Analysis of the

CURRENT LEGAL FRAMEWORK FOR CIVIL SOCIETY IN INDIA

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ICNL
INTERNATIONAL CENTER
FOR NOT-FOR-PROFIT LAW

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Civil society in India is noted for its vibrancy, innovation, and research-based advocacy. It has played an important role in supporting government as a partner in nation-building. Civil society has a particularly powerful role to play as an enabler and constructive challenger, creating the political and social space for collaboration that is based on the core values of trust, service, and the collective good. Both government and civil society need to work together to build institutional relationships based on mutual trust and a shared vision.

Since the last edition of this report was published in 2019, several changes have occurred in the legal and regulatory space to further impede the operation and work of civil society organizations and the voluntary sector, forming an alarming trend that threatens to close the civic space in India altogether.

The State's Mistrust

The government has the right to regulate but not control a civil society organization's internal affairs. During the Covid-19 pandemic the government of India drastically amended both the Act and the Rules of the Foreign Contribution (Regulation) Act (FCRA). In 2020, the Ministry of Home Affairs made major amendments to the FCRA, which included a complete prohibition on sub-granting, a twenty percent cap on administration expenses drawn from foreign funds, and a requirement that organizations open a bank account to receive foreign funds only at the main branch of the State Bank of India (SBI) in New Delhi. These changes have dealt a significant blow to NPOs, many of who faced onerous burdens and technical difficulties during the processes. Since 2020, several prominent organizations have experienced suspension or revocation of their FCRA license, as well as other government investigations such as raids, leading to, for example, the closure of Amnesty International's country offices.

The Ministry of Home Affairs continues to bring in new compliance requirements for civil society organizations (CSOs) by way of official circulars and orders.

Enabling Environment

While corporate laws in India have seen significant reform aimed at simplification, improving transparency and governance and bringing laws into line with global trends, civil society has not seen any similar such reform. Although the national mantra appears to be "ease of doing business," no one seems to be talking about the "ease of doing 'good'."

Business startups receive a number of benefits, while CSO start-ups face obstacles under FCRA and corporate social responsibility (CSR) laws. Government should play the role of an empowering agency and enabler.

Laws governing CSOs often lack clarity. At times there is also a dichotomy between state and central laws. Since 'charity' falls under state (and concurrent list), not central, oversight in India, legal choices exist, with some states having excessive regulations, while others have virtually none at all. These realities contribute to a lack of uniformity and standardization in non-profit governance in India.

Civil society organizations are increasingly burdened with onerous requirements that are often difficult to comply with or otherwise unclear. In recent years and particularly during the Covid-19 pandemic, the government has issued numerous new compliance requirements including re-registration and detailed reporting, often on unreliable platforms, that place additional burdens on already overwhelmed organizations responding to and trying to survive the pandemic. Failure to register or go through other official processes have consequences that jeopardize CSO tax exemption status, ability to receive funds, and other integral functions that allow CSOs to do their work.

The Finance Act of 2021 and 2023 imposed further restrictions on how CSOs may receive funding to do work or provide funding to other CSOs. NPOs have also faced re-registration requirements under the Income Tax Act with a lack of clarity during the process, during which many faced a malfunctioning registration platform.

Corporate Social Responsibility

The Companies (CSR Policy) Amendment Rules 2021 have made CSR compliance for companies extremely stringent, indirectly impacting CSR-implementing NPOs. For instance, some companies are now putting unrealistic pressures on NPOs to fully utilize the funds before the fiscal year closes. Previously, the Ministry of Corporate Affairs (MCA) only placed emphasis on companies spending two percent of their pre-tax profits on approved CSR Activities. The emphasis has now shifted from "spending" to "utilization." Unless it happens to be an "ongoing project" (specified as a project with a duration of three years), the un-utilized funds must be returned by the NPO to the company, to be given to government funds such as the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES) or the Prime Minister's National Relief Fund (PMNRF).

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Social Enterprises

In 2022, the Securities and Exchange Board of India authorized the establishment of a Social Stock Exchange (SSE) that would allow social enterprises to raise funds through issuing investment stock or through established mutual funds and CSOs by issuing Zero Coupon Zero Principle instruments.

This development could provide a new way for CSOs to raise funds through a potentially broader and accessible form, but the effectiveness remains to be seen and will require a more enabling environment for civil society at large. Nevertheless, the SSE offers a glimmer of hope amidst a general environment of mistrust toward civil society organizations.

Suggestions & Recommendations

- There is no need to add laws or more compliance requirements considering that the government has enough powers to "investigate" those it believes are not transparent enough through Comptroller Auditor General (CAG) and CBI agents. Indeed, restrictive measures such as the FCRA (2020) Amendments should be rolled back in order to achieve a more enabling environment and adequate resourcing for the non-profit sector.

- The Ministry of Home Affairs should consider constituting an appellate authority (like the income tax appellate tribunal) to address FCRA-related grievances.

- When granting tax exemption certificates, the Income Tax Authority should specify under which category of "charitable purpose" it has recognized the non-profit organization (NPO): education, medical relief, or any other object of general public utility.

- "Approval Raj", "Inspector Raj" and "License Raj" (Raj means regime) are detrimental to the growth of the sector.

- The government should understand NPOs as playing an important role not only in nation-building but also as a significant contributor to the economy (a recent study by CSOs@75 indicate that NPOs contribute 2% of India's GDP) and make policies that enable NPOs to do their work, not impede them. The contribution of NPOs was particularly evident during the Covid-19 pandemic, when NPOs played a key role providing health and humanitarian services and often filling service gaps resulting from a sluggish response from authorities.

- The government often questions what "public good" CSOs do apart from voicing dissent. However, the government should understand and accept that "dissent" itself is a "public good" in a democracy. The freedom to express opinions – including critical ones – is integral to democracy.

I. INTRODUCTION

CURRENT POLITICAL & ECONOMIC CONTEXT FOR THE FUNCTIONING OF CIVIL SOCIETY IN INDIA

"Civil society" refers to the sum of individuals, groups, organizations, and institutions that express and work on behalf of a variety of interests and initiate various activities and debates in society in support of those interests. It includes journalists, academics, community-based groups, trade unions, charities, human rights organizations, collectives, think-tanks, religious groups, academic institutions, and political parties. Commonly known as the "third sector," it is separate from the state and businesses.

"Civil society" is not a term commonly used in India, though in recent years the media has begun to use this term especially for groups and organizations involved in policy research and advocacy-related work. Civil society in India is largely equated with voluntary organizations or the more colloquially used term, NGO, or Non-Governmental Organization. The recently established Social Stock Exchange has recognized two types of "social enterprises" – for-profit enterprises and non-profit enterprises.

There are several other acronyms under which Civil Society Organizations (CSOs) function in India.

Example:

- **SDO** – Service Delivery Organization
- **SPO** - Social Purpose Organisation
- **CBO** – Community Based Organization
- **PVO** – Private Voluntary Organization
- **INGO** – International NGO
- **BINGO** – Big International NGO
- **QANGO** – Quasi Autonomous NGO
- **GONGO** – Government-organized NGO
- **MANGO** – Market Advocacy NGO
- **PANGO** – Party NGO (set up by Political Parties, disguised as NGOs)

The voluntary sector in India is noted for its vibrancy, innovation, and research-based advocacy. It has played an important role in supporting government as a partner in nation-building. Historically, Indian voluntary development organizations played three significant roles: first, in filling gaps in the government's welfare systems, such as delivering basic services like health care, education, water and sanitation to the most remote locations in the country; second, in research-based advocacy, such as analyzing the efficacy and reach of various government projects to provide guidance to the government for policy change; and, third in working on a rights-based approach and entitlements. Voluntary groups work for marginalized communities in providing access to basic services, and their modus operandi is primarily to educate and empower the community about their entitlements and review government plans and policy for their efficacy.

Religious institutions also play a major role in civil society by either inspiring, initiating or supporting innovative social initiatives. One such example is the Akshaya Patra Foundation, inspired by the Founder of the International Society for Krishna Consciousness (ISCON). Akshaya Patra Foundation is a not-for-profit organization headquartered in Bengaluru. The Foundation strives to eliminate school classroom hunger by implementing the Mid-Day Meal Scheme in government schools and government-aided schools. Akshaya Patra also aims to counter malnutrition and support the right to education of socio-economically disadvantaged children.

Since the year 2000, Akshaya Patra has been concentrating all its efforts towards providing fresh and nutritious meals to children every single school day. They are continuously leveraging technology to multiply their outreach. Their state-of-the-art kitchens have become a subject of study and have attracted curious visitors from around the world. Their partnership with the Government of India and various State Governments, along with the persistent support from corporations, individual donors, and well-wishers has helped them to grow from serving just 1,500 children in 5 schools in 2000 to serving 2 million children.

Today, Akshaya Patra is the world's largest (not-for-profit run) Mid-Day Meal Programme serving wholesome food every school day to over 2 million children from 22,367 schools across 15 states & 2 Union territory of India.

Similarly, temples, churches and mosques across the country have been instrumental in establishing or supporting schools, colleges, vocational training centers and hospitals.

Civil society in India was organized and active even before India's independence from British rule. There were groups addressing various social and political injustices by working on literacy and empowerment for women, the rights of

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communities shunned or ostracized by society, and sanitation. Following India's independence on 15 August 1947, voluntary organizations have played a leading role in poverty and hunger alleviation programs, education, health care and ensuring the rights of marginalized and vulnerable communities.

Civil society is often described as the "social basis of democracy." It encompasses a growing diversity of groups, organizations, networks and movements that play myriad roles in strengthening the common good. These roles include but are not limited to:

- **Watchdog:** holding public institutions to account, promoting transparency and accountability
- **Advocate:** raising awareness of societal issues and challenges and advocating for change
- **Service:** delivering welfare services to meet societal needs such as education, health, food and security; implementing disaster management, preparedness and emergency responses
- **Domain Expert:** bringing unique knowledge and experience to shape policy and strategy and identifying and building solutions
- **Capacity builder:** providing education, training, skills and other capacity-building
- **Incubator:** developing solutions that may require a long gestation or payback period
- **Representative:** giving power to the voice of the marginalized or under-represented
- **Citizens' champion:** encouraging citizens' engagement and supporting citizens' rights
- **Solidarity adherent:** promoting fundamental and universal values
- **Definer of standards:** creating norms that shape social, economic and state activity

The legal regime in India follows common law (a British pre-independence legacy). The legal framework was earlier quite supportive of civil society. However, in the past few years, with a series of amendments to laws regulating civil society organizations, the government of India appears to have moved from a 'regulatory' role to a 'control' mode.

The Situation of Nonprofit Organizations Under the FCRA

The Central Statistical Institute of India had announced around the year 2009 that there were 3.3 million NGOs registered in India or literally one NGO for every 400 Indian citizens. However, after the process of revalidation of tax exemption and tax deduction certificates that all NPOs across India went through in 2021, the Income Tax Department concluded that there are about 224,000 tax exempt organizations in India.

Only about 20,000 organizations are eligible to receive foreign funds under the Foreign Contributions Regulation Act (FCRA) 2010.

Significantly more foreign funds flow into India through Foreign Direct Investment (FDI) and through Foreign Institutional Investors (FIIs). However, these are regulated under the relatively more enabling Foreign Exchange Management Act (FEMA).

During the fiscal year 2021-22, India's Foreign Direct Investment inflows was around INR 695,000 crore (~$84 billion USD) while the FDI equity inflow was INR 490,000 crore (~$60 billion USD) (1 crore = 10 million rupees). By contrast, the total amount of foreign contribution received by NPOs in the fiscal year 2021-22 stood at INR 22,085.1 crore (~$2.67 billion USD), compared with INR 17,058.64 (~$2.06 billion USD) crore in 2020-21 and INR 15,438.21 crore (~$1.87 billion USD) in 2019-20, as per data provided by the Ministry of Home Affairs in the Rajya Sabha on March 15, 2023.

