Compliance Matters.

DevelopAid Guidance Note

FCRA Amendments 2020

Contents

The September 2020 amendments to FCRA[1] took everyone by surprise, especially the NGOs who were preoccupied with Covid-19 relief and other more pressing matters. Once unveiled, the possible impact of these has shaken the sector, especially those organisations which largely depend on foreign contribution to carry on their work. Mainstream and social media have become furiously active and more opinionated than ever before.

This Guidance Note looks at the nine changes (effective from 29-Sep-2020) and what they might or might not mean for Charities in India.

NGO Networks & FCRA

In 1970s Lokanayak Jaiprakash Narayan (JP), who then headed AVARD (Association of Voluntary Agencies in Rural Development), launched a powerful movement against poor governance. It shook the government, and possibly was a main factor in imposition of emergency in 1975, and the subsequent downfall of Congress government in 1977. Back in power after a short exile, Congress set up Kudal Commission in 1982 to find out how did JP mobilise so many so quickly. The enquiry which started with four organisations, spread to over 400 NGOs. It led to the 1984 amendment in FCRA, requiring every NGO to obtain FCRA registration or permission before accepting foreign contribution. And because AVARD had shared the funds with other NGOs, the law provided that second or subsequent receivers should also get FCRA registration or permission.

The model of shared funding has continued since JP's times. It has allowed large NGOs to increase their reach to the furthest corners, at a very low cost. Larger NGOs, INGOs, and donor agencies raise funds from various sources, design pan-India programs and then get rural NGOs on-board with these. Unlike Government pay scales, which are mostly uniform irrespective of place of posting, there are very big differences in salaries paid by NGOs in metropolitan cities and those in small towns or villages. This means that each dollar can go further, even if it is spread very thinly. NGO networks, built on ideas, shared values, and a bit of money, allow larger NGOs to mobilise people quickly in times of disaster or distress and otherwise. The communication is bi-lateral and multilateral. Anything that happens in a small village, can quickly be relayed back to state, national and international capitals.

However, this is not in line with Government's policy, which views this as an illegitimate interference in its mandate. Government also seems to think that regranted funds are difficult to monitor and could find their way into the hands of insurgents, maoist sympathisers or civil rights activists.

Hence this move to break up FC-funded networks.

1. No Transfers or Sub-grants

Beginning 29-Sep-2020, it is no longer legal for FCRA-licensed entities[2] to retransfer foreign contribution to other entities in India for program activities.[3] It doesn't matter whether these other entities have FCRA registration/prior-permission or not. Every FCRA-approved entity must spend the foreign contribution on their own. The restriction covers money, material and securities. This is one of the two most critical changes in FCRA (see box: *NGO Networks and FCRA*).

a. Payments to For-Profits

This restriction applies whether the second or subsequent receiver is a not-for-profit or a for-profit entity.[4] This also applies whether the payment is a donation, grant or is made through a service

1 Foreign Contribution (Regulation) Act 2010. Consequent changes to Foreign Contribution Regulation Rules 2011 are still awaited.

2 Any person with FCRA registration or prior-permission

3 Sec. 7 of FCRA

4 Sec. 2(1)(a) of FCRA. The term 'association' is wide enough to cover all forms of organisation (LLPs, Companies, Firms, Cooperatives, Producer Companies, etc.), and not just NGOs and not-for-profits. Though FCRA is applicable, registration or permission is granted rarely, if ever to for-profits. Payments to individuals, HUFs, and sec. 25 companies are also covered through sec. 2(1)(m).

contract. This means surrogate grants clothed in service contracts should not be made. If discovered and proven, these can result in penalties under sec. 35.

However, payments in the ordinary course of business are not restricted.[5] Examples include payment of consultancy fees or charges to schools, hospitals, training centres, etc., or payments for goods and services purchased for the organisation's *own* use. Clandestine transfer of foreign contribution through service agreements where nominal services are availed or inflated costs/ charges are paid, should not be attempted. If detected, these can result in prosecution under FCRA.

b. Program vs. Services

How does one know whether a Service Contract is for executing program activities or for purchasing services for programs? There are at least four tests one can apply:

1. Who receives the services/benefits? The client/buyer or someone else?
2. Is there a direct connection between the recipients of the services and the client? For example, are these employees, grantees, or other associates of the client/buyer? Or is the connection a very tenuous one?
3. How much discretion does the consultant/vendor have in execution of the work? Are the recipients nominated by the client/buyer or does the service provider have wide discretion in selecting them?
4. To what extent does the client/customer direct or supervise the outcome of the activities?

In principle, where the client/customer is not receiving the services for itself, for its employees or for its grantees/associates, there is a risk that the activity could be a program activity. This risk is reduced if the service provider has limited discretion in selecting the beneficiaries, in executing the activities or is supervised closely by the client/customer. In case of doubt, competent advice should be obtained.

c. Service Contracts with Foreign NGOs

If the contract is with an overseas client or customer, then additional restrictions come into play. For example, an FCRA NGO in India (or a foreign source with business operations in India)[6] can give you a contract to build houses for the poor. However, an overseas INGO cannot. This would amount to the overseas organisation executing program activities in India through an agent, without FCRA registration.[7] The same restriction applies to INGOs who have liaison offices in India. They can buy services for their own use — but not for executing program activities in India. If they have a branch office and want to execute program activities, they will need FCRA registration to do so.

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5 Explanation 3 to Sec.2(1)(h)

6 For example, subsidiary of a foreign company in India building houses under CSR

7 This appears to be the issue behind CBI registering an FIR in the case of Red Crescent contracting Sane Ventures LLP to build houses for the poor in Kerala.

d. Placing Personnel in India

These restrictions also come into play if a foreign NGO appoints consultants/personnel in India directly or through an HR agency. This is within the law if these persons are providing only advisory support for grant-making, monitoring, coordinating, etc.[8] However, if these individuals are involved in program implementation or in execution of program activities, then they will need FCRA registration.[9]

e. Assets created out of FC

The Sec. 7 restriction on transfer of FC covers funds, material and securities received by a person.[10] It also covers interest, other income derived from FC.[11] But what about fixed assets or equipment purchased out of FC? Does the restriction also cover transfer of these also?

There is a view that the restriction applies only to foreign contribution as such. It ceases to apply once the FC changes form into fixed assets, equipment, vehicles, property, etc. Therefore, an NGO with FCRA registration can still transfer these to other NGOs which have FCRA. Is this view correct?

It could be if this was Income Tax Act, where in case of ambiguity, the view favouring the tax-payer is preferred. However, in the case of FCRA, this interpretation will create a black hole for FC to disappear. People may be tempted to launder FC into non-FC, by simply buying fixed assets with foreign contribution and then giving them away. The receivers can then sell these off, and realise the funds as non-FC. If the FCRA Dept. doesn't act to stop this, it will become an official loophole, defeating the very purpose of FCRA. For all these reasons, any equipment, assets, investments, etc., created or derived from FC should be treated as foreign contribution, and subject to the sec. 7 restriction.

f. Conversion

What happens if an FCRA-registered trust or society converts into a sec. 8 company? Will transfer of assets or funds to the new company be a violation of sec. 7?

