the effect of the words "in the interests of". This clause again cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect, the restriction can be said to be in the interests of public order. A***

> ***restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct***. *Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression "in the interests of public order". This interpretation is strengthened by the other requirement of clause (4) that, by itself, the restriction ought to be reasonable. It would be difficult to hold that a restriction which does not directly relate to public order can be said to be reasonable on the ground that its connection with public order is remote or far-fetched. That is another consideration which is relevant. Therefore, reading the two requirements of clause (4), it follows that the impugned restriction can be said to satisfy the test of clause (4) only if its connection with public order is shown to be rationally proximate and direct. That is the view taken by this Court in Superintendent, Central Prison, Fatehgarh v. Dr Ram Manohar Lohia [AIR 1960 SC 633] . In the words of Patanjali Sastri J. in Rex v. Basudev [1949-50 FCR 657 at p 661] "the connection contemplated between the restriction and public order must be real and proximate, not far-fetched or problematical". It is in the light of tins legal position that the validity of the impugned rule must be determined."*

70. It is submitted that with regard to the interpretation of the terms in article 19(2) [being synonymous with Article 19(4)] this Hon'ble Court had duly upheld the power of the government to impose broad Section 144 orders, in the entire district or public at large, when it is not possible to distinguish between those whose conduct must be controlled and those whose conduct is clear. It is submitted that the constitution bench of this Hon'ble court in the case of ***Babulal Parate v. State of Maharashtra***, reported in **(1961) 3 SCR 423**, while upholding the constitutional validity of the section 144 CrPC held as under:

> *"29. Coming to the order itself we must consider certain objections of Mr Mani which are, in effect, that there are three features in the order which make it unconstitutional. In the first place, according to him the order is directed against the entire public though the Magistrate has stated clearly that it was promulgated because of the serious turn which an industrial dispute had taken. Mr Mani contends that it is unreasonable to place restrictions on the movements of the public in general when there is nothing to suggest that members of the public were likely to indulge in activities prejudicial to public order. It is true that there is no suggestion that the general public was involved in the industrial dispute. It is also true that by operation of the order the movements of the*

members of the public would be restricted in particular areas. But it seems to us that it would be extremely difficult for those who are in charge of law and order to differentiate between members of the public and members of the two textile unions and, therefore, the only practical way in which the particular activities referred to in the order could be restrained or restricted would be by making those restrictions applicable to the public generally.

30. The right of citizens to take out processions or to hold public meetings flows from the right in Article 19(1)(b) to assemble peaceably and without arms and the right to move anywhere in the territory of India. If, therefore, any members of the public unconnected with the two textile unions wanted to exercise these rights it was open to them to move the District Magistrate and apply for a modification of the order by granting them an exemption from the restrictions placed by the order.

31. Mr Mani's contention, and that is his second ground of attack on the Magistrate's order, is that the only exception made in the order is with respect to funeral processions and religious processions and, therefore, it would not have been possible to secure the District Magistrate's permission for going out in procession for some other purpose or for assembling for some other purpose in the area to which the order applied. So far as the customary religious or funeral processions are concerned, the exemption has been granted in the order itself that if anyone wanted to take out a procession for some other purpose which was lawful it was open to them under Section 144, sub-section (4) to apply for an alteration of the order and obtain a special exemption. Mere omission of the District Magistrate to make the exemption clause of the order more comprehensive would not, in our opinion, vitiate the order on the ground that it places unreasonable restrictions on certain fundamental rights of citizens."

71. It is submitted that the aforesaid dictum of this Hon'ble court was further upheld by a seven judge Constitution bench of this Hon'ble court in the case of ***Madhu Limaye v. Sub-Divisional Magistrate***, reported in **(1970) 3 SCC 746** which while testing the correctness of the law laid down in ***Babulal Parate* supra**, held as under:-

"26. The effect of the order being in the interest of public order and the interests of the general public, occasions may arise when it is not possible to distinguish between those whose conduct must be controlled and those whose conduct is clear. As was pointed out in Babulal Parate case where two rival trade unions clashed and it was difficult to say

whether a person belonged to one of the unions or to the general public, an order restricting the activities of the general public in the particular area was justified.

27. It may be pointed out that mere disobedience of the order is not enough to constitute an offence. There must be in addition obstruction, annoyance, or danger to human life, health or safety or a riot or an affray before the offence under Section 188 of the Penal Code, 1860 is constituted. Thus the person affected has several remedies. He can ask the order to be vacated as against him, he can file a revision and even a petition for a writ. But no person can ask to be considered free to do what he likes when there are grounds for thinking that his conduct would be of the kind described in the section for purposes of preventive action. Ordinarily the order would be directed against a person found acting or likely to act in a particular way. A general order may be necessary when the number of persons is so large that distinction between them and the general public cannot be made without the risks mentioned in the section. A general order is thus justified but if the action is too general, the order my be questioned by appropriate remedies for which there is ample provision in the law.

28. All those matters were considered also by this Court in Babulal Parate case. In that case the Court emphasised that the restraint is temporary, the power is exercised by senior Magistrates who have to set down the material facts, in other words, to make an inquiry in the exercise of judicial power with reasons for the order, with an opportunity to an aggrieved person to have it rescinded either by the Magistrate or the superior Courts. We have reconsidered all those matters and are satisfied that there are sufficient safeguards available to person affected by the order and the restrictions therefore are reasonable. We are of opinion that Section 144 is not unconstitutional if properly applied and the fact that it may be abused is no ground for striking it down. The remedy then is to question the exercise of power as being outside the grant of the law."

72. It is submitted that thus from the aforesaid it is evident that the argument of the petitioners that the restrictions under the impugned amendments are excessive or disproportionate, are completely untenable and misconceived. It is submitted that as pointed out above, this Hon'ble Court, in the context of Section 144 Cr.P.C., in the case of ***Babulal Parate*** **supra**, after discussing the entire law of United States, has clearly held as under:-

*"**25.** The language of Section 144 is somewhat different. The test laid down in the section is not merely "likelihood" or "tendency". The section says that the Magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety etc. The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger.*

***27**. Whatever may be the position in the United States it seems to us clear that anticipatory action of the kind permissible under Section 144 is not impermissible under clauses (2) and (3) of Article 19. Both in clause (2) (as amended in 1951) and in clause (3), power is given to the legislature to make laws placing reasonable restrictions on the exercise of the rights conferred by these clauses in the interest, among other things, of public order. Public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order. We must, therefore, reject the contention.*

***28**. It is no doubt true that since the duty to maintain law and order is cast upon the Magistrate, he must perform that duty and not shirk it by prohibiting or restricting the normal activities of the citizen. But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order. In such circumstances that could be the only mode of discharging the duty. We, therefore, reject the contention that Section 144 substitutes suppression of lawful activity or right for the duty of public authorities to maintain order."*

73. The aforesaid ratio was upheld by this Hon'ble court in ***Madhu Limaye case* supra**, wherein this Hon'ble court held as under:

"12. The present doubt has arisen with regard to Babulal Parate case, stated earlier, by not adhering to the phraseology of Article 19(2) where the words in the interest of public orders' appear. It is these words which need an exposition and not the expression 'in the interest of maintenance of law and order', which are not the words of the article. To expound the meaning of the right expression we are required to go over some earlier decisions of this Court.

