IN THE HIGH COURT OF DELHI AT NEW DELHI

(CIVIL ORIGINAL JURISDICTION)

Writ Petition (Civil) No. ..... Of 2015

A WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA SEEKING AN APPROPRIATE WRIT FROM THIS HON'BLE COURT TO CONSTITUTE AN INDEPENDENT BODY TO ADMINISTER ENFORCEMENT OF FOREIGN CONTRIBUTION (REGULATION) ACT, 2010 (FCRA)

MEMO OF PARTIES

In the matter of Public Interest Litigation:

Association for Democratic Reforms
Through Its Founder-Trustee and Secretary
Prof. Jagdeep S Chhokar
B-1/6 Upper Ground Floor
Hauz Khas, New Delhi-110016 …… Petitioner No.1

Dr. E.A.S. SARMA
Age: About 74 years
Former Secretary to GOI
14-40-4/1, Gokhale Road
Maharanipeta
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eassarma@gmail.com
PAN number: AABPE1384L
Mobile: 919866021646 …… Petitioner No. 2

VERSUS

Union of India
Through Its Secretary
Ministry of HOME AFFAIRS
NORTH BLOCK
Central Secretariat
New Delhi–110001 …The Respondent

NEW DELHI
DATED:

(PRASHANT BHUSHAN)
ADVOCATE FOR THE PETITIONERS
301, NEW LAWYERS CHAMBERS
SUPREME COURT OF INDIA
NEW DELHI-110001

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Association for Democratic Reforms & Anr …The Petitioners

VERSUS

Union of India …The Respondent

A WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA SEEKING AN APPROPRIATE WRIT FROM THIS HON'BLE COURT TO CONSTITUTE AN INDEPENDENT BODY TO ADMINISTER ENFORCEMENT OF FOREIGN CONTRIBUTION (REGULATION) ACT, 2010 (FCRA)

To,

THE HON'BLE CHIEF JUSTICE OF DELHI AND HIS COMPANION JUDGES OF THE HON'BLE HIGH COURT OF DELHI, AT NEW DELHI

The Humble Petition of the
Petitioners above-named

MOST RESPECTFULLY SHOWETH: -

1. That the petitioners are filing the instant writ petition in public interest. Petitioners have no personal interest in the litigation and the petition is not guided by self-gain or for gain of any other person / institution / body and that there is no motive other than of public interest in filing the writ petition.

2. That the petitioners have based the instant writ petition from authentic information and documents made available publicly from the websites of the Government and Courts. Intelligence report was

acquired from reliable sources whose identity if revealed could adversely affect free flow of information for general interest of public.

3. That the petition, if allowed, would benefit the citizens of this country generally as rule of law is essential for democracy and such brazen violation of law by executive is to the detriment to citizens as a whole. Since these persons are too numerous and have no personal interest in the matter, they are unlikely to approach this Hon'ble Court on this issue. Hence the petitioners herein prefer this PIL.

4. The affected party by the orders sought in the writ petition would be the Union of India, who has been made as a Respondent. To the best of the knowledge of the petitioners, no other persons / bodies / institutions are likely to be affected by the orders sought in the writ petition.

5. That the petitioner no. 1 is Association for Demorcatic Reforms (ADR). ADR has been in the forefront of electoral reforms in the country for the last 14 years from wide-ranging activities including advocacy for transparent functioning of political parties, conducting a detailed analysis of candidates in every election, and researching the financial records of political parties including their income-tax returns. It was on ADR's petition this Hon'ble Court ordered all election candidates to declare their criminal records and financial assets, a judgment which was later upheld by the Hon'ble Supreme Court. The Organization is registered as Public Trust under Mumbai Public Trust Act, 1950. Under the practice followed by ADR, the Founder-Trustee & Secretary Prof. Jagdeep S Chhokar is authorised to institute proceedings on behalf of petitioner no. 1.