Under present law, though conversion is permitted in theory,[12] it is rare in practice, with approvals required from Registrar of Societies[13] and Income Tax Department, among others. You also have to file form FC-6B with FCRA Dept. for updating change in registration of the organisation. It is possible that the FCRA Department may ask you for additional information, before recording the change.

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8 In some cases, this can result in creation of a Permanent Establishment (PE), with unexpected tax and compliance challenges.

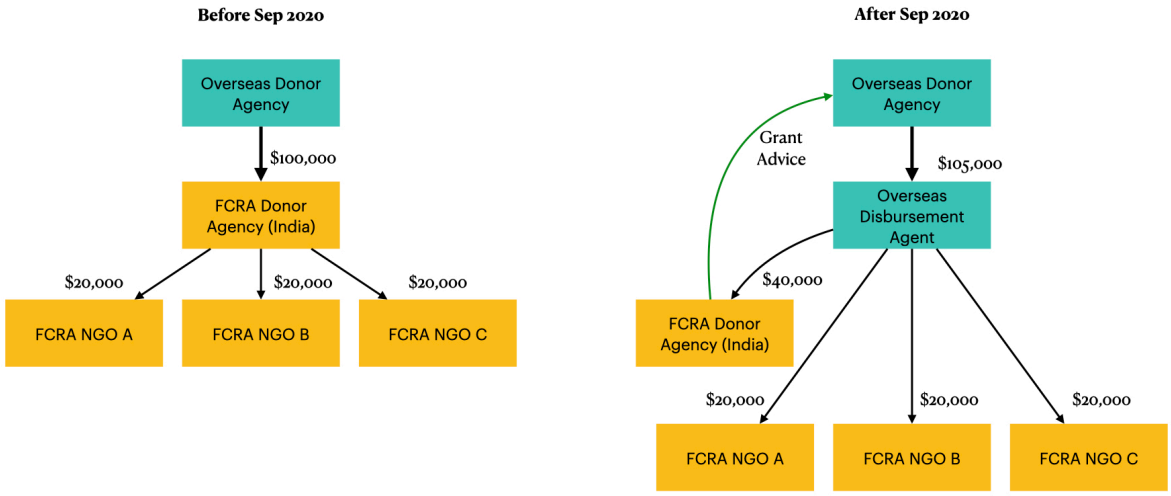
9 FCRA is applicable to individuals undertaking program activities with foreign contribution. However, registration or permission is rarely granted.

10 Sec. 2()(h)

11 Explanation 1 to Sec. 2(1)(h). Before this explanation was added, some people erroneously believed that interest earned on FC endowments or secondly income was not treated as FC.

12 Sec. 366 of Companies Act 2013

13 Or Charities Commissioner in some states



Coming to the main question, change in form of organisation doesn't result in a violation of sec. 7, as there is no transfer of funds or assets to another entity. It is only a change in the form of organisation. However, this is not a road that many people have walked before — you will probably have to beat your own path for this to happen.

g. Mergers & Takeovers

The above principle doesn't apply where two NGOs merge into a third one.[14] Firstly the newly formed entity needs a new FCRA registration (as well as other approvals under Income Tax). Secondly, foreign contribution and assets of the old entities cannot be transferred to the new one without tripping over FCRA. The only solution would be to first sell off all the FCRA assets, utilise all the FCRA funds (including the sale proceeds), and then merge the non-FCRA parts that remain along with their identities.

Similar complications will arise in case one FCRA NGO wants to takeover another which has FCRA. The second NGO must first use up all its foreign contribution, before it can be absorbed by the first one.

h. Making Direct Disbursals

Section 7 disallows sub-granting by an FCRA-licensed NGO to another. Thus three conditions have to be fulfilled before section 7 is attracted:

1. The transfer must be made by an FCRA-licensed organisation or its agent.
2. The transfer must be made to an FCRA-licensed organisation or its agent.
3. The transfer must be donative in nature — meaning it should be free or at less than its true value.

Therefore, if a foreign source or overseas donor agency makes direct disbursals to sub-grantees, will the restriction still come into play? No — direct grants are still permitted.

What if funds meant for India are first received by another overseas entity, who passes these on to the sub-grantees as advised by an FCRA donor agency in India (which has FCRA

[14] In practice, formal mergers and takeovers of NGOs in India are extremely rare.

registration)? If funds do not come to the FCRA donor agency at any stage, there will not be any violation of sec. 7.[15]

i. Off-shore Banking

Can an FCRA NGO open a bank account overseas (in its own name or in someone else's name), receive the foreign contribution there, and disburse the funds from there to sub-grantees in India? No, it should not. Foreign bank accounts must be disclosed in the Income Tax Return of the signatories. Opening or operating such an account could attract charges under FCRA, FEMA[16] as well as PMLA[17].

What if the donor agency opens a special bank account overseas, which is operated by the Indian NGO? The donor agency transfers the funds for India to the bank account, and disbursements can be authorised online by the Indian NGO's staff, using the login ID and the password of the account holder. While this might sound like a good idea, in reality it is not. Such bank accounts are treated as benami foreign bank accounts, and can trigger charges under PMLA, in addition to attracting penal provisions under FCRA, FEMA and Income Tax Act.

j. Reimbursements

Does the restriction also cover reimbursement of expenses? This depends on what kind of expenses are being reimbursed. For example, if you ask a friend to book a train ticket for you, and later pay the amount, that is reimbursement, and would be permitted. However, if you ask a person to undertake program activities on your behalf, collect bills in your name, and then settle the amount, this is not 'reimbursement'. Here the mechanism is being confused with the purpose. In the first case, the purpose is merely convenience. In the second, the purpose is bypassing FCRA. Therefore the second should be avoided.

k. Advances

A related question being raised frequently is that of advances for expenses. Is there any restriction on giving advances out of FCRA funds to staff or others? The simple answer is yes and no. If the advances are given to your employees or vendors in the ordinary course of business, then there is no issue. However, if these are given to other NGOs for taking up program activities, with the bills being submitted later and accounted in your books, this would be a violation. This restriction also applies if people from other NGOs are 'appointed' as your employees, and advances given to them in place of a sub-grant.

l. Direct Implementation

The other valid option FCRA donor agencies in India are left with is direct implementation. To do so, they will need to terminate their existing grant agreements with partners, and then recruit people directly. Some of these people might be ex-employees of their former partners, who are appointed by the donor agency. This will also raise several HR and logistics complications, including pay-scales, provident fund, gratuity, etc.

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15 This defence may be challenged if the overseas entity is merely a proxy or a shell operated remotely by the Indian entity.

16 Foreign Exchange Management Act, 1999

17 Prevention of Money Laundering Act, 2002. Criminal conspiracy under section 120B of Indian Penal Code is also a scheduled offence under PMLA, and often invoked in such cases.

In some cases, the entire staff complement of a former NGO partner might join the FCRA donor agency as staff. If so, care should be taken to ensure that these staff do not project the name of the former NGO in the field, as this can be seen as shadow-lending under FCRA.

What about the cap on administration expenses if additional staff is taken on? This has to be examined on a case-by-case basis, as discussed under 'Lower Cap on Administrative Expenses' on page 7.

