

## Lawyers Collective's ('LC') response to FCRA suspension order

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2.6.2016

### **I. Events**

- ◇ 23.10. 2000: LC was registered under section 6(1) of the Foreign Contribution (Regulation) Act, 1976 ('FCRA, 1976')
- ◇ 5.11.2015: LC received a letter and standard questionnaire from the FCRA Wing (Monitoring Unit), Ministry of Home Affairs ('MHA'), under the signature of 'Anand Joshi', Under Secretary. The said questionnaire does not have any basis in law and the exercise was claimed to be "*an endeavor by the Ministry to bring in transparency and accountability while ensuring national security*".
- ◇ 20/21.11.2015: Articles appeared in the press reporting that LC had been served a show-cause notice for violating FCRA by the MHA.
- ◇ 22.11.2015 and 5.12.2015: LC wrote letters to MHA inquiring about the alleged notice, which it had not received.
- ◇ 11.12.2015: LC received a reply from MHA stating that no show-cause notice under FCRA had been issued to it by the Ministry till date.
- ◇ 4.1.2016: LC submitted a reply to the standard questionnaire along with documents sought by the MHA.
- ◇ 12.1.2016: LC received a notice of inspection u/s 23 of Foreign Contribution (Regulation) Act, 2010 ('FCRA, 2010').
- ◇ 19-23 January 016: LC's accounts were inspected by a team of officers designated by the MHA.
- ◇ 29.2.2016: LC received observations/findings of the inspection, alleging violation of provisions of the FCRA, 2010.

- ◇ 30.3.2016: LC submitted its reply to the inspection report, rejecting all the allegations, in both fact and law.
- ◇ 1.6.2016: An order dated 31.5.2016 u/s 13 of FCRA, 2010 suspending LC's registration for 6 months as well as a show cause notice for cancellation u/s 14 of FCRA, 2010 was put up on MHA's website. LC has not received the said order, till date.

## **II. Some pertinent observations**

LC's reply dated 30.3.2016 to the findings of the FCRA inspection has not been considered at all. The suspension order merely repeats the allegations contained in the inspection report dated 29.2.2016, which LC has denied with a detailed explanation of facts as well as law. It is doubtful whether LC's explanation has been understood, let alone examined by the MHA. The suspension order dated 31.5.2016 curtly rejects it as "*unsatisfactory and not providing adequate explanation*". This is not surprising as LC has always believed that the FCRA inquiry against it is pre-determined and biased.

This is compounded by the fact that in the present proceedings, the government [the MHA] has acted as the prosecutor-judge and jury in its own cause, in complete violation of the rules of natural justice. LC has not been given a fair and independent inquiry; the MHA has clearly forgotten that "*no-one should be a judge in his own cause.*"

The unfairness of the investigation is underscored by the fact that the FCRA, 2010 is itself an arbitrary, undemocratic and unconstitutional law that curtails the freedom of expression, association and occupation, among

other fundamental rights. In a note dated 20 April 2016, the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Mr. *Maina Kiai* has observed that undue restrictions placed on individuals and civil society organizations under the FCRA “*impact the enjoyment of the freedom of association and undermine civil, cultural, economic, political and social rights as a whole*”.<sup>1</sup>

LC’s case demonstrates the use of an unfair law by a vindictive and authoritarian establishment for intimidating critics and suppressing dissent.

As an organisation committed to the protection of fundamental rights, LC has relentlessly worked to uphold rights and realise social justice, irrespective of the political establishment of the day. We have done so for the last three decades during the tenure of many different governments, at the Centre as well as the States. Our beliefs are grounded in the respect for the dignity, diversity and equality of life; in humanism and in human rights. Our ideology doesn’t change, no matter what colour or ideology the regime may have. That is why LC is respected across quarters, internationally as well as at home. It is unfortunate that LC’s constitutional and legal work is being given a ‘*political hue and colour*’ by the current dispensation, for reasons best known to itself.

The credibility of the FCRA investigation has come under the scanner with the recent allegations and arrest of *Anand Joshi*, the Under Secretary who issued notices to several NGOs for alleged FCRA violations last year. The same *Anand Joshi* also initiated FCRA inquiry against LC on behalf of MHA

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<sup>1</sup> <http://freeassembly.net/wp-content/uploads/2016/04/UNSR-FOAA-info-note-India.pdf>

in November 2015 and continued to correspond with us until early January 2016. The veracity of the present proceedings against LC are therefore, cast under serious doubt.

It is ironic that political parties, who are expressly banned from receiving foreign contribution under the FCRA, 2010 have reportedly been taken off the legal hook by a provision in the Finance Bill, 2016 moved by the Finance Minister earlier this year.<sup>2</sup> The law is however, being used to threaten and silence certain NGOs that are doing legitimate, rights-based work, on the pretext that this amounts to political activities.

### **III. Allegations and reply**

LC categorically states that all the foreign contribution received by it has been utilised for the exact purposes for which it was received. Not a single penny has been diverted or utilised for any other purpose or misappropriated or used for personal gain by any of its Trustees, staff or professionals engaged by it.