Given the small amount of foreign income directed toward NPOs, especially compared to FDI inflows, the focus on foreign funding of 20,000 NPOs for various social, cultural, economic, educational activities as a potential "threat to national interest" or acts that "affect prejudicially the sovereignty and integrity of India" seems to disproportionately target NPOs.

On its 'NGO Darpan' (NGO Mirror) platform, NITI Aayog (formerly known as the Planning Commission of India) lists 175,334 organizations (as of September 2023). Every organization which receives foreign contributions under FCRA 2010 or grants from the government is required to register on this platform and obtain a Unique ID Number.

II. PROVISIONS OF GENERAL LAWS

A. Consistency & Clarity of Laws

Recent laws have been drafted rather ineptly and passed by Parliament with such haste that they require constant amendment. For example, the Goods & Services Tax Act 2017 came into effect on 1 July 2017. However, it underwent several amendments within just the first year. The FCRA 1976 was replaced by FCRA 2010. However, FCRA Rules 2011 were significantly modified by FCRA (Amendment) Rules 2015. During the Covid-19 pandemic the government of India drastically amended both the Act and the Rules, mandating, among other changes, that all foreign contributions must only be received in a designated FCRA Bank Account with the State Bank of India, New Delhi Main Branch. The other major change was prohibiting organizations licensed to receive 'foreign contributions' from sub-granting such funds to a partner organization, even if the latter is registered under FCRA. The Ministry of Home Affairs continues to bring in new compliance requirements by way of official circulars and orders.

At times there is also a dichotomy between state and central laws. For example, the central Income Tax Act allows CSOs to invest their funds in any mutual fund; however, under the state-regulated Maharashtra Public Trusts Act, CSOs are allowed to invest funds only in certain debt-based mutual funds. Moreover, the Ministry of Home Affairs, which regulates CSOs registered under FCRA, prohibits investment of funds in any mutual fund.

B. General Constitutional & Legal Framework

Civil society organizations play an essential role in the promotion and protection of human rights; they are a tool enabling individuals to work towards the elimination of human rights violations and hold those responsible to account. Enshrined in all leading human rights instruments, the right to freedom of association allows for individuals to form or join formal or informal groups to take collective action to pursue a common goal.

Article 19 of the Constitution of India contains the following provisions relevant to nonprofit organizations, philanthropic organizations, and philanthropic giving:

> **Article 19** - Protection of Certain Rights Regarding Freedom of Speech, etc. [excerpt]
>
> 1. All citizens shall have the right
>
> (a) To freedom of speech and expression;

> (b) To assemble peaceably and without arms;
>
> (c) To form associations or unions or co-operative societies;
>
> 2. Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
>
> 3. Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
>
> 4. Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

C. Types of Organizations

NPOs or CSOs usually take one of three legal forms: public charitable trust, society, or non-profit/ Section 8 company.

TRUST

Three or more trustees may form and govern a public charitable trust. Such a trust may be established for a number of purposes, including poverty relief, education, medical relief, the provision of facilities for recreation, or any other objective of general public utility.

The laws governing charitable trusts and societies vary from state to state. Most states have their own "Public Trusts Act." Maharashtra State, for example, governs trusts under the Maharashtra Public Trusts Act 1950. A similar act is applicable in neighboring Gujarat State, with some variations. In states that do not have a Trusts Act, the principles of the Indian Trusts Act of 1882 apply, and such trusts are registered under the Indian Registration Act 1908. The Government of India is working towards ensuring that every State in India has a Public Trusts Act enacted and trusts of every state is regulated by a Charity Commissioner.

SOCIETY

A society is a nonprofit membership organization, formed by seven or more members for a literary, scientific, or charitable purpose. The definition of "society" and the scope of its permissible purposes may vary somewhat based on the relevant state law, though most state laws are based on the Central Societies Registration Act of 1860. Section 20(1) of this Act provides that it applies to: "Charitable societies, the military orphan funds,… societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, the diffusion of political education, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of Art, collections of natural history, mechanical and philosophical inventions, instruments, or designs." The differences among state laws may have implications for NPOs. For example, a society registered in Maharashtra or Gujarat is not required to renew its registration periodically. However, societies registered in the northeastern states must renew their registration every year.

A society is usually managed by a governing council or a managing committee.

SECTION 8 COMPANY

A Section 8 company is a nonprofit company established for one or more purposes: "the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object." It must apply any profits or other income to promoting its objectives and must prohibit the payment of any dividends to its members.

Section 8 companies may be incorporated either as private or public. A private company is formed by two or more members who by default serve on the governing board as directors.

Unlike trusts and societies, which are generally subject to state law, nonprofit companies are governed by the Central Indian Companies Act 2013. (Section 8 companies were previously registered under Section 25 of the Indian Companies Act 1956, and therefore used to be called Section 25 companies. The new Act came into force on April 1, 2014.)

INFORMAL ORGANIZATIONS

An Indian organization is not required to form a legally recognized entity and may instead establish an informal organization. However, such organizations would not enjoy tax exemptions, and donors to such organizations would not receive tax deductions on their donations. Most institutional donors, be they companies or foundations, prefer to fund registered entities.

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FOR-PROFIT SOCIAL ENTERPRISES

Many social entrepreneurs are also choosing to register as for-profit enterprises. These are either registered as private companies, partnership firms, or limited liability partnerships (LLP). Some even operate as "sole proprietary."

MICROFINANCE ORGANIZATIONS

Microfinancing is typically defined as the process of providing loans, credit, savings, and other necessary financial services and products to individuals who are extremely poor, in order to provide access to regular sources of finance such as private banks or other financial institutions. Microfinance is provided to underprivileged people under the theory that charity or philanthropy is not the solution to poverty.

Microfinance is a great way to help the poor become financially independent. The financially disadvantaged or those who are not deemed "credit worthy" by banks or financial institutions can use these funds at very low rates of interest to start their own small venture or to make their other dreams come true. Many of the underprivileged in the country do not have the necessary resources to save money or manage finances, which they are able to do when they acquire microfinancing from a reliable institution.

Microfinance is also offered to people who are interested in purchasing equipment or vehicles of high value that are required for carrying out their business activities. These can be tractors for agriculture, machines for manufacturing textiles, trucks for transportation of the goods created by small entrepreneurs, etc.

There are several microfinance institutions in the country that are exclusively dedicated to offering microfinance to people. Microfinance institutions aim at getting people out of poverty and improving poor people's financial conditions. Microfinance institutions target poor people who are unemployed or those who are or want to be entrepreneurs, as well as farmers.

Microfinance is usually procured by loan applicants through banks, non-banking financial corporations, and microfinance institutions or by forming a group with a common goal of obtaining finance to create and develop new small business ventures or make a living.

REVIVE ALLIANCE

When the pandemic began in 2020, India's informal workers and entrepreneurs faced unprecedented headwinds. Persistent lockdowns and health concerns depleted their savings, stalled their livelihoods, eroded their earnings, and inhibited their personal and professional aspirations.

Traditionally, this segment was left out of formal finance systems. Without access to formal financial support, informal workers were often forced to access riskier forms of support such as private moneylenders. The lack of access to secure finance and working capital stunted any hopes of their recovery from the pandemic. However, backed by an incredible set of anchor funders, companies and social organizations, the REVIVE Alliance (curated by Samhita Social Ventures and Collective Good Foundation) aimed to fill this gap around timely, affordable and accessible capital and "REVIVE" over 200,000 informal workers and entrepreneurs.

Through a set of blended and innovative financial instruments such as returnable grants and pay-for-performance, supported by interventions such as skilling, digitization and access to social security schemes, the Alliance has fostered economic recovery, resilience and growth for small businesses, nano-entrepreneurs, and workers — especially women.

REVIVE has been able to positively impact the families and communities of over 173,000 individuals since October 2020, and is on its way to reaching 10 million workers and micro-entrepreneurs.

D. Permissible & Prohibited Purposes for Organizations

Any NPO's/CSO's stated objective(s) must fall within the definition of "charitable purpose."

For the purpose of charitable tax exemptions and tax deductions for donors, an NPO must pursue a "charitable purpose" according to the definition provided by the Income Tax Act 1961. Section 2(15) of the Act 1961 states that "charitable purpose" includes:

- Relief of the poor;
- Education and yoga;
- Medical relief;
- Preservation of the environment (including watersheds, forests and wildlife);
- Preservation of monuments or places or objects of artistic or historic interest; and
- The advancement of any other object of general public utility.

Amendments made under the Finance Acts of 2008, 2010, 2011, and 2015 have affected all organizations falling under the sixth category, i.e. advancement of any other object of general public utility, primarily by limiting the permissible scope of economic activity an NPO may carry out without losing its tax-exempt status.

NPOs or CSOs in India may not engage in political campaign activities nor undertake a range of advocacy activities related to legislative processes. However, they are not specifically prohibited from communicating with legislators, other government officials, and the media, or from encouraging their constituents to do so.

Indian nonprofit entities may also lobby for non-political causes, provided that such activity promotes “general public utility” and is incidental to the attainment of the charity’s objects. Societies, moreover, may have as their primary objective the dissemination of political education, according to the Societies Registration Act 1860.

Whether the object of an NPO’s activities is “political” is not clearly defined in the laws governing the three NPO forms. However, courts in India have also held that an institution or trust whose dominant object is political in character cannot be said to have been established for charitable purpose.

In addition, under the FCRA, if an NPO is deemed to be of a “political nature,” it may not receive foreign contributions. Previously, the Act did not specifically define “political nature,” but set forth a process by which the central government made such a determination based on the organization’s activities, ideology, program, or its association with the activities of a political party.

According to the Foreign Contribution Rules 2011 (before the 2020 amendment), an organization could be designated as having a “political nature” on one of many grounds, including: an organization having avowed political objectives in its Memorandum of Association or bylaws; a Trade Union whose objectives include activities for promoting political goals; a voluntary action group with objectives of a political nature or which participates in political activities; a front or mass organization such as a students’ union, workers’ union, or women’s wing of a political party; or an organization of farmers, workers, students, or youth whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include advancing the political interests of political parties.

However, under the Foreign Contribution Regulation Rules as amended in 2020, organizations receiving foreign contributions shall be considered of a “political nature,” “if they participate in active politics or party politics, as the case may be.” This amendment is in line with the earlier ruling of the Supreme Court of India.

Regardless, in practice, an NPO aligned with an opposition party or endorsing an ideology in opposition to the government may be more likely to be deemed “political” and precluded from receiving foreign funds. The government must notify the organization of this determination and its basis in writing. The NPO is usually given thirty days to respond in its defense.

III. ESTABLISHMENT REQUIREMENTS

TRUSTS

The registration process for trusts varies from state to state. In states that have their own Trust Act, a trust can register with the State Charity Commissioner. In states where there is no state Trusts Act or Charity Commissioner, the trustees may register the Deed of Trust with the office of the Registrar of Deeds or Assurances. The key registration document is the Deed of Trust. The Deed must specify the name of the trust, the names of its founders and trustees, the purposes of the trust, and how the trust should be governed.

SOCIETIES

Societies may register with the state Registrar of Societies. The two key registration documents are the Memorandum of Association, which contains the society's name and objectives, as well as names, addresses, and occupations of its founders; and the society's Rules and Regulations.

SECTION 8 COMPANIES

A nonprofit company may be registered with the Registrar of Companies. The key registration documents are the Memorandum of Association and Articles of Association.

Common Central Tax Law

The Federal Income Tax authorities govern all three NPO forms (trust, society, and Section 8 Company) for the purpose of tax exemptions and deductions. In order to enjoy certain tax benefits, NPOs must register with the Income Tax Department under certain sections of the Income Tax Act. NPOs must register under Section 12AA (now 12AB since 2021) in order to obtain a tax exemption, and under Section 80G in order for organization donors to receive tax deductions. Both these benefits are now available to NPOs only for a period of five years. The application for renewal must be filed at least six months before the date of expiry of the tax exemption and tax deduction certificate.