2. Lower Cap on Administrative Expenses

The 2006 FCRA Bill proposed a limit of 30% for administrative expenses. Many NGOs protested this, even though most spend just 10-15% on administrative expenses. Another problem was figuring out what are administrative expenses. Expenses are generally tracked using traditional accounting heads like purchases, travel, salaries, rent, etc. These are not tracked using a functional classification (administration, marketing, research, etc). Audited financial statements also do not offer this classification — the allocation process is too expensive and subjective to be of any use for public disclosure.

In response to this, the Government made two changes in the 2010 Act: one, it raised the limit to 50%; two, it added a definition of administrative expenses to the rules.[18] The definition in rule 5 is not based on a functional classification — rather its uses traditional accounting heads:

> **Rule 5.** The following shall constitute administrative expenses:-
>
> (i) salaries, wages, travel expenses or any remuneration realised by the Members of the Executive Committee or Governing Council of the person;
>
> (ii) all expenses towards hiring of personnel for management of the activities of the person and salaries, wages or any kind of remuneration paid, including cost of travel, to such personnel;
>
> (iii) all expenses related to consumables like electricity and water charges, telephone charges, postal charges, repairs to premise(s) from where the organisation or Association is functioning, stationery and printing charges, transport and travel charges by the Members of the Executive Committee or Governing Council and expenditure on office equipment;
>
> (iv) cost of accounting for and administering funds;
>
> (v) expenses towards running and maintenance of vehicles;
>
> (vi) cost of writing and filing reports;
>
> (vii) legal and professional charges; and
>
> (viii) rent of premises, repairs to premises and expenses on other utilities:
>
> *Provided* that the expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training shall not be counted towards administrative expenses:
>
> *Provided* further that the expenses incurred directly in furtherance of the stated objectives of the welfare oriented organisation shall be excluded from the administrative expenses such as salaries to doctors of hospital, salaries to teachers of school, etc.

[18] Normally, critical definitions are given in the Act itself and not in the rules.

Therefore, using the term 'administrative expenses' for these expenses, irrespective of their purpose, causes confusion. Most people are led to believe that whatever is not program spending will be administrative expenses.

Use of ambiguous phrases such 'personnel for management of the activities' also adds to the confusion. Does this mean 'management' in an hierarchical sense, or does it mean all the staff who implement the activities? The ambiguity of the rule is such that it could be interpreted either way. In a restrictive sense it would mean salaries of only the managers, officers, and other responsible for supervising or guiding. In an expansive sense, it could mean that all staff salaries are part of 'administrative expenses'.[19] It would not matter whether the staff are part of the management or are field workers.[20]

Whether you read the rule in a restrictive sense or an expansive sense, there are two exceptions to this:

1. If the organisation is primarily engaged in research or training, then salaries, fees, honorarium of trainers, data collectors, and data analysts, will be excluded from 'administrative expenses'.[21]
2. If the organisation is welfare-oriented (such as a hospital or a school), then all expenses incurred on promoting its objects will be excluded from administrative expenses.

The definition of administrative expenses is a precise definition, as it uses the word 'constitutes'. Therefore any expenditure that is not specifically mentioned in rule 5 should not be reported as 'administrative expenses', irrespective of whether it is for program, fund-raising, or anything else. Some examples of such expenses are:

- Purchase of capital items, vehicles, building, etc.
- Insurance of assets or for staff
- Medicines, books, and other items for distribution among communities
- Commission on funds raised
- Travel, conveyance or meal expenses to participants/beneficiaries/resource persons
- Advertisement and publicity expenses
- Registration/renewal fees
- Interest paid to bank, bank charges
- Hospitality expenses, etc.

With this background, let us look a little closely at the exceptions in Rule 5:

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19 In at least two cases, the FCRA Department's cancellation order indicates that salaries of all the staff is being included in administrative expenses. For Greenpeace India Society, administrative expenses were pegged at 81-88% (order dated 2-Sep-2015). For Sabrang Trust, these were calculated at 55-64% (order dated 16-Jun-2016).

20 If so, then by not distinguishing salaries of program and administrative staff, this rule disallows what the Parliament has allowed.

21 This proviso supports the argument that all staff salaries are counted as administrative expenses. Otherwise this proviso would not be required at all.

a. Research

Firstly, what kind of research is exempt under the rule? Research can take many forms, can cover different topics and lead to a wide variety of results. Statistical research and surveys on matters such as formal education, health, sanitation, nutrition, housing, employment, etc., have relatively less scope of influencing political or social discourse and appears to be safe. However, qualitative or interpretative research into issues such as governance, government policies, gender, judiciary, legislation, electoral matters, budgetary allocations, caste, communal, religious, or cultural issues, law and order, social discrimination, civil rights, environment, displacement, etc., are much more sensitive and may not be what the government means by research here (see box: *'Sustainable Research and FCRA'*).

Secondly, there are two conditions to be fulfilled for the first proviso to rule 5:

1. The organisation should be *primarily* engaged in research; and,
2. The concerned staff should be engaged in collection or analysis of field data.

A common question being asked by many NGOs is whether they can exclude the salaries of their policy and advocacy teams from administrative expenses? These NGOs should check whether they are mainly engaged in research. If the answer is 'yes', they should identify the staff who are 'engaged in

Sustainable Research and FCRA

The traditional conception of research is mostly of an academic activity, conducted by chalk-dusty professors or white-coated scientists. This kind of research takes a long time to percolate into main-stream thought or turn into commercial products. However, with more and more academicians thinking about impact, research has become more current, more applied. NGO research is one variety of such applied research.

This research is often incidental to different kinds of NGO programs, especially modern ones which tend to be more cerebral and strategic. Sometimes NGO research cuts across multiple areas of CREES (cultural, religious, economic, educational and social). For example, an NGO seeking to improve economic conditions of the poor might take up research into migration patterns or pastoral communities, or examine the impact of government policies on the poor. It might also look into impact of cultural practices, such as early marriage and drop-out rates on earning capacity of families. Another NGO working on, say, sustainable tourism, might look into impact of mass pilgrimages on local economy, environment or community.

This also raises the related question of what kind of FCRA registration (cultural, religious, economic, educational and social) should the NGO have (Form FC-3A). NGOs mustn't get into areas for which they are not registered under FCRA. If your research isn't aligned to your FCRA registration, you may have to file form FC-6B.

The results of the research might be held internally for designing better programs or these might be published to influence public opinion or change government policy. Publication can have unexpected consequences and trigger clamour for inquiry into the funding for the research. Therefore, a cool-headed risk-assessment of any research for publication is always a good idea. Three critical questions to consider before publishing are:

- Does the research get into religious, political, governance, or cultural issues?
- Will particular interest groups be adversely affected by the research?
- What actions can be triggered by such groups against the NGO?

With regard to administrative expenses, what kind of research does rule 5 talk about? There are no guidelines anywhere. In fact, it is not even clear whether research is covered by FCRA, and if so, where does it fit into the CREES scheme of things. According to one booklet (*A Handbook on FCRA*, MHA & ICAI, 2005), FCRA Department seems to think that research is part of 'education'. However, rule 5 itself implies that 'research' can be a stand-alone activity or connected with training.

