

## Social Sector Hotline

March 16, 2020

### NGOS INVOLVED IN SOCIAL ACTIVISM NOT NECESSARILY POLITICAL UNDER FCRA

- Indian Social Action Forum (hereinafter referred to as **"the Appellant"**), had challenged the constitutionality<sup>1</sup> of Section 5(1) and Section 5(4) of Foreign Contribution Regulation Act, 2010 (**"FCRA"**) which prescribed procedures to notify a certain class of organization, not otherwise a political party, as a political organization;
- The Appellant further challenged constitutional validity of corresponding rules under Foreign Contribution Regulation Rules, 2011 (**"FCRR"**) i.e. sub-rule 3(1), 3(v) and 3(vi) that provided guidelines for declaring organizations to be of political nature, that were not otherwise political parties;
- Supreme Court of India (hereinafter referred to as the **"Apex Court"**), while upholding and confirming the constitutional position and validity of aforesaid sections and rules, acknowledged participatory and democratic role of dissent being played by civil society organizations/voluntary organizations;
- Organizations engaged in charitable, educational and promotion of civil, political, economic and cultural rights should be allowed access to domestic as well as foreign funding;
- The Apex Court further clarified that the scope of aforesaid sections and rules do not restrict for civil society organizations to receive foreign funds, so long such democratic participations through civil disobedience movements are not carried out under the garb of electoral politics or political agenda or propaganda;
- As per the Apex Court, possible abuse of power should not be a ground to declare a provision unconstitutional under FCRA;
- Right to receive foreign contribution is not a fundamental right under Article 19 of the Indian Constitution, and is subject to reasonable restrictions;

#### BACKGROUND

The Appellant is a registered society involved in combating communalism and defending the tenets of democracy. The Appellant organization firmly believes in a secular and peaceful social order and opposes communalism and the targeted attacks on the lives and rights of people including religious minorities. The power conferred by FCRA on the Central Government to declare an organization to be an organization of a political nature under Section 5(1)<sup>2</sup> of FCRA was challenged by the Appellant on the ground that no guidelines were provided for exercise of such power.

Per Section 5(1) of FCRA, central government is conferred with the power to declare an organization to be political in nature, which otherwise is not a political party. Further, rule 3(1)(e) & (f) of FCRR completely prohibits any political party or its office-bearer thereof to receive foreign contributions as well as organizations that may be political in nature, even though they are not registered or recognized as political parties. The provisions of FCRA further envisages that the central government may notify an organization to be political in nature for the purposes of FCRA, basis activities carried out or ideology propagated or their latent or patent association with activities of any political party.

It is pertinent to note that vide Section 5(1) of FCRA, the central government is empowered to provide guidelines to determine whether an organization is of a political nature.

#### ARGUMENTS BY THE APPELLANT:

The Appellant assailed Section 5(4) of FCRA on the ground that the "authority" to which a representation had to be made by the aggrieved party had not been specified, which gave rise to undue bureaucratic discretion, non-transparency and vitiated the process enshrined under rule 3(i), 3(v) and 3(vi) of FCRR. According to the Appellant, the guidelines provided in rule 3<sup>3</sup> of FCRR are impermissibly wide, giving arbitrary discretion to the authorities which would result in abuse of the power. It was argued that rule 3(i), 3(v) and 3(vi) of FCRR suffered from unreasonableness and arbitrariness and was violative of the fundamental rights enshrined in Articles 14, 19 (1)(a), 19 (1) (c) and 21 of the Constitution.

It was argued that the guidelines in the aforesaid rules were vague and allowed ample scope for bureaucratic or administrative misuse and outreach at the cost of voluntary organizations' freedom of speech and expression. The Appellant organization, which had no interest in active politics, could be deprived of the right to receive foreign contribution at the whims and fancies of the executive by resorting to certain vague guidelines. It was further argued that the expressions 'political objectives', 'political activities', 'political interests' and 'political action' used in FCRR have no clarity and any activity though not connected with party politics could still be brought into the fold of rule 3 of FCRR.

Therefore, as per the Appellant, such aforesaid rules suffered from the vice of over-breadth and were liable to be declared as unconstitutional being violative of Article 14 and Article 19 of the Constitution as the rules were unreasonable and violative of freedom of speech and expression and the right to form associations which is

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otherwise protected under Article 19 (1)(a) and 19 (1)(c) of the Indian Constitution.

## ARGUMENTS BY THE STATE:

The State argued that right to receive foreign contribution is not a fundamental right guaranteed under the Constitution. The State further argued that sufficient safeguards against possible abuse of power were incorporated in FCRA and FCRR, and a mere possibility of abuse of power should not be a ground to challenge the aforesaid legislations. The State further argued that principle of 'reading down' should be adopted if the Court is of the opinion that there remained an ambiguity in rule 3 of FCRR.

## THE CURRENT PROCESS TO NOTIFY AN ORGANIZATION AS 'POLITICAL' UNDER FCRA

Before declaring an organization to be of a political nature not being a political party, the Central Government should take into account the activities of the organization or the ideology propagated by the organization or the program of the organization or the association of the organization with the activities of any political party.

The Central Government is obligated in terms of Section 5(2) of FCRA to issue notice in writing informing the organization in respect of which the order is proposed to be made of the ground(s) on which an order under Section 5(1) is proposed. Per Section 5(3) of FCRA, the organization is to be given an opportunity to submit its representation which should be considered within the time prescribed in Section 5 and an order is required to be passed recording the reasons therefor. Guidelines for declaration of an organization to be an organization of a political nature not being a political party are prescribed under rule 3 of FCRR.

