



RATIONALE OF **REPLACING FERA** **WITH FEMA**

Presented By
D.K.Singh

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Background

- Exchange control was introduced in India under the Defence of India Rules on September 3, 1939 on a temporary basis. The statutory power for exchange control was provided by the Foreign Exchange Regulation Act (FERA) of 1947, which was subsequently replaced by a more comprehensive Foreign Exchange Regulation Act, 1973.

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- Under the provisions of FERA, a person is guilty of forex violations unless he/she proves that he/she has not violated any norms of FERA i.e. no forex transaction was permitted unless specifically mentioned in the Act.
- The above situation culminated into captive market and created hurdles in the development of a orderly forex market. It also encouraged Hawala transactions due to highly controlled forex transactions.

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- Government of India took steps to liberalize the Indian economy for which regulatory changes in the foreign exchange was felt utmost necessary to develop an orderly forex market and open the doors for foreign investments in the various sectors of Indian economy.
- FERA 1973 as amended by the Foreign Exchange Regulation (Amendment) Act 1993 which formed the statutory basis for replacing FERA with FEMA.
- FEMA 1999 came into the force on 1st June, 2000.
- The objective & the rationale to replace FERA with FEMA may be understood from the various parameters summarized as under:

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	FERA 1973	FEMA 1999
Objective & Purpose	An Act to control, regulate or prohibit foreign exchange transactions with a view of conservation and to utilise the same judiciously (by rationing) among competing claims	To facilitating external trade & payments for promoting orderly development & maintenance of forex market in India.

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	FERA 1973	FEMA 1999
Need	Introduced to meet the contingencies of 2 nd world war and subsequently it took a legal shape.	Since 1993, exchange rate regime was deregulated as a sequel to liberalization in financial sector which further required more liberalized foreign exchange, convertibility of rupees through a change in the existing legal structure. Hence FEMA came into being.

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	FERA 1973	FEMA 1999
Current Account Transactions	A lot of restrictions in putting through current A/c transactions and subject to limits prescribed by RBI under its general or specific permission.	With a view to facilitate trade & payments, all residents have been allowed to put through any current A/c transactions subject to specified limits through the ADs unless specifically prohibited .

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	FERA 1973	FEMA 1999
Capital Account Transactions	Capital A/c transactions were regulated by RBI and could be put through only with the general or specific permission thus restricting movement of capital investments & deposits.	Capital A/c transactions have been liberalized and number of sectors have been permitted in which foreign investments are permitted under the general permissions without approaching to RBI subject to certain reporting requirements. Thus, capital investments and NRI deposits have increased many folds in the FEMA regime.

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	FERA 1973	FEMA 1999
Definition of a Non-resident	<p>Staying abroad pursuing a vocation or employment or for any other purpose indicating their indefinite stay abroad are Non-residents. Persons who held Indian Passports, or whose parents/grand parents were Indians or who have married Indians are persons of Indian origin. Both NRIs & PIOs are treated similarly when opening bank account or availing investment facilities.</p>	<p>Stay more than 182 days in a preceding financial year or gone abroad for employment, business or vocation or any other purpose indicating stay abroad for an uncertain period. Companies incorporated outside India are called Non-residents. However, branches/ offices of Indian companies (owned or controlled by them) abroad are classified as Residents.</p>

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	FERA 1973	FEMA 1999
Presumption by the Act	<p>Presumes everyone accused as guilty of crime and has to prove his/her innocence. This is "mens rea" in legal parlance i.e. he/she had intent or motive or knowledge what he/she is contravening.</p>	<p>No such assumptions. Like any other civil case, the prosecution has to prove that the person had committed the offence. Such other stringent provisions of FERA like power to arrest have also been deleted.</p>

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	FERA 1973	FEMA 1999
Gravity of Offences	All offences major or minor are considered alike and pursued by ED and are treated as criminal cases.	Less serious offences (or contraventions) may be compounded by RBI/ED and penalty imposed i.e. all contraventions are treated as civil offence. It is the prosecution that has to prove the guilt of the accused.

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	FERA 1973	FEMA 1999
Rigorous (Draconian) Provisions	FERA contains some strict provisions. Foreign exchange was required to be surrendered to AD immediately for conservation of foreign exchange. Non-compliance to the provisions was treated as criminal offence.	Such provisions like imprisonment do not find place anymore in FEMA. Remittances upto the prescribed limits may be sent to NRIs without prior approval of RBI as such it is more liberal and user friendly.

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	FERA 1973	FEMA 1999
Compounding	All cases of contraventions under FERA were investigated by ED and guilty punished- penalty and imprisonment are both (imprisonment from 6 to 7 months).	ED RBI to compound contraventions and imposed penalty. Penalty upto 3 times the amount contravened if amount not quantifiable, penalty upto Rs. 2 lakh. Imprisonment for 6 months only if the amount of the penalty not paid.

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	FERA 1973	FEMA 1999
Investigation/ Adjudication	By Enforcement Directorate	<ul style="list-style-type: none"> i) Adjudicating Authority ii) Appeal to Special Director(Appeals) iii) Appellate Tribunal <p>All these authorities have judicial powers like a civil court. Aggrieved can appeal to High Court for remedy (again civil nature)</p> <p>An advocate or CA can be engaged.</p> <p>No other civil court can intervene in the matter or grant stay.</p>

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	FERA 1973	FEMA 1999
Examination under oath	RBI officials could examine under oath an official of an AD/FFMC/RMC for recording information about their affairs	No provision under FEMA for examining any person under oath by any official of RBI/ED. They will exercise powers at par with IT officials.

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	FERA 1973	FEMA 1999
Repeal	FERA 1973 repealed and the FEMA came into being. Anything done under FERA (in so far as not inconsistent with FEMA) will be treated as having been done under corresponding provisions of FEMA.	Offences could be booked under the repealed FERA within two years of commencement of FEMA if the violations were committed before 31.05.2000.

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