However, exempting expenses on research designed to influence public or government policy would contradict the former Home Minister's statement regarding foreign influence on 'social and political discourse' (see box: '*Reason for Capping*', page 11). Therefore, it is a fair guess that FCRA Department is talking about exempting only academic research or statistical surveys in the first proviso to rule 5.

collection or analysis of field data'. Salaries of such staff can be excluded from administrative expenses. Salary of people engaged in managing or directing research, in theorising, writing research papers, or in policy, advocacy, etc., cannot be excluded.

b. Training

Firstly, training can also be of various types, especially in the NGO sector. Training people in handicrafts, mechanical, technical skills, vocations, or skills of particular trades (computers, carpentry, tailoring, plumbing, hospitality, arts, business, etc.) would appear to be fine. However, training in rights-based issues, gender matters, socio-political analysis, governance, activism, or activities such as organising, mobilising, cadre-building, awareness generation (e.g., on government policies) , etc., would most likely not be covered by the term training.

Secondly, there are two conditions to be fulfilled for the first proviso to rule 5 with regard to training:

1. The organisation should be *primarily* engaged in training; and,
2. The concerned staff should be performing the role of trainers.

Therefore, an organisation which is not primarily engaged in training does not qualify at all. For such organisations, the salaries of trainers will also not be excluded from administrative expenses.

If you find an organisation which is primarily focused on training (of the right kind, as discussed above), you can take the second step: identify staff who are trainers. Salaries of only such people can be excluded from administrative expenses — salaries, fees of other staff (e.g., Training Coordinator) cannot be excluded.

Right vs. Rights

According to a particularly lucid comparison, the welfare model of development focuses on three basic questions:

> '1 How are the public goods or technical knowledge delivered to the poor?
>
> 2 What is the missing input or catalyst—seeds, nutrition, or family planning strategy—that will power development?
>
> 3 Which crucible—state-led infrastructure expansion and industrialisation, or the market—can most efficiently reduce poverty and spur development?'

The welfare model is contrasted with the rights-based approach which:

> '…envisions the poor as actors with the potential to shape their own destiny and defines poverty as social exclusion that prevents such action. Instead of focusing on creating an inventory of public goods or services for distribution and then seeking to fill any deficit via foreign aid, the rights-based approach seeks to identify the key systemic obstacles that keep people from accessing opportunity and improving their own lives (Center for Economic and Social Rights, 1995). From the very outset, the focus is on structural barriers that impede communities from exercising rights, building capabilities, and having the capacity to choose.'

Thus, while the welfare approach uses foreign aid to offer goods, services and benefits directly to the poor as charity, the rights-based approach organises the poor to demand these from the Government as a matter of right. Rights-based approach bristles at the poor getting benefits as Capitalist charity, but shies away from the total revolution which Communists want. It, therefore, alarms the Right and is despised by the Left.

- Quoted text from 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective,' (Raymond C. Offenheiser and Susan H. Holcombe); 2003, Nonprofit and Voluntary Sector Quarterly, vol. 32, no. 2, June 2003.

What if an NGO arranges training for its own staff on program or financial issues? Will this be treated as administrative expenditure or program expenditure? Rule 5 is silent on this — only fees paid to trainers/resource persons appears to be covered under legal and professional charges. Therefore, such expenses should not be reported under administrative expenses.

c. Welfare-Oriented?

What is a welfare-oriented organisation? Just like politics, this term too is not defined anywhere in Indian law. However, in NGO circles, it is clearly understood and contrasted with rights-based approach to development (see box *'Right vs. Rights'*).

Even though the rights-based approach is rather complex, it has become quite popular with many FCRA-registered NGOs over the last twenty years. The number of rights, sub-rights and their relatives has also multiplied over the years, often leaving the Government bewildered. In some cases, NGO actions based on rights-based approach have made it difficult for governments and industry to build infrastructure or set up industrial projects in rural areas. At the same time, NGOs find it difficult to understand why does the Government reject an approach that it has signed up for as part of the Universal Declaration of Human Rights,[22] and the International Covenant on Economic, Social and Cultural Rights.[23]

This appears to be the key to unlocking the mysterious 'welfare-oriented organisations' of rule 5 of FCRR 2011. These are NGOs which use foreign contribution for providing, material, services, technical know-how and other benefits directly to the poor and the needy. They do not ask the State to do so. Any foreign contribution they spend directly on furthering their objectives will not be counted as administrative expenses, even it is towards salary, fees, travel, or rent (see box: *'The Reason for Capping'*).

Now with the jaw-dropping reduction in the limit to 20%, more attention is likely to given to this aspect of budgeting and program design by NGOs and donor agencies. The chart shows how administrative expenses should be calculated for different types of NGOs. This should be used to check compliance with FCRA limit of 20%.

The Reason for Capping

On 19-Aug-2010, while replying to a Rajya Sabha debate on the FCRA Bill, Mr. P. Chidambaram, the Minister for Home Affairs stated:

> 'The regulations have been so framed that while legitimate charitable, social, educational, medical and activity that serves any public purpose is allowed, foreign money does not dominate *social and political discourse* in India. There is enough money for charity within India. Enough money can be raised within India for charitable causes, the social causes. But, if you want to access foreign money, then one has to come under a system of regulation.' [Emphasis added]

Once the FCRA 2010 became law, the Home Secretary made this even clearer in 2013:

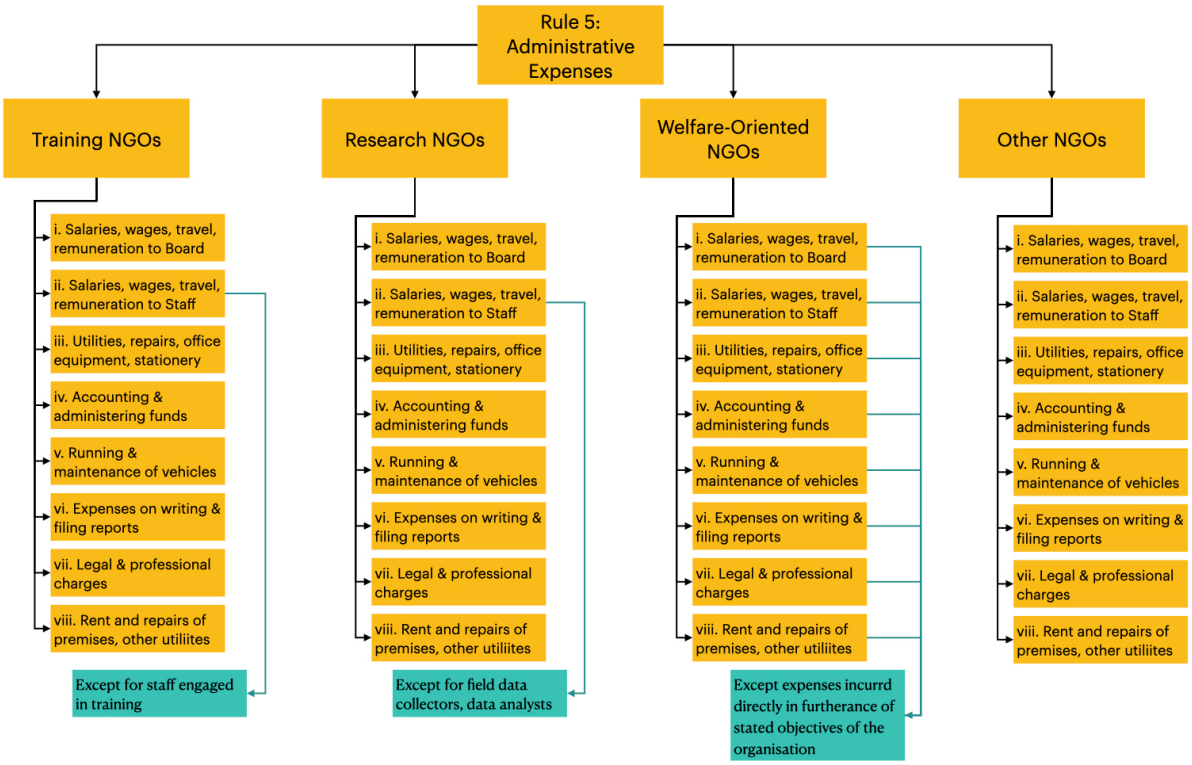
> 'The general policy of the Government of India is not to encourage soliciting of foreign contribution. However, if it is intended for *bonafide welfare activities*, foreign contribution can be received either by obtaining registration or prior permission from the Central Government under the FCRA 2010.' [Emphasis added]