Additionally, the Ministry of Home Affairs regulates all three NPO forms if they receive foreign contributions. An NPO seeking to receive funds from any "foreign source" must apply to the Ministry under the Foreign Contributions Regulation Act (FCRA) 2010. The organization may either apply for a one-time prior permission to receive funds from a single foreign source, or register for a five-year permit to receive unlimited foreign contributions from several foreign sources. Registration is generally only granted to organizations that have been active for at least three years.

Founding members of all NPOs must be of majority age (above the age of eighteen). Foreign nationals are not specifically barred from serving as founders of NPOs. However, if the NPO seeks foreign contributions, the organization is less likely to be approved for registration or prior permission under the FCRA if it has a foreign national serving on the governing board.

TRUSTS

In states like Maharashtra or Gujarat where there is a Charity Commissioner, at least One Settlor and three founder trustees are required to form a trust. In other states, two would suffice. In addition to being of majority age, a trustee must be competent to contract, which requires that he or she be "of sound mind" and "not disqualified from contracting by any law to which he/she is subject."

SOCIETIES

At least seven members are required to form a society, who by default become members of the first Managing Committee of the Society. There are generally no specific qualifications for the founders of a society.

SECTION 8 COMPANIES

Two or more members, who by default may become Directors of the governing board, are required to register a private Section 8 company.

All NPOs are required to have a physical address. This could be the business address of a founder or member of the organization, or a rented premise.

IV. REGISTRATION & INCORPORATION REQUIREMENTS

A. Registration: Voluntary or Mandatory

Registration is voluntary but registration would be mandatory for any NPO or CSO receiving grants from a local or overseas foundation, or a company or the government.

However, there are several grassroots initiatives which function as unregistered AOP (Associations of Persons).

B. Responsible State Agencies

At the primary level of registration, responsible state agencies are the Charity Commissioner (for trusts), the Registrar of Societies (for societies), and the Registrar of Companies (for both for-profit and non-profit companies).

The Income Tax Authority determines if the organization exists for a "charitable purpose" and grants registration accordingly under section 12AA (for tax exemption) and section 80G for tax deduction. Section 80G enables a donor to generally enjoy a fifty percent tax deduction – or a one hundred percent tax deduction in the case of institutions like the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities, the National Association for the Blind, the Family Planning Association of India, etc. – on the contribution made while computing his/her taxable income. The Ministry of Home Affairs would be the agency to grant registration or prior permission to any "person" (individual or institution) wanting to receive funds from any 'foreign source' for a "definite cultural, economic, educational, religious or social program."

Other regulators are involved, depending on the size, nature of work and activities of the organization, such as under the Shops and Establishments Act and Goods and Services Tax.

C. Registration Procedures

At the state level, registration procedures vary from state to state. A trust can be registered within a few days in Delhi or Karnataka state. However, in the State of Maharashtra or Gujarat the process could take a few months. A not-for profit company can be registered anywhere in India within about six to eight weeks.

To obtain a tax exemption and tax deduction, the processing time by the Income Tax Authority could take several months.

Registration or prior permission under FCRA could also take a minimum of three to four months, but the process often takes much longer.

Most registration processes are now online. By doing away with the human interface, corruption has dropped dramatically. However, procedural delays are still rampant.

Registration fees are quite reasonable and affordable. However, if the task of registration is entrusted to a professional lawyer or accountant or consultant, the professional fees can vary.

D. Eligibility & Grounds for Refusal of Registration

Generally, there should be no reason why registration would be refused to a CSO or NPO which has been established for a "charitable purpose."

However, in recent history there have been instances where registration has been refused if the registering authority felt that the objectives of the NPO or CSO are potentially of a "commercial nature" or if the objectives appear to be of a "political nature."

E. Procedural Safeguards

It would be good to ensure that the constitution or charter of the NPO or CSO does not contain clauses which indicate that the organization has been established for commercial or political purposes and affirm that persons on the Board of the organization are people of good repute.

F. Registration Irregularities & Inconsistencies

Trusts registered in states other than Maharashtra, Gujarat, Madhya Pradesh and Rajasthan can legally bypass at least one regulating authority (i.e. the Charity Commissioner) because most other states, including the National Capital, Delhi, do not have a state-level Public Trusts Act or an Office of the Charity Commissioner.

Societies which are registered under the Societies Registration Act 1860 in Maharashtra and Gujarat State are by default required to also register as Trusts under the Trusts Act.

Companies seeking registration under the Indian Companies Act are required to go through a name approval process. This process ensures that there is no other company registered in India under a similar name. However, there is no such process or procedure laid down at the state level for trusts or societies. As a result, there are instances of several trusts and societies registered under the same or similar name.

V. BARRIERS TO OPERATIONS

A. Legal

NPOs in India may not engage in political campaign activities or undertake a range of advocacy activities related to legislative processes.

Every tax-exempt NPO's income must be used or accumulated in India. However, the organization's income may be used outside India to promote international causes in which India has an interest, without being subject to income tax, with prior permission of the Central Board of Direct Taxes.

As long as the activities of the NGO are within the "charitable purpose" framework, the law does not impose burdens or constraints relating to operations. See above sections for the definition of "charitable purpose" according to Section 2(15) of the Income tax Act 1961.

AMENDMENT UNDER THE FINANCE ACT 2015

According to the amended Finance Act 2015, "the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess (tax) or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless:

(i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

(ii) the aggregate receipts from such activity or activities during the previous year do not exceed twenty percent of the total receipts, of the trust or institution undertaking such activity or activities, of that fiscal year.

In the meantime, the Supreme Court of India in a landmark judgement on 19 October 2022 ruled that if the "business activity" is in furtherance of objects and carried out without "profit motive," i.e. on a "cost basis" or "nominally above cost," the activity should not be considered as trade commerce or business.

CHANGES IN THE TAX REGIME

On 1 February 2020, prior to the declaration of the COVID-19 pandemic, Finance Minister Nirmala Sitharaman declared in her Union Budget speech that all charitable trusts and institutions enjoying tax exemptions or deductions must revalidate their registrations with the Income Tax Department. Despite the pandemic and following lockdown, the government did not withdraw this proposed requirement. Instead, the government delayed the implementation, which continued to add to pressure faced by NGOs, many of which were already coping with relief work and struggling to sustain their organizations.

On 1 April 2021, during the height of India's second COVID wave, the Income Tax online portal finally opened to receive applications to revalidate 12AA (tax exemption) and 80G (tax deduction) certificates that were due to expire within a period of three months. The deadline for revalidation applications was 30 June 2021. However, the government revamped the Income Tax online portal in early June, causing numerous glitches and presenting numerous challenges to organizations attempting to submit applications. An extension was granted only a few days before the initial deadline, extending the deadline to 31 March 2022. Although the extension provided some temporary relief, the continual uncertainty and wasted time navigating a malfunctioning platform posed significant challenges for overwhelmed organizations.

Decreased manpower and compliance costs diverted energy and resources at a time when CSOs were attempting a herculean effort to provide COVID relief, support migrant workers, and fill service gaps left by inadequate government responses.

The revalidated certificates are only valid for five years, meaning organizations are now faced with the substantial administrative burden associated with applying for revalidation every five years.

Beginning in fiscal year 2021-22, the Income Tax Department also placed the onus on NPOs to report all donations received during the fiscal year, along with details of the donor on the Income Tax portal in an online Form 10BD, and generate deduction certificates in Form 10BE for the donors from the portal.

Further, the Finance Act 2021 mandated that all donations received toward corpus, i.e. toward capital, must be invested in an approved security and are allowed as application of income for charitable purpose only when borrowing from the corpus, or when the capital is replenished.

Under the Finance Act 2023, application out of corpus or a loan before 1 April 2021 is not allowed as application for charitable or

"

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religious purposes even when such amount is put back into corpus or the loan is repaid. This requirement is ostensibly to avoid double tax deduction. Further, a deduction is allowed only if the amount taken from the corpus is put back into corpus or the loan is repaid within five years from application out of the corpus or loan.

By far the worst blow to intermediaries and grant-making foundations has come recently under the Finance Act 2023. Inter-charity donations from one tax-exempt charitable trust or institution donating to another remain allowed but with various significant restrictions.

Under an earlier amendment, one charitable organization could donate to another charitable organization but not from its "accumulated income." One of the key conditions for tax exemption given to charitable organizations is applying or spending at least eighty-five percent of the total income every financial year. If the organization is unable to spend this minimum amount, it has the option to accumulate the same for up to five years. However, this accumulated amount must be spent by the organization on its own activities and cannot be donated to another charitable organization.

The Finance Act subsequently disallowed charitable organizations from giving donations to other charitable organizations, whether from its accumulated or current year's income, toward the corpus of another charitable organization.

Now, under the Finance Act 2023, in addition to the prior restrictions, if one charitable organization donates to another charitable organization, only eighty-five percent of the donations is considered as application of income in the donor charitable organization's books of account.

This may prove to be a potential setback for grant-making organizations, unless they spend one hundred percent of their total income every year and do not set aside fifteen percent toward their reserve after spending eighty-five percent of the income.

B. Extra-Legal & In Practice

In early July 2018, Maharashtra State Charity Commissioner issued an order directing around 400 NGOs and trusts registered in the state to remove the words "corruption" and "human rights" from their names or risk suspension under the Maharashtra Public Trusts Act 1950.

Earlier, the Pune Charity Commissioner's office took similar action against 16 NGOs with the word "corruption" in their names, including Anna Hazare's *Bhrashtachar Virodhi Jan Andolan,* which has been suspended. The NGO's case to regain its registration is pending in court.

According to press reports, the State Charity Commissioner was of the view that the government already has the machinery to prevent corruption and protect human rights.

In the same month, July 2018, the State Charity Commissioner also issued an order directing all government-aided private hospitals in Maharashtra run by public charitable trusts to add "charitable" to their names so that poor patients would easily know they can take advantage of free or concessional treatment under the reserved quota.

Orders like this are suggestive of judicial activism: quasi-judicial authorities like the Charity Commissioner are compelling or attempting to control organizations instead of showing judicial restraint and regulating them within the framework of the law.

Meanwhile, the Ministry of Home Affairs (MHA) launched an "Online Analytical Tool' "to keep a close eye on foreign funded NGOs. According to media reports, MHA launched the "Online Analytical Tool" on 1 June 2018 "to analyze in real time the source, destination and the actual usage of the fund."

On 21 December 2017, the Ministry of Home Affairs issued a notice that organizations having prior permission or registered under the Foreign Contribution Regulation Act (FCRA) 2010 should maintain their FCRA bank account only with banks integrated with the Public Financial Management System (PFMS). At that time, thirty-tow banks were in the list of PFMS integrated banks. The list later grew to fifty-nine. However, the September 2020 amendment of FCRA later mandated that all foreign contributions were to be received only in the designated FCRA account to be maintained with the State Bank of India, New Delhi Main Branch.

The Public Financial Management System, earlier known as the Central Plan Schemes Monitoring System (CPSMS), is a web-based online software application developed and implemented by the Office of the Controller General of Accounts (CGA).

Reportedly, the online analytical tool gave government "the capacity to take data-driven and evidence-based decisions regarding the compliance of the provisions of the Foreign Contribution (Regulation) Act, 2010." It had analytical features to conduct big data mining and data exploration. Its dashboard was integrated with the bank accounts of FCRA-registered entities through the Public Financial Management System for updating transactional data on a real-time basis.

VI. BARRIERS TO FREE SPEECH, ADVOCACY, & POLITICAL ACTIVITY

A. Legal

Based on the relevant legal provisions, the "improvement of democracy and governance in India through political and electoral reforms" could arguably be considered a "charitable purpose" under the sub-category, "advancement of any other object of general public utility." Limitations to the organization would include not "carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for any fee, tax or other consideration" and ensuring the aggregate value of receipts from such activity does not exceed twenty percent of the total receipts in the relevant fiscal year.

