

Critical Issues on Foreign Contribution (Regulation) Bill, 2006

Introduction

In the societal context, voluntary organizations constitute the third sector; the first sector being the “Government” and the second sector being the “market” or private business. Voluntary Sector has been recognized as an important player in contributing to the development of the society and promoting the interest of the larger public.

According to a study conducted some time back, there are about 1.2 million voluntary organizations registered in India. Accountability and transparency are non-negotiable principles in the Voluntary Sector. However, it is important to recognize that due to the nature of service and for effective service, the voluntary organizations require flexibility in the laws governing them. Therefore, the laws and policies for the voluntary sector should create an enabling environment to function more effectively. Recognizing this, Planning Commission of India prepared a draft National Policy on Voluntary Sector in 2006 which is still awaiting the approval of the Government. However, certain developments in the recent past have sent signals that the Government is interested in controlling the voluntary sector by introducing stringent laws and thereby trying to encroach upon the democratic space enjoyed by the Voluntary sector.

In 2005, the Government introduced the Foreign Contribution (Management and Control) Bill, 2005 (FCMC Bill), for Public Debate. There were quite a number of harsh provisions which were opposed by the Voluntary Sector. Government then replaced the FCMC Bill, 2005 by the present Bill called Foreign Contribution (Regulation) Bill in 2006. The Bill was introduced in Rajya Sabha on 18th of December 2006.

It may be noted that there are approximately 30,000 FCRA registered organizations receiving about 6,250 crore through FCRA channels in India annually. Through the new Bill, the Government instead of enabling the sector has posed major challenges by allowing a lot of discretionary powers to the implementers of law. Further, there are also a lot of administrative compliances in the Bill which would become a big burden for the entire sector if the bill becomes a law.

Some of the provisions of the Foreign Contribution (Regulation) Bill, 2006 are analyzed as below:

1) Preamble to the Bill

The text of the preamble in the proposed Foreign Contribution Regulation Bill, 2006 reads:

“A Bill to consolidate the law to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto”.

From the above, what becomes clear is that the bill is drafted to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.

To understand as to how the proposed change in the new preamble would bring about a difference to the voluntary sector, it is important to give a reading to the preamble to existing FCRA, 1976.

It reads:

“An Act to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organizations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic, and for matters connected therewith or incidental thereto”.

A plain reading of the preamble to the proposed FCR bill, 2005 gives the reader a negative view as it is couched in negative language which talks of “to prohibit” whereas the existing FCRA, 1976 talks of “to regulate”. The use of the negative expression-“to prohibit” has the potential to curb the democratic space of the dynamic voluntary sector which works proactively for the betterment of the poor and marginalized. Such prohibition is bound to hinder the working of the sector.

The important developmental role which the voluntary sector plays has not been reflected in the present Bill whereas in the existing bill the vital role of Voluntary organizations has been strongly acknowledged. Also, the bill talks about prohibiting “activities detrimental to national interest”. This seems to us to be a subjective expression and what indicators would suggest activities detrimental to national interest are not mentioned anywhere in the Bill.

After going through the text above it becomes quiet clear that there is a room for the government to exercise its subjectivity.

2) Prohibition to accept foreign contribution by organization of a political nature not being political parties'

Section 3 (1) (f) of the FC(R) Bill 2006 states that organizations of a political nature as may be specified by the Central Government is prohibited from accepting foreign contribution.

Section 5(1) of the proposed FCR Bill, 2006 reads:

The Central Government may, having regard to the activities of the organization or the ideology propagated by the organization or the programme of the organization or the association of the organization with the activities of any political party, by an order published in the Official gazette , specify such organization as an organization of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3.

Another provision related to the organizations of a political nature is contained in section 54 (2) (b) of the Bill.

Section 54 (2) (b) reads:

Notwithstanding such repeal,-

(b) any organization of a political nature, not being a political party, to whom the prior permission was granted under section 5 of the repealed Act, shall continue to be the organization of a political nature, not being a political party under clause (f) of sub-clause (1) section 3 of this Act, till such permission is withdrawn by the Central Government;

Again the definition of an “organization of political nature” is not clear and it is open for interpretation. The voluntary organizations which follow a “rights-based approach” and stand for the rights of the people are now in danger of being interpreted as organizations of a political nature by the Central Government in the absence of a definition to that effect in the Bill. In comparison to this, in the present Foreign Contribution Regulation Act, 1976, an organization of a political nature was allowed to receive foreign contribution with the prior permission of the Government

3) Prohibition to accept foreign contribution by correspondent, columnist and news organization

Section 3 (1) (b), (g) and (h) of the proposed Bill reads:

Section 3 (1) *No foreign contribution shall be accepted by any-*

(b) correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;

(g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (g) of sub section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000) or any other mode of mass communication ;

(h)) correspondent, columnist, cartoonist, editor, owner, of the association or company referred to in clause (g).