And to ensure this, the Government capped spending on salaries, overheads, etc., to 50% of the total foreign contribution utilised.

However, the restriction has not really been enforced. In fact, till 2015, FCRA department did not even ask for administrative expenses to be reported. Even after reporting was added to form FC-4 in Dec-15, the Department has not clamped down so far on over-spending. No one has been asked to pay compounding fees — or lost their FCRA due to non-compliance. Therefore, while NGOs have occasionally worried about the 50% cap, they've not really changed their approach.

22 UN General Assembly, 1948

23 International Covenant on Economic, Social and Cultural Rights. https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx



d. Cross-border Payments to Employees

Can an INGO or foreign donor agency make direct payments to employees[24] based in India? This depends on the role and number of persons based in India. For instance, if they are working with the overseas office for supporting international operations, this doesn't create an FCRA issue.

However, if such a person/s are working for an FCRA-NGO in India, the direct payments might be seen as an attempt to bypass the restriction on administrative expenses. If these people are working for a non-FCRA NGO in India, then this can be viewed as a method of financing the NGO in India, and thus a violation of FCRA. The same concept applies to the INGO or overseas agency paying directly for office space or various facilities for the Indian NGO.[25]

e. Allocating Staff Salaries to Program Activity

Some organisations allocate one part of the salary of CEO and other staff to administrative expenses and the balance to program expenses. While this is a fair approach from a functional classification perspective, it is not valid in the present situation as rule 5 does not allow such allocation of expenses. If a person is covered by clause i or clause ii of rule 5, then his/her

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24 Sometimes employees are appointed as full-time consultants through consultancy contracts. This does not change the legal implications discussed here.

25 From a literal point of view, contribution of services is not foreign contribution, as these are not money, material or securities. However, regulators are often able to show that this is merely a mechanism to bypass the restriction on transfer of money. There is the additional risk of creating a Permanent Establishment for the overseas NGO, which has its own painful implications. Therefore, such stratagems should be avoided.

entire remuneration, travel, etc. should be treated as administrative expenses, unless the organisation is a welfare-oriented organisation.[26]

f. Changing Staff Designations

Rule 5 allows NGOs to exclude salaries of trainers, researchers, etc., from administrative expenses. What if an NGO changes the designation of some of their staff to trainers, researchers, etc.? Can they exclude the salaries of such staff from administrative expenses? As discussed earlier, this works only if:

a. The organisation is primarily engaged in training and research; and,
b. If the staff are actually performing the roles specified in rule 5.

If this is not the case, then such cosmetic changes will not help.

h. Using non-FC funds for Administrative Expenses

Can an NGO pay for some of the administrative expenses in an FC-funded project out of non-FC funds? Yes, as long as the NGO:

a. Makes the payment for these from non-FC bank accounts,
b. Keeps the expenses in non-FC books, and,
c. Ensures there is no inter-fund transfer between FC and non-FC.

This will allow the NGO to reduce its administrative expenditure in FC funds, without breaking the law.

i. Seeking FCRA Approval for Higher Spending

If nothing works, and your administrative expenses cannot be kept within 20%, then you must apply to FCRA Department for permission to spend more. This must be done in advance, before you actually overspend the money. There is no defined procedure for this, so you should apply by email, with proper justification for why you should be allowed to spend more. It is not known how long will the department take to approve or decline the permission, therefore, you should apply as early as possible.

j. Compounding

What happens if you overshoot the 20% limit? There are two possibilities. The FCRA Department may condone this once in three years, after you pay 5% of the overspent amount as compounding fees. However, this is at the discretion of the Department. If they do not offer compounding option (or if you decline it), then you can lose your FCRA registration.

3. FCRA Renewal

The new change to FCRA requires that each renewal application has to be processed almost like an application for fresh registration. The FCRA Department needs to make sure that each applicant meets all the conditions laid down in sec. 12(4). This may require getting fresh IB

[26] See 'Welfare-Oriented?' for more on this.

reports on each applicant, as well as their board members. NGOs whose board members are residing abroad may face even longer delays if the FCRA Department asks for their verification.[27] The Department will also have to check that the applicant has not defaulted on FCRA compliance in the past. While computerisation helps, the human element is critical in processing FCRA applications, as this is an internal security law, and each case is unique to some extent.

All this means that renewals could get delayed (see box: *'Rebirth and Renewal'*). It is possible that the FCRA Department might extend the validity period as it did last time — it is also equally possible that it may not. And once the FCRA validly expires, NGOs will not be able to received fresh contribution. In some cases, they might not even be able to spend what they have already received.[28]

Clearly, the winter of 2021 could be a very cold one for many NGOs. It is therefore important that NGOs apply as early as possible. The system allows NGOs to apply up to one year in advance. So most NGOs can file their application on 1 November 2020, if they are otherwise ready. As of now, providing the new SBI Gateway account number is not compulsory for filing the renewal application.

They should also make sure that the application is filled up correctly, has all the required information and documents (including especially the affidavits from all board members), and that they are otherwise compliant in all respects. They should remain alert for FCRA requests (SMS and email)[29] for additional information.

Rebirth and Renewal

By all accounts, taking birth is a frightening, once-in-a-lifetime experience. So it is for NGOs when they get their FCRA registration for the first time. Under the 1976 Act, once an NGO registered for FCRA, it was valid as long as it was not taken away by cancellation. The 2010 Act changed this. NGOs must get their FCRA registration renewed every five years. Apparently the idea behind this was to eliminate NGOs which became dormant after registering. It was expected that renewal would be granted almost automatically on application to an NGO, if there were no violations on record. Thus, Sec. 16 provides that:

1. The Government shall grant the renewal, ordinarily within 90 days from date of application.
2. If the certificate is not renewed in 90 days, the Government shall share the reasons with the NGO.
3. Renewal may be refused only where the NGO has violated any provision of the Act or rules.

In practice, renewals are often delayed, sometimes by as much as two years after expiry of FCRA. In most cases of delay, there is no information about why it is delayed or when it might come through, other than the cryptic status message, 'under processing'. It is not known how many NGOs have received an explicit refusal, though many appear to have suffered from the unending processing that their renewal seems to be going through. There are also numerous cases where the renewal application is 'deemed to be lapsed,' because the concerned NGO failed to respond to the FCRA request for information in time.

