

AccountAble™

AccountAble 31: The Politics of FCRA

Feb'15

IN THIS ISSUE

Three Approaches	pg 1
Charitable Activities • The 'Charitable' in FCRA • The 'Political' in FCRA	pg 2
Charitable or Political? • A View from the Courts • AVARD (1990) • INSAF (2013)	pg 3
Greenpeace India Society (2015) • Conclusion	pg 4

About fifty years ago in 1967, there was a furious debate in the Lok Sabha. The issue was the role of foreign money in Indian elections. Eventually, this led to passing of FCRA. FCRA placed a ban on politicians and parties receiving foreign donations. There was nothing very unique in this - many other countries had similar laws.

However, by the time FCRA was passed in 1976, history had already overtaken it. JP movement had caused a political upheaval in early '70s. It led to a temporary suspension of civil rights during emergency, followed by a routing of the government in elections. The new coalition government itself collapsed in a short while.

When Congress came back to power in 1980, it set up the Kudal Commission to probe JP movement. In 1984, this Commission told the Government that JP movement was fuelled by foreign donations routed through NGOs. The Government immediately extended FCRA to all NGOs as well. That was just the beginning. As time passed, the FCRA department kept asking for more powers to regulate foreign-funded NGOs. Their wish was granted 27 years later, with the FCRA 2010 becoming law.

The new FCRA focuses almost totally on foreign-funded NGOs. It also has a declared objective of curtailing their 'political activities'. Effectively, this means that NGOs engaged in political activities can not get FCRA registration at all.¹ But do NGOs really engage in 'political activities'? Most NGOs don't think so.



In this issue of AccountAble, we try to understand the reasons for this conflict between FCRA Department and NGOs. We then also look at ways to resolve this.

THREE APPROACHES

NGO work is mostly based on one of the following three approaches:

1. Relief, which involves feeding the poor and caring for the sick;
2. Development, which calls for helping people become self-sufficient, and take care of their own needs; and,
3. Rights-based, which encourages people to pressurise their Government to deliver on civil, social, economic and political rights.

¹ It does not matter whether the 'political activities' are taken up with FCRA funds or non-FCRA funds.

www.AccountAid.net

Relief or welfare approach has been around for a long time. The development approach emerged as an offshoot of this approach in the 1960's. The rights-based approach evolved in the 1990's. This happened due to initiative of the UNDP and some International NGOs.²

CHARITABLE ACTIVITIES

The classic relief or welfare approach is the most widely understood. It is also reflected in our words and laws. For example, societies are generally formed for charitable activities, such as promotion of science, literature, education, knowledge, etc.³ Similarly, Bombay Public Trusts Act refers to public religious or charitable activities. The Companies Act also allows registration of not-for-profit companies with charitable objectives such as 'promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment, etc.'

Similar is the case with the Income Tax Act. This Act defines charitable purpose mainly as relief of the poor, education, medical relief. Preservation of environment and cultural heritage were added recently.

Most NGOs in India, therefore, end up being registered as charitable organisations. However, these NGOs also take up activities which are not 'charitable' in the classic sense of the word. How do they do this?

The Income Tax Act has a trailing phrase in its definition of charitable purpose: 'advancement of any other object of general public utility'. All modern NGOs, which follow a rights-based approach, use this clause to get tax exemption.

This is valid under Income Tax law. In one particular case, a society's objects were 'the advancement of education, culture, social, economic and political level of the people of the country'. The Income Tax Department argued that inclusion of 'political advancement' made the organisation a political society. Therefore it was not charitable.

The Income Tax Tribunal rejected this:

'Patently the Society is not engaged in any political activity in the country. Political advancement means advancement of political awareness, imparting the people of the country with knowledge latest political thought and happening in India and abroad, informing the people of their political rights and telling them how to exercise and defend them. All activities directed towards that end would be activities of general public utility and, thus of a charitable nature. If it were not so, a department in a college or a university that teaches political science could be said to be indulging in activity, which is neither charitable nor of general public utility. We, therefore, are of the opinion that the use of the word 'political advancement' in the objects clause is itself a char-

itable object and not a political object devoid of character as an activity of charitable nature or of general public utility.⁴

THE 'CHARITABLE' IN FCRA

The word 'charitable' is not defined in FCRA. However, a distinction is being made between charitable and political in the FCRA. In 2010, the Hon. Minister for Home Affairs stated:

'The regulations have been so framed that while legitimate charitable social, educational, medical 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.'