The provision fails to take into consideration the vital role played by civil society organizations in disseminating information with the use of radio as a mode. Important information regarding issues like literacy, sanitation, AIDS and other important areas is spread to the masses with the help of audio broadcast.

The provision has the potential to seriously affect and impede religious broadcasting work activity, which is a constitutional right to practice, profess and propagate one's religion, and has no relation to the stated aims and objects of the Bill.

Also the intent of the proposed statute seems to be to allow autonomy to the national media and not allow any external influence through FCRA funding. However what is not consistent with the intent of the Government is that, on other hand it has allowed 20% Foreign Direct Investment in private FM radio services and 26% in print media, at the same time it prohibits any association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode to receive foreign contribution. We would like the Government to have a uniform approach and policy for the non-profit as well as the profit sector.

4) Speculative Business

Section 8(1) of the Foreign Contribution Regulation Bill, 2006 states:

Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution,-

a) Shall utilize such contribution for the purpose for which the contribution has been received:

Provided that any foreign contribution or any other income arising out of it shall not be utilized for speculative business;

It is important to note that the words “speculative business” are not defined anywhere in the Bill.

More importantly, the NPO are governed by the provisions of the Income Tax Act, 1961. The Income Tax Act prescribes that the funds of the non-profit organization can be invested in the mode specified under section 11 (5) of the Income Tax Act, 1961. The mode of investment also includes the government owned mutual funds. Whether the government owned mutual funds is speculative business or not is an open question.

Further, as there is no synchronization between Income Tax Act, 1961 and Foreign Contribution Regulation Bill, 2006 about the mode of investment; it has the potential to create enormous difficulties for the NGOs to comply with both the laws having different requirements.

5) Administrative Expenses

Section 8(1) (b) and 8 (2) of the proposed FCR Bill, 2006 states:

Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution,-

b) Shall not defray as far as possible such sum, not exceeding fifty per cent of such contribution, received in a financial year, to meet the administrative expenses:

Provided that the administrative expenses exceeding fifty per cent of such contribution may be defrayed with the prior approval of the Central Government.

(2) The Central Government may prescribe the elements which shall be included in the administrative expenses and the manner in which the administrative expenses referred to in sub-section (1) shall be calculated.

Firstly, in the proposed bill, the term “administrative expenses” is not defined. Further, some expenses which are programme related, like the salary of a doctor for running a dispensary should be treated as programme costs and not administrative costs. In the absence of a clear basis for determining administrative costs, the same will be open for subjective interpretation and would result in litigation.

6) Grant and renewal of certificate of Registration and Deemed Registration

The relevant sections from the proposed bill, 2006 are 12(3), 12 (5) and 16.

Last para of section 12(3) reads:

“The Central Government may register such person and grant him a certificate or give him prior permission, as the case may be, subject to such terms and conditions as may be prescribed.”

Section 12 (5) reads:

“The certificate granted under sub-section (3) shall be valid for a period of five years and the prior permission shall be valid for the specific purpose or specific amount of foreign contribution proposed to be received, as the case may be”.

Section 16 reads:

(1) Every person who has been granted a certificate under section 12 shall have such certificate renewed within six months before the expiry of the period of the certificate.

(2) The application for renewal of the certificate shall be made to the Central Government in such form and manner and accompanied by such fees as may be prescribed.

(3) The Central Government shall renew the certificate subject to such terms and conditions as it may deem fit and grant a certificate for renewal for a period of five years:

***Provided** that the Central Government may refuse to renew the certificate in case where a person has violated any of the provisions of this act or rules made thereunder.*

With regard to the grant of certificate of registration section 11(2) of the existing FCRA, 1976 states:

If an application referred to in sub-section (1) is not disposed of within ninety days from the date of receipt of such application, the permission prayed for in such application shall, on the expiry of the said period of ninety days, be deemed to have been granted by the Central Government:

PROVIDED that, where in relation to an application, the Central Government has informed the applicant the special difficulties by reason of which his application cannot be disposed of within the said period of ninety days, such application shall not, until the expiry of a further period of thirty days, be deemed to have been granted by the Central Government.