## THE APEX COURT'S FINDINGS

The Apex Court observed that as the intention of FCRA was to prohibit foreign funds in active politics, any civil society organization with avowed political objectives or such similar organizations that are actively engaged in active politics or party politics should not be permitted to access foreign funds. Per the Apex Court, there seemed to be no ambiguity in rule 3(i) of FCRA and the same could not be termed as ultra-vires the provisions of FCRA.

The Apex Court further looked into rule 3(v) of FCRR that dealt with organizations of farmers, workers, students etc. which were not directly aligned to any political party, but objectives of which included steps towards advancement of 'political interests' of such organizations. The Court agreed that such organizations agitating for their legitimate claims should not be prevented access to foreign funds by resorting to vague terms like 'political interests'. In fact, moving a step further, the Court went on to read-down rule 3(v) of FCRR to hold that voluntary organizations which had absolutely no connection with either 'party politics' or 'active politics' should not be denied access to foreign contributions.

Therefore, such of those organizations working for the social and economic welfare of the society should not be treated at par with organizations with political affiliations or interests, and the term 'political interests', and the expression 'political interests' in rule 3(v) of FCRA is to be construed to be in connection with 'active politics' or 'party politics'.

Support to public causes by resorting to legitimate means of dissent like general strike or concerted cessation of work cannot deprive an organization of its legitimate right of receiving foreign contribution. Any organization which supported the cause of a group of citizens agitating for their rights without a political goal or objective cannot be penalized by being declared as an organization of a 'political nature'.

## ANALYSIS & CONCLUDING COMMENTS

It is interesting to note that while the Apex Court agreed with the Appellant's argument that the words "political interests" under rule 3(v) of FCRR were vague and are prone to misuse, it simply decided to read-down the provision than declaring it unconstitutional on the basis that a possible abuse of power alone should not render a provision unconstitutional.

When seen in the historical context of how FCRA has been administered by the central government, it was incumbent upon the Apex Court to have looked into what constituted 'active politics' or 'party politics' than leave it for FCRA authorities to determine it alone. Post this judgment, the central government should revisit FCRA provisions to define what constitutes "party politics", "political activities" and "political interest". This will help all the stakeholders to understand the basic difference between social activism and politics – expressions that are inherently ambiguous and overlapping in the context of FCRA.

Contemporary classifications and definitional understanding of terms like "party politics" or "active politics" or "public interests" should be introduced within the FCRA framework in order to mediate between 'activism' and 'polity', The Apex Court's judgment is a welcome step in this direction as it has simplified the polysemous understanding of "political activities" in the context of foreign contribution law and de-cluttered the regulatory understanding of what is permissible and restricted under FCRA.

– **Rahul Rishi, Dr.Milind Antani & Kishore Joshi**

You can direct your queries or comments to the authors

<sup>1</sup> The Appellant has challenged the constitutionality on the ground that Section 5(1) & 5(4) of FCRA read with sub-rule 3(i), (v) and (vi) were violative of Article 14, Article 19(1)(a), 19(1)(c) and Article 21 of the Indian Constitution

**Article 14** [Equality before law]. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth **Article 19** [Protection of certain rights regarding freedom of speech etc.]

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practice any profession, or to carry on any occupation, trade or business

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, 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

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise **Article 21** [Protection of life and personal life]. No person shall be deprived of his life or personal liberty except according to procedure established by law."

<sup>2</sup> "5(1). The Central Government may, having regard to the activities of the organization or the ideology propagated by the organization or the program of the organization or the association of the organizations with the activities of any political party, by an order published in the Official Gazette, specify such organization as an organization of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3: Provided that the Central Government may, by rules made by it, frame the guidelines specifying the ground or grounds on which an organization shall be specified as an organization of a political nature."

(2) Before making an order under sub-section (1), the Central Government shall give the organization in respect of whom the order is proposed to be made, a notice in writing informing if of the ground or grounds, on which it is proposed to be specified as an organization of political nature under that sub-section.

(3) The organization to whom a notice has been served under sub-section (2), may, within a period of thirty days from the date of the notice, make a representation to the Central Government giving reasons for not specifying such organization as an organization under sub-section (1): Provided that the Central Government may entertain the representation after the expiry of the said period of thirty days, if it is satisfied that the organization was prevented by sufficient cause from making the representation within thirty days.

(4) The Central Government may, if it considers it appropriate, forward the representation referred to in sub-section (3) to any authority to report on such representation.

(5) The Central Government may, after considering the representation and the report of the authority referred to in sub-section (4), specify such organization as an organization of a political nature not being a political party and make an order under sub-section (1) accordingly.

(6) Every order under sub-section (1) shall be made within a period of one hundred and twenty days from the date of issue of notice under sub-section (2): Provided that in case no order is made within the said period of one hundred and twenty days, the Central Government shall, after recording the reasons therefor, make an order under sub-section (1) within a period of sixty days from the expiry of the said period of one hundred and twenty days.

<sup>3</sup> "3. Guidelines for declaration of an organization to be of a political nature, not being a political party. - The Central Government may specify any organization as organization of political nature on one or more of the following grounds:

(i) organization having avowed political objectives in its Memorandum of Association or bylaws;

(ii) any Trade Union whose objectives include activities for promoting political goals;

(iii) any voluntary action group with objectives of a political nature or which participates in political activities;

(iv) front or mass organizations like Students Unions, Workers' Unions, Youth Forums and Women's wing of a political party;

(v) organization of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of Political interests of such groups;

(vi) any organization, by whatever name called, which habitually engages itself in or employs common methods of political action like 'bandh' or 'hartal', 'rasta roko', 'rail roko' or 'jail bharo' in support of public causes."

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