13. When Romesh Thappar v. State of Madras and Brijbhushan v. State of Delhi were decided, the original clause (2) was there. It did not include phrase "in the interest of public order". The validity of statutes was,

therefore, tested against the words "the security of the State". After the retrospective amendment substituted a new clause, the latter fell to be considered in relation to 'public order'. In Ramjilal Modi v. State of Uttar Pradesh [1957 SCR 860] it was pointed out that the language employed by the Constitution, that is to say, "in the interest of" was wider than the expression "for the maintenance a and the former expression made the ambit of the protection very wide. It was observed that a law may not have been designed to directly maintain public order and yet it may have been enacted in the interest of public order". This was again reaffirmed in Virendra v. State of Punjab [1958 SCR 308] distinguishing on the same ground the two cases before the First Amendment. The following passage (p. 323) may be quoted:

> *"It will be remembered that Article 19(2), as it was then worded, gave protection to a law relating to any matter which undermined the security of or tended to overthrow the State. Section 9(1-A) of the Madras Maintenance of Public Order was made 'for the purpose of securing public safety and the maintenance of public order'. It was pointed out that whatever end the impugned Act might have been intended to subserve and whatever aim its framers might have had in view, its application and scope could not, in the absence of limiting words in the statute itself, be restricted to the aggravated form of activities which were calculated to endanger the security of the State. Nor was there any guarantee that those officers who exercised the power under the Act would, in using them, discriminate between those who acted prejudicially to the security of the state and those who did not. This consideration cannot apply to the case now under consideration. Article 19(2) has been amended so as to extend its protection to a law imposing reasonable restrictions in the interests of public order and the language used in the two sections of the impugned Act quite clearly and explicitly limits the exercise of the powers conferred by them to the purposes specifically mentioned in the sections and to no other purpose".*

We may say at once that the distinction has our respectful concurrence. 14. Then came the decision in Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia. [(1960) 2 SCR 821] "in that case, the expression in the interest of public order" fell to be considered. Subbarao J., (as he then was) traced the exposition of the phrase, particularly the expression "public order". He referred first to the observations of Patanjali Sastri J, (later C.J.) in Ronush Thappar case distinguishing offences involving disturbances of public tranquillity which the learned Judge said were in theory offences against public order of a purely local sentence and other forms of public disorders of more serious and

aggravated kind calculated to endanger the security of the State. Subbarao, J. also quoted the observations of Fazal Ali, J. in Brij Bhushan case:

> *"When we approach the matter in this way, we find that while 'public disorder' is wide enough to cover a small riot or an affray and other cases where peace is disturbed by, or affects, a small group or persons, 'public safety' (or insecurity of the State) will usually be connected with serious internal disorders and such disturbances of public tranquillity as jeopardise the security of the State (p. 612)."*

Subbarao, J. on the strength of those observations concluded that "public order" was the same as "public peace and safety" and went on to observe:

> *"Presumably in an attempt to get over the effect of those two decisions, the expression 'public order' was inserted in Art. 19(2) of the Constitution by the Constitution (First Amendment) Act, 1951, with a view to bring in offences involving breach of purely local significance within the scope of permissible restrictions under clause (2) of Article 19".*

He quoted the observations of the Supreme Court of the United States in Cantwell v. Connecticut [(1940) 310 US 296] to establish that offences against 'public order' were also understood as offences against public safety and public peace. He referred to a passage in a text-book on the American Constitution which states:

> *"In the interests of public order, the State may prohibit and punish the causing of 'loud and raucous noise' in streets and public places by means of sound amplifying instruments, regulate the hours and place of public discussion, and the use of the public streets for the purpose of exercising freedom of speech; provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate broach of the peace or riot as distinguished from utterances causing mere public inconvenience, annoyance or unrest".*

He referred also to the Public Order Act, 1936 in England.

15. Subbarao, J. however, distinguished the American and English precedents observing:

> *"But in India under Article 19(2) this wide concept of 'public order' is split up under different heads. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order decency or morality, or in relation to contempt of court, defamation or incitement to an offence. All the grounds mentioned therein can be brought under the general head 'public order' in its most*

> *comprehensive sense. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. 'Public order' is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that 'public order' is synonymous with public peace, safety and tranquillity".*

His summary of his analysis of cases may be given in his own words:

> *"Public order' is synonymous with public safety and tranquillity : it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State."*

16. We may here observe that the overlap of public order and public tranquillity is only partial. The terms are not always synonymous. The latter is a much wider expression and takes in many things which cannot be described as public disorder. The words "public order" and "public tranquillity" overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. A person playing loud music in his own house in the middle of the night may disturb public tranquillity, but he is not causing public disorder. "Public order" no doubt also requires absence of disturbance of a state of serenity in society but it goes further. It means, what the Frunch designate order publique, defined as an absence of insurrection, riot turbulence, or crimes of violence. The expression "public order" includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression "order publique" explained above but not acts which disturb only the serenity of others.
24. The gist of action under Section 144 is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences. As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequences sufficiently grave. Without it the exercise of power would have no justification. It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order under Section 144, Criminal Procedure Code cannot be passed without taking evidence: see Mst Jagrupa Kumari v. Chobey Narain Singh [37 Cr LJ 95] which in our opinion is correct in laying down this proposition. These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of

public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. We are, however, not concerned with this part of the section and the validity of this part need not be decided here. In so far as the other parts of the section are concerned the key-note of the power is to free society from menace of serious disturbances of a grave character. The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. If that be so the matter must fall within the restrictions which the Constitution itself visualizes as permissible in the interest of public order, or in the interest of the general public. We may say, however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order.

46. The gist of the Chapter is the prevention of crimes and disturbance of public tranquillity and breaches of the peace. There is no need to prove overt acts although if overt acts have taken place they will have to be considered. The action being preventive is not based on overt act but on the potential danger to be averted. These provisions are thus essentially conceived in the interest of public order in the sense defined by us. They are also in the interest of the general public. If prevention of crimes, and breaches of peace and disturbance of public tranquillity are directed to the maintenance of the even tempo of community life, there can be no doubt that they are in the interest of public order. As we have shown above 'public order' is an elastic expression which takes within its various meanings according to the context of the law and the existence of special circumstances. This power was used in England for over 400 years and is not something which is needed only for administration of colonial empires. Its need in our society today is as great as it was before the British left. We find nothing contrary to Article 19(1)(a), (b), (c) and (d) because the limits of the restrictions are well within clauses (2), (3), (4) and (5). We accordingly hold the Chapter as explained by us to be constitutionally valid."