However, courts in India have held that an institution or trust whose dominant object is political in character cannot be said to have been established for a charitable purpose [Lokamanya Tilak Jubilee National Trust Fund, [1942] 10 ITR 26 (Bom.); CIT v. All India Hindu *Mahasabha* [1983] 140 ITR 748 (Delhi)]. In one case, a trust was created to give effect to the wishes of Lokmanya Tilak as expressed in his will: spreading political education through the *Kesari* and *Maratha* newspapers to make people aware of their political rights and rouse them to demand changes in the structure of the country's administration. However, the Supreme Court held that the trust was not a public charitable trust as defined under the Bombay Public Trusts Act.

The position is summarized in Halsbury's Laws of England: "A trust for the attainment of political objects is invalid, not because it is illegal -- for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public welfare or benefit, and therefore cannot say that a gift to secure the change is a charitable gift." This argument was also advanced by Lord Parkar in Bowman v. Secular Society Limited.

According to Indian courts, political purposes include, but also extend beyond, the support of political parties or of those seeking political office. Supporting or opposing a change to the law or government policy is a political purpose and not a charitable purpose. Also, attempts to sway public opinion on controversial social issues are legitimate and lawful but not charitable.

A purpose pursued by an NGO would be considered political if:

- It is concerned with party politics;
- It involves the dissemination of "propaganda" for some cause; or
- It involves seeking changes to the law, or to the administration of the law, or to government policy.

The second and third of these notions of "political" create difficulties for activist welfare organizations. The judicial reasoning that has induced English courts and other Commonwealth country courts, including India, to include activities such as advocating changes to the law within the notion 'political' is as follows:

A purpose cannot be held to be charitable unless it is beneficial to the public. Accordingly, when a court has to decide whether a trust or other organization which aims to change the law (or for that matter to change the administration of the law, or some government policy) is charitable, it must determine whether the change sought would be beneficial. However, a court's task is to resolve disputes according to existing law and cannot rule on whether a particular change to the law would or would not be beneficial.

Every NGO is independent where matters concerning internal governance are concerned. The government has the right to "regulate" but not "control" the internal affairs of an NGO. Fines and penalties may be imposed for compounding certain irregularities such as not filing returns in time. NGOs may also be subject to random financial or tax assessments by the regulatory authorities.

B. Extra-Legal & In Practice

In practice, the government continues to crack down on activist organizations, often raiding their offices and freezing their bank accounts.

In the year 2016, a slew of actions against CSOs by the government threatened the existence of civil society in India. First, the government cancelled the registration of the *Sabrang* Trust, run by activist Teesta Setalvad, for alleged diversion of

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funds to activities and expenses for other than what they were meant. Setalvad and her NGO, Citizens for Justice and Peace, were running a sustained campaign against atrocities committed during the 2002 Gujarat riots under the watch of the then-Chief Minister Narendra Modi. The Ford Foundation was also put on the watch list for funding Setalvad's NGO, which was accused of promoting "communal disharmony." Restrictions against Ford Foundation were later eased ahead of a visit by Prime Minister Modi to the United States.

On 1 June 2016, the FCRA registration of leading lawyer Indira Jaising's NGO, Lawyers Collective, was suspended for six months for alleged violation of FCRA norms. The NGO allegedly used the funds for organizing rallies with political "hue and color." Anand Grover, co-founder of Lawyers Collective, had argued against BJP President Amit Shah in the Sohrabuddin fake encounter case. Grover had also represented Sanjiv Bhatt, Priya Pillai, and Yakub Memon.

Earlier, on 3 September 2015, the government cancelled the FCRA registration of Greenpeace India and froze seven of its bank accounts for allegedly campaigning against mining and nuclear projects. Their chief campaigner Priya Pillai was offloaded from a flight to London at Delhi airport. The government's decision to bar her from travelling was declared illegal by the Delhi High Court.

The Enforcement Directorate (ED) raided the offices of Greenpeace and Amnesty International in October 2018 in Bengaluru. It also froze their bank accounts for alleged FCRA violations, as well as allegedly "raising funds through fraudulent means." According to a statement issued by the ED, after Amnesty International India Foundation Trust (AIIFT) was earlier denied permission/registration under FCRA 2010 by Ministry of Home Affairs, AIIFT allegedly bypassed the FCRA by floating a commercial entity in the name of Amnesty International India Pvt. Ltd (AIIPL). This entity, according to the ED, has received Rs 36 crore in foreign funds through a commercial route. Out of the total, Rs 10 crore was received as long-term loans. This amount was immediately placed in fixed deposits (FDs) and another Indian entity—Indians for Amnesty International Trust (IAIT)—established an overdraft facility for Rs 14.25 crore, placing the said Rs 10 crore FD as collateral. The remaining Rs 26 crore was received in two other bank accounts of AIIPL as "consultancy services." AIIFT took the view that FCRA does not apply to business enterprises and commercial or business transactions.

The actions taken by the government against Sabrang Trust, Ford Foundation, Greenpeace and Lawyer's Collective lend credence to the accusations that the government has launched a witch hunt against activists and CSOs who have been fighting for the rights of victims of the Gujarat riots or questioning inequitable development projects, ruthless corporatization, and unsustainable exploitation of natural resources.

Similar raids and FCRA registration suspensions continued after the passage of the amended FCRA 2020. In February 2023, the government suspended the FCRA license of the Center for Policy Research (CPR), one of India's leading think tanks, and subsequently revoked its tax-exempt status, alleging that CPR used its funds for litigation rather than research. Similarly, CARE India's FCRA license was suspended by the Ministry of Home Affairs (MHA) in June 2023 over alleged violations of the FCRA. Around the same time, the MHA also revoked the FCRA license for the Young Women's Christian Association of Delhi (YWCA). In 2021, the Ministry denied renewal of Oxfam India's FCRA license as well as Oxfam's revision application in 2022 after Oxfam petitioned the high court against the decision. The government re-instated the FCRA registration for Mother Teresa's organization, Missionaries of Charity, two weeks after it declined the renewal due to "adverse inputs."

In February 2023, the Tax Department conducted raids against BBC offices in India after the release of a documentary critical of the Prime Minister Narendra Modi. Officials from the tax department arrived at BCC offices in Delhi and Mumbai to conduct a "survey" as part of a tax evasion investigation into the BBC in India. Similar raids were conducted on Amnesty International, leading to frozen accounts and closing down of operations.

VII. BARRIERS TO ASSEMBLY

A. Legal

The authors of the Indian Constitution conferred a fundamental right on all citizens "to assemble peaceably and without arms." Prior to the Constitution coming into force, the right to assemble could have been abridged or taken away by law. Now, however, only reasonable restrictions, i.e. in the interests of the sovereignty and integrity of India or public order, within Article 19(3) of the Constitution may be imposed.

In Railway Board v. Narinjan Singh, AIR 1969 SC 966: (1969) 1 SCC 502: (1969) 3 SCR 548, the Supreme Court held that "although the citizens of India have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions, it does not mean that they can exercise those freedoms in whatever place they please."

The rules limiting freedom of assembly, association, and expression must be reasonable. Typically, refusals to permit an assembly or procession should be accompanied by reasons for such refusals. The law also cannot disallow spontaneous demonstrations on the same principles of the fundamental right to peaceful assembly and freedom of speech and expression. However, arrests can be made for not obtaining permission.

In recent years authorities have tried to impose obligations on protesters to compensate for potential property damage (please see ICNL report on India's legal framework for assembly for more details). For instance, the state of Haryana passed a new law in 2021 that allows authorities to recover compensation on protestors for damage to public and private property. Similarly, police in Uttar Pradesh charged 450 people with vandalizing public and private property in connection with protests against the Citizenship Amendment Act in 2019.

Other restrictions are also often imposed when permissions are granted. In August 2011, Team Anna Hazare gave an undertaking to the Delhi police agreeing to 16 of the 22 conditions set by the Delhi Police for holding hunger fasts in protest at the Jayaprakash Narayan Park. However, the team refused to accept the following police conditions: to vacate the park on 18 August evening, to restrict the number of protesters to 4,000-5,000, to allow government medical officers to examine those participating in the fast three times a day, to not use loudspeakers or public address system, to ensure that only 50 cars and 50 two-wheelers were parked around the venue and to not erect a *shamiana* (temporary canopy) on any road. The conditions were rejected on the grounds that they were unconstitutional.

The undertaking was submitted by Neeraj Kumar, a member of India Against Corruption, to the Deputy Commissioner of Police (Central) Vivek Kishore at his office around noon. In response to Team Anna's rejection of the conditions as unconstitutional, the police replied to Kumar that permission could not be granted.

The police said permission was denied as the most important conditions were rejected by Team Anna. The police barricaded the area, and no one was allowed to enter without permission. The police threatened to invoke Section 144 (Arrests by a Magistrate) of the Code of Criminal Procedure 1973. A magistrate can impose a prohibition against the assembly of five or more persons. However, the courts in India have held that this prohibition cannot be exercised arbitrarily. There must be a sound reason, such as danger to the public or property and so on.

In India, a lot of "political" gatherings take place without overt objection from the state or police. Where violence has occurred or is anticipated (e.g. when a politician and his followers come into a state, especially when some high-profile incident takes place), permissions have been denied to enter and to hold rallies.

During an assembly, megaphones and symbols can be prohibited. For example, the religious group *Anand Margis* were forbidden from taking their skull dancing on to the streets. Slogans and overly provocative symbols could be prohibited when passing through certain sensitive areas, e.g. Hindu procession going through a Muslim area. Such a restriction would be considered reasonable. There are many permutations and combinations, and the discretion given to Magistrates and the Police is wide, allowing them to determine "reasonable restriction" based on the particular circumstance. It is therefore difficult to specify what would be permitted. A Magistrate or the Police's action would be circumstantial.

B. Extra-Legal & In Practice

Under the law, no particular category of persons or groups is restricted from organizing or participating in assemblies. However, with the *kudakulam* and POSCO plant agitations there have been deportations and criminal sanctions against foreigners "associated' with these protests.

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In recent history, there have also been instances and many news reports of the State using excessive force to break up assemblies, particularly with respect to the Anti-Citizenship Amendment Act Protests in December 2019 – March 2020 and the farmers' protests in 2021.

There are clear protocols for crowd control under the Police Act. A Magistrate must be present before firing can happen, though the police also have powers in this area. *Lathi* charges (beating crowds with a wooden staff) are resorted to more often. These are often violent. However, in areas where there is strong media scrutiny, such as cities like Mumbai and Delhi, more care has traditionally been taken with respect to crowd, protest, and procession control. In Mumbai, the police have significant experience at controlling huge crowds, especially around festive occasions like *Ganesh Utsav* during which thousands of devotees throng the streets.

Generally, the State provides sufficient protection to the organizers and participants in assemblies. However, the quality of police response has much to do with the politics of the situation and the level of the state police's abilities. The aforementioned protests witnessed significant abuse of force by local authorities in Delhi and elsewhere, with little accountability and instead general tolerance of abuses by national-level actors. Many protesters arrested during these protests are still in detention or undergoing criminal trials, charged with various national security crimes.

There is no specific protocol or law to address counter-demonstrations, which are generally treated as demonstrations. The effort is to acknowledge both and keep them both peaceful.

Under Section 124 A of the Indian Penal Code (IPC), an individual can be charged with "sedition" if he or she: "by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection (which includes disloyalty and all feelings of hate) towards the Government established by law in India."

In 2016, Amnesty International India organized an event as part of a campaign to seek justice for "victims of human rights violations" in Jammu and Kashmir. The police were invited and present at the event. Acting on a complaint filed by the *Akhil Bharatiya Vidyarthi Parishad* (ABVP), the J.C. Nagar police charged Amnesty International India on 15 August (India's Independence Day) under section 124-A of the Penal Code.

On 12 February 2019, fourteen students of Aligarh Muslim University (AMU) were also charged with sedition after a clash following a confrontation with a Republic TV crew. A First Information Report (FIR) was filed by the police based on a complaint by BJP *Yuva Morcha* (Youth Wing) leader Mukesh Lodhi, who alleged that hundreds of AMU students surrounded his vehicle, assaulted, and fired at him. The complaint also accused the students of shouting pro-Pakistan and anti-India slogans, leading to the sedition charge. However, video evidence proved the allegations to be false and two days later, the police dropped the sedition charge.