That the Petitioner No. 2 is former Secretary to Government of India and has been campaigning for electoral reform, public awareness of Right to Information Act and need to protect the environment. As a former Commissioner for Tribal Welfare in erstwhile united Andhra Pradesh state, he has also been campaigning for protecting the rights of the tribals. His annual income is Rs 11 lakhs (approx.) (PAN number: AABPE1384L). His UID number is 853422610935. Petitioners have means to pay if any cost is imposed by the Hon'ble Court.

6. The petitioner no. 2 has made representation to Union Home Secretary seeking an Independent Regulatory body for FCRA enforcement dated 13-03-2015 **Annexure P1** (Pg _____), followed up on 10-04-2015 **Annexure P2** (Pg _____). A representation was also made to Cabinet Secretary on 11-04-2015 **Annexure P3** (Pg _____) without any meaningful outcome.

7. That the petitioner no. 1 has filed several notable PILs in the past in the Hon'ble Supreme Court.

S. No.	Case	Status	Outcome
1	Petition seeking disclosure of the antecedents of election candidates. (2001) 5 SCC 294	Disposed off	SC directed all election candidates to declare their educational qualifications, financial assets and criminal records
2	Petition challenging the amendment made in the Representation of	Disposed off	SC struck down the amendment in the said Act as unconstitutional

	People's Act 1951 barring certain disclosures by election candidates (2003) 4 SCC 399		

That the petitioner no. 2 has also filed several notable PILs in the past in the Hon'ble Supreme Court/Delhi High Court. A brief of them is given below.

S. No.	Case	Status	Outcome
1	WPC 250/2007 (PIL on the issue of 'Salwa Judum' in Chhatisgarh)	Disposed off	SC allowed the writ petition holding the deployment of 'Salwa Judum' forces as unconstitutional
2	WP(C) 131/2013(PIL on Foreign contributions to political parties)	Disposed off	HC allowed the petition holding political parties liable. Appeal pending in SC
3	WPC 464/2011 (PIL on the lack of safety in the use of nuclear energy)	Pending	SC has admitted the petition
4	WPC 407/2012 (PIL on the issue of liability of Kudankulam nuclear power plant)	Pending	SC has issued notice on the petition

THE CASE IN BRIEF

8. That the Petitioners are filing the instant writ petition in public interest under Article 226 of the Constitution seeking constitution of quasi-judicial tribunal to administer enforcement of Foreign Contribution (Regulation) Act, 2010(hereafter referred to as FCRA), in order to avoid the misuse of FCRA, as seen in several cases. Executive is tasked with effective enforcement even against the political parties, politicians, legislators, quasi-political institutions with strong political affinity and non-governmental organizations (NGOs). However, legislators being the political master of the executive and with capability to influence the executive, enforcement against them and quasi-political institutions may not be effective in view of the conflict of interest. Justice should not only be done but also seen to have been done. Hence the need for constituting an independent quasi-judicial tribunal to oversee FCRA enforcement.

9. The then, Ministry of Home Affairs, introduced the Bill for FCRA on 12-12-2006, in Rajya Sabha with the following 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."

10. The Preamble to the Foreign Contribution (Regulation) Act, 2010 (Hereafter referred as the FCRA) reads as follows.

"*An Act 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.*"

This implies that the Parliament, in its wisdom, thought it fit to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies in order to safeguard the national interest.

11. With specific reference to acceptance of foreign contribution or foreign hospitality by political parties, legislators and candidates for election is concerned, the Act prohibits the same in terms of Section 3, the relevant extract of which is reproduced below.

"3. (1) No foreign contribution shall be accepted by any
(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; if>organisation of a political nature as may be specified under sub-section (I) 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 (I) of section 2 of the Information Technology Act, 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).
(2) (a) No person, resident in India, and no citizen of India resident outside India, shall accept any foreign contribution, or acquire or agree to acquire any currency from a foreign source, on behalf of any political party, or any person referred to in sub-section (I), or both.
(b) No person, resident in India, shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any person if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or any person referred to in sub-section (1), or both.
(c) No citizen of lndia resident outside India shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to-
(i) any political party or any person referred to in sub-section (I), or both; or
(ii) any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person referred to in sub-section (1), or both.