74. It is submitted that a law framed for the present purpose is clearly protected under Article 19(4). It is submitted that in ***Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637**, this Hon'ble Court, held as under :

*"**154.** There is no doubt that the freedom of the press is a valuable and sacred right enshrined under Article 19(1)(a) of the Constitution. This right is required in any modern democracy without which there cannot be transfer of information or requisite discussion for a democratic*

society. Squarely however, the contention of the petitioner rests on the chilling effects alleged to be produced by the imposition of restrictions as discussed above.

155. *Chilling effect has been utilised in Indian Jurisprudence as a fairly recent concept. Its presence in the United States of America can be traced to the decision in Wieman v. Updegraff [Wieman v. Updegraff, 1952 SCC OnLine US SC 111 : 97 L Ed 216 : 344 US 183 (1952)] . We may note that the argument of chilling effect has been utilised in various contexts, from being purely an emotive argument to a substantive component under the free speech adjudication. The usage of the aforesaid principle is chiefly adopted for impugning an action of the State, which may be constitutional, but which imposes a great burden on the free speech. We may note that the argument of chilling effect, if not tempered judicially, would result in a "self-proclaiming instrument".*

156. *The principle of chilling effect was utilised initially in a limited context, that a person could be restricted from exercising his protected right due to the ambiguous nature of an overbroad statute. In this regard, the chilling effect was restricted to the analysis of the First Amendment right. The work of Frederick Schauer provides a detailed analysis in his seminal work on the First Amendment. [Frederick Schauer, Fear, Risk and the First Amendment : Unraveling the Chilling Effect (1978).] This analysis was replicated in the context of privacy and internet usage in a regulatory set up by Daniel J. Solove. These panopticon concerns have been accepted in K.S. Puttaswamy (Privacy-9 J.) [K.S. Puttaswamy (Privacy-9 J.) v. Union of India, (2017) 10 SCC 1] .*

157. *We need to concern ourselves herein as to theoretical question of drawing lines as to when a regulation stops short of impinging upon free speech. A regulatory legislation will have a direct or indirect impact on various rights of different degrees. Individual rights cannot be viewed as silos, rather they should be viewed in a cumulative manner which may be affected in different ways. The technical rule of causal link cannot be made applicable in the case of human rights. Human rights are an inherent feature of every human and there is no question of the State not providing for these rights. In one sense, the restrictions provided under Article 19(2) of the Constitution follow a utilitarian approach wherein individualism gives way for commonality of benefit, if such restrictions are required and demanded by law. In this context, the test of "direct impact" as laid down in A.K Gopalan v. State of Madras [A.K Gopalan v. State of Madras, AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] , has been subsequently widened in Rustom Cavasjee Cooper v. Union of India [Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248] , wherein the test of "direct and inevitable consequence" was propounded. As this is not a case wherein a detailed analysis of chilling effect is*

required for the reasons given below, we leave the question of law open as to the appropriate standard for establishing causal link in a challenge based on chilling effect.

158. *The widening of the "chilling effect doctrine" has always been viewed with judicial scepticism. At this juncture, we may note the decision in Laird v. Tatum [Laird v. Tatum, 1972 SCC OnLine US SC 160 : 33 L Ed 2d 154 : 408 US 1 (1972)] , wherein the respondent brought an action against the authorities to injunct them from conducting surveillance of lawful and peaceful civilian political activity, based on the chilling effect doctrine. The United States Supreme Court, in its majority decision, dismissed the plea of the respondent on the ground of lack of evidence to establish such a claim. The Court observed that : (SCC OnLine US SC para 22)*

> *"22. ... Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm...."*

Therefore, to say that the aforesaid restrictions were unconstitutional because it has a chilling effect on the freedom of press generally is to say virtually nothing at all or is saying something that is purely speculative, unless evidence is brought before the Court to enable it to give a clear finding, which has not been placed on record in the present case. (Refer to Clapper v. Amnesty International USA [Clapper v. Amnesty International USA, 2013 SCC OnLine US SC 10 : 185 L Ed 2d 264 : 568 US 398 (2013)] .)

159. ***In this context, one possible test of chilling effect is comparative harm. In this framework, the Court is required to see whether the impugned restrictions, due to their broad-based nature, have had a restrictive effect on similarly placed individuals during the period****. It is the contention of the petitioner that she was not able to publish her newspaper from 6-8-2019 to 11-10-2019. However, no evidence was put forth to establish that such other individuals were also restricted in publishing newspapers in the area. Without such evidence having been placed on record, it would be impossible to distinguish a legitimate claim of chilling effect from a mere emotive argument for a self-serving purpose. On the other hand, the learned Solicitor General has submitted that there were other newspapers which were running during the aforesaid time period. In view of these facts, and considering that the aforesaid petitioner has now resumed publication,* ***we do not deem it fit to indulge more in the issue than to state that responsible Governments are required to respect the freedom of the press at all times.*** *Journalists are to be accommodated in reporting and there is no justification for allowing a sword of Damocles to hang over the press indefinitely."*

75. It is submitted that specifically in the context of national security and a complete ban of associations, while interpreting Article 19(4) with article 19(1)(c), this Hon'ble Court in, ***People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580**, held as under :

> *"**40.** Sections 18 and 19 deal with the notification and denotification of terrorist organisations. The petitioners submitted that under Section 18(1) of POTA a Schedule has been provided giving the names of terrorist organisations without any legislative declaration; that there is nothing provided in the Act for declaring organisations as terrorist organisations; that this provision is therefore, unconstitutional as it takes away the fundamental rights of an organization under Articles 14, 19(1)(a) and 19(1)(c) of the Constitution; that under Section 18(2) of the Act, the Central Government has been given unchecked and arbitrary powers to "add" or "remove" or "amend" the Schedule pertaining to terrorist organisations; that under the Unlawful Activities (Prevention) Act, 1967 an organization could have been declared unlawful only after the Central Government has sufficient material to form an opinion and such declaration has to be made by a notification wherein grounds have to be specified for making such declaration; that therefore such arbitrary power is violative of Articles 14, 19 and 21 of the Constitution. Pertaining to Section 19 the main allegation is that it excessively delegates power to the Central Government in the appointment of members to the Review Committee and they also pointed out that the inadequate representation of judicial members will affect the decision-making and consequently, it may affect the fair judicial scrutiny; that, therefore, Section 19 is not constitutionally valid.*
>
> ***41.** The learned Attorney General contended that there is no requirement of natural justice which mandates that before a statutory declaration is made in respect of an organization which is listed in the schedule a prior opportunity of hearing or representation should be given to the affected organization or its members; that the rule of audi alteram partem is not absolute and is subject to modification; that in light of the post-decisional hearing remedy provided under Section 19 and since the aggrieved persons could approach the Review Committee there is nothing illegal in the section; that furthermore, the constitutional remedy under Articles 226 and 227 is also available; that therefore, having regard to the nature of the legislation and the magnitude and prevalence of the evil of terrorism it cannot be said to impose unreasonable restrictions on the fundamental rights under Article 19(1)(c) of the Constitution.*

