Foreign Contribution (Regulation) Act 2010 and the FCR Rules

Points for consideration[1]

Purpose of the earlier FCRA

The FCRA was first enacted during the Emergency era (1976). The official rationale was to prohibit the flow of foreign funds to political parties, candidates contesting elections to any public office, journalists, cartoonists, editors, owners, printers and publishers of registered newspapers and individuals in the service of the State or any of its official agencies and academics. Organisations identified as being of 'political nature' specifically identified by the Central Government through a Gazette notification could receive foreign contribution only with prior permission of the Government. However, a system was laid down for associations to receive foreign contribution upon registration with the Government or through prior permission for- undertaking activities related to a definite cultural, economic, educational, religious or social programme. The registration was one-time only and was valid until the Government suspended or cancelled it through due procedure laid down in this law. Acceptance of foreign hospitality in violation of the provisions of this this law and receiving foreign contribution in violation of FCRA provisions were made punishable offences some of which invited a prison term of up to five years.

Rationale behind and the objectives of FCRA 2010

According to the Statement of Objects and Reasons attached to the FCR Bill when it was introduced in Parliament by the UPA Government in 2006 (and enacted in September 2010), the new law which repealed the 1976 law was intended to bring about large scale changes because:

a) Internal security scenario had changed (what had changed is not specified);

b) Influence of voluntary organisations had increased;

c) Use of communication and information technology had spread;

d) there was a quantum leap in the amount of foreign contribution received; and

e) there was large scale growth in the number of registered organisations (under FCRA 1976).

So Parliament was informed that the new law was being brought to – **regulate the acceptance, utilization and accounting of foreign contribution and acceptance of foreign hospitality by a person or association.** The main objectives of the law are said to be (quoted from the Bill itself):

(*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;

[1] Prepared by Venkatesh Nayak, Commonwealth Human Rights Initiative, New Delhi in May 2015, for public knowledge, use and further action

(*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 (no such restriction in FCRA 1976);

(*v*) cap administrative expenses at fifty per cent. of the receipt of foreign contribution (no such limit in FCRA 1976);

(*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 (as opposed to permanent registration under the FCRA 1976), and also to provide for cancellation or suspension of registration;

(*x*) make provision for compounding of certain offences.

However the long title of the Bill (and now the Act) indicated that the law was aimed to "**prohibit acceptance of foreign contribution or foreign hospitality for activities that are detrimental to the national interest**." **Significantly, neither the Bill nor the Act define 'national interest'.** So theoretically speaking, the Government of the day can prohibit receipt of foreign contribution by an association whose sole mission is to encourage its members and the general public to laugh out loudly every morning in a public park (for presumed health benefits) by declaring it to be an activity detrimental to the national interest.

Organisations of political nature

Section 5 of FCRA 2010 empowers the Central Government to declare through an order published in the Official Gazette any organization as being 'political in nature' having regard to its activities or ideology that it propagates, or its programme or its association with the activities of any political party. However two conditions must be satisfied for taking such action:

a) The Government must by rules specify the grounds on which an organization may be declared as 'political in nature'; and

b) Before making an order give such organization advance 'show cause' notice why such action must not be taken against it.

FCR Rules 2011 (Rule 3) contain the following guidelines for determining whether an organisation is 'political in nature':

(i) organisations 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 organisations like students unions, workers unions, youth forums and women's wings 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 objective, as stated in their 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' or 'rasta roko', 'rail roko' or 'jail bharo' in support of public causes.

These guidelines have several implications out of which two are important to note:

(i) that the Government will monitor the activities of foreign funded organisations routinely and

(ii) public expression of dissent through mobilization of people for any public cause will result in being labelled as an organization of 'political nature'.

No Parliamentary scrutiny of the FCR Rules till date

Section 48 of the FCRA 2010 empowers the Central Government to make rules for carrying out its provisions. FCR Rules were notified in 2011 and amended at least twice in 2012 and 2013. Section 49 of the FCRA 2010 requires every FCR Rule made by the Central Government to be table in both Houses of Parliament. The dates of the tabling of the FCR Rules in Parliament are as follows:

1) FCR Rules 2011 (GSR No. 349E notified on 29/04/2011):
tabled on 02/08/2011 in the 15th Lok Sabha
tabled on 03/08/2011 in the 223rd session of the Rajya Sabha

2) FCR Amendment Rules 2012 (GSR No. 317E notified on 12/04/2012):
tabled on 08/05/2012 in the 15th Lok Sabha
tabled on 02/05/2012 in the 225th Session of the Rajya Sabha

3) FCR Amendment Rules (GSR No. 488 Enotified on 29/04/2013):
tabled on 13/08/2013 in the 15th Lok Sabha
tabled on 14/08/2013 in the 229th Session of the Rajya Sabha

Why tabling in Parliament and what happens thereafter?

A Bill becomes an Act after Parliament approves it, the President gives assent and it is notified in the Official Gazette. Usually an Act becomes operational only after the Government frames the Rules and issues another gazette notification stating the date from which the statute will become operational. (Rarely laws contain an "operationalise by" date. For example, *The Right Information Act* itself stipulated that it will become fully operational within 120 days of notification in the Official Gazette.)