12. FCRA therefore prohibits political parties, candidates contesting for legislature, Judges, Media and legislators from accepting contributions and hospitality from foreign companies and foreign sources as defined in Section 2(g) and section 2(j) respectively, of the Act.

13. There are corresponding provisions in the Representation of the People Act, 1951 that prohibit political parties from accepting contributions from foreign sources. The relevant portion of Section 29B of that Act is reproduced below.

“29B. Political parties entitled to accept contribution. —Subject to the provisions of the Companies Act, 1956 (1 of 1956), every political party may accept any amount of contribution voluntarily offered to it by any person or company other than a Government company:

Provided that no political party shall be eligible to accept any contribution from any foreign source defined under clause (j)of section 2 of the Foreign Contribution (Regulation) Act, 1976 (49 of 1976).”

14. Section 40 of FCRA reads as under

Bar on prosecution of offences under the Act –No Court shall take cognizance of any offences under this Act, except with the previous sanction of the Central Government or any officer authorised by that Government in this behalf.

Central Government is conferred powers by Section 5, to notify organizations as political, by Section 9, to prohibit receipt of foreign contributions, by Section 11, for registration of persons for receiving foreign contributions by Central Govt. Section 13 and 14 provide for suspension and cancellation of the same. Section 43 provides for Central Govt to specify any authority to investigate offences under the Act. Section 46 provides for power to give directions as it deems necessary and Section 47 to delegate powers to any authority.

By virtue of these sections, enforcement of FCRA is clouded by government discretion and political executive influence, leaving scope for non-application of mind in some cases and possibly vindictive, arbitrary action contrary to Article14 of Constitution of India, in some other cases.

15. There have been instances of political parties and legislators accepting contributions and hospitality from foreign sources, prima facie, in violation of the FCRA. A case in point is the proceedings in WP(C) 131/2013 before Hon'ble Delhi High Court in which the court pronounced an order dated 28-3-2014, against the political parties for violation of Foreign Contribution (Regulation) Act, 1976. The

Hon’ble Delhi High Court directed the Ministry of Home Ministry to comply with that order within six months. A copy of the judgment of the Hon’ble High Court of Delhi dated 28.03.2014 in WPC 131 of 2013 is annexed as **Annexure P4** (Pg _____). Despite the fact that more than sixteen months have elapsed since the date of that order, it is yet to be complied with. Two national political parties, one of which is a part of the political executive at the Centre today, were respondents in that case. Both the political parties have filed appeals before the Hon'ble Supreme Court (SLP 18190/2014, SLP 32626/2014) against the above cited order of the Hon'ble Delhi High Court. The appeals are presently pending before the Apex court. No interim relief has been granted in favour of appellants.

16. There are other complaints filed by the petitioner no. 2 before the FCRA Division of the Union Home Ministry against some political parties and legislators for prima facie violation of the FCRA and they are presently pending with the Union Home Ministry. Compliant was lodged against BJP on 14-02-2015 for FCRA violations, **Annexure P5** (Pg _____). Compliant was lodged to Election Commission of India on FCRA Violations by BJP and Indian National Congress, dated 26-2-2015, **Annexure P6** (Pg _____). A complaint on FCRA violations of Shri Nitin Gadkari was filed on 27-02-2015 **Annexure P7** (Pg _____) and followed up on 07-03-2015 **Annexure P8** (Pg _____). A complaint was lodged with Home Secretary on Honorable Members of Parliament accepting Foreign Multinational Monsanto Hospitality, **Annexure P9** (Pg _____). A complaint was made to Home Secretary on Ms Vasundhara Raje accepting foreign hospitality on 17-06-2015, **Annexure P-10** (Pg_____). Another complaint was made to Home Secretary against BJP about receiving foreign contributions dated 25-02-2015, **Annexure P-11** (Pg_____).