42. ***<u>The right of citizens to form associations or unions that is guaranteed by Article 19(1)(c) of the Constitution is subject to the restrictions provided under Article 19(4) of the Constitution. Under Article 19(4) of the Constitution the State can impose reasonable restrictions, inter alia, in the interest of sovereignty and integrity of the country. POTA is enacted to protect sovereignty and integrity of India from the menace of terrorism. Imposing restriction under Article 19(4) of the Constitution also includes declaring an organization as a terrorist organization as provided under POTA. Hence Section 18 is not unconstitutional.</u>***

43. *It is contended that before making the notification whereby an organization is declared as a terrorist organization there is no provision for pre-decisional hearing. But this cannot be considered as a violation of audi alteram partem principle, which itself is not absolute. Because in the peculiar background of terrorism it may be necessary for the Central Government to declare an organization as terrorist organization even without hearing that organization. At the same time under Section 19 of POTA the aggrieved persons can approach the Central Government itself for reviewing its decision. If they are not satisfied by the decision of the Central Government they can subsequently approach the Review Committee and they are also free to exercise their constitutional remedies. The post-decisional remedy provided under POTA satisfies the audi alteram partem requirement in the matter of declaring an organization as a terrorist organization. (See Mohinder Singh Gill v. Chief Election Commr. [(1978) 1 SCC 405] , Swadeshi Cotton Mills v. Union of India [(1981) 1 SCC 664] , Olga Tellis v. Bombay Municipal Corpn. [(1985) 3 SCC 545] and Union of India v. Tulsiram Patel [(1985) 3 SCC 398 : 1985 SCC (L&S) 672] .) Therefore, the absence of pre-decisional hearing cannot be treated as a ground for declaring Section 18 as invalid.*

44. *It is urged that Section 18 or 19 is invalid based on the inadequacy of judicial members in the Review Committee. As per Section 60, Chairperson of the Review Committee will be a person who is or has been a Judge of a High Court. The mere presence of non-judicial members by itself cannot be treated as a ground to invalidate Section 19. (See Kartar Singh case [(1994) 3 SCC 569 : 1994 SCC (Cri) 899 : (1994) 2 SCR 375] at p. 683, para 265 of SCC.)*

45. ***<u>As regards the reasonableness of the restriction provided under Section 18, it has to be noted that the factum of declaration of an organization as a terrorist organization depends upon the "belief" of the Central Government. The reasonableness of the Central Government's action has to be justified based on material facts upon which it formed the</u>***

> ***opinion. Moreover, the Central Government is bound by the order of the Review Committee. Considering the nature of legislation and magnitude or presence of terrorism, it cannot be said that Section 18 of POTA imposes unreasonable restrictions on fundamental right guaranteed under Article 19(1)(c) of the Constitution. We uphold the validity of Sections 18 and 19."***

76. It is a settled law that rights under Article 19 are not absolute and subject to such reasonable restrictions which may be imposed by competent legislature to achieve the desired objectives of the Act. It is submitted that prohibition on transfer of foreign contribution, receipt of foreign contribution in the State Bank of India, New Delhi Main Branch and obtaining Aadhaar number, etc. of the office bearers, key functionaries and members would improve compliance mechanism, enhance transparency and fix accountability in the receipt and utilisation of foreign contribution.

77. It is submitted that with regard Article 19(1)(g), it is stated that it is undeniable that the impugned amendments would be protected by Article 19(6) as the same is wider than Article 19(4). It is submitted that this Hon'ble court has often interpreted the words "public interest" in a wide fashion in order to enable the State to take appropriate measures. Be that as it may, this Hon'ble Court in the case of ***Akadasi Padhan v. State of Orissa*, 1963 Supp (2) SCR 691 : AIR 1963 SC 1047**, in the monopoly [as opposed to partial ban in the instant case, which would be at a lower threshold], held as under :

> *"P.B. Gajendragadkar, J.— In challenging the validity of the Orissa Kendu Leaves (Control of Trade) Act, 1961 (No. 28 of 1961) (hereinafter called "the Act"), this petition under Article 32 of the Constitution raises an important question about the scope and effect of the provisions of Article 19(6). The petitioner Akadasi Padhan owns about. 130 acres of land in village Bettagada, Sub-division Raira-khol in the District of Sambalpur, and in about 80 acres of the said land he grows Kendu leaves. Kendu leaves are used in the manufacture of Bidis and so, prior to 1961, the petitioner used to carry on extensive trade in the sale of Kendu leaves by transporting them to various places in and outside the District of sambalpur. But since the Act was passed in 1961 and it came into force on January 3, 1962, the State has acquired a monopoly in the trade of Kendu*

leaves, and that has put severe restrictions on the fundamental rights of the petitioner under Articles 19(1)(f) and (g). That, in substance, is the basis of the present petition.

14. The amendment made by the Legislature in Article 19(6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public. Article 19(6)(ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. The width of the power conferred on the State can be easily assessed if we look at the words used in the clause which cover trade, business, industry or service. It is true that the State may, according to the exigencies of the case and consistently with the requirements of any trade, business, industry or service, exclude the citizens either wholly or partially. In other words, the theory underlying the amendment in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach, but on the doctrinaire approach which Socialisum accepts. ***That is why we feel no difficulty in rejecting Mr Pathak's argument that the creation of a State monopoly must be justified by showing that the restrictions imposed by it are reasonable and are in the interests of the general public. In our opinion, the amendment clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public, so far as Article 19(1)(g) is concerned.***

15. The amendment made in Article 19(6) shows that it is open to the State to make laws for creating State monopolies, either partial or complete, in respect of any trade, business, industry or service. The State may enter trade as a monopolist either for administrative reasons, or with the object of mitigating the evils flowing from competition, or with a view to regulate prices, or improve the quality of goods, or even for the purpose of making profits in order to enrich the State ex-chequer. The Constitution-makers had apparently assumed that the State monopolies or schemes of nationalisation would fall under, and be protected by, Article 19(6) as it originally stood; but when judicial decisions rendered the said assumption invalid, it was thought necessary to clarify the intention of the Constitution by making the amendment. It is because the amendment was thus made for purposes of clarification that it begins with the words "in particular". These words indicate that restrictions imposed on the fundamental rights guaranteed by Article 19(1)(g) which are reasonable and which are in the interests of the general public, are saved by Article 19(6) as it originally stood; the subject-matter covered by the said provision being justiciable, and the amendment adds that the State monopolies or nationalisation, schemes which may be introduced by legislation, are an illustration of reasonable restrictions imposed in

the interests of the general public and must be treated as such. That is why the question about the validity of the laws covered by the amendment is no longer left to be tried in Courts. This brings out the doctrinaire approach adopted by the amendment in respect of a State monopoly as such."