Following the passage of the Citizenship Amendment Act in 2019, which has been criticized by the United Nations and several governments as discriminatory on the basis of religion, BJP officials and the police have threatened protestors against the Act. The authorities have resorted to physical violence, while failing to intervene when government supporters attacked protestors. The government has similarly suppressed farmers' protests, using sedition law and the Unlawful Activities Prevention Act (UAPA) to arrest and detain people who participated in the protests. A number of journalists have been arrested for reporting on the farmer protests, while several Twitter accounts and content related to the protests were suspended and removed, respectively, by the Indian government.

C. Scope of Public Participation in Indian Environmental Decision-Making

According to Meenakshi Kapoor and Krithika A. Dinesh,

> "India's plan to fast-track growth and Covid recovery relies on industrial expansion and resource extraction. It is looking at large-scale renewable energy deployment and afforestation to meet its goal of net zero emissions by 2070. All these plans, if done without due engagement of public and civil society, run the risk of leading to unsustainable decisions and high costs for its environment, people's health, traditional livelihoods, and well-being of those at the margins. However, genuine implementation of laws that uphold community control over their resources and provide for public participation in environmental decisions is on the decline."

Under a research project supported by the International Center for Not-for-Profit Law (ICNL), public participation in environmental decision-making is examined at three levels under the current environmental regulatory system: law and policy making, planning and governance, and project decisions.

LAW & POLICY MAKING

The 2014 pre-legislative consultation policy recommends public view of drafts for a minimum period of 30 days prior to being tabled in the parliament. However, awareness of the policy is low.

Public scrutiny of any rule, order or notification issued under the Environment (Protection) Act 1986 is mandated by the Environment Protection Rules. However, the 2006 Environmental Impact Assessment Notification and the Coastal Regulation Zone Notification have often been altered without the compulsory public input.

PLANNING & GOVERNANCE

Public engagement in planning exercises is at a nascent stage. Some citizens have opportunities to engage in public hearings, consultations, and collaborative governance, but their impact on the final outcomes of these plans is hardly visible. Many collaboration opportunities are either dominated by government officials, considered elitist, or remain underutilized.

PROJECT DECISIONS

For most projects to begin construction, certain permissions are mandatory. Very few stipulate public consultations. Through public consultation, environmental impact assessment notification provides an important platform for people to voice their fears, apprehensions and demands concerning a project. However, the process lacks the legitimacy to impact a project's fate. The Land Acquisition Act of 2013 also provides for public hearings for assessment of social impacts and rehabilitation and resettlement needs of those being displaced. In tribal-dominated scheduled areas and forest areas, the projects need to obtain consent of the Gram Sabha (village assembly). However, these processes are also being diluted.

D. Other Barriers to Genuine Public Participation

LIMITED LEGITIMATE SPACE

The existing mechanism has very few legally binding provisions for public engagement. Even these provisions only provide opportunities for participation and often do not have a bearing on project and planning decisions. Largely, it only allows for one-time opportunity of participation without adequate follow-up action.

WEAK POST-HEARING & APPROVAL GRIEVANCE RESOLUTION

There is an absence of a mechanism to appeal against poorly conducted public hearings. Also, once a project is approved, a policy notified, or a plan made, insufficient and weak mechanisms for people to register their complaints and raise their concerns often push them to approach courts.

Additionally, public participation suffers because of poor access to information, overlapping jurisdictions, language barriers, lack of translation of government documents in vernacular and parallel passing of draft laws and plans.

E. Recommendations

1. Build awareness of and implementation of the Pre-legislative Consultation Policy.
2. Define "Public Interest."
3. Acknowledge citizens' right to time-bound action when aggrieved by environmental violations.
4. Rate environmental institutions' performance on redress of public complaints.
5. Encourage proactive government action towards enabling effective public participation.
6. Determine outcomes of public participation and ensure they are achieved.

VIII. DIGITAL & ONLINE RESTRICTIONS THAT IMPACT CSOs

A. Infringements on Privacy

In August 2017 a nine-judge bench of the Supreme Court (SC) of India unanimously upheld that the "Right to Privacy is an integral part of Right to Life and Personal Liberty guaranteed in Article 21 of the Constitution." The Court added that the right to privacy is intrinsic to the entire fundamental rights chapter of the Constitution.

B. Infringements on the Rights to Receive or Impart Information

The law does not specifically prevent people from exchanging information, planning, or communicating about protests within the country, with foreigners, or online. However, there are cyber laws to regulate this area. Laws to regulate social media, such as India's Information Technology Act, can and do easily become tools to criminalize speech, often to protect powerful political figures.

Section 66A of the Information Technology Act, which criminalizes a broad range of speech, has been repeatedly used to arrest those who criticize the authorities and to censor content.

In May 2014, five students were temporarily detained in Bangalore for allegedly sharing a message on the mobile application WhatsApp that was critical of then newly elected Prime Minister Narendra Modi.

Earlier in April 2012, Ambikesh Mahapatra, a professor at Jadavpur University in the eastern state of West Bengal, was arrested under section 66A for forwarding an email featuring a spoof of the state's chief minister, Mamata Bannerjee. A month later, police in Puducherry arrested a businessman for posting messages on Twitter questioning the wealth amassed by the son of the country's then-Finance Minister.

Section 66A was declared unconstitutional by the Indian Supreme Court in March 2015. The government has said that it is examining the Supreme Court judgment and may enact an amended version of section 66A to bring it into line with constitutional requirements. The Supreme Court judgment lays down important safeguards for the future of internet freedom in India. While aspects of the judgment relating to the blocking of internet content raise concerns, any new laws should be consistent with the safeguards set forth in the court's ruling and with international human rights standards.

THE RIGHT TO INFORMATION

The Parliament of India's Right to Information Act (RTI, 2005) sets out "the practical regime of right to information for citizens." Under the provisions of the Act, any citizen may request information from a "public authority."

According to Section 2(h) of the RTI, "public authority" includes any authority, body, or institution of self-government established or constituted. This definition has been extremely contentious since the RTI came into force. The RTI Act mandates that "every public authority shall pro-actively disclose information pertaining to it, and maintain its documents and records to facilitate the right to information under the Act."

The question of who constitutes a public authority is critical because it sets the boundaries of the scope of the RTI Act specifically, and the transparency regime in the country, more generally. Over the last few years, a wide variety of entities otherwise considered to be private entities, such as schools, colleges and sports associations, have been declared public authorities, and have had to comply with the requirements of the RTI Act.

A perusal of judgments of High Courts and the Chief Information Commissioner (CIC) reveals a diverse and, at times, conflicting jurisprudence regarding the ambit of "public authorities" under the RTI Act.

As defined in the Act, a "public authority" is any authority, body, or institution of self-government established or constituted by or under the Constitution; by any other law made by the Parliament or a State Legislature; or by notification issued or order made by the Central Government or a State Government. Bodies owned, controlled, or substantially financed by the Central Government or State Government also fall within the definition of public authority.

In a landmark judgment having wider implications on government-funded NGOs and organizations run on public contributions, the State Information Commission (SIC) on 7 December 2012 ruled that all "substantially financed" NGOs

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(receiving over INR ten million from state or government grants) are a public authority under the RTI and must make their annual “income and expenditures” public.

In its order, the SIC stated that in cases where the state gives less substantial grants (INR 2.5 million or less) to NGOs, the State or a government agency will be appointed as the public authority and required to provide information.

The SIC also added that an NGO that has been raising funds from public contributions should voluntarily place maximum information regarding its activities on the web, including its constitution, bylaws, rules and regulations, annual income and expenditure, and the nature of works undertaken or completed.

The order stated: “If an NGO is not substantially financed by the government and also raises funds by collections from public contribution and it performs functions of a public nature that are ordinarily performed by the government or its agency, it is desirable that the NGO voluntarily place maximum information regarding its activities on its website.”

Despite the expansive application of the RTI to NGOs, relief funds established by the government, including the the Prime Minister’s Citizen Assistance and Relief in Emergency Situations Fund (PM CARES), have been declared by the government and affirmed by courts to not be applicable under the RTI as a “public authority,” requiring such funds to provide much less information to the public than NGOs.

IX. ENDING THE NONPROFIT

DISSOLUTION, TERMINATION, & LIQUIDATION

A. Voluntary Termination

Indian public charitable trusts are generally irrevocable. If it becomes difficult to carry out the trust's objectives, the doctrine of *cy pres*, meaning "as near as possible," may be applied to change the objectives of the trust. Unlike trusts, societies and Section 8 companies may be dissolved.

An NPO may be voluntarily dissolved if the objects for which it was registered are achieved or are no longer relevant, or if the governing body is no longer interested in continuing the organization. Upon dissolution and after settlement of all debts and liabilities, the funds and property of the society or company may not be distributed among the members. Instead, the remaining funds and property must be given or transferred to some other society or Section 8 company, preferably one with similar objectives. This is determined at the time of the NPO's founding or creation and is designated in the NPO's founding documents.

The Income Tax authorities now insist that there should be a clear clause in the charter of the NPO concerning dissolution and the affirmation therein that the funds and property of the trust, society or non-profit company may not be distributed among the members. Instead, the remaining funds and property must be given or transferred to some other trust, society, or Section 8 company, preferably one with similar objectives.

B. Involuntary Termination & Liquidation

The government may terminate an NPO if it deems the organization's activities "against national interests or the sovereignty or integrity of India."

NPOs may also face penalties for the failure to submit their financial reports in a timely manner, which can include involuntary termination. Between the year 2017 and 2018, for instance, the Charity Commissioner of Maharashtra State deregistered over a hundred thousand charitable trusts and societies that failed to file their annual audited accounts with his office for the previous five years.

NPOs face a variety of potential penalties for violations of FCRA, as well. For example, if an NPO accepts and deposits a foreign contribution without being registered under FCRA or having obtained prior approval to do so, the organization is barred from using the contribution and must pay a penalty.

An FCRA-registered NPO or CSO may have its registration revoked, if it accepts a foreign contribution likely to affect prejudicially:

- the sovereignty and integrity of India;
- the security, strategic, scientific or economic interest of the State;
- the public interest;
- freedom or fairness of election to any legislature;
- friendly relation with any foreign State;
- harmony between religious, racial, social, linguistic, regional groups, castes or communities.

FCRA registration may also be revoked if the accepted contribution is deemed to "lead to incitement of an offense," or "endanger the life or physical safety of any person." These sanctions apply regardless of the NPO's legal form. Under section 15 of FCRA 2010, the Ministry of Home Affairs has the right to manage the properties of the NPO in cases where the registration under FCRA is cancelled. This provision has been further tightened under the amendment of 2020 to state that if the FCRA registration is cancelled or even voluntarily surrendered by the NPO, the property (movable or immovable) acquired by the NPO under FCRA would vest in the "competent authority."

On 5 November 2018, the Ministry of Home Affairs (MHA) issued a notification making the Additional Chief Secretary or Principal Secretary (Home) of the concerned State Government or Union Territory the competent authority for the purposes of section 15 of FCRA where the assets of the NPO with a cancelled registration are physically located. Thus, if the FCRA registration of a CSO registered in Maharashtra State is cancelled or revoked by MHA, the Additional Chief Secretary or Principal Secretary (Home) of Maharashtra State would have powers to manage the movable and/or immovable properties acquired by the CSO under FCRA 2010.

X. STATE SUPERVISION

A. Regulatory Authorities

NPOs have reporting obligations and are answerable to a number of regulatory authorities.

Trusts and societies in Western India are regulated by the Office of the Charity Commissioner. Non-profit companies are regulated by the Registrar of Companies. Income Tax authorities regulate all three types of entities on their tax exemption status in a given fiscal year. The Ministry of Home Affairs regulates the flow of funds from foreign sources to NGOs and CSOs.