17. The proceedings under FCRA are quasi-judicial in nature and it is desirable that they are independent, insulated from extraneous influences. There is a conflict of interest in Ministry of Home Affairs (MHA) continuing to administer FCRA, under the direct oversight of the political executive. The present arrangement does not provide

the necessary independence for FCRA proceedings for the following reasons.

(a) While MHA has often acted firmly and with a great deal of alacrity against several NGOs for violating the FCRA provisions, the Ministry had not displayed the same concern and alacrity in proceeding against the political parties and their affiliated institutions and legislators which violated the FCRA. The Ministry has not suo moto monitored foreign contributions received by the political parties in violation of the FCRA and taken action against them, despite the likelihood of acceptance of such foreign contributions would compromise the national security. The Ministry had initiated action against the political parties only after concerned individuals and associations filed cases before Hon'ble Delhi High Court in WP(C) 131/2013. Even after the Hon'ble Delhi High Court, in their order dated 28-03-2014 directed the Ministry to take action within six months, the Ministry is yet to finalize the proceedings against the political parties till date.

(b) As seen from the order dated 28-3-2014 in WP(C) 131/2013 Annexure P4, before Hon'ble Delhi High Court and SLP 18190/2014, SLP 32626/2014 pending before Hon'ble Supreme Court, there have been instances of political parties having prima facie violated the Foreign Contribution (Regulation) Act, 1976. It is possible that a political party found to have prima facie violated the FCRA is also a part of the political executive at the helm of affairs of the government as is the case now. The letters at Annexures P5 to P-11, show that, however, earnestly the concerned functionaries in Ministry of Home Affair may try to function objectively and independently in acting on a complaint against the political party in power or legislators belonging to it for violation of the FCRA provisions, the fact that they are administratively sub-ordinate to the political executive erodes their credibility as an independent authority.

(c) In the recent times, in the context of the ongoing debate on what constitutes "development", several individuals and NGOs have differed with the successive governments and questioned some of

their so-called “development” projects on the ground that they displaced people and adversely affected their livelihoods. Some of these NGOs are also registered under the FCRA and, perhaps, they received funds from overseas institutions. The intelligence agencies of the government, under the control of the government, have often reported against such NGOs on the basis of what they themselves perceive as the approach to “development” and, on that ground, the Ministry of Home Affairs has proceeded against the concerned NGOs under the FCRA. In such cases, to use FCRA proceedings as an instrument to penalize the concerned NGOs for holding a different view on the approach to “development” would amount to a gross misapplication of the Act itself. Hon'ble Delhi High Court's order dated 12-3-2015 in WP(C) 774/2015 (Priya Parameswaran Pillai vs Union of India) at **Annexure P-12** (Pg _____), emphasize the same.

Para 13 reads as “…..developmental activities, not now, but for ages have always had a counter point. The advancement in knowledge base, and the ability of common citizen to access information vis-à-vis public projects, has only made dissent more strident and vigorous. Whether one model of development has to be rolled out as against the other, is an on-going debate….. ”.

Para 13.1 reads as “……The mere fact that such debates obtain, or such debates metamorphose into peaceful protests, cannot be the reason for curtailing a citizen’s fundamental rights…..”.

Para 13.2 reads as “Ms Pillai, as the facts in this case would reveal, believes that the rights of tribal communities residing in Mahan would get impacted if, a coal mine, were to be opened in that area. This, is a view, which the executive may or may not agree with. That by itself, cannot be a reason to prevent Ms Pillai from exercising her fundamental right to travel abroad and, thereby, in effect, disable her from expressing her views on the subject…..”

Para 13.4,13.5 read as “…..The point in issue is, why must the State interfere with the freedom of an individual, as long as the individual concerned operates within the ambit of laws framed by the legislature. The core aspect of democracy is the freedom of an

individual to be able to freely operate, within the framework of the laws enacted by the Parliament. The individual should be able to order his or her life any way he or she pleases, as long as it is not violative of the law or constitutes an infraction of any order or direction of a duly constituted court, tribunal or any statutory authority for that matter. Amongst the varied freedoms conferred on an individual (i.e., the citizen), is the right of free speech and expression, which necessarily includes the right to criticise and dissent. Criticism, by an individual, may not be palatable; even so, it cannot be muzzled. Many civil right activists believe that they have the right, as citizens, to bring to the notice of the State the incongruity in the developmental policies of the State. The State may not accept the views of the civil right activists, but that by itself, cannot be a good enough reason to do away with dissent."