78. It is submitted that further, the Respondent and Legislatures across the country have wide powers "*in the interests of the general public*". It is submitted that that the following cases justify the position of the Respondent :

Freedom of Trade - Generally

(i) ***Kerala Bar Hotels Association and Anr. v. State of Kerala and Ors.*, (2015) 16 SCC 421, [Para 30-38] (Page19-23)**

(ii) ***Laxmikant v. Union of India and ors*. (1997) 4 SCC 739 [Para 10 (Page 28)]**

(iii) ***Municipal Corporation of the City of Ahmedabad and Ors. v Jan Mohammed Usmanbhai and Anr*. (1986) 3 SCC 20 [Para 15-24 (page 37-42)]**

(iv) ***Om Prakash and Ors. v State of U.P. and Ors*. [Para 31-40 (Page 54-56)]**

(v) ***Sushila Saw Mil v. State of Orissa and Ors*. [Para4] (page 60)**

(vi) ***Indian Handicraft Emporium and Ors v. Union of India and Ors. (2003) 7 SCC 589* [Para 31-41(Page 75-78)]**

(vii) ***State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* (2005) 8 SCC 534 [Para 73-79 (Page 160-161) Para 135-137 (Page 163-164)]**

79. It is further submitted that this Hon'ble Court, in the context of freedom of trade and profession, has even held that the Legislature may by statute control the entire trade or profession in its own hands to the exclusion of all other. It is submitted that even such drastic measures, if grounded in public interest, have passed the muster of Article 19(1)(g). The following cases would justify the position of the Respondent in this regard :

Canalisation

(i) ***Municipal; Committee, Amritsar v. State of Punjab*, (196) 1 SCC 475 [Para 10, 14]**

(ii) ***Sagir Ahemd v. State of U.P.,*** **AIR 1954 SC 728 [Para 23]**

(iii) ***M/S. Daruka & Co. V. The Union Of India & Ors,*** **(1973) 2 SCC 617- [Paras 16-20 & 24-25]**

(iv) ***Daya V. Joint Chief Controller Of Imports & Exports,*** **AIR (1962) SC 1796- [Paras 14-19]**

(v) ***Md. Serajuddin V. State Of Orissa,*** **(1975) 2 SCC 47- [Para 28]**

(vi) ***Krishnan Kakkanth V. Govt Of Kerala,*** **(1997) 9 SCC 495 [Paras 27,28,29]**

80. It is submitted that it is clear that the impugned amendments are directly relatable to the objective sought to be achieved by the Act, which is benign, relevant and imperative in the interest of sovereignty and integrity of the country, public order and interests of general public. It is submitted that such objective, being a consistent part of the legislative policy of the country for the past almost 5 decades, is beyond judicial review. It is submitted that further, the impugned amendments have a direct and proximate relationship with the object of the Act, which is subsumed within the protected spheres of State action Article 19(4) and Article 19(6). It is submitted that the impugned amendments are reasonable and provide for a necessary and discernible classification on the basis of objective criterion and intelligible differentia. It is submitted that impugned amendments are directly relatable to activities/programmes detrimental to the sovereignty and integrity of India, public order and interests of general public.

Right to life and liberty cannot include right to receive unregulated foreign contributions

81. It is submitted that in this regard, it is submitted that there exists no right to seek foreign contribution without regulation. It is submitted that further, the FCRA, 2010 or the impugned amendments, do not seek to prohibit the foreign contributions or the right form the associations itself or the right to practice any profession rather merely seeks to provide efficacy to the already present regulatory regime regarding

foreign contributions to such associations. It is submitted that the rights under Article 21 of the Petitioners remain unaffected and untouched by the amendments. It is submitted that the right to life and liberty of a natural persons cannot include the right to receive foreign contributions without due care and regulation as provided by the procedure established by law. Without prejudice to the non-existence of the rights under Article 19, it is submitted that impugned amendments are clearly protected as they fall under the "procedure established by law", are reasonable and are duly proportionate and furthers a legitimate state interest.

82. It is submitted that the present amendments are well within the judicially defined limits in the case of ***K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 1.** It is submitted that from the above, it is amply clear that the impugned amendments are in furtherance of a legitimate State interest which was mentioned in ***Puttaswamy* supra**. The reference to the compelling state interest or legitimate state interest in the context of Article 21 was first made in ***Gobind* v. *State of M.P.,* (1975) 2 SCC 148**. In ***Gobind* v. *State of M.P.,* (1975) 2 SCC 148**, it is held that the right to privacy is implicit in the concept of individual autonomy and liberty. However, the Hon'ble Supreme Court categorically states that it is not an absolute right and can be subjected to restrictions based on compelling public interest. The Court observed that the contours of the right will have to go through a process of case-by-case developments. Para 28 is relevant and reads as follows:

> *"22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right.*
>
> *23. Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions. Subtler and far-reaching means of invading privacy will make it possible*

to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

.....

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from which one can characterize as a fundamental right, we do not think that the right is absolute."

83. In ***K.S. Puttaswamy v. Union of India (Privacy-9 J.)*, (2017) 10 SCC 1**, the Hon'ble Supreme Court held as under :

J. CHANDRACHUD

310. *While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action.* ***The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the***

guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the othe*r. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.*

311. Apart from national security, the State may have justifiable reasons for the collection and storage of data. In a social welfare State, the Government embarks upon programmes which provide benefits to impoverished and marginalised sections of society. There is a vital State interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients. Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the State to insist on the collection of authentic data*. But, the data which the State has collected has to be utilised for legitimate purposes of the State and ought not to be utilised unauthorisedly for extraneous purposes. This will ensure that the legitimate concerns of the State are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology—legitimately deployed is a powerful enabler in the spread of innovation and knowledge.*

J. CHELAMESHWAR

377. It goes without saying that no legal right can be absolute. Every right has limitations. *This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain*

a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

380. *The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. [District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496 : AIR 2005 SC 186] , [State of Maharashtra v. Bharat Shanti Lal Shah, (2008) 13 SCC 5] Gobind [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468] resorted to the compelling State interest standard in addition to the Article 21 reasonableness enquiry.* ***From the United States, where the terminology of "compelling State interest" originated, a strict standard of scrutiny comprises two things—a "compelling State interest" and a requirement of "narrow tailoring" (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, "compelling State interest" does not have definite contours in the US. Hence, it is critical that this standard be adopted with some clarity as to when and in what types of privacy claims it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used****. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed, must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right to privacy is to be found.*

J. ROHINTON

526. ***But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest****. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried*

out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

J. SAPRE

558. *One cannot conceive an individual enjoying meaningful life with dignity without such right. Indeed, it is one of those cherished rights, which every civilised society governed by rule of law always recognises in every human being and is under obligation to recognise such rights in order to maintain and preserve the dignity of an individual regardless of gender, race, religion, caste and creed. It is, of course,* ***subject to imposing certain reasonable restrictions keeping in view the social, moral and compelling public interest, which the State is entitled to impose by law****.*