Apart from these three key regulating authorities, certain NPOs or CSOs must also register under the Shops and Establishments Act, regulated by the local municipal authority. NPOs having turnover of goods or services in excess of INR two million need to register under the Goods & Services Act 2017. From 1 April 2019 the turnover limit for goods has been enhanced to INR four million. The threshold limit for services continues to remain INR two million.

One of the key issues in non-profit governance in India is the lack of uniformity and standardization. Since "charity" is a state and not a central subject in India, some states have excessive regulations while others have virtually none. For example, in the states of Maharashtra and Gujarat, the Charity Commissioner requires regular "change reports" to be filed, as well as prior permission for buying and selling immovable property. On the other hand, the National Capital Delhi and several other states do not have a Charity Commissioner. It is no surprise that many new nonprofits attempt to seek registration in New Delhi or other territories where one may officially bypass at least one regulatory authority.

Diversity in legal choices also allows entities to choose an institutional type that requires the least accountability. While societies and nonprofit companies require a modicum of accountability and are obligated to conduct annual general meetings and annual reports for members, trusts are legally exempt from this requirement.

Also, while societies and nonprofit companies require periodic rotation on Boards by a process of nomination and election, trust Boards are usually static. Trusteeship is usually for life and new trustees are appointed by surviving trustees.

In India, it is not uncommon to find Boards that are remunerated for their service. The law generally allows "reasonable remuneration." However, this often raises ethical questions and debate.

The relationship between Boards and the Chief Executive is also an issue that merits deeper attention and understanding. Sometimes it is the CEO that drives the organization while the Board remains static, and at other times it is the reverse. Both situations are undesirable. There should be healthy respect, communication, interaction, and a system of checks and balances.

Trustees of trusts are not bound by law to provide copies of the trust's annual accounts and returns to stakeholders other than to registering authorities like the Charity Commissioner, Registrar of Societies, and the Home Ministry. Societies and non-profit companies are required by law to provide these details only to their subscribing members. Obtaining these details even from the registering authorities is difficult. Additionally, internal standards for excellence that include policies on conflicts of interest, human resources, financial accountability, fundraising, and public affairs are still unheard of among many Indian non-profits.

SHOPS AND ESTABLISHMENTS ACT

In most states, organizations with ten or more employees are required to register under the Shops and Establishments Act. Organizations registered under this law must ensure compliance on work hours, rest hours, mandatory holidays, and minimum wages determined by the state.

Under the Maharashtra Shops and Establishment Act, 2017, the applicable "establishment" "includes a society registered under the Societies Registration Act, 1860, and a charitable or other trust, whether registered or not, which carries on, whether for purposes of gain or not, any business, trade or profession or work in connection with or incidental or ancillary thereto."

MATERNITY BENEFIT ACT 2017

The Maternity Benefit Act provides for maternity leave and other benefits for women employed in factories, mines, plantations and every shop or establishment (including an NPO) having ten or more employees. Maternity leave benefit has been extended now to a period of twenty-six weeks.

Dismissing a woman from employment during or on account of her maternity leave is unlawful and punishable.

In most states, organizations with ten or more employees are required to register under the Shops and Establishments Act. Organizations registered under this law must ensure compliance on work hours, rest hours, mandatory holidays, and minimum wages determined by the state.

For a woman who has two or more surviving children, the maternity benefit will continue to be twelve weeks, which cannot be availed before six weeks from the date of the expected delivery.

Under this law, for the first time the role of a "commissioning mother" has been recognized and defined under law. A commissioning mother means "a biological mother who uses her egg to create an embryo implanted in any other woman." Prior to this, the Maternity Benefit Act did not recognize the role of a commissioning mother. A commissioning mother is entitled to paid maternity leave of twelve weeks from the date the child is given to her custody.

Also, a woman who legally adopts a child below the age of three months is entitled to a maternity benefit for a period of twelve weeks.

SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION & REDRESS) ACT, 2013

This law provides protection against sexual harassment of women in the workplace and for the prevention and redress of complaints of sexual harassment and or related matters.

Sexual harassment includes any one or more of the following unwelcome acts or behavior (whether directly or by implication): physical contact and advances; a demand or request for sexual favors; making sexually colored remarks; showing pornography; and any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

Every employer of a workplace employing ten or more employees is required to constitute a committee to be known as the "Internal Complaints Committee." The Presiding Officer (Chairperson) of the Committee should be a woman employed at a senior level in the workplace. The Committee should comprise no fewer than two members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge – and one member from amongst non-governmental organizations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment. At least one-half of the total members so nominated should be women.

The Committee is required to complete the inquiry on receipt of a written complaint received from the aggrieved female employee within ninety days. The Committee may recommend disciplinary action for the employer to implement, which could range from seeking a written apology, reprimanding the offender, or withholding a promotion or salary raise, to termination of services.

B. Reporting, Disclosure Requirements, & Supervision

Every registered NPO must file annual returns with the relevant registering authority, the Charity Commissioner, Registrar of Societies, or Registrar of Companies. Annual returns must also be filed with the Income Tax authorities and, if the NPO is registered under the FCRA, with the Ministry of Home Affairs.

MHA also requires that NPOs make disclosure of funds that the NPO receives and spends on its own organizational website.

C. State Enforcement & Sanctions

The state has powers to deregister an NPO or CSO in cases where it fails to comply with requirements such as filing annual audited accounts or reporting changes on the governing board of the organization.

D. Self-Regulation

Self-regulation is relatively new on the agenda in India. Yet, experiments with self-regulation have proved to be quite fruitful with a number of initiatives underway. These initiatives include the development of codes of conduct and monitoring, rating or validation mechanisms such as a Credibility Alliance to strengthen the sector's understanding of how to improve accountability and the public's understanding of the nonprofit sector.

GuideStar India certifies NGOs based on their level of transparency and public accountability following due diligence carried out by their team of certification experts. Due diligence is based on verifying financial and legal compliance through a thorough scrutiny of registration documents, tax returns, FCRA returns, audited financial statements and auditor's reports, public disclosures on GuideStar India's portal, key facts reported to stakeholders according to GuideStar India's Annual Report disclosure template, and confirmation of third-party site visits and references.

E. State Harassment

State harassment can take several forms, such as the Ministry of Home Affairs putting some organizations on the "watch list," suspending or de-registering others, and raiding the offices and freezing the bank accounts of organizations like Greenpeace.

Another form of harassment is government agencies preventing assembly at certain public places or initiating action against organizations on charges of archaic laws of sedition for assembling and protesting.

XI. FOREIGN ORGANIZATIONS

A. Registration

Foreign NPOs seeking to establish branch or liaison offices in India are required to obtain approval from the Reserve Bank of India (RBI) under provisions of the Foreign Exchange Management Act, 1999 (FEMA). The RBI is the sole registration body relevant for foreign NPOs seeking to operate in India. FEMA does not provide specific constraints on foreign NPOs' independent activities, provided that the RBI specifically permits such activities.

If a foreign NPO wishes to apply for approval to establish either a branch or liaison office, it must submit a form to the RBI containing the name of the applicant NPO; date and place of incorporation or registration; contact information; details on the organization's financial holdings; a brief description of its activities; and details as to the location and proposed activities of the organization's branch or liaison office. Unlike branch offices, which may carry out independent activities, a liaison office may only undertake the activities of a liaison. The liaison office generally only functions as a channel of communication between the organization's home office abroad and parties in India and is not allowed to undertake any business activity or earn any income in India. Foreign NPOs must also provide details as to what activities the organization carries out elsewhere and where they take place. They must additionally attach copies of their articles of association, bylaws, an audited balance sheet, and a report from the organization's bank in its home country stating that the organization is in good standing with a sound financial record over the previous three years.

The RBI considers such applications in coordination with the Finance Ministry. If permission for a foreign NPO to establish a branch or liaison office is granted, the initial permission lasts for three years, after which the NPO must apply for an extension. Liaison and branch offices of foreign NPOs must file Annual Activity Certificates and audited balance sheets showing that the office has carried out only those activities permitted by the RBI.

If, instead of operating a branch or liaison office, the foreign NPO decides to register as a trust, society, or Section 8 company in India, all the relevant laws applicable to an Indian trust, society or Section 8 Company would apply.

A foreign NPO must operate in India within the scope of the definition provided for each of the three legal forms by the relevant federal or state law. A foreign NPO desiring to enjoy charitable tax benefits and raise funds in India or through foreign sources other than its parent organization must apply for tax exemption and deductions under the Income Tax Act. It must also seek prior permission or registration under FCRA 2010 if it wishes to receive foreign contributions.

B. Reporting & Supervision

Until recently, FCRA provisions were not applicable to foreign NPOs with branch or liaison offices in India. FCRA provisions could become relevant depending on the nature of any grants received and disbursed by the foreign office in India. If the branch or liaison office received funds from foreign sources other than the organization's head office, then FCRA and income tax laws became relevant. For instance, if the branch office of a foreign NPO received a grant in India directly from foreign donors, then FCRA would apply. The branch office must then either seek prior approval from the Ministry of Home Affairs for a one-time foreign grant, or register with the Ministry for multiple foreign contributions.

The Reserve Bank of India's Notification No. FEMA 22(R) /RB-2016 of 31 March 2016 was amended on 31 August 2018. The amendment requires registration under FCRA instead of permission under FEMA if the applicant for establishing an office or place of business in India is an NGO, NPO, or entity of a foreign government engaged in any activities covered under the FCRA 2010.

Organizations seeking registration under FEMA are now also required to declare: "We will not undertake either partly or fully, any activity that is covered under the Foreign Contribution Regulation Act, 2010 (FCRA) and we understand that any misrepresentation made or false information furnished by us in this behalf would render the approval granted under the Foreign Exchange Management (Establishment in India of a branch office or liaison office or a project office or any other place of business) Regulations, 2016, automatically as void *ab initio* and such approval by the Reserve Bank shall stand withdrawn without any further notice."

C. Lokpal & Lokayukta Act 2013

The anti-corruption agitations in the year 2011 forced the government of India to hurriedly pass the *Lokpal* and *Lokayukta* Act in 2013 (LLA). *Lokpal* – meaning caretaker of people, an ombudsman who represents public interest - is responsible for investigating corruption charges at the national level and the *lokayukta* at the state level. These laws, however, turned out to potentially discourage individuals from associating themselves with CSOs.

The LLA is intended to regulate and control corruption in "public institutions." Unfortunately, NGOs and charitable institutions that are voluntary organizations for public purposes and public good have also been included within the purview of this law.

The Act deems trustees and officers of certain charitable institutions and NGOs as "public servants" and requires them to declare their assets in the public domain. As a result, several high-profile persons serving on boards of charitable institutions in a purely voluntary capacity considered stepping down.

Many high-profile businessmen and professionals contribute their time and other resources as trustees of these organizations or associations out of a sense of deep concern and a clear and committed sense of responsibility. Even senior officers of charitable institutions work on salaries far lower than their corporate counterparts.

Many charitable institutions receive funds from foreign sources and have high net-worth individuals on their boards who may be reluctant to disclose their personal assets in the public domain and make themselves vulnerable to extortionists and other anti-social elements.

Though the LLA was intended to bring about transparency and accountability among government servants and minimize corruption within the government sector, trustees and officers of charitable institutions have been affected as a result.

WHO ARE 'PUBLIC SERVANTS' UNDER THE LLA?

Section 14(1) (f), (g) and (h) are of particular relevance for most charitable institutions.

Under Section 14(1)(f): "Any person who is or has been a Chairperson or Member or Officer or Employee in any Body or Board or Corporation or Authority or Company or Society or Trust or Autonomous Body (by whatever name called) established by an Act of Parliament or Wholly or Partly financed by the Central Government or Controlled by it."

Several charitable institutions are "partly financed" by the Central Government; the term "partly financed" is neither defined nor explained where this particular sub-clause is concerned.

Under Section 14(1)(g): "Any person who is or has been a Director, Manager, Secretary or other Officer of every other Society or Association of Persons or Trust (whether registered under any law for the time being in force or not), by whatever name called, wholly or partly financed by the Government and the annual income of which exceeds Rs one Crore."