Similarly, in 2013, the Home Secretary wrote:⁵

'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.'

This is the crux of the problem. Rights-based NGOs think that their activities are legitimate and, well, charitable. The FCRA Department thinks that these are political and, therefore, illegal - if funded with foreign money. Who is right?

THE 'POLITICAL' IN FCRA

Under the old FCRA, politics was seen as only electoral politics. If an NGO was involved in election campaigns, they could be termed 'political'. For instance, in Sep '99, several NGOs were issued notices by FCRA Department. Why? They had endorsed a newspaper advertisement criticising a political party.

This happened under FCRA 1976. At that time, an NGO could be declared as political based on:

1. The activities of the organisation
2. The ideology being spread by the organisation
3. The program of the organisation
4. Its association with activities of a political party.

² Applying a HRBA to Developing Cooperation and Programming (UNDP, Sep 2006)

³ The Societies Registration Act, 1860 also allows registration of societies set up for 'diffusion of political education'. This change occurred in 1927, as political societies were finding it difficult to register under the Act. However, such societies are unlikely to get FCRA registration. Therefore, rights-based NGOs rarely use the words 'political education' in their objectives.

⁴ Income-Tax Officer vs Servants of the People Society on 27 September, 1989. ITAT-Delhi.

⁵ Foreword to FCRA Annual Report 2011-12 (6-Dec-13)

These four grounds remain in the new FCRA as well. However, there is more clarity on what is 'political'. Rule 3 of FCR Rules 2011 provides three tests to say whether an NGO is involved in political activities:

1. Stated Objectives

Do the organisation's memorandum, bylaws or other documents contain political objectives? Does it promote political goals or interests of its members?

2. Actual Activities

Does the organisation participate in political activities? Do its activities include steps towards advancement of political interests of its members? Does it habitually engage in common methods of political action (e.g. strikes, blockages, mass arrests) to support public causes? In some cases, FCRA Department may view activism as political activity.

3. Associates

Is it a front or a mass mobilisation organisation for a political party? Examples include Students' Unions, Workers' Unions, Youth Forums, and Women's Wings etc.

Still neither the Act, nor the rules define 'political'. In fact, this word is not defined anywhere in law! Dictionaries offer some help. Black's Law Dictionary defines political as 'pertaining to politics; of or relating to the conduct of government'.

And what does politics itself mean? This is defined as 'the science of the organisation and administration of the state'. According to Shorter Oxford Dictionary, politics is the art or science of government, dealing with the form, organisation, and administration of a state or part of a state, and with the regulation of its relations with other states. Politics also refers to 'public life and affairs involving the authority and government of a state or part of a state.'

Closer to home, a legal glossary published by the Central Government defines political as 'pertaining to the policy or the administration of a State or government.'

What does this mean? Any activities that are directly related to Government policies or administration can be called political. Therefore, it is not sufficient for FCRA NGOs to stay away from electoral politics. They should not comment on government policy or administration either!

CHARITABLE OR POLITICAL?

Where does that leave us? NGOs with rights-based programs are using the UNDP development framework. This framework is based on UN's Universal Declaration of Human Rights (1948). This declaration is a political tool to achieving universal well-being. The UNDP framework suits UN very well, as UN is essentially an international political organisation, above domestic laws. However, it

also blurs the distinction between 'charitable' and 'political'.

Following this, development agencies and NGOs have expanded the traditional meaning of 'charitable'. This has led them to take up activities which could be seen as 'political' under FCRA law.

FCRA specifically prohibits such activities for NGOs with FCRA. Therefore, the FCRA department may possibly be within its rights if it clamps down on rights-based approach of FCRA NGOs.

A VIEW FROM THE COURTS

However, such cases must be argued properly. It seems the courts are not willing to accept cryptic arguments and vague insinuations about 'anti-national activities'. They need definite evidence. There are three important cases that highlight the judicial view:

1. AVARD vs. Union of India (1990)

AVARD received a notice from FCRA Department in 1988 for not filing of FCRA returns for 1979-82. AVARD filed these returns. Shortly after this, the Government cancelled AVARD's FCRA registration, because it was 'likely to affect prejudicially the public interest'. AVARD challenged this in Delhi High Court.