To a very great extent, this is due to a system overload. About 21,000 NGOs apply for renewal at the same time. All these applications have to be processed within 6-12 months by a Department which can probably allocate just about 5-7 people to this. This would mean that each person would have to process at least 20 applications a day for six months, even if each worked independently in a flat hierarchy. Mistakes and delays are bound to occur.

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27 This is usually coordinated through the Indian Embassy or High Commission abroad.

28 At least one bank is reportedly freezing FCRA designated accounts completely when FCRA registration expires, even if the renewal application has been filed in time and is being processed.

29 Make sure that you fill these up correctly in the renewal application are correct, and keep them live till the time renewal is granted.

4. Public Service and FCRA

FCRA places a total prohibition on civil servants, judiciary, government employees, politicians, etc., accepting any foreign contribution.[30] These people are not permitted to even accept foreign hospitality[31] while abroad, without prior approval from the Government. Journalists are also covered by the prohibition on accepting foreign contribution (though they don't need permission for taking sponsored foreign trips). Thus all the four pillars of the democracy (Legislature, Executive, Judiciary, and the Media) are insulated from foreign influence. However, there is another pillar — public service — which is not as visible. This consists of thousands of public-spirited citizens and professionals helping the Government in many small but important ways. There are numerous Government commissions, committees and boards where non-official members and NGO representatives serve. To name just a few, these include:

- Vigilance & Monitoring Committees (VMC)
- Juvenile Justice Boards (JJB)
- Child Welfare Committees (CWC)
- National and State Commissions for Protection of Child Rights (NCPCR, SCPCR)
- Town Vending Committees (TVC)
- National and State Commissions for Women
- Central and State Information Commissions

The Government appears to be of the view that foreign contribution should not corrode this invisible pillar. Therefore, it has amended sec. 3 of the FCRA to enlarge the restriction to include public servants as well. The term is defined in sec. 21 of Indian Penal Code 1860 (IPC) to include a wide variety of persons [32] including those who perform any public duty:

> **Section 21. "Public servant".**
>
> The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:
>
> [***]
>
> Second. Every Commissioned Officer in the Military, Naval or Air Forces of India;
>
> Third. Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;
>
> Fourth. Every officer of a Court of Justice (including a liquidator, receiver or commissioner) whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties;
>
> Fifth. Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

30 Payments in the ordinary course of business (salaries, fees, royalty, etc.) are permitted.

31 Casual offers, such as a cup of tea or dinner are not restricted.

32 Sec. 21(12), and Explanation 1 of IPC. The word 'person' also includes Company, Association or body of persons, whether incorporated or not.

> Sixth. Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;
>
> Seventh. Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;
>
> Eighth. Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;
>
> Ninth. Every officer whose duty it is as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of 7the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government;
>
> Tenth. Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;
>
> Eleventh. Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;
>
> Twelfth.--Every person --
>
> (a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;
>
> (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).
>
> *Illustration*
>
> A Municipal Commissioner is a public servant.
>
> *Explanation 1.* Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.
>
> *Explanation 2.*--Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.
>
> *Explanation 3.*--The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.

Clause 12 above includes any person who is getting paid by the Government (or a local authority, Government corporation or Government company) for performing any public service. Clause 12 also covers those who are performing a public service — even if they are not entitled to or drawing any remuneration. Thus the definition includes all the positions listed earlier. Most likely, it will also include nominees to bodies such as the former National Advisory Council under UPA II or expert groups set up by bodies such as the Niti Aayog.[33]

A related tweak is that related to corporations referred in sec. 3(1)(c). The restrictions on Government employees also cover those employed by any corporation. These people are not permitted to accept any foreign contribution or foreign hospitality. The word corporation has

[33] Additionally, FCRA Department might even include attorney generals, public prosecutors, district counsels, as well as amicus curiae (who get a nominal fees for helping the court), although such an interpretation is quite contentious and will probably be fought vigorously.

now been explained to mean only those corporations which are owned or controlled by the Government (Central or State), including Government companies.

a. Implications

The restriction is on public servants receiving foreign contribution during their tenure. There is no restriction on the NGOs associated with them who can continue receiving foreign contribution. These NGOs can also pay them fair remuneration for their actual services. However, proving that the remuneration was fair and it was for actual services can be tricky, even if the required permissions were in place.[34] Therefore caution is advisable.

b. Tricks and Traps

People might try a number of ways to bypass these provisions. For instance, some might think of accepting the money as inflated reimbursement of expenses. Others might take the money surreptitiously in cash. Still others might think of accepting the payments in the name of a relative (or even in the name of trusted driver, who then passes on cash to them). Some may try to increase payment of rent , etc., to compensate themselves. All these tricks are well known to law enforcement agencies. If discovered, these can cause grave embarrassment as well as trigger prosecution. You should avoid these totally.

The best solution is for the public servants to resign from any paid position with FCRA NGOs during the period they hold a public office or perform a public duty. If not, the public servants should either not accept any payment from FCRA funds or they should ensure that the payments are for actual services, are properly documented and can withstand public gaze.

RBI vs. RTI

The central premise of FCRA 2010 is that access to foreign funds is the source of NGOs' power to 'influence social and political discourse' in India. Therefore, control over banking channels is a critical mechanism for FCRA.

In 1985, the original FCRA was amended to ensure that NGOs received their foreign contribution only in one bank account, which was noted in MHA records. Depositing foreign contribution in any other account could lead to severe penalties (*see* CBI vs M. Kurian Chief Functionary of Comprehensive Rural Operations Services Society (CROSS); SC, 2001).

In 2011, this was relaxed somewhat by allowing NGOs to open secondary bank accounts for ease of utilisation in the field. In 2017, regulations were tightened again by asking all NGOs to keep their FCRA accounts in PFMS-compliant banks only. Still, there were cases where funds from prior-reference category donors would slip through. For those who don't know, the prior-reference category is a list of some 20-25 foreign donors whose remittances must be cleared first by MHA, before these can be credited to the NGO, if at all. For some bureaucratic reason, the list is secret. And it is so secret that RBI has filed a case in Mumbai High Court to prevent it being made public ('RBI seeks stay on CIC order on foreign donors in FCRA list,' Livemint, 30-Nov-2018).

The latest change will help MHA ensure that the restrictions on sub-granting can be enforced more rigorously. If will also help prevent remittances from prior-reference category donors slipping through. Last but not the least, there will be no need to send out the list of these donors to 60 banks.

5. FCRA Gateway Banking

One unique and somewhat confusing change (see box: *'RBI vs. RTI'*) is that all FCRA NGOs must open a special bank account with SBI, New Delhi Main Branch for receiving foreign

[34] Foreign contribution excludes payments received in the ordinary course of business.

contribution.[35] This can be a savings account or a current account.[36] Once the funds are credited to this gateway account, these can be transferred to the NGO's other FCRA accounts straight away or later, as required. The secondary accounts must, of course, be recorded with FCRA Department as utilisation accounts. NGOs can open the SBI gateway account remotely, and have been given time till 31-Mar-21 to do so.

Once the SBI account is opened, they should file form FC-6C to update their FCRA banking details. SBI will then allow them to start using the new account.[37]

Once the SBI account is opened, they must stop credit of fresh contribution in the present FCRA designated bank account.[38] They can continue to use the old bank accounts for keeping or using foreign contribution, so long as all future foreign contribution is first received in the SBI gateway account.