Though the LLA was intended to bring about transparency and accountability among government servants and minimize corruption within the government sector, trustees and officers of charitable institutions have been affected as a result.

This section defines "public servant" to include every trustee, manager, officer etc., of a charitable trust or society that is wholly or partly financed by the Government with an annual income exceeding Rs one Crore.

Under Section 14(1)(h): "Any person who is or has been a Director, Manager, Secretary or other Officer of every other Society, or Association of Persons or Trust (whether registered under any law for the time being in force or not) in receipt of any donation from any foreign source under the Foreign Contribution (Regulation) Act, 2010 in excess of Ten lakhs Rupees in a year or such higher amount as the Central Government may, by notification, specify."

The Explanation under Section 14(1) adds: "For the purpose of clauses (f) and (g), it is hereby clarified that any entity or institution, by whatever name called, corporate, society, trust, association of persons, partnership, sole proprietorship, limited liability partnership (whether registered under any law for the time being in force or not), shall be the entities covered in those clauses."

The definition of "public servant" covers every board member and senior employees of charitable institutions and NGOs wholly or partly financed by the Government with annual income that exceeds Ten Million Indian Rupees, as well as every board member and senior employee of charitable institutions and NGOs who receive in a year more than one million Indian Rupees under FCRA 2010.

The Competent Authority to whom the *Lokpal* return should be filed is the respective Ministry which has provided the maximum proportion of the grant or donation during the previous year. In case of foreign contribution received, the Competent Authority is the Ministry of Home Affairs.

There was a lot of lobbying against the implementation of this law. Currently, due to the amendment made to Section 44 of the LLA by the *Lokpal* and *Lokayukta* (Amendment) Act, 2016, the Public Servants (Furnishing of Information and Annual Return of Assets and Liabilities and the Limits for Exemption of Assets in Filing Returns) Rules, 2014 and all the amendments made thereto have become redundant. At present there is no requirement for public servants to file declarations of their assets and liabilities.

Reportedly, the Government is in the process of finalizing a new set of rules which will in due course prescribe the form, manner and timelines for filing of the declarations.

Meanwhile, on 19 March 2019, former Supreme Court judge and current member of the National Human Rights Commission (NHRC), Pinaki Chandra Ghose, was appointed the first anti-corruption ombudsman, or Lokpal, after his name was cleared and recommended by the high-level selection committee chaired by Prime Minister Narendra Modi.

XII. ACCESS TO RESOURCES

A. Foreign Funding

Any association can receive foreign contribution subject to the following conditions:

- It must have a definite cultural, economic, educational, religious or social program.
- It must obtain registration or prior permission from the Ministry of Home Affairs (Central Government)
- It must not be prohibited under the law to receive foreign contributions.

Under FCRA 2010, **the following individuals or entities cannot receive foreign contributions** for any definite cultural, economic, educational, religious or social program:

- a candidate for election;
- a correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
- a judge, government servant or employee of any corporation or any other body controlled or owned by the Government;
- a member of any legislature;
- a political party or office bearer thereof;
- an organization of a political nature as may be specified under sub-section (1) of Section 5 by the Central Government;
- an association or company engaged in the production or broadcast of audio news or audio-visual news or current affairs programs through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (i) of Section 2 of the Information Technology Act, 2000 or any other mode of mass communication;
- a correspondent or columnist, cartoonist, editor, owner of the association or company referred to in point (vii);
- individuals or associations who have been prohibited from receiving foreign contributions.

Any amount received from a "foreign source," whether in rupees or foreign currency, is construed as a "foreign contribution" under FCRA, 2010. Even in rupees, such transactions are considered foreign contributions.

WHAT ARE FOREIGN SOURCES?

- the Government of any foreign country or territory and any agency of such Government;
- any international agency, not being the United Nations or any of its specialized agencies, the World Bank, the International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf;
- a foreign company;
- a corporation, not being a foreign company, incorporated in a foreign country or territory;
- a multi-national corporation referred to in Section 2(g) sub-clause (iv) of FCRA, 2010;
- a trade union in any foreign country or territory, whether registered in such foreign country or territory or not;
- a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;
- a society, club or other association of individuals formed or registered outside of India;
- a citizen of a foreign country.

Because of an amendment under the Finance Act 2016, Indian companies with more than fifty percent foreign shareholdings are no longer treated as foreign source. However, a "foreign company" or "Multi National Company" (MNC) will continue to be treated as foreign source.

Foreign companies and their subsidiaries and MNCs which operate in India as branches or liaison offices or under special license of the Reserve Bank of India and are not incorporated under the Indian Companies Act are treated as foreign source.

Because of an amendment under the Finance Act 2016, Indian companies with more than fifty percent foreign shareholdings are no longer treated as foreign source. However, a "foreign company" or "Multi National Company" will continue to be treated as foreign source.

A few bodies of the United Nations, the World Bank, and some other International agencies and multilateral organizations are exempted from this definition and are not treated as foreign source. Hence, funds received from them are not considered foreign contributions.

Foreign contributions include articles (books, computers, relief material etc.), sums of money (whether the currency is Indian or foreign), or a security or share of stock, received from any foreign source.

However, any amount received from any foreign source in India, by way of fee (including fees charged by an educational institution in India from a foreign student); towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India; or any contribution received from an agent or a foreign source towards such fee or cost is excluded from the definition of foreign contributions.

There are two modes of obtaining permission to accept foreign contributions according to FCRA, 2010: registration and prior permission.

FOR A GRANT OF REGISTRATION UNDER FCRA, 2010, THE ASSOCIATION SHOULD:

- be registered under an existing statute like the Societies Registration Act, 1860 or the Trusts Act of the state or section 25 of the Companies Act, 1956 (now Section 8 of the Companies Act, 2013);
- Normally be in existence for at least three years and have undertaken reasonable activity in its chosen field for the benefit of the society for which the foreign contribution is proposed to be utilized. For this purpose, the association should have spent at least Rs 1,500,000/- over the last three years on its aims and objects, excluding administrative expenditure. Statements of income and expenditure, duly audited by a chartered accountant, for the last three years are to be submitted to prove that it meets these financial parameters.

An organization in the formative stage is not eligible for registration. Such organizations may apply for a grant of prior permission under the FCRA, 2010.

Prior permission is granted for receipt of a specific amount from a specific donor for carrying out specific activities and projects. For this purpose, the association should meet the following criteria:

- be registered under an existing statute like the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956;
- submit a specific commitment letter from the donor indicating the amount of foreign contribution and the purpose for which it is to be given; and

- for Indian recipient organizations and foreign donor organizations having common members, FCRA prior permission shall be granted to an Indian recipient organization subject to it satisfying the following:
    - The Chief Functionary of the recipient Indian organization should not be a part of the donor organization;
    - At least 51% of the office-bearers or members of the governing body of the Indian recipient organization should not be members or employees of the foreign donor organization;
    - In the case of the foreign donor organization being a single individual, that person should not be the Chief Functionary of the recipient Indian organization;
    - In the case of a single foreign donor, at least 51% office bearers or members of the governing body of the recipient organization should not be the family members and close relatives of the donor.

Application for a grant of registration is to be submitted online through form FC-3 A (Form FC3-B for Prior Permission). Registration under the FCRA must be renewed every five years. The Ministry of Home Affairs is known to take several months or often a year or more to process applications for registration or prior permission.

Once permission is received, the CSO must accept and utilize all foreign contributions only from the designated FCRA Bank account. Quarterly reports of receipt of foreign contribution must be disclosed either on the CSO's own website or that of the Ministry of Home Affairs. Accounts must be audited, and returns must be filed annually. If there is any change in the FCRA utilization Bank account or the name of the CSO or change in address of the CSO, or if there is any change in the CSO's governing board from the time registration or prior permission is granted or renewed, online reporting to the government is required within forty-five days in the prescribed online FC forms.

Any violation or contravention of the law could attract hefty penalties, suspension or in some cases de-registration.

CHANGES UNDER THE FCRA

In September 2020, the Ministry of Home Affairs made major amendments to the Foreign Contribution (Regulation) Act (FCRA) 2010. These changes included a complete prohibition on sub-granting, a twenty percent cap on any administrative expenses drawn from foreign funds, and a requirement that organizations open a bank account to receive foreign funds only at the main branch of the State Bank of India (SBI) in New Delhi, among other burdensome provisions.

NPOs were initially given until 31 March 2021 to open their State Bank of India accounts; however, the SBI New Delhi Main Branch was overwhelmed by the influx of paperwork and processing during the height of the Delta COVID-19 wave, necessitating an extension to 30 June 2021. NPOs could not file their annual FCRA returns for the fiscal year 2019-2020 until their SBI accounts were opened, leading to hefty penalties for those who were unable to open their accounts and file their returns on time.

The complete prohibition on sub-granting of FCRA funds—even to other NPOs that had FCRA registration—was a major blow to the sector. Many grassroots-level NGOs working at the local and community level traditionally relied heavily on resources from larger NGOs that brought in funding from foreign sources. They have since had to deal with a complete suspension of funding, which for many organizations has meant an inability to continue.

The reduction in the cap on administrative expenses from fifty percent to twenty percent was another significant blow to many organizations. Administrative expenses are critical to the ability of NGOs to carry out their work, covering staff salaries, accounting, advocacy and research programming, and other important areas. Since private sector donations typically allow only five to seven percent of the budget to be allocated for overhead costs, the funding for additional organizational needs often comes primarily from foreign sources.

To add to the newfound hurdles and burdens faced by NPOs, the FCRA registration of most organizations expired at the end of September 2021. The Ministry of Home Affairs (MHA) extended the validity of these registrations up to 31 December 2021. However, MHA processed each application sluggishly, leaving thousands of NPOs anxiously awaiting renewal by the December deadline. The MHA subsequently extended the deadline to 31 March 2022 for NPOs that had already submitted applications. Even as of March 2023, thousands of NPOs were still awaiting disposal of their application. MHA meanwhile has provided further extension (post expiry of validity on 30 September 2021) to 30 September 2023 to NPOs that had applied for renewal within the stipulated time and are still awaiting renewal.

B. CSR Funding

The Indian Companies Act 2013 under section 135 makes Corporate Social Responsibility (CSR) compliance mandatory for any company, where it is private, public, foreign, or even a nonprofit company registered under Section 8, if the company meets certain criteria of profit, turnover or net worth. Reportedly, India is the only country in the world that mandates CSR.

In any fiscal year, if the company has a net-worth of Rs 500/- crore or more, a turnover of Rs 1,000/- crore or more, or net profits of Rs 5 crore, it must:

- constitute a CSR Committee of the Board;
- have a CSR Policy for the company, disclose the contents of such policy in its report and place it on the company's website, if any;

- ensure that the company spends, in every financial year, at least two percent of the average net profits the company made during the three immediately preceding financial years in pursuance of its CSR Policy.

Companies are required to spend on programs and projects listed under Schedule VII of the Indian Companies Act, which covers a wide range of purposes including education, health care, skill development, and the environment.

This provision of the Indian Companies Act 2013 (which came into force on 1 April 2014) has opened new opportunities for funding for service delivery organizations (SDOs). The aggregate funds available for CSR-related activities ranges around INR 22,000 crore annually.

Under the law, a company may carry out CSR-related activities directly with the help of its employees, through its own corporate foundation, or through an "implementing agency." The agency should be registered as a trust, society or Section 8 company, have a track record of at least three years of service, register its details on the Ministry of Corporate Affairs website and obtain a Unique Identification Number by filing an application in online Form CSR-1.

Most companies prefer to undertake CSR-related activities through their own corporate foundation or engage SDOs as their CSR program partners. Ideally, there should be a grant agreement between the company and the NGOs. However, some companies choose to enter into vendor or service agreements (works contracts) with SDOs, which creates other complications for the SDO, including the requirement for the SDO to register under Goods and Services Tax Act and potentially endanger its tax-exempt status under the Income Tax Act 1961.