The High Court passed an order in favour of AVARD. The court said that the government had not produced any material to show how AVARD could be harming national interest. The court also ordered the Government to pay costs of Rs.1500 to AVARD!

2. INSAF vs. Union of India (2013)

The FCRA registration of INSAF was suspended in Apr'13. The Government told Delhi High court that foreign funds received by INSAF were being transferred to other NGOs. These NGOs were utilising the funds for organising protest, etc. against the welfare policies of the Government. Such utilisation may therefore prejudicially affect the public interest.

The High Court passed an order lifting the suspension in Sep'13. It said that the Government had not followed proper procedure in suspending INSAF's FCRA. Secondly, the Government must clearly record the reasons for suspension. These reasons must be included in the suspension order. These reasons should be covered by 'sub-section (1) of Section 13 [and should be] otherwise cogent, objective and transparent.'



3. Greenpeace India Society vs. Union of India (2015)

Transfer of funds from Green Peace International and Climate Works Foundation to Greenpeace India was put on hold in Jun'14. In Sep'14, the FCRA Department also made an inspection at Greenpeace office. However, the remittance was not cleared. The Government told the Delhi High Court that Green Peace International and Climate Works Foundation were on MHA watch list. Further, the activities of Greenpeace India were 'detrimental to the national interest'. No evidence was provided for either of the arguments.

The High Court passed an order in Jan'15 telling the bank to immediately release Greenpeace funds. The Court also observed that Greenpeace's 'disagreement with the policies of the Government of India, could not, [as such] be construed as actions which are detrimental to national interest. [NGOs]

often take positions, which are contrary to the policies formulated by the Government of the day. That by itself, in my view, cannot be used to portray, petitioner's action as being detrimental to national interest. The government is free to execute its policies as it has the mandate of the people behind it, notwithstanding a different point of view of [NGOs], such as [Greenpeace].'

CONCLUSION

The FCRA law apparently provides a legal framework for the Government to block transfer of foreign funds to selected NGOs. The courts are willing to accept this, provided the Government offers clear and cogent reasons in each case. However, the Government seems to be reluctant to disclose these reasons. Therefore, the FCRA Department continues to use administrative orders to slow down the activities of NGOs involved in rights-based work around environmental and political issues.

This conflict will probably intensify as FCRA registrations come up for renewal. Many such NGOs may find their FCRA registration is not renewed. What options would such NGOs have for continuing their work? Possibly three:

1. Modify their approach in line with FCRA
2. Raise funds from Indian sources for all their work
3. Challenge the FCRA Department in courts

Which of these will the NGOs choose? Only time will tell.

What is AccountAble: Each issue of 'AccountAble' covers a different topic related to NPO regulation or accounting and is posted/ emailed to about 3,000 persons in NPOs, Agencies, CSR Departments, Corporate Foundations and audit firms. AccountAid encourages re-production or re-distribution of 'AccountAble' in workshops or NPO newsletters for non-commercial use, provided the source is acknowledged.

Interpretation of law: Interpretation of law given here is of a general nature. Please consult your advisors before taking any important decision. Law referred here is updated as of 20-Jan-15.

Questions and doubts? You can send your questions by e-mail (query@accountaid.net) or letter.

Comments: AccountAid India, 55-B, Pocket C, Siddharth Extension, New Delhi-110 014; Phone: 011-2634 3128;

Phone/Fax: 011-2634 3852; e-mail: query@accountaid.net

Text © AccountAid™ India: विक्रम संवत् २०७१ फाल्गुन १, February 2015 CE

Printed and published by Ms. Renu Agarwal for AccountAid India, New Delhi (Ph. 26343128) at PRINTWORKS, W-11, Okhla Industrial Area, Phase 2, New Delhi 110 020

Content: Shri Sanjay Agarwal

Editing: Ms. Soumyasree Mullick

Design: Ms. Moushumi De

Images: ©Ballot Box (Niyazz); Human rights (stevanovicigor) at istockphoto.com

For private circulation only.