Para 15.3 reads as "….there may be disparate views amongst persons who form the nation….. may also pertain to the tradition and heritage of the Nation and the manner in which they are to be taken forward. Contrarian views held by a section of people on these aspects cannot be used to describe such section or class of people as anti-national. Belligerence of views on nationalism can often lead to jingoism. There is a fine but distinct line dividing the two. Either way, views held, by any section or class of people, by itself, cannot be characterized as anti-national activities."

NGOs and institutions which have been against the so called, mis-guided development projects at the cost of environment and legally recognized rights of the natives, esp anti-nuclear, anti-coal, anti-Genetically modified organism and prevention of extractive industries in the North-East, were targeted by the intelligence agencies and government under the guise of economic development without considering overall cost and implications to the society and inter-generational equity, due to these activities. Intelligence report, **Annexure P-18** (Pg_____) is a testimony to the same.

Annexure P-13 (Pg_____), is an article written by the petitioner no. 2 in Economic and Political weekly on how the intelligence agencies of the government, under the control of the government, have often reported against such NGOs on the basis of what they

themselves perceive as the approach to “development” and how the government had acted on the basis of such reports to penalise the NGOs, whereas the government had failed to take action against political parties infringing the provisions of FCRA.

Governments of different political parties could have different perspectives on development and consequently different approaches in implementation of FCRA. Considering that FCRA proceedings are entirely judicial in nature and they cannot and should not be subject to the respective views of different political parties that rule the government, they need to be insulated from the political executive altogether. Hence it would be appropriate to have a quasi-judicial tribunal rather than executive determining the cases for the sake of uniformity, continuity and consistency.

(d) Honorable Judges and former Judges, of even Constitutional Courts are subject to executive discretion, affecting Judicial Independence.

(e) Since proceedings under the FCRA are strictly judicial in nature, those who administer the Act should have the necessary judicial training and experience and the capacity to conduct the proceedings in accordance with the norms set out in the Constitution and the principles of natural justice. In addition, such proceedings should be transparent and accessible to the public to invoke public confidence and credibility. The existing arrangement does not inspire sufficient confidence from this point of view.

(f) In other countries there are independent bodies regulating election funding including foreign funding. Federal Election Commission(FEC), an independent body regulates foreign contributions in USA. FEC’s Mission and History is stated as follows.

“In 1975, Congress created the Federal Election Commission (FEC) to administer and enforce the Federal Election Campaign Act (FECA)

- the statute that governs the financing of federal elections. The duties of the FEC, which

is an independent regulatory agency, are to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections".

Elections Canada, again an independent body administers Canada Elections Act, regulating foreign contributions. The Canada Elections Act regulates the conduct of elections in Canada. Political parties are prohibited under this Act to accept foreign contributions. The relevant extracts from Election Canada website are as follows.

"Seven jurisdictions – Canada, Quebec, Manitoba, Saskatchewan, Alberta, the Northwest Territories and Nunavut – prohibit foreign contributions or contributions from outside the jurisdiction"

"In all jurisdictions except Nunavut, the Chief Electoral Officer is responsible for ensuring that electoral legislation is enforced. Federally, enforcement is carried out by the Commissioner of Canada Elections, who is appointed by the Director of Public Prosecutions for a seven-year term (subject to removal for cause). As a rule, the Chief Electoral Officer in each jurisdiction has the power to investigate possible breaches of electoral law."

