Weaponise FCRA against NGOs; Monetise it for political patties

Bizarre ways of the government

E A S Sarma

Former Secretary to the Government of India

In recent times, one came across several examples of how successive governments have weaponised the Foreign Contributions (Regulation) Act [FCRA] against NGOs who took up people's causes and questioned the illegalities committed by public authorities against adivasis, the disadvantaged sections and the people at large.

For example, it was reported a few days ago (https://www.ndtv.com/india-news/centre-recommends-cbi-inquiry-against-activist-harsh-manders-ngo-aman-biradari-3877494#pfrom=home-ndtv_indiatrending) that the Ministry of Home Affairs (MHA) had recommended a CBI inquiry against Aman Biradari, an NGO established by writer and human rights activist, Harsh Mander, for alleged violation of the FCRA. Aman Biradari Trust is doing excellent work, according to reports, towards promoting fraternity and a secular attitude among the people. While one cannot claim to have all the details of the FCRA case against Harsh Mandar and one would prefer NGOs being provided funds from domestic sources, it suffices to say that the government should draw a clear distinction between *mens rea* (intention to commit a crime) and a mere technical violation of the provisions of the FCRA. Setting the CBI against a helpless NGO like Aman Biradari for committing a technical violation of the FCRA seems to be an extreme measure, more to spite the NGO, than to help it carry on its commendable effort (https://countercurrents.org/2023/03/cbi-investigation-against-harsh-mandars-ngo-is-nothing-but-travesty-of-justice/)

A more recent example is a CBI investigation initiated by MHA for FCRA violations against the well-known environmental lawyer, Ritwick Dutta and the NGO promoted by him, Legal Initiative for Forest and Environment (LIFE). The CBI seems to have alleged that an overseas-based organisation has funded LIFE's legal activism to "*take down India's existing and proposed coal projects*" (https://www.ndtv.com/india-news/foreign-funds-used-in-anti-coal-cases-cbi-charges-environmental-lawyer-ritwick-dutta-of-life-3969283), a somewhat over-simplistic charge that

betrays the investigating agency's inadequate understanding of how projects can have both social costs and social benefits, which need to be evaluated before decisions are taken. The CBI should know that it is civil society's right to question the executive's decisions in a democracy and seek judicial intervention with the help of legal counsel.

While the exact nature of the FCRA violations alleged to have been committed by LIFE are not yet available, it is important to note that Ritwick Dutta's first case was against the Vedanta Group, where he represented the Dongria Kondh tribals seeking a ban on bauxite mining in the Niyamgiri hills in south-west Odisha (https://www.business-standard.com/article/economy-policy/we-ve-excess-power-but-no-access-to-it-environment-lawyer-ritwick-dutta-118022400633_1.html). It is ironic that the Odisha Mining Corporation Ltd., a State PSU, supported by the enormous might of the State authorities, allowed the Vedanta Group to take up bauxite mining in Niyamgiri Hills, displacing Dongria Kondh adivasis, recognised as a Particularly Vulnerable Tribal Group (PVTG), in blatant violation of the provisions of the Panchayats (Extension to the Scheduled Areas) Act [PESA] and the Forest Rights Act [FRA]. In the normal course, had the Odisha authorities ever cared to respect and comply with the PESA and the FRA, they would have first consulted the Gram Sabhas of the Dongria Khonds before unilaterally imposing bauxite mining on their lives. When the State failed to deliver justice to these helpless adivasis, the civil society had to seek judicial intervention. Public-spirited advocates like Ritwick Dutta took up the adivasis' case before the apex court, which firmly stood on the side of the adivasis and ordered the government to comply with the provisions of the PESA and the FRA, a direction that ultimately resulted in the adivasis' rights being fully protected. This in turn stopped the Vedanta group from carrying out bauxite mining on Niamgiri hills, as the adivasi Gram Sabhas consistently expressed their opposition to it. When political parties in power, funded profusely by big business houses, choose to violate the law of the land and take decisions against the public interest, it is public-spirited legal activism alone that can come to people's rescue. Should such people-oriented legal activism be considered a crime, when political parties themselves have no qualms about heinous criminal acts committed by their compatriots in the name of winning elections?

When the Andhra Pradesh (AP) government, with active support from the Centre, chose to allow a private company to set up a highly polluting thermal power plant in a unique wetland in Srikakulam district, the local communities including traditional fisherfolk collectively opposed it. The State's nexus with the private company was so strong that it even chose to use coercive power against the agitating public, resulting in innocent persons losing their lives (https://www.epw.in/journal/2010/33/insight/saga-sompeta-public-deception-private-gains.html) It

was Ritwick Dutta who came to the fisherfolk's help to put forward their case at different judicial forums, that culminated in the National Green Tribunal (NGT) pronouncing a landmark order upholding the local communities' case and protecting the wetland. Alleging that Ritwick Dutta's legal activism thwarted the government's plan to set up a thermal power plant such as that one would evidently amount to hiding the government's collusion with the private promoter and condoning its illegalities that would have damaged the health of the local communities and disrupted their lives.