#### **1. Ms. Indira Jaising received foreign contribution of Rs 96 lakhs as remuneration from LC, while serving as ASG**

As Additional Solicitor General of India ('ASG') (July 2009-May 2014), Ms. Jaising was not a government servant and therefore, the bar under section 3 of FCRA, 2010 does not apply.

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<sup>2</sup> <http://thewire.in/2016/04/02/revealed-jaitley-gifts-bjp-congress-a-clean-chit-retrospectively-on-fcra-violation-27134/>

Ms. Jaising had permission from the appropriate authority for continuing to serve as a Trustee well as to receive remuneration from the LC. There was no conflict of interest between her role as an ASG and her working for gender justice for the LC. Ms Jaising was granted this permission, since LC was being supported by UN Women and other reputed international organizations working on issues of domestic violence, sexual harassment at the workplace and sexual abuse.

Ms. Jaising received the said amount over a period of 5 years, as professional fees for the services rendered to LC. For a person of her experience and repute, the amount barely compensates for the services that she rendered over *59 months*.

**2. Anand Grover availed foreign contribution for UNSRH activities including foreign travel and also used it for personal benefits**

Mr. Anand Grover was appointed as the United Nations Special Rapporteur on the Right to Health ('UNSRH') by the United Nations Human Rights Council (2008-2014), in recognition of LC's work on HIV and Human Rights, which he headed.

UNSRH activities are for protecting and promoting the right to health, which is very much a part of LC's aims and objectives. The foreign contribution was received specifically for this purpose and was used for this purpose.

Mr. Grover was not paid any remuneration by LC for UNSRH activities. LC only reimbursed him for telephone and other legitimate expenditure incurred by him for doing LC's work on his travel abroad,

against itemized bills. This is standard practice in all professional associations, including LC. Besides, the said reimbursement constituted *less than 1%* of the foreign contribution received for UNSRH activities.

**3. Appearance in Novartis Case by Anand Grover and the use of foreign contribution for that purpose**

Mr. Anand Grover appeared in the Novartis Case, heading the legal team of LC, on behalf of cancer patients to secure access to affordable and quality anti-cancer medicines for the benefit of millions of Indians. This was integral to LC's aims and objects and part of the mandate to work on the protecting the fundamental rights of people, including the right to health. There was no requirement of a resolution to be passed by the Trustees to this effect. No specific violation of FCRA, 2010 has been alleged and is made out.

Advice of Ms. Indira Jaising, who is a Senior Counsel, was sought by LC on a specific legal issue that had arisen in the case. It is for this reason that she undertook travel and the ticket expense was borne by LC. There is no violation of Section 7 or Section 8 of FCRA, 2010.

**4. Spending foreign contribution on awareness/workshops on HIV/AIDS and women's empowerment, which are unrelated to 'social' issues**

It is absurd to suggest that receiving and utilising foreign contribution for raising awareness and conducting workshops/meetings/seminars on issues relating to HIV/AIDS and women's empowerment does not relate to 'social issues'. LC has been registered under the category of

'social' for receipt of foreign contribution under Section 11, FCRA, 2010 and has been rightly listing its activities under Item 48 in Form FC-6, i.e., "*Awareness about Acquired Immune Deficiency Syndrome (AIDS)/treatment and rehabilitation of persons affected by AIDS*", in column 3 of the FC-6. It is evident from Item 45 (Awareness Camp/Seminar/Workshop/Meeting/Conference), Item 46 (Providing free legal aid/Running legal aid centre) and Item 48, as stated above, that utilising foreign contribution for raising awareness or organising workshops is very much related to the 'social' category for which foreign contribution can be received and utilised. There thus is no violation of Section 8, FCRA, 2010.

#### **5. Transfer of foreign contribution outside India**

LC has not transferred any foreign contribution to any person abroad. It had only reimbursed expenditure incurred by organisations in Hungary and Malaysia towards the regional conferences on right to health that LC organized, in accordance with the purpose of the foreign contribution received. There is no prohibition in FCRA, 2010 to spend foreign contribution abroad for the specific activities for which it was received. Organising conferences and seminars on law and human rights is very much part of the aims and objects of LC. Further, FCRA, 2010 cannot be applied retrospectively. The allegation makes vague reference to FCRA, 1976 but does not refer to a specific provision allegedly violated by LC under the 1976 Act. Since there is no transfer of foreign contribution outside India, there exists no violation of Section 7 read with Rule 24, Foreign Contribution (Regulation) Rules, 2011. ('FCRR, 2011')

**6. Violation of visa norms and spending foreign contribution on organising conferences in foreign countries**

As part of its work to advance right to health by supporting the mandate of the UNSRH, LC engaged professionals, including some foreign nationals, who worked in India in complete compliance with the relevant visa norms. No person came on tourist visa. No visa norms were violated or specific violation even cited and no violation of FCRA is made out.