CNCCFP - France's National Commission for Campaign Accounts and Political Financing is also an independent body and deals with regulation of foreign contributions (Annexure P-15). Presentation on France's National Commission for Campaign Accounts and Political Financing is annexed as **Annexure P-14** (Pg_____). Extracts from Law Library of US Congress on France Campaign Finance are presented as **Annexure P-15** (Pg_____). Extracts from a report by International Institute for Democracy and

Electoral Assistance on Funding of Political parties and election campaigns are presented as **Annexure P-16** (Pg_____). Pages 47-48, 109-111,131-133,139-154 of the report reemphasize the necessity of an independent regulatory body while discussing worldwide enforcement regulatory mechanism and experience.

18. The petitioner no.2 has addressed several letters to the Union Home Ministry on the subject but has not received any response so far. Annexures P5 to P-11 demonstrate continued inaction on complaints related to Monsanto an MNC, providing foreign hospitality to Members of Parliament, Ms Vasundhara Raje accepting foreign hospitality, FCRA violations by BJP, FCRA violations by Shri Nitin Gadkari, and lopsided enforcement of FCRA.

    News article on CBI raid, of the offices, of the MsTeestaSetlevad dated 15-07-2015 could also be a case in point, of possible misuse of FCRA by the government at **Annexure P-17** (Pg _____).

19. Against this background, it is imperative to insulate FCRA proceedings from the political executive and constitute a separate body to administer the FCRA. That body could be headed by a senior member of the judiciary. The members of the body should be appointed on the basis of the recommendation of the apex court of India. The body should be accountable to the judiciary, not to the government.

20. Constitutional Courts in exercise of inherent powers and mandate of the Constitution have earlier directed creation of such independent bodies and issued directions, guidelines in similar circumstances.

    In Vineet Narain & Others Vs UOI & Anr (1998) 1 SCC 226, in Para 3, it was held, “This experience revealed to us the need for the insulation of these agencies from any extraneous influence to ensure the continuance of the good work they have commenced. It is this need which has impelled us to examine the structure of these agencies and to consider the necessary steps which would provide permanent insulation to the agencies against extraneous influences

to enable them to discharge their duties in the manner required for proper implementation of the rule of law. Permanent measures are necessary to avoid the need of every matter being brought to the court for taking ad hoc measures to achieve the desired results. This is the occasion for us to deal with the structure, constitution and the permanent measures necessary for having a fair and impartial agency. The faith and commitment to the rule of law exhibited by all concerned in these proceedings is the surest guarantee of the survival of democracy of which rule of law is the bedrock. The basic postulate of the concept of equality: "Be you ever so high, the law is above you" , has governed all steps taken by us in these proceedings."

Para 44 reads as "…..The law does not classify offenders differently for treatment thereunder, including investigation of offences and persecution for offences, according to their status in life. Every person accused of committing the same offences is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone…. "

Para 48,49 reads as "Power of the Supreme court In view of the common perception shared by everyone including the Government of India and the Independent review Committee (IRC) of the need for insulation of the need for insulation of the CBI from extraneous influence of any kind, it is imperative that some action is urgently taken to prevent the continuance of this situation with a view in ensure proper implementation of the rule of law. This is the need of equality guaranteed in the Constitution. The right to equality in a situation like this is that of the Indian polity and not merely of a few individuals. The powers conferred on this Court by the Constitution are ample to remedy this defect and to ensure enforcement of the concept of equality.

There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions..... It is

essential and indeed the constitutional obligation of this court under the aforesaid provisions to issue the necessary directions in this behalf. We now consider formulation of the needed directions in the performance of this obligation. The directions issued herein for strict compliance…….. ”