The transition to SBI is not likely to be smooth — opening an account with a Nationalised Bank is always a memorable experience. Also KYC requirements for charities are relatively more stringent. However, once the account has been opened, it is relatively easier to operate an account with SBI than with some other private or foreign banks. SBI is also focused on banking only. The lack of smart service is somewhat compensated by the lack of high-pressure marketing of various insurance, investment and loan products by private banks.

The Panchatantra in FCRA

Panchatantra, popularly viewed as a set of stories for children, is actually an insightful look into pragmatic statecraft, and probably extraordinarily influential at a subconscious level. According to Patrick Olivelle:

> "…Pañcatantra is a complex book that does not seek to reduce the complexities of human life, government policy, political strategies, and ethical dilemmas into simple solutions; it can and does speak to different readers at different levels. Indeed, the current scholarly debate regarding the intent and purpose of the Pañcatantra— whether it supports unscrupulous Machiavellian politics or demands ethical conduct from those holding high office—underscores the rich ambiguity of the text…."
>
> - The Ascetic and the Mouse, Story 1, Book II, Panchatantra, Tr. Patrick Olivelle (Oxford University Press, 1997), p. x.

It also offers us a valuable insight into power of money through the story of a mouse called Hiranyaka, who lived over a treasure hoard. The smell of gold gave him the confidence to jump several feet to reach the ascetic Tamrachooda's alms, and feed his band of followers every day. One day, Tamrachooda receives a guest called Brihatsphic, who helps him figure this out. Both follow the trail to Hiranyaka's treasure and dig it out. Once Hiranyaka loses his treasure, he loses his aura, his jumping powers, and his band of followers.

This is not very different from what FCRA is trying to achieve, because, in the Panchatantra scheme of things:

> अर्थेन च विहीनस्य पुरुषस्याऽल्पमेधसः।
> उच्छिद्यन्ते क्रियाः सर्वा, ग्रीष्मे कुसरितो यथा॥९॥
> Just as small mountain streams dry up in summer,
> so come to nought the wits and plans of a man without wealth. [91]
>
> - Book 2, Story 1, *Panchatantram*, Chaukhamba Surbharati, Varanasi, 2008, pp. 450-487.

Therefore, though this move signals the Government's tougher stance on FCRA, it is not likely to affect day-to-day NGO working in any significant way. However, the psychological impact of this change on NGOs might be immense (see box: *'The Panchatantra and FCRA')*.

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35 Named as 'XYZ NGO - FCRA Account'

36 RBI specifically permits NGOs to open and maintain Savings Bank Accounts, provided these are not used for trading activities. (RBI/DBR/2015-16/19 Master Direction DBR. Dir. No.84/13.03.00/2015-16 of March 03, 2016, updated as on 22-Feb-2019, pp. 17-19)

37 On filing FC-6C, the previous FCRA designated account is taken off the FCRA record. NGOs might have to file FC-6D for this account if they plan to continue using it as an FCRA utilisation account.

38 FCRA Public Notice dated 13-Oct-2020, F. No. II/21022/23(35)/2019-FCRA-III

There are also other questions about the bank operation. It is not clear whether the account is meant only for fresh FC receipts or for other receipts of FC as well, such as the following:

- Refund from a vendor or a staff member
- Income tax refunds
- Credit of interest on FC fixed deposits
- Sale proceeds of FC investments or FC assets or FC received in kind
- Receipts from sales or fees in income-generating FC projects
- Receipts from hiring out of FC equipment/buildings
- Repayment of micro-credit loans given out of FC funds
- FC donations received as currency

Hopefully, some of these doubts will be cleared up once the rules are released.

6. Surrendering to FCRA

FCRA 1976 did not have a specific provision for cancellation of FCRA. It only allowed the Government to place a registered organisation on prior-permission, which effectively meant that they no longer had a valid registration. FCRA 2010 has special provisions for suspension and cancellation. And for what happens afterwards. This is part of a curious development in charity regulation reflecting the increasingly uneasy relationship between Charity and the State (see box: *'Coup de grâce for Charity?'*).

The cancellation provisions have now been extended further through a new one for surrender.[39] To some extent, this is a formal recognition of an existing practice, where NGOs could write to FCRA Department and give up their FCRA registration voluntarily. These cases were called 'cancellation on request'. Under the newly introduced sec. 14A, an NGO can apply for surrender of FCRA registration. The Government can permit this after an enquiry, provided two conditions are fulfilled:

1. The NGO has not violated any FCRA provisions; and,
2. The foreign contribution and assets

Coup de grâce for Charity?

When a public charity is wound up or cannot function any more, its assets normally go to another charity with similar objects. If such a charity cannot be found, then these can be re-purposed by the court. This has been a long-settled principle in charity regulation, though being eroded now gradually.

For example, tax law now provides that a charity losing its tax registration under sec. 12A for any reason will have to pay a tax of about 42% of the current net market value of its assets (sec. 115TD of Income Tax Act, 1961). In some cases, the charity might have to sell its assets to pay this tax. In all fairness, this is occurring because charity tax privileges are sometimes misused by corporate consultants for enriching their clients or for evading taxes. Unfortunately everyone ends up paying the price.

FCRA 2010 goes further. It provides that if the FCRA registration of an NGO is cancelled, the FC funds and assets will vest in the Government. The Government can utilise these to continue the NGO's activities or sell off the assets if sufficient funds are not available to run the programs. If the FCRA registration of the NGO is later restored, then these will be returned to the NGO.

[39] Sec. 14A of FCRA 2010

created out of these have been vested[40] in the Government.

Thus, the contribution and assets will pass into the custody and management of the Government even if no violation of FCRA provisions is found.[41] This is a very unusual approach and shows that the Government is deeply reluctant to any permit unsupervised use of endowments or infrastructure created out of foreign contribution.

However, this can create complications in some cases. For example, a mission hospital might have been constructed partly out of foreign contribution and partly out of other funds. Sec. 14A mandates that the Government must take it over and run it even if there is no violation of FCRA. This will tie down Government resources in activities that are easily performed by the private sector.

There is the added complexity of minority educational institutions. These are protected under Article 30 of the Constitution, which allows minorities to administer these on their own. Any action of taking these over on cancellation or surrender of FCRA will not be easy. It will probably be defended vigorously all the way to the Supreme Court and thence maybe to international fora as well.

Mirror, mirror on the Wall…

Aadhar, a 12-digit unique identity number with bio-metric information, was originally conceived around 2009 by private individuals as a tool to gather information about how people in India used their money. This would have eventually become a hugely valuable tool for gathering market intelligence for companies, as well as collecting data for the Planning Commission. This was the reason for relatively simple security checks and safeguards for getting an Aadhar.

In 2014, when a new Government came to power, it reoriented Aadhar as a tool for plugging tax evasion. Aadhar of individuals was also linked to Darpan ID, a new unique identifier for NGOs. Darpan ID was initially optional, but was later made compulsory for all FCRA NGOs by an office order, without legislative backing (MHA order dated 4-Oct-17).