Expenses for foreign travel for Mr. Anand Grover and other associates were covered in connection with the regional conferences on right to health, which LC organized in other countries. There is thus no violation of Sections 7 and 8 of FCRA, 2010.

**7. Receipt of foreign contribution in non-designated FC account**

The amounts mentioned in the allegation do not constitute foreign contribution, since they were received from a foreign source in India as fees for rendering specific services, which is exempt under Explanation 3 of Section 2(1)(h), FCRA, 2010. Even if they are considered as foreign contribution, the receipt of these amounts in non-FC-designated account was due to an inadvertent and bonafide error of the accounting staff of LC. There was no intention to suppress any foreign contribution, since the same was disclosed to other statutory bodies, i.e., Income Tax and Charity Commissioner, Mumbai as well as to MHA in the reply of the Association to the Standard Questionnaire dated 05.11.2015. No provision of FCRA, 2010 is violated, let alone Section 18 read with Section 33.

**8. Non-reporting of opening of utilisation account, in violation of FCRA, 2010**

LC had five active FC-utilisation accounts on 1st May, 2011, when the FCRA, 2010 came into effect, which did not require intimation of active utilisation accounts but only intimation of opening of new utilisation accounts. LC complied with the requirement, when it intimated to MHA the opening of FC-utilisation account in Union Bank of India in Mumbai in July, 2015 (317302010753463). Further, FCRA, 1976 contained no similar requirement. There is no violation of any provision of FCRA, 1976 or FCRA, 2010.

**9. Inter-transfer of foreign contribution from one utilisation account to another utilisation account**

There is no prohibition under FCRA, 2010 to transfer foreign contribution from one FC-utilisation to another FC-utilisation account. No violation of Section 17 read with Rule 9(1)(e), FCRR, 2011 is established.

**10. Transfer of funds from local accounts to FC-utilisation account and mixing of funds**

There is no transfer of foreign contribution from FC-designated account to either FC-utilisation account or local accounts. LC had only defrayed expenses from FC-designated account to the local accounts. There exists no violation of Section 17, FCRA, read with Rule 9(1)(e) and they cannot be applied retrospectively. Section 54,

FCRA, 2010 has no application in the present case, since the activity in question was not prohibited under FCRA, 1976.

**11. Spending foreign contribution on advocacy with media and MPs and in organising *dharnas*/rallies, in violation of letter and spirit of FCRA, 2010**

There exists no bar either in the FCRA, 2010 or in the FCRR, 2011 on meeting MPs and raising awareness on legal issues, including discrimination faced by people living with HIV and the need for legislative measures to redress the same. These activities are in line with the National AIDS Control Organisation of the Ministry of Health and Family Welfare, Government of India, which itself aims to achieve 'zero discrimination on HIV'. LC respects the sanctity of parliamentary institutions and political processes and has never violated the same. No money was spent on rallies or *dharnas* having any political hue or *colour*. Further, some of the activities took place before the FCRA, 2010 came into force on 1st May, 2011, when Section 8 or any provision similar to Section 8 did not exist.

Furthermore, expenses for rest of the activities in 2011 and 2014 were borne from the money received from the United Nations, which is not foreign contribution within the meaning of FCRA.

**IV. Conclusion**

The impact of LC's work has been tremendous and is recognized the world over, whether in drafting and monitoring the implementation of the Protection of Women from Domestic Violence Act, 2005 or in

challenging discrimination against people living with HIV through cases like *MX vs. ZY* (Bombay High Court, 1997). LC's legal team has been at the forefront of the battle against section 377, IPC that criminalises same-sex relations, the recognition of transgender identity and rights, securing affordable medicines by preserving public health safeguards under section 3(d) the Patents Act, 1970, and more recently, in crafting changes to ensure access to essential narcotic drugs under the Narcotic Drugs and Psychotropic (Amendment) Act, 2014. LC has worked extensively with various Government departments, both at the Centre and in the States on laws, policies and programmes that protect Fundamental Rights and advance the Directive Principles of State Policy, as enshrined in the Indian Constitution.

As the saying goes: - "*Only a tree that bears fruit gets pelted with stones.*" It is no coincidence that LC is being targeted for its stellar work in reforming laws and legal systems for the marginalized. More so, when its founding trustees – Ms. Indira Jaising and Mr. Anand Grover, have, in the course of their professional duties as lawyers, defended cases of Priya Pillai (Green Peace India), Teesta Setalvad and Yakub Memon that have caused discomfort to many in the current establishment. Ms. Jaising also represented Sanjiv Bhatt, the IPS officer from Gujarat demanding an independent investigation by SIT into false and frivolous FIRs lodged against him in the State of Gujarat. Mr Grover appeared in the Bombay High Court protesting the discharge of BJP President - Amit Shah in the Sohrabuddin murder case.

There is no doubt that attempts to hound and malign LC are part of the larger clampdown on civil society voices that seek to preserve and protect shrinking democratic spaces in India and zealously guard civil liberties and fundamental rights.

LC will take appropriate actions against this persecution and will continue to fight valiantly for truth and justice.

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