These days, the Union Ministry of Coal has embarked on an ambitious plan to auction coal and other mineral blocks to private companies. Considering that many such blocks are located in the Scheduled Areas largely inhabited by adivasis, it is mandatory that the Ministry obtains prior consent of the adivasi Gram Sabhas, as required by both the PESA and the FRA, without which the auction process would be considered illegal. In many cases, mineral blocks have been auctioned in violation of the PESA and the FRA.

Even in economic terms, the so-called “economic benefits” of mining, as simplistically perceived by the government, would be minuscule compared to the economic cost of the loss of valuable forest wealth that mining causes, the loss of biodiversity on that account, its adverse impacts on major river catchments and, more important, the socio-economic cost of displacement of adivasi communities and their cultural losses. It is a matter of serious concern that India's elite bureaucracy and the political executive that overseas them should remain totally illiterate about path-breaking research studies carried out on social-cost-social-benefit evaluation of projects and the pitfalls of despotic rulers imposing people-unfriendly projects without any genuine public participation in decision making.

The political leaders and their civil servant cohorts are advised to go through a comprehensive study, “*The Economics of Biodiversity: The Dasgupta Review* (February, 2021)” commissioned by the UK government to understand the economic value of biodiversity and the long-term implications of taking up projects that cause loss of biodiversity.

Incidentally, Ritwick Dutta coauthored a book with the present Union Environment Minister, Bhupender Yadav on “Supreme Court on Forest Conservation in 2005”, a highly informative compilation of the apex court's judgements that provided a far-reaching interpretation of the relevant provisions of the Constitution and the country's forest conservation laws. To consider his legal activism to be against the public interest is nothing but a figment of imagination.

There are many other NGOs who have of late come under the FCRA scanner.

The Tamil Nadu Governor, apparently speaking on behalf of the MHA, recently announced that foreign forces intent on destabilising India's economy were behind an NGO that activated the local community to protest against Sterlite company's highly polluting Thoothukudi copper smelter plant that caused widespread public health damage. The State taking sides with Sterlite, deployed coercive steps against the agitating people leading to 14 deaths. Considering that Sterlite's copper smelter unleashed toxic pollution on the people residing in its vicinity, with regulatory authorities reluctant to impose restrictions on the unit's operations, it was inane on the part of the local government not to expect a public agitation with or without an NGO's help. However, there is a far more worrisome aspect of Thoothukudi saga, which the Tamil Nadu Governor conveniently chose not to mention or was blissfully unaware of.

The foreign-listed Vedanta Group, of which Sterlite is a subsidiary, along with several other foreign-listed companies, were known to have funded both BJP and Congress, in violation of the FCRA, in exchange for *quid pro quos* in terms of policy changes and condoning illegalities. (https://thewire.in/government/tamil-nadu-governor-thoothukudi-vedanta-bjp-congress).

The sordid saga of how the present government at the Centre monetised the FCRA to benefit itself makes interesting reading.

Both the national political parties, namely, BJP and Congress, accepted donations from foreign sources year after year, in violation of the provisions of the Foreign Contributions (Regulation) Act (FCRA) of 1976 and its successor legislation, FCRA, 2010. The Association for Democratic Reforms (ADR) and I filed a case before the Hon'ble Delhi High Court [WP(C) 131/2013] and the court pronounced a judgement on 28-2-2014 directing the Home Ministry to take appropriate action within 6 months, against the political parties for violating the FCRA. Both BJP and Congress chose to contest the judgement before Hon'ble Supreme Court (SLP No 18190/2014) and during the proceedings before the Hon'ble Supreme Court, following detailed arguments on our behalf, the two political parties had to withdraw their SLPs, as recorded in the court's order dated 29-11-2016.

In the normal course, if the government had any respect for maintaining the integrity of the electoral process, it would have immediately proceeded to take action against the political parties including BJP, for violating the FCRA, especially in view of the fact that foreign donations to political parties can hurt the sanctity of our democracy, much more than in the case of anyone else receiving such

donations.

Instead of this, the present NDA government quickly took the extraordinary step of retrospectively altering the laws that rendered foreign donations illegal in the first instance and stood in the way of foreign donations flowing into the bank accounts of the political parties in the future.

Ironically, the government introduced those amendments, not through a regular Bill that could be discussed by both Houses of Parliament, but through the backdoor means of the successive Finance Acts of 2016 & 2017. The amendments not only "regularised" the illegal foreign donations received in the past but also legalised all future donations flowing into the coffers of the political parties, if a foreign company could merely channel it through a subsidiary set up in India. As if this was not enough, the government went one step further to amend the Companies Act itself to relax the ceiling on private companies' donations to political parties, opening the floodgates to both domestic and overseas business houses funding India's elections.