582. *Privacy is an inherent right. It is thus not given, but already exists. It is about respecting an individual and it is undesirable to ignore a person's wishes without a compelling reason to do so.*

J. KAUL

The restrictions

639. *The right to privacy as already observed is not absolute. The right to privacy as falling in Part III of the Constitution may, depending on its variable facts, vest in one part or the other, and would thus be subject to the restrictions of exercise of that particular fundamental right.* ***National security would thus be an obvious restriction, so would the provisos to different fundamental rights, dependent on where the right to privacy would arise. The public interest element would be another aspect.****"*

84. It is submitted that in ***Chintamanrao v. State of M.P.*****, AIR 1951 SC 118**, this Hon'ble Court, opined as under:

"7. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

85. Similarly in ***State of Madras v. V.G. Row*, AIR 1952 SC 196**, this Hon'ble Court ruled that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. The relevant portion is quoted as under :

> *"[T]he test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable."*

86. It is submitted that in ***Ramlila Maidan Incident, In re,* (2012) 5 SCC 1**, this Hon'ble Court opined that a restriction imposed in any form has to be reasonable and to that extent, it must stand the scrutiny of judicial review. It cannot be arbitrary or excessive. It must possess a direct and proximate nexus with the object sought to be achieved. Whenever and wherever any restriction is imposed upon the right to freedom of speech and expression, it must be within the framework of the prescribed law, as subscribed by Article 19(2) or Article 21 of the Constitution. Thereafter, it has been laid down that associating police as a prerequirement to hold such meetings, dharnas and protests, on such large scale, would not infringe the fundamental rights

enshrined under Articles 19(1)(a) and 19(1)(b) of the Constitution or Article 21 as this would squarely fall within the regulatory mechanism of reasonable restrictions, contemplated under Articles 19(2) and 19(3). Furthermore, it would help in ensuring due social order and would also not impinge upon the rights of the others, as contemplated under Article 21 of the Constitution of India. The emphasis was laid on the constitutional duties that all citizens are expected to discharge.

87. It is submitted that in ***Sahara India Real Estate Corpn. Ltd. v. SEBI*, (2012) 10 SCC 603**, this Hon'ble Court reiterated the principle of social interest in the context of Article 19(2) as a facet of reasonable restriction.

88. It is submitted that in ***Teri Oat Estates (P) Ltd. v. UT, Chandigarh*, (2004) 2 SCC 130**, it was summarised as under :

> ***"Proportionality***
>
> ***40.*** *The issue in the light of the decision of the Full Bench of the Punjab and Haryana High Court in Ram Puri v. Chief Commr., Chandigarh [AIR 1982 P&H 301 : 84 Punj LR 388 (FB)] as affirmed by this Court in Babu Singh Bains v. Union of India [(1996) 6 SCC 565] may have to be considered from another angle.*
>
> ***44.*** *The situation, thus, in our opinion, warrants application of the doctrine of proportionality.*
>
> ***45.*** *The said doctrine originated as far back as in the 19th century in Russia and was later adopted by Germany, France and other European countries as has been noticed by this Court in Om Kumar v. Union of India [(2001) 2 SCC 386 : 2001 SCC (L&S) 1039].*
>
> ***46. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve".***
>
> ***49. Ever since 1952, the principle of proportionality has been applied vigorously to legislative and administrative action in India. While dealing with the validity of legislation infringing***

fundamental freedoms enumerated in Article 19(1) of the Constitution of India, this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. In cases where such legislation is made and the restrictions are reasonable; yet, if the statute concerned permitted administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing the restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restrictions etc. In such cases, the administrative action in our country has to be tested on the principle of proportionality, just as it is done in the case of main legislation. This, in fact, is being done by the courts. Administrative action in India affecting the fundamental freedom has always been tested on the anvil of the proportionality in the last 50 years even though it has not been expressly stated that the principle that is applied is the proportionality principle. (See Om Kumar [(2001) 2 SCC 386 : 2001 SCC (L&S) 1039] .)

xxx

130. *The principles as regards reasonable restriction as has been stated by this Court from time to time are that the restriction should not be excessive and in public interest. The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down any abstract standard or general pattern. It would depend upon the nature of the right which has been infringed or sought to be infringed. The ultimate "impact", that is, effect on the right has to be determined. The "impact doctrine" or the principle of "inevitable effect" or "inevitable consequence" stands in contradistinction to abuse or misuse of a legislation or a statutory provision depending upon the circumstances of the case. The prevailing conditions of the time and the principles of proportionality of restraint are to be kept in mind by the court while adjudging the constitutionality of a provision regard being had to the nature of the right. The nature of social control which includes public interest has a role.* ***The conception of social interest has to be borne in mind while considering reasonableness of the restriction imposed on a right. The social interest principle would include the felt needs of the society.***

89. It is submitted that in ***Excel Crop Care Ltd. v. CCI,*** **(2017) 8 SCC 47**, in a slightly different context, this Hon'ble Court, held as under :

> *"**29.** One has to keep in mind the aforesaid objective which the legislation in question attempts to subserve and the mischief which it seeks to remedy. As pointed out above, Section 18 of the Act casts an obligation on CCI to "eliminate" anti-competitive practices and promote competition, interests of the consumers and free trade. It was rightly pointed out by Mr Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in Competition Commission of India v. SAIL [CCI v. SAIL, (2010) 10 SCC 744] in the following manner: (SCC pp. 755-56 & 794, paras 6, 8-10 & 125)*
>
> *xxx*
>
> ***92. Even the doctrine of "proportionality" would suggest that the court should lean in favour of "relevant turnover". No doubt the objective contained in the Act viz. to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out "proportional result or proportionality stricto sensu". It is a result-oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.***
>
> ***94.** The doctrine of "purposive interpretation" may again lean in favour of "relevant turnover" as the appropriate yardstick for imposition of penalties. It is for this reason the judgment of the Competition Appeal Court of South Africa in Southern Pipeline Contractors [Southern Pipeline Contractors v. Competition Commission, 2011 SCC OnLine ZACAC 5] , as quoted above, becomes relevant in Indian context as well inasmuch as this Court has also repeatedly used same principle of*

interpretation. It needs to be repeated that there is a legislative link between the damage caused and the profits which accrue from the cartel activity. There has to be a relationship between the nature of offence and the benefit derived therefrom and once this co-relation is kept in mind, while imposing the penalty, it is the affected turnover i.e. "relevant turnover" that becomes the yardstick for imposing such a penalty. In this hue, doctrine of "purposive interpretation" as well as that of "proportionality" overlaps.