This order was challenged in Delhi High Court by Rajiv Gandhi Charitable Trust, which was then allowed to file FC-4 without quoting Darpan ('Delhi HC Allows Rajiv Gandhi Charitable Trust To File FCRA Annual Returns Offline, Without Aadhaar Linking,' 17-Dec-18, Live Law). This temporarily undid FCRA Department's efforts to tag NGO functionaries to NGOs.

The new amendment removes this minor legislative bump in leveraging the Aadhar for controlling what NGOs do with foreign contribution.

7. Identity Parade: Aadhar and Darpan

All FCRA NGOs will now have to provide the Aadhar number of each key functionary while applying for registration, prior-permission, renewal or even change of functionaries. And if a person cannot get Aadhar because they are not resident in India,[42] they must provide their Passport number or the OCI card number.

With this change in place, the Darpan ID will soon become mandatory for all FCRA NGOs. The Minister of State for Home Affairs has already stated this in Parliament.

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40 Vesting doesn't have a fixed meaning in law, though it is different from seizure or confiscation, used elsewhere in the Act. In the present context, it seems that vesting does not confer absolute rights over the property, but only a duty to manage it as best as possible in public interest. See Fruit & Vegetable Merchants Union vs. Delhi Improvement Trust, AIR 1957, SC 344, 353.

41 Sec. 15(2). Assets/funds vest in the Addl. Chief Secretary or Principal Secretary (Home) of the State/UT, where the assets are situated. (F. No. II/ 21022/23(43)/2018-FCRA-III; S.O. 5650(E), dated 5-Nov-2018)

42 In practice foreigners are not allowed on board of FCRA NGOs, but PIOs (Persons of Indian Origin) are.

This is an administrative change, which was actually introduced some three years ago, but had hit a road block (see box: *'Mirror, Mirror on the Wall'*). Most of the FCRA NGOs have already obtained a Darpan ID. Those who haven't should obtain it as early as possible.

One problem that some NGOs had faced last time was listing at least three officers for getting a Darpan ID. However, while societies typically have 3-5 office bearers, many trusts and sec. 8 companies have only two trustees or directors. Niti Aayog, which runs the Darpan portal, should try and fix this problem, so that such NGOs do not have to list their drivers and office assistants as officers, just to get a Darpan ID. People should also not place their proxies on the Board[43] to get around the restriction of being a public servant, while also simultaneously drawing remuneration from a foreign source or an FCRA NGO. Remember always that FCRA is an internal security legislation and it should not be toyed with.

Once the linking of Aadhar and Darpan IDs become fully operational, it will become easier to enforce FCRA provisions even more forcefully. Enforcement aspects include operating bank accounts without being listed as key functionary in FCRA records, engagement as public servants, not disclosing prosecutions, involvement with multiple NGOs, and numerous other subterranean connections which the Aadhar's neural network can identify and force to the surface. It is therefore critical for each NGO to do a risk assessment as early as possible and fix any lapses.

And though most NGOs have nothing to hide, there are many board members who do not want to expose their personal or business transactions to regulator's scrutiny or to public gaze. These persons are likely to disengage from FCRA NGOs over the next few years. Will this be good or bad? It is probably too early to say.

8. More Suspense during Suspension

As mentioned above, FCRA 1976 had no provision for cancellation or suspension of FCRA registration. FCRA 2010 has both these facilities. However, this has not made life easier for FCRA Department. If you enforce any law more rigorously, you also generate more resistance to enforcement.[44] One of the unexpected results has been increasingly sophisticated attempts at concealment as well as a more robust defence against prosecution. Number of consultants and experts helping NGOs with complicated legal cases has also increased. Presumably all this has increased the workload of FCRA Department, which therefore needs more than six months to investigate suspected offences before cancellation can be ordered, or in rare cases, suspension withdrawn.

The changed provision of FCRA increases the permissible period of suspension from six months to 360 days, just five days short of a full year. During this period, the NGO cannot receive any foreign contribution. It cannot also use any foreign contribution it has already

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43 This unfortunate practice is quite common among shady companies, often used for money laundering or cheating the public. As a result, many rickshaw pullers and daily wage workers have become company directors, without their knowledge or consent!

44 It is instructive to compare the arming of police in Europe, especially Britain, with that in the USA. While the former still rely on sticks, batons and shields, the latter routinely carry equipment which will be more fitting for storm troopers in Europe.

received — except for upto 25%, with the prior approval of FCRA Department. This cap of 25% has remained unchanged, though the period of suspension has been doubled.

By all standards, this is an unusually long duration. Compare this with the 90 days within which a chargesheet must be filed under Criminal Procedure Code or under PMLA.[45] Even UAPA,[46] often called a harsh law by Civil Rights groups, requires that a chargesheet must be filed within 180 days or the suspect be released. To extend this duration, police have to approach a court which may or may not allow additional time to the investigators.

As discussed above, the more charitable explanation for this is the change in complexity of violations and the enhanced ecosystem of FCRA consultancy. There could be another, less justifiable reason. Suspension of FCRA registration is very much like cancellation. A one year-period, without funds, is enough to dry out any organisation. From the enforcement point of view, there is also an added advantage — FCRA does not have any specific provision for appealing against a suspension order.

9. Revoking Prior-permission

A prior-permission under FCRA is like a temporary license. An NGO without FCRA registration can apply and get advance permission for accepting foreign contribution from specific donor/s, for a specific project. The amount is also specified in the permission. This is useful for NGOs which haven't completed the three-year gestation period and are not eligible for getting FCRA registration. Generally, only small amounts are approved, though there are cases where people received approval for Rs. 10-12 crores.

Over the last few years, FCRA Department has become more and more cautious about this route. One result has been a capping of prior-permission amount to Rs. 50 lakh for NGOs which haven't completed three years. This has been done by asking NGOs to submit three years' audited accounts (at the time of applying for prior-permission) if the project amount is over Rs. 50 lakhs.

However, there is no provision for suspension or withdrawal of prior-permission. The present change fixes this tiny breach in the Great Wall of FCRA. Now the government can suspend prior permission after holding brief inquiry. During the period of suspension, the NGO cannot receive or utilise any foreign contribution without additional and prior approval of the FCRA Dept. Later if it is found that there has been a violation of FCRA, the Government can confiscate any remaining amount of foreign contribution, apart from banning any further receipt.

45 Prevention of Money Laundering Act, 2002

46 Unlawful Activities (Prevention) Act, 1967

Conclusion

Changes to FCRA (and to other NPO legislation) are a work-in-progress. It is, therefore, probably too early to come to a conclusion. Still, while the Government of a sovereign nation has every right to write laws and enforce them for the benefit of the nation, the design of FCRA is such that Government spends more time giving out registrations and permissions rather than checking how these are being used. The provisions themselves are often ambiguous, which makes it difficult for most NGOs to follow these. It doesn't help that charity is recognised universally as a virtue — laws that restrict it are therefore baffling to most people. Experience shows that many people are willing to turn a blind eye to violation of law that are not seen as morally reprehensible.

Also, with an increasingly contested world, FCRA is unlikely to see a 1992-like liberalisation till foreign contribution becomes comparatively insignificant in the scheme of things. This could happen either because domestic philanthropy grows to stymie cross-border charity, or because FC-funded activities (and activists) become more domesticated. Till that time, FCRA NGOs should buckle down for a turbulent ride and follow the rules as best as they can.

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