Para 51 reads as “In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In Erach Sam Kanga etc. vs. Union of India & Anr. (Writ Petition No. 2632 of 1978 etc. etc.) decided on 20th march, 1979, the Constitution Bench laid down certain guidelines relating to the Emigration Act. In Lakshmi Kant Pandey vs. Union of India (in re: Foreign Adoption), 1984 (2) SCC 244, guidelines for adoption of minor children by foreigners were laid down. Similarly in State of West Bengal & Ors. etc. vs. Sampat Lal & ors. etc. 1985 (2) SCR 256, K. Veeraswami vs. Union of India and Others, 1991 (3) SCC 655, Union Carbide Corporation and Others vs. Union of India and Others, 1991 (4) SCC 584, Delhi Judicial Service Association etc. vs. State of Gujarat and Others etc.(Nadiad Case), 1991 (4) SCC 406, Delhi Development Authority vs. Skipper Construction Co. (P) Ltd. And Another, 1996 (4) SCC 622 and Dinesh Trivedi, M.P. and Others vs. Union of India and Others, 1997 (4) SCC 306, guidelines, were laid down having the effect of law, requiring rigid compliance. In Supreme Court Advocates-on- Record Associations and Others vs. Union of India (IInd Judge Case), 1993 (4) SCC 441, a 9-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges……”

Para 53 reads as “On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and, by virtue

of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court……."

In Prakash Singh Vs UOI (2006) 8 SCC 1, Para 30 reads as: "Article 32 read with Article 142 of the Constitution empowers this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter. All authorities are mandated by Article 144 to act in aid of the orders passed by this Court….."

Para 31 reads as "…..we issue the following directions to the Central Government, State Governments and Union Territories for compliance till framing of the appropriate legislations : State Security Commission……."

In TSR Subramanian & others Vs UOI & others (2013) 15 SCC 732, Para 34 reads as under:

"We, therefore, direct the Centre, State Governments and the Union Territories to constitute such Boards with high ranking serving officers, who are specialists in their respective fields, within a period of three months, if not already constituted, till the Parliament brings in a proper legislation in setting up CSB."

In Vishaka V. State of Rajasthan (1997) 6 SCC 241 Para 16,17 reads as under:

"…..we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

The GUIDELINES and NORMS prescribed herein are as under:….."

Para 18 reads as: "Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the

working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field……"

Law Governing the moot point:

The concept of justice is such that it should not merely be dictated by the court but it should also be seen to be done. Unless justice can be seen to have taken place the spirit of justice is not followed through. In the case, R v sussex justices, ex parte mccarthy ([1924] 1 kb 256, [1923] all er rep 233) it was held that "It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. *But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

In the case Ashok Kumar Todi vs Kishwar Jahan &Ors (2011) 3 SCC 758 it was held "By placing such acceptable materials, the writ petitioners expressed doubt about fair investigation under the CID and demonstrated that investigation by the CBI under the orders of the court is necessary, since justice should not only be done but seen to be done"

The state of AP v V Sharma and others MANU/SC/8640/2006 has also upheld the principle as follows:

"We would have ordered an enquiry under Section 340 Cr.P.C. by the Sub-Judge himself but as the matter had earlier been considered by two Judges of this Court though administratively and the report of such committee had been approved by the Full court, therefore, we direct that the matter be heard and decided by the High Court reminding ourselves with the old maxim that justice must not only be done but also seen to have been done."

In the case N.K.Bajpai v UOI &Anr (2012) 4 SCC 653 the same principle was upheld.

Under the English Law, the genesis of bias has been described as the perception that the court is free from bias, that it is objectively impartial stems from the overworked aphorism of Lord Hewart C.J. in R. v.

Sussex Justices Ex. P. McCarthy [(1924) 1 KB 256 KBD at 259] wherein he said, "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

Porter v. Magill [(2002) 2 AC 357]

The test is now whether the fair-minded observer, having considered the facts, would consider that there was a reasonable possibility that the tribunal was biased.

The reason is plain enough as per Lord Denning in The Discipline Of Law,(1982)pg.87, Justice must be rooted in the confidence and the confidence is destroyed when right minded people go away thinking that the judge is biased.

21. The petitioners have not filed any other petition raising the issue raised in the present Writ Petition in any other Court of this Country. The petitioners have no other better remedy available.

22. Since this is a public interest matter, and there is an asymmetry of availability of information, petitioners seeks liberty from this Hon'ble Court to produce other documents and records as and when required in the course of the proceedings, and as and when they become available to the petitioners.