95. *In fact, some justifications have already appeared in this behalf while discussing the matter on the application of doctrine of proportionality. What needs to be repeated is only that the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others. Such a purpose can adequately be served by taking into consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. Therefore, it cannot be said that the purpose of the Act is to "finish" those industries altogether by imposing those kinds of penalties which are beyond their means. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted."*

90. Therefore, it is submitted that even though the expanse of Article 21 is extremely wide in India, the prohibition on transfer of foreign contribution, receipt of foreign contribution in the State Bank of India, New Delhi Main Branch and obtaining Aadhaar number, etc. of the office bearers, key functionaries and members would improve compliance mechanism, enhance transparency and accountability in the receipt and utilisation of foreign contribution and would not impinge on any fundamental rights of the Petitioners. It is directly relatable to activities/programmes detrimental to the sovereignty and integrity of India, public order and interests of general public and for matters connected therewith or incidental thereto. It is therefore a reasonable and proportionate restriction as it has a clear nexus with the object of the Act. Further, all registered associations would continue to receive foreign contribution directly from any foreign donor and would have an option to

open and operate another FCRA account and any number of utilisation accounts in any bank/branch of their choice anywhere in the country.

91. It is submitted that the amended section 12A empowers the Central Government to obtain Aadhaar Number, etc. as identification documents. The Hon'ble Supreme Court of India has held in the matter of ***K.S. Puttaswamy vs. Union of India*** **supra**, any intrusion into the privacy of a person has to be backed by a law and for such a law to be valid it has to pass the test of legitimate aim which it should serve and also proportionality. Although there is no question of intrusion in the privacy of any individual in this case, however, it is clarified that the amendment via new section 12A meets even this requirement as per the said ruling of the Hon'ble Apex Court. The Aadhaar numbers of the office bearers, key functionaries and members would facilitate proper identification of person and associations for facilitating monitoring of activities of associations and to prevent the NGO/person from being "fictitious or benami" as expressly provided in sub-clause (i) of clause (a) of sub-section (4) of section 12 of the Act. In addition, and as also stated earlier the prohibition on transfer would also spare substantial additional resources for the activities/programmes for direct benefit of society by curtailing unnecessary administrative expenditure at multiple stages of transfer. This is to ensure that such activities are not taken up that could be detrimental to the "sovereignty and integrity of India". Hence, the restrictions are reasonable and proportionate.

SPECIFIC RESPONSE TO PETITIONER'S APPREHENSIONS

92. The concern of the petitioner about the physical access to the local bank account of its choice is unfounded and misleading. It may be submitted that for outstation FCRA organizations located in remote areas or and for operational ease of any FCRA organization, ***MHA and State Bank of India have put in place a system to enable the NGOs to open the main designated FCRA Account in SBI, New Delhi Main Branch without any need to physically come to Delhi***.

93. The concern of the petitioners regarding appointment of a designated person in New Delhi to manage their account is misplaced and reflects ignorance of the procedure laid down for opening FCRA Account in the New Delhi Main Branch (NDMB) of State Bank of India (SBI). The person applying for FCRA certificate or Prior Permission of Central Government have been and would continue to be able to open his FCRA account in the NDMB, SBI by submitting all his documents, KYC details etc. in any branch of SBI in the country or an SBI branch nearest to him. That SBI branch would transfer all these documents to the NDMB, SBI and an account would be opened in the New Delhi branch and communicated to the FCRA applicant. He will not have to travel to Delhi. He can open and operate his FCRA account opened in the NDMB of SBI through any SBI branch in the country. This has been clearly laid down in the Standard Operating Procedure (SOP) for opening FCRA Account in the NDMB of SBI and uploaded on the FCRA portal on the website fcraonline@nic.in. In this regard detailed SOP was issued to all SBI Branches across the country to process the forms and KYC papers at any SBI branch that the NGO may choose to apply in. Based on such remote processing, the NDMB of SBI has already opened about 19,000 main designated accounts in New Delhi. ***In other words, any NGO can open designated FCRA account in the NDMB of SBI without physically visiting New Delhi.***

94. It is submitted that in addition, the amended section 17 provides the petitioners and NGOs/persons an option to open and operate another FC account in any bank branch of their choice anywhere in the country. They can link these two accounts and transfer the foreign contribution received in the NDMB of SBI into their "other FCRA bank account" of their choice anywhere in India. Location of (second) "another FCRA account" depends on the choice of the recipient organisations. In addition, if petitioners or NGO want they can also use the NDMB account for operational purposes besides being its account of first entry point for the foreign contribution. Even further petitioners and FCRA NGOs can maintain as many FCRA utilization Accounts as they wish in any bank branch of their choice. In other words,

as long as the foreign contribution first lands in the main designated FCRA Account in the NDMB of SBI, ***the petitioners and NGOs have absolute freedom about opening & operating any additional FCRA Bank Accounts in bank branches of their choice***.

95. Further, ***transfer of Foreign Contribution from the designated FCRA account in the specified NDMB of SBI to the (second) another FCRA account in the bank branch of their choice would be allowed on free/gratis basis without any bank charge on real time basis by the SBI on the instructions of the recipient organisations through digital or internet banking***.

96. From the above it may also be clearly inferred that contention of the petitioners that the amended provision forces to maintain multiple accounts (3 separate accounts) such as primary bank account at NDMB of SBI, another FCRA Account and a utilisation account is misconceived. In fact, opening of another FCRA account in any bank branch of their choice anywhere in the country and utilisation account(s) are absolutely optional as per the choice of the petitioners as provided under the section 17. It is submitted that moreover, the erstwhile section 17 also mandated an exclusive and designated FCRA account and opening of utilisation account was optional then also as per the choice of the person. Similar provisions are continued in the amended provisions also with more options along with the requirement of exclusive FCRA Account in the NDMB of SBI. Further, the Foreign Contribution (Regulation) Act, 2010 does not prescribe anything about domestic contributions neither in the pre-amended section 17 nor in the post-amended section 17 of the Act.

97. The concern of the petitioners regarding organisation located in remote areas of the country lacking access to digital infrastructure such as internet/computer facilities, regular electric supply and as such being unable to make transactions via net-banking is misconceived for the reason because the transfer of foreign contribution in most FCRA accounts from a “foreign source” happens only through

net-banking/digital media including the receipt of foreign contributions from foreign donors located abroad. Besides, all FCRA services including registration, renewal, prior permission, change of details, uploading of returns annually, etc. are available mandatorily in the online mode only through FCRA website fcraonline@nic.in since December, 2015 and all FCRA organisations have been consistently complying with all their statutory obligations through the online mode only without any difficulty.