The existing FCRA, 1976 specifies a time frame for the Central Government to dispose of the application for grant of prior permission.

In absence of a provision relating to the time frame within which the application should be disposed of, a number of applications can remain pending and the organizations are left to the discretion of the implementers to take their own time in granting prior permission.

Secondly, renewal of registration every five years would be a major constraint in the smooth functioning of the organization as the organization will have to initiate the process of renewal of registration. Further there is no time limit in the proposed bill by which application for re-registration has to be disposed off. Any delay in Re-registration can affect the implementation of a project at the field level. In the absence of a clear time limit for disposing the application for re-registration there is hardly any accountability of the bureaucracy to the civil society organizations.

7) Restriction to receive foreign funds on organization not specifically mentioned in section 3

Section 9 (a) of the FCR bill, 2006 reads:

The Central Government may-

(a) prohibit any person or organization not specified in Section 3 from accepting any foreign contribution;

This provision gives arbitrary powers to prohibit any organization from receiving foreign contribution. Also the proposed Section 3 has the potential to be misused to the detriment of the Voluntary sector.

8) Government by notification to specify the person, area, purpose and source of utilization.

Section 11 (3) empowers the Central Government to specify-

- a) The areas or areas in which the foreign contribution shall be utilized.[Section 11(3) (ii)]*
- b) The purpose or purposes for which the contribution shall be utilized section [11(3) (iii)]*
- c) The source or sources from which the foreign contribution shall be accepted [11(3) (iv)] with the prior permission of the Central Government.*

This again is a provision which gives enormous discretionary power to the Central Government.

10) Grant of Certificate of registration

Section 12 which deals with registration of an organization under FCRA has many subjective and discretionary clauses that provides enormous discretionary powers to the Central Government.

Such clauses are discussed below:

a) Conversion through Inducement and Force [Section 12(3) (ii)]

According to this clause the registration would be granted to an organization which has not indulged in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another.

This clause has a potential of being used selectively against a group or community which is genuinely doing good work by providing facilities like medical aid, providing food, shelter, clothing, education without any intention for conversion through inducement.

b) Use of violent methods by the person or organization to achieve its end [Section 12(3) (v)]

According to this clause the registration would be granted to an organization which has not engaged or likely to engage to propagate sedition or advocate violent methods to achieve its end. Again, this clause has been put to provide power to the Central Government to deny registration to genuine civil society organizations who are engaged in human rights and other rights based approach activities for the community.

c) Undertake a meaningful activity or meaningful project [section 12 (3) (b)]

According to this clause the registration would be granted to an organization which “has undertaken meaningful activity in its chosen field for the benefit of the people or has prepared a meaningful project for the benefit of the people”. It is not apparent from the clause as to what measures will satisfy the Government that the organization has undertaken meaningful activity in the Bill. Meaningful Activity is a very broad expression and has the potential for subjective interpretation and should be clearly defined.

- d) **Grant of certificate of registration only in cases where there is no conviction or prosecution for any offence pending against the individual. [Section 12 (d) & 12 (e)]**

According to this clause, certificate of registration shall not be granted to any person or any of the directors or office bearers who have been convicted under any law for the time being in force or any prosecution for any offence pending against him. As per the principle of natural justice, a person cannot be held guilty until proven. However, according to this clause, even if there is a prosecution pending against the persons, he is prohibited from receiving foreign funds. This clause would restrict a number of organizations from receiving FCRA registration since there can be false cases and accusations pending against social activists working in the field taking up rights issues on behalf of the marginalized communities.

10) Management of Foreign Contribution of persons whose certificate has been cancelled

Section 14 (1) of the proposed FCR bill states:

The Central Government may, if it is satisfied after making such inquiry as it may deem fit, by an order, cancel the certificate if—

(a) the holder of the certificate has made a statement in, or in relation to, the application for the grant of registration or renewal thereof, which is incorrect or false; or

(b) the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or

(c) in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or

(d) the holder of certificate has violated any of the provisions of this Act or rules or order made thereunder.