Making no secret of the political parties' insatiable greed for company donations, the present NDA government further introduced an opaque system of Electoral Bonds through which anyone and everyone can channel donations to political parties, without the citizens of India having an opportunity, as required in Article 19, to know who is funding the political parties (https://thewire.in/politics/fcra-reviving-lapsed-law-amending-retrospectively-trumps-ethical-legal-barriers)

It is ironic that an ordinary citizen has to comply with all kinds of cumbersome Know-Your-Customer (KYC) requirements for a meagre account opened in a bank but the political parties should go scot-free when they blissfully receive thousands of crores of rupees without having to answer anyone!

While we have separately contested the propriety of the government retrospectively amending the two FCRA legislations, prima facie, there is no ethical justification for legalising an offence already committed by a political party under the FCRA and for condoning foreign donations to be received in the future, as by whatever name one may call it, foreign funding of elections is unacceptable.

Why should companies, especially, foreign companies, give donations to political parties? Certainly not out of love for promoting democracy, but more for *quid pro quos* from a willing political executive to enable them in every possible way to profiteer, at the cost of the public. (https://thewire.in/politics/fcra-reviving-lapsed-law-amending-retrospectively-trumps-ethical-legal-barriers)

It is distressing that the political parties in power, especially the present NDA government, should pretend to be concerned about prosecuting NGOs for FCRA violations on the ostensible ground that

foreign agencies funding such NGOs would “destabilise” the economy but conveniently bend every statute to allow foreign agencies to give huge political donations that could have a far more deleterious impact on the nation's security and the integrity of our democracy.

When the MHA goes to the extent of coercing civil society in the name of FCRA violations on the ostensible ground that foreign agencies are trying to destabilise the economy by promoting domestic legal activism, it leads one to a feeling that the government is also indirectly conveying its discomfort at judicial pronouncements that result in reopening project proposals that violate the law of the land.

A similar feeling emerges from a report released by Niti Ayog in June, 2022 claiming that Rs 24,541.15 crore and 82,060 jobs had been lost due to five cases in which the Supreme Court and the National Green Tribunal temporarily halted or completely banned economic activities that violated environmental laws or had adverse environmental effects. (https://amp.scroll.in/article/1029461/why-a-niti-aayog-study-on-the-economic-costs-of-judicial-activism-must-be-viewed-with-scepticism) It is a matter of distress that the government's premier think tank, Niti Ayog should attempt such a study in the first instance and proudly release it to the public, betraying its utter lack of understanding of the executive's obligation to respect the law of the land and the executive's lack of respect for the role of the judiciary as the sole Constitutional authority to judge the legality of the executive's actions. Niti Ayog should have known that if there are economic losses in such cases, they are attributable to the public authorities that ignored the law of the land and undertook projects in ways that are prima facie illegal. Niti Ayog has highlighted a highly impressionistic estimate of the job losses arising from projects being delayed but has conveniently ignored the number of people displaced by a project losing livelihoods or the trauma suffered by them.

It is unfortunate that Niti Ayog, unlike its predecessor, Planning Commission, apparently lacks an understanding of the way projects need to be evaluated from the society's point of view. The Project Appraisal Division of the erstwhile Planning Commission used to carry out a full-fledged social-cost-social-benefit appraisal of public projects. Apparently, the present Niti Ayog has no such pretensions about project evaluation. When Niti Ayog has openly expressed itself in favour of grooming a few private olgarchs into becoming "global champions" (https://www.niti.gov.in/battling-barrier-scale), it has no time to waste on understanding the societal impacts of projects, the need to insist that projects should comply with the law of the land and that the civil society should be involved as an important stakeholder in decision making.

(https://www.niti.gov.in/battling-barrier-scale). It was reported sometime ago that Niti Ayog even expressed a feeling that "*too much democracy*" was a hurdle to "reform"! (https://www.thehindu.com/business/Economy/reforms-are-difficult-as-india-has-too-much-of-democracy-says-niti-aayog-ceo/article33281237.ece)

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While the government may take the technically correct stand that errant NGOs committing technical violation of the FCRA provisions should be proceeded against, it should see whether such violations involved any serious criminal intent. More importantly, the government should ponder over the amendments it has introduced in the FCRA and the Companies Act that tilt the balance of power in a democracy from the citizen to big businesses and the long-term adverse implications of foreign funding of political parties hurting the national interest.

When governments refuse to recognise the illegalities of their own decisions, find fault with those who point them out and in effect “shoot the messenger” that brings sane advice, one should feel deeply concerned about the future of our democracy. The sooner the government realises it, the better it would be for the security of the nation.