While approving a Bill, Parliament only lays down the broad framework of the law and vests the Rule-making power with the Government to flesh out the details. This is known as the power of subordinate legislation which Parliament delegates to the Government. The Rules made under a statute become operational upon their publication in the Official Gazette. There is no requirement for taking prior approval of Parliament for operationalising any Rule made under an Act of Parliament.

However, every instance of the exercise of the Government's rule-making power must be scrutinised by Parliament. This is why Section 49 of FCRA 2010 requires all Rules notified by the Central Government to be tabled in both Houses of Parliament. They are left there for a maximum period specified in that Section. **Under Section Parliament can either modify or annul the Rules and they will become operational or get thrown out as decided by Parliament**.

Rule 317 of the **Lok Sabha** Rules of Procedure requires every Rule tabled in Parliament to be examined for its validity within the four corners of the provisions of the principal statute. This task is always required to be done by the Committee on Subordinate Legislation. This House Committee usually has representation from all major political parties represented in the Lok Sabha (15 members). Rule 320 requires this Committee to examine each Rule whether:

(i) it is in accord with the general objects of the Constitution or the Act pursuant to which it is made;

(ii) it contains matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;

(iii) it contains imposition of any tax;

(iv) it directly or indirectly bars the jurisdiction of the courts;

(v) it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

(vi) it involves expenditure from the Consolidated Fund of India or the public revenues;

(vii) it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

(viii) there appears to have been unjustifiable delay in its publication or in laying it before Parliament; and

(ix) for any reason its form or purport calls for any elucidation (further detailing or clarification).

The **Rajya Sabha** also has a similar Committee on Subordinate Legislation (15 members) which is mandated to examine every Rule tabled in that House. Both Committees examine the Rules in detail and submit a report containing recommendations, if any for ensuring that the Rules fit in within the framework laid down by the letter and the spirit of the concerned law. During this process the concerned department in the Central Government is called upon to explain the purport or likely impact of the Rules framed before making any recommendation.

Till date neither Committee on Subordinate Legislation in Parliament has examined any of the FCR Rules notified by the Central Government. Consequently several anomalies created by the FCR Rules have escaped Parliamentary scrutiny.

Some examples of problematic FCR Rules

The following illustrations will help explain the arbitrariness of the FCR Rules better:

1) **One of the reasons given by the Union Home Ministry (MHA) why Greenpeace's FCRA registration was suspended is: "not taking prior approval of MHA before replacing 50% of the members of its Executive Committee (EC)".**
(http://mha1.nic.in/pdfs/TempSuspensionGreenpeace_090415.pdf http://mha1.nic.in/pdfs/TempSuspensionGreenpeace_090415.pdf)
Nothing in the FCR Rules empowers the Central Government to take such action. Instead, Clause (ii) has been put in the Declaration and Undertaking appended to Form FC-3 which is used by an organisation to apply for registration that it will obtain prior approval of MHA before replacing 50% of its EC members. This clause is excessive as the purpose of FCRA 2010, is not to regulate the internal affairs of a registered organization. The purpose is only to regulate the receipt and use of foreign contribution. So clearly Form FC-3 is ultra vires of the provisions of the principal Act.

2) **Another reason given for suspending Greenpeace's FCRA registration is: "shifting office from Chennai to Bengaluru without prior approval".**
Nothing in the FCR Rules empower the Central Government to take such action. Instead Clause (i) has been put in the Declaration and Undertaking appended to Form FC-3 merely requiring an organization registered under this law to merely inform within 30 days if any change tales place to the name, address, registration (under other laws), its nature, aims and objects. There is simply no requirement for taking prior approval of the MHA in this form or anywhere in the Rules. This also amounts to unreasonable interference in the internal affairs of an organization which is not the objective of the principal Act.

3) **Rule 22 requires the Central Bureau of Investigation (CBI) to furnish detailed reports if tasked with any investigation of an organization registered under FCRA 2010 by the Central Government.**
Nothing in FCRA 2010 makes a reference to the CBI as being empowered to investigate cases under this law. Instead Section 44 read with Section 45 merely empowers the Central Government to specify any authority which can investigate an offence punishable under the principal Act. It is not clear whether this will be done on a case by case basis or there if is a general notification specifying the CBI as an investigating agency for the purpose of this law. At least such a notification is not in the public domain.

4) **Rule 3 laying down the guidelines for declaring an organization to be 'political in nature'.**

Clause (iii) of this Rule, namely- any voluntary action group with objectives of a political nature or which participates in political activities does not contain any explanation and only reiterates what is mentioned in Section 5 of FCRA 2010. This is being misused to curb any dissenting view expressed or work done by NGOs.

Clause (vi) of Rule 3 prevents an FCRA registered organisation from undertaking almost any kind of mobilisational activity as the list is not exhaustive but inclusive (use of the word "like"). This may amount to an unreasonable restriction on the freedoms of peaceful assembly and movement not covered by Articles 19(3) and 19(d).

Legal experts may identify more problems with the FCR Rules. This piece has not analysed the constitutionality of the provisions of the principal Act. In the matter of *Indian National Social Action Forum (INSAF) vs Union of India* the Supreme Court of India in September 2013 allowed the petitioner to challenge the constitutionality of Sections 13 and 14 relating to suspension and cancellation of FCRA registration. This matter is still pending in Court.

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