Section 15 of the proposed bill reads:

The foreign contribution and assets created out of the foreign contribution in the custody of every person whose certificate has been cancelled under section 14 shall vest in such authority as may be prescribed.

(2) The authority referred to in sub-section (1) may, if it considers necessary and in public interest, manage the activities of the person referred to in that sub-section for such period and in such manner, as the Central Government may direct and such authority may utilise the foreign contribution or dispose of the assets created of it in case adequate funds are not available for running such activity.

(3) The authority referred to in sub-section (1) shall return the foreign contribution and the assets vested upon it under that sub-section to the person referred to in the said sub-section if such person is subsequently registered under this Act.

It is very important that only the foreign contribution which has been accessed in violation of any of the prescribed clauses should vest in the prescribed authority otherwise the clause is very harsh. Also the sale of assets by the prescribed authority must not be permitted as it is open to misuse.

12) Receive foreign funds through only one bank account

Section 17 (1) of the FCR Bill, 2006 states that , every person who has been granted a certificate and received prior permission shall receive foreign contribution only in single bank account. However, the welcome change is that the organization may open one or more accounts in one or more branches of the bank for utilizing the foreign contribution received by them. This was long awaited and much debated. However, there is a problem for the organizations that are into micro- credit programmes at the field level. Since according to this section the foreign contribution have to be received in a single bank account, the loan repayments have to be physically carried from the field to the headquarters in order to be deposited in the FCRA designated bank accounts. There is a need to make this procedure simple by allowing refund of loans to be deposited in FCRA subsidiary bank account.

13) Intimation

Section 18 of the FCR Bill, 2006 every person receiving foreign contribution shall report to such authority as may specified –

- a) the amount of foreign remittance;*
- b) the source and manner in which the foreign remittance was received; and*
- c) other particulars in a form and manner as may be prescribed and shall submit a copy of a statement indicating the particulars of foreign contribution received and duly certified by officer of the bank or authorized person in foreign exchange and furnish the same to the central Government.*

This is a cumbersome procedure involving submitting a bank statement to the Central Government every time there is foreign remittance. In any case in the annual return the

entire amount received are reflected after audit. Therefore this provision seems to be quite unnecessary.

14) Disposal of Assets created out of foreign contribution

Section 22 of the FCR Bill, 2006 states that where any person who was permitted to accept foreign contribution ceases to exist or has become defunct, all the assets of the person shall be disposed of in accordance with the provision contained in any law for the time being in force. In case there is no law, the Central Government shall specify the disposal of all the assets in the manner and procedure as may be prescribed. This provision seems to be quite balanced in our opinion.

11) Appeal:

Section 31 of the proposed FCR Bill reads:

Any person aggrieved by any order made under section 29 may prefer an appeal-

It is important that the provision of appeal ought to apply to each and every discretion exercised by the government, particularly under section 6, 9,10,12,13, 14, 15 and 16 of the Bill to the District Judge.

The relevant sections are stated below:

Section 6: Restriction on acceptance on Foreign Hospitality

Section 9: Power of Central Government to prohibit receipt of Foreign contribution etc in certain cases.

Section 10: Power to prohibit payment of currency received in contravention of the Act.

Section 12: Grant of certificate of registration

Section 13: Suspension of Certificate

Section14: Cancellation of Certificate

Section15: Management of Foreign Contribution of persons whose certificate has been cancelled.

Section 16: Renewal of certificate

In all the above cases where the discretion can be exercised by the government, provision for appeal should be included.

12) Power of the Central Government to exempt:

Section 50 of the proposed FCR Bill states:

If the Central Government is of opinion that it is necessary or expedient in the interests of the general public so to do, it may, by order and subject to such conditions as may be specified in the order, exempt any person or association or organization (not being a political party), or any individual (not being a candidate for election) from the operation of all or any of the provisions of this Act and may, as often as may be necessary, revoke or modify such order.

The provision gives powers to the Central Government as no proper guidelines are prescribed for such exemption.

CONCLUSION

We would wish that FCRA registration should become automatic with the registration of the organization. The Government needs to identify only dubious sources. Any organization which receives foreign contribution from such dubious sources should be required to take prior permission. From all other sources, the amount should be allowed without any restriction.

We would also wish that there would be low discretionary authority with the implementers of law for smooth functioning of this vibrant sector in India by providing adequate democratic space.