98. Further, petitioners' contentions regarding Rule 16 of the Foreign Contribution (Regulation) Rules (FCRR), 2011 relating to reporting of information by the banks within 48 hours and other mechanisms in the earlier FCRA regime, it is submitted that there is a difference between obtaining information for receipt of foreign contribution from one bank location and information gathered from hundreds of bank branches located all over the country as was the case in the erstwhile provision of the Act. In addition, even at the inspection and audit stages, it entailed huge operational difficulties while collecting, collating and consolidating the information from hundreds of bank branches. From enforcement and operational angle, flow of information from one centralized location is necessary and has a reasonable and proximate relationship with the object sought to be achieved by the Act. It is submitted that the same further leads to transparency in receipt of foreign contribution and ensures compliance. From petitioners' point of view or for that matter from NGO's point of view it is immaterial and inconsequential as the availability of all information to the Respondent at one point in bank branch entails no additional compliance burden on the petitioners or the NGO. Easier availability of details of inflows & outflows of foreign contribution from the main FCRA account would help Government in implementing the mandate of the Act more effectively. It would make the working of FCRA NGOs more transparent and bring in positive incentives for higher accountability in utilisation of the foreign contribution.

99. Therefore, while ensuring proper monitoring of the inflow and outflow of Foreign Contribution from FCRA Account in the NDMB of SBI as mandated by the amended provision, ***it has been duly ensured that the NGOs/associations are not***

put to any undue hardships or extra financial costs/compliance burden. The efforts made are explained at preceding paras. The amended provision only aims to facilitate monitoring of all inflows of foreign contribution more coherently and effectively towards making the fund flow transparent.

100. It is also respectfully submitted that the answering Respondent recognizes the role of non-profit organizations (NGOs) and voluntary organizations in national development. Genuine NGOs need not shy away from any regulatory compliance mandated under the Foreign Contribution (Regulation) Act, 2010 for quick and effective monitoring of the receipt and utilisation of foreign contribution for sake of transparency, accountability so that the foreign contribution is not received and utilised for any activities detrimental to the sovereignty and integrity of the country, public order and interests of general public and for matters connected therewith or incidental thereto.

101. It is submitted that averments made by some petitioners regarding their frequent visit to Delhi during change of details of office bearers, key functionaries and other members for KYC etc. are misconceived and wrong. It is submitted that ***State Bank of India, New Delhi Main Branch has ensured KYC verification through their branches across the country and based on this remote processing, over 19000 Accounts have already been opened at SBI, New Delhi Main Branch***. Further, applications for change of details such as change in name, address, aims, objectives, or key members of the association under Rule 17-A of the Foreign Contribution Regulation Rules, 2011 are processed only online through the FCRA web portal at fcraonline@nic.in. There are no physical application since December, 2015.

102. The averments made by some Petitioners stating that there are close to 50,000 persons registered under FCRA is false and misleading and amounts to twisting of facts. If fact, a closer scrutiny of the documents attached from the FCRA website would reveal that out of close to 50000 persons registered under FCRA, registration certificate of less than 23000 persons are active, whereas registration of over 20,600

non-compliant persons have been cancelled already. Based on the existing procedure over 19000 Accounts have already been opened at SBI, New Delhi Main Branch.

103. It is submitted that regarding averments made by some petitioners that section17 read with the Notification dated 7th October, 2020 violates the consumer's right to choose from a variety of services under section 2(9)(iii) of the Consumer Protection Act, 2019, it is respectfully submitted that The Foreign Contribution (Regulation) Act, 2010 is a regulatory legislation and with objective to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individual or associations or companies and to prohibit acceptance and utilization of foreign contribution or foreign hospitality. The erstwhile provisions of section 17 also provided for an exclusive account for receipt and utilization of the foreign contribution. Further, section 46 of the Act also confers on the Central Government powers to give such directions as it may deem necessary to any other authority or any person or class of person regarding the carrying into execution of the provisions of the Act. Therefore, provisions of the Consumer Protection Act, 2019 cannot be invoked over and above the provisions of the FCRA. The associations or the Petitioners are not "consumers" of foreign contributions and neither are foreign contributions "goods or services".

104. It is submitted that the averments made by some petitioners about avoidable administrative burdens on the Respondents and cause unnecessary expenditure of resources to ensure adequate infrastructure and sufficient personnel to transact for over 23,000 FCRA registered organizations from one branch of the State Bank of India is misconceived and unfounded and hence denied. It is submitted that the answering Respondents have made prior consultations with the State Bank of India on such issues with a view to ensuring on the one hand that the NGOs/associations are not put to any undue hardships or extra financial costs/compliance burden and on the other hand facilitating monitoring of all inflows of foreign contribution more coherently and effectively towards making the fund flow transparent as mandated by the Act. Further, administrative burdens on the Respondents need not cause concern

for the Petitioners. It is submitted that regarding Rule 16 relating to reporting of information by the banks within 48 hours is concerned, it is submitted that from petitioners' point of view or for that matter from NGO's point of view it is immaterial and inconsequential as it entails no additional compliance burden on the petitioners or NGOs.

105. Further, the averments made by some petitioners that out of exiting 30,000 FCRA registered societies/ association, approximately only 500 applicants and that too fresh applicants have come forward to open in FCRA account in NDMB, SBI in completely false and misleading. ***It submitted that close to 22,600 associations are registered under FCRA. Due to proactive efforts of the Respondents, over 19000 FCRA Accounts have already been opened at SBI, New Delhi Main Branch***.

106. It is submitted that regarding averments made by some petitioners about the FCRA Charter for the Banks, it submitted that the averments are misconceived and misleading. It is respectfully submitted that the FCRA Charter for the Banks does not attempt to oversee the banking functions. In fact, it only brings out clarity on crucial role assigned to banks in respect of implementation of the Foreign Contribution (Regulation) Act, 2010 so that they are not placed at the wrong side of the law while allowing receipt and utilization of foreign contribution. This charter is only an administrative guidance to better implement the provisions of the Act.

107. It is submitted that regarding averments made by some petitioners about the Reserve Bank of India's Circular dated 06.02.2012 with guidelines, it is submitted the said Circular brings out and reiterates the erstwhile provisions of the Foreign Contribution (Regulation) Act, 2010 and the rules made thereunder, which have not been amended by the competent legislature. Hence, the answering Respondent is competent to issue the impugned Public Notice dated 13.10.2020 and it does not have any jurisdictional infirmity in the eyes of law.

108. It is submitted that regarding the averments made by some petitioners impugning the amendments under on the ground of need of foreign aid during

COVID-19 pandemic better outreach, one of the petitioner in the connected Writ Petition (Civil) No. 634/2021 has in fact questioned the bonafide of such plea alleging that taking the shield of Covid pandemic and their relief work, several NGOs and individuals are actually misusing the FCRA regime to siphon of funds obtained from abroad for purposes other than those permitted under FCRA. It is submitted that this Hon'ble Court, may take note of the same.

109. It is submitted that for the reasons stated in the foregoing paras, it is respectfully prayed that this Hon'ble Court may be pleased to dismiss the writ petitions and/or pass such further orders, as deemed fit in the interest of justice in the facts and circumstances of the case.

110. The present affidavit is bonafide and in the interest of justice.

VERIFICATION

Verified on this 20th day of October 2021 that the contents of the above affidavit are true and correct to the best of my knowledge and knowledge derived from the official records and nothing material has been concealed therefrom.