23. Petitioner no.2 has approached Hon'ble Supreme Court of India by WP(C) 624 of 2015 and Hon'ble Court was please to dispose of the same with following orders dated 04/09/2015 **Annexure P-19** (Pg _____).

"Learned counsel for the petitioner, on instructions, seeks permission of this Court to withdraw this petition with liberty to approach the High Court for appropriate relief(s). Permission sought for is granted. The writ petition is disposed of as withdrawn with liberty to the petitioner to approach the High Court by filing appropriate writ petition for

appropriate relief(s). We request the High Court to dispose of the writ petition as expeditiously as possible". Hence, this Writ Petition.

GROUNDS

A. Honorable Judges and former Judges of even Constitutional Courts, are also subject to FCRA jurisdiction and hence executive persecution and discrimination, impacting judicial independence.

B. Since the previous sanction from the government is prerequisite, it could lead to victimization of even Press and Media freedom, by prosecuting those who do not fall in line with the political executive philosophy.

C. There is scope for harassment of anti-corruption activists and human rights defenders and activists who high-light human rights abuses by the government, violating Article 21 of the Constitution of India.

D. There is a conflict of interest in Ministry of Home Affairs continuing to administer FCRA, under the direct oversight of the political executive. While the bureaucrats are expected to function under the direction and control of the political executive, and at their confidence, under FCRA, they also need to initiate and monitor prosecutions against the political masters and legislators and institutions affiliated to them. It would not infuse confidence when bureaucratic executive decides the cases of their master political executive. Thus there is a need to move enforcement function to an independent body.

E. *Nemo iudex in causa sua*. No man shall be a judge in his own cause. Legislators and politicians who are covered under the act are also the masters of the executive who are tasked with enforcement responsibility. As per Section 40 of FCRA, government permission is prerequisite for any prosecutions. Thus political executive gets to decide who needs to be prosecuted and if so, in which way and to what extent. Political executive and legislators, who are sought to be

regulated under FCRA, get to decide their own cases, by having the privilege to decide if any prosecutions could be initiated against them.

F. Ongoing FCRA investigations are creating aspersions on the neutrality and capability of fair enforcement by the executive. Enforcement seems to be strict on NGOs and not so convincing on legislators and politicians. Since the process is not transparent and clouded with executive discretion, it could be perceived as a source of discrimination and it could actually be one. There is no progress on complaints against the political executive and legislators while too much attention is focused on NGO transactions.

G. Proceedings under the FCRA are strictly judicial in nature, those who administer the Act should have the necessary judicial training and experience and the capacity to conduct the proceedings in accordance with the norms set out in the Constitution and the principles of natural justice. In addition, such proceedings should be transparent and accessible to the public to elicit public confidence and credibility. The existing arrangement does not inspire sufficient confidence from this point of view.

H. In several countries like USA, Canada and France, there are laws that prohibit political parties and legislators from accepting foreign donations and hospitality. In those countries, there are independent, credible statutory institutions in place to oversee alleged violations of the relevant laws and enforce them through processes that are transparent.

I. Justice should not only be done but also seen to have been done. Enforcement by bureaucratic executive, directly under the control of political executive does not infuse confidence in the system, especially when regulating and prosecuting political executive under FCRA. It gives wide scope to be perceived as discriminatory in violation of Article 14 of Constitution of India. Hence it would be appropriate to have a quasi-judicial tribunal rather than executive

determining the cases for the sake of uniformity, continuity and consistency.

PRAYERS

In view of the facts & circumstances stated above, it is most respectfully prayed that this Hon'ble Court in public interest may be pleased to: -

a. Issue appropriate writ directing the Union of India to set-up a body or tribunal or committee independent of political executive to administer enforcement of Foreign Contribution Regulation Act, 2010

b. Issue or pass any writ, direction or order, which this Hon'ble court may deem fit and proper under the facts and circumstances of the case.

Petitioners
Through

PRASHANT BHUSHAN
Counsel for the Petitioners

Drawn by : T. Sudhaker
Drawn & Filed On : September 2015
New Delhi