CHANGES TO THE CSR LAW

The Companies (CSR Policy) Amendment Rules 2021 have made CSR compliance for companies extremely stringent, indirectly impacting CSR-implementing NPOs. For instance, some companies are now putting unrealistic pressures on NPOs to fully utilize the funds before the fiscal year closes. Previously, the Ministry of Corporate Affairs (MCA) only placed emphasis on companies spending two percent of their pre-tax profits on approved CSR Activities. The emphasis has now shifted from "spending" to "utilization." Unless it happens to be an "ongoing project" (specified as a project with a duration of three years), the un-utilized funds must be returned by the NPO to the company, to be given to government funds such as the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES) or the Prime Minister's National Relief Fund (PMNRF).

NPOs are also required to register on the MCA portal and obtain a unique identification number in CSR-1.

C. Retail Fundraising

Retail fundraising, including home, office doorstep, or fundraising in the streets, is growing rapidly in India. In virtual space, crowdfunding platforms and social media too have become popular mediums for retail fundraising. Crowdfunding, however, is an unregulated space in which a number of for-profit enterprises have entered, some of whom are not knowledgeable enough to ensure strict compliance under the FCRA and other such regulations.

There are also for-profit professional fundraising enterprises which conduct retail fundraising campaigns on behalf of NPOs. Fundraising with the aid of professional (commercial) fundraising enterprises is quite common among large state or national NPOs wanting to cast their fundraising net far and wide. However, the high cost of fundraising remains a controversial issue within the sector. Many of these agencies have been known to charge commissions in excess of fifty percent of the sums raised by them for the charity.

D. Social Stock Exchange

India's Finance Minister on 5 July 2019 declared, "I propose to initiate steps towards creating an electronic fund-raising platform – a social stock exchange (SSE) – under the regulatory ambit of Securities and Exchange Board of India (SEBI) for listing social enterprises and voluntary organizations working for the realization of a social welfare objective so that they can raise capital as equity, debt or as units like a mutual fund."

In July 2022, the Securities and Exchange Board of India (SEBI) notified the Rules for Social Stock Exchanges to provide "Social Enterprises" with additional avenues to raise funds. SEBI has also given the Bombay Stock Exchange (BSE) and National Stock Exchange (NSE) the approval to set up a Social Stock Exchange (SSE) as a separate segment of the BSE and NSE. Social Enterprise is defined as either a "Not-for-Profit Organization" or "For Profit Social Enterprise" that meets the eligibility criteria specified by SEBI.

"

There are for-profit professional fundraising enterprises which conduct retail fundraising campaigns on behalf of NPOs. ... However, the high cost of fundraising remains a controversial issue. Many of these agencies have been known to charge commissions in excess of fifty percent of the sums raised for the charity.

"For-Profit Social Enterprise" means a company or a body corporate operating for profit that is a Social Enterprise for the purposes of SEBI's regulations on the SSE and does not include a company incorporated under section 8 of the Companies Act, 2013.

"Not-for-profit Social Enterprise" includes charitable trusts, charitable societies, companies licensed under section 8 of the Indian Companies Act 2013 and any other entity as may be specified by the Board.

A for-profit or not-for-profit entity must first be identified as a Social Enterprise by establishing the primacy of its social intent.

Corporate foundations, political or religious organizations or activities, professional or trade associations, infrastructure, and housing companies, except affordable housing, are not eligible to be identified as a social enterprise.

The SSE includes a vigorous due diligence process. However, listing could enhance recognition and credibility of an approved social enterprise. Social enterprises listed on the SSE will also be subject to regular audits to measure social impact, with reports disclosed to all stakeholders similar to for-profit entities (listed companies) on regular stock exchanges.

Social audits shall be carried out by Social Auditors, who hold a certificate by the National Institute of Securities Market and Social Audit Firms that employ Social Auditors and have a track record of minimum three years for conducting social impact assessment.

NPOs may raise funds by issuing Zero Coupon (i.e., zero interest) Zero Principal Instruments to institutional investors and non-institutional investors, which would be a form of grant and donations through Mutual Fund schemes as specified by SEBI and any other means as specified by SEBI.

FPOs (for-profit organizations) may raise funds by issuing equity shares on the main board, SME platform, innovators growth platform, equity shares issued to an Alternative Investment Fund including a Social Impact Fund, issuance of debt securities and any other means as specified by SEBI from time to time.

A few NPOs have already been listed on the NSE and BSE SSE. India's Social Stock Exchange comes as a glimmer of hope amid the climate of mistrust between government and non-governmental organizations.

This development could provide a new way for CSOs to raise funds through a potentially broader and accessible form, but the effectiveness remains to be seen and will require a more enabling environment for civil society at large.

To know more:

NSE SSE: https://www.nseindia.com/companies-listing/social-stock-exchange

BSE SSE: https://www.bsesocialstockexchange.com

E. Reserve Bank of India Directive

On 1 October 2021, a new directive by the Reserve Bank of India (RBI), India's central bank and regulatory body, came into force. With the stated purpose of consumer protection, the directive prohibits automatic recurring payments for a variety of services without authentication by the customer. For some NPOs that rely on membership-based recurring donations, this resulted in a sudden and substantial loss in donations. For instance, digital rights advocacy group Internet Freedom Foundation (IFF) witnessed a seventy percent drop in donors since the RBI's regulation, resulting from lack of technical capabilities on the banks' end. Groups like IFF have had to pivot away from important rights protection programs to fundraising, to avoid cutting staff and programming.

While likely not intentionally aimed at the voluntary sector, the directive was ill-thought through and imposed another hardship for many civil society organizations already struggling to survive.

F. Philanthropy (Including Tax Benefits to CSOs' Donors)

The Income Tax Act permits donors to deduct contributions made to trusts, societies and Section 8 companies that have registered for charitable status. Section 80G of the Act lists some of these institutions, many of which are government-related. Donors are entitled to a one hundred percent deduction for donations to some of these government funds. The following are examples of governmental charities listed in Section 80G, contributions to which entitle the donor to a one hundred percent deduction: the Prime Minister's National Relief Fund; the Prime Minister's Armenia Earthquake Relief Fund; the Africa (Public Contributions – India) Fund; and the National Foundation for Communal Harmony.

As to those entities not specifically enumerated in Section 80G above, donors may deduct fifty percent of their contributions to such organizations, provided the following conditions are met:

- The institution or fund was created for charitable purposes in India;
- The institution or fund has registered as tax exempt under Section 12AA of the Income Tax Act;
- The institution's governing documents do not permit the use of income or assets for any purpose other than a charitable purpose;
- The institution or fund is not designed to be for the benefit of any particular religious community or caste; and
- The institution or fund maintains regular accounts of its receipts and expenditures.

In addition, total deductions claimed may not exceed ten percent of the donor's total gross income. Further, in order to qualify for a tax deduction, any donation in excess of INR 2,000 cannot be made in cash.

Companies may also claim the standard fifty percent deduction for charitable donations made to qualifying NPOs, for instance through their corporate social responsibility (CSR) programs. Philanthropic individuals and groups are not limited in the amount they may contribute or designate to a charity by India's inheritance or other law.

Exceptions: Donations to institutions or funds "for the benefit of any particular religious community or caste" are not tax deductible. A nonprofit organization created exclusively for the benefit of a particular religious community or caste may, however, create a separate fund for the benefit of "Scheduled castes, backward classes, Scheduled Tribes or women and children." Donations to these funds may qualify for a deduction under Section 80G, even though the organization may be for the exclusive benefit of a particular religious community or caste. The organization must maintain a separate account of the monies received and disbursed through such a fund.

In-kind donations (e.g., computers, medicines, relief material, etc.) are not tax deductible under Section 80G. The donation should be a sum of money. Receipts issued to donors by NPOs must bear the number and date of the 80G certificate and indicate the period for which the certificate is valid.

A donor may also donate any sum of money as a corpus donation to the NPO. However, it is essential that the donor specifies in writing that either a part of the donation or the entire donation be treated as a donation toward the corpus of the NPO.

A corpus donation is essentially a "capital receipt" for the recipient NPO and is not accounted for as "income." Thus, a corpus donation is reflected directly in the balance sheet and not the income and expenditure statement of the NPO.

As per the amendment to Finance Act 2017, one NPO or charitable organization may contribute funds to another NPO or charitable organization, but not as a corpus donation or grant.

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In-kind donations (e.g., computers, medicines, relief material, etc.) are not tax deductible under Section 80G. The donation should be a sum of money. Receipts issued to donors by NPOs must bear the number and date of the 80G certificate and indicate the period for which the certificate is valid.

G. Economic Activities (Including Social Entrepreneurship)

For all three legal forms of NPOs, there are no restrictions on an organization's incidental business, commercial, or economic activities, provided that the NPO is established for and primarily carries out activities for the relief of poverty, education, medical relief, preservation of the environment (including watersheds, forests, and wildlife), monuments, or places or objects of artistic or historic interest.

The NPO must maintain separate books of account for business, commercial, or economic activities, and any profits received must be applied fully towards charitable objects. However, an organization that has as its purpose the advancement of "any other object of general public utility" may not generate business income in excess of twenty percent of its total income from donations, grants and other non-business receipts. If the above conditions are not satisfied, the NPO will lose its income tax exemption and its income will be liable to taxation at the maximum marginal rate (thirty percent).

H. Tax Benefits of CSOs

The Income Tax Act 1961 (amended by subsequent Finance Acts) governs tax exemption of nonprofit entities throughout India. The Act provides that organizations may qualify for tax exempt status if the following conditions are met:

- The organization is organized for religious or charitable purposes;
- The organization spends at least eighty-five percent of its income in any financial year (1 April to 31 March) on the objects of the organization. If it is unable to do so on account of late receipt of the income during the fiscal year, it may exercise the option to spend it the following year by filing online Form No. 9A. Unspent income may also be accumulated for specific projects or a capital purpose for a period ranging from one to five years by filing online form No. 10. These Forms must be submitted by 31 August;
- The funds of the organization must be deposited as specified in Section 11(5) of the Income Tax Act;
- No part of the income or property of the organization may be used or applied directly or indirectly for the benefit of the founder, trustee, relatives of the founder or trustee or a person who has contributed in excess of INR 50,000 to the organization in a financial year;
- The organization must file its annual income returns (online in ITR 7) by 31 October as also Audit Report in Form 10B by 30 September;
- The organization's income must be applied or accumulated in India. However, trust income may be applied outside India with the prior permission of the

Central Board of Direct Taxes (CBDT) to promote international causes in which India has an interest (such as disaster relief or cultural exchange) without being subject to income tax; and

- The organization must keep a basic record (name, address, telephone number and Permanent Account Number) of all donors, particularly those contributing more than Rs 50,000 during the fiscal year.
- According to Section 115BBC of the Finance Act (2006), anonymous donations to charitable organizations are taxable. Finance Act No. 2 (2009), however, carves out the following exception: anonymous donations equaling up to five percent of the total income of the organization or a sum of Rs 100,000 (whichever is higher) will not be taxed. Religious organizations, including, temples, churches, and mosques are exempt from the provisions of this section.
- The organization must keep proper books of accounts and preserve records for at least ten years.

Non-religious NPOs must also meet the Income Tax Act's definition of "charitable purpose:" which includes poverty relief; education and yoga; medical relief; preservation of the environment; preservation of monuments, places or objects of artistic or historic interest; and "the advancement of any other object of general public utility." An amendment to these provisions in 2015 placed new limits on the final category (i.e. "the advancement of any other object of general public utility"), primarily limiting the permissible scope of economic activity an NPO may carry out without losing its tax-exempt status. The amendment provides that if an organization conducts even limited business activity, it will not be eligible for tax exemption unless (a) the business activity is undertaken in the course of advancing an object of general public utility; and (b) the aggregate receipts from the business activity during the previous fiscal year do not exceed twenty percent of the organization's total receipts for that year.

In order to obtain tax exempt status, NPOs must file an online application with the Income Tax Department. The form requires extensive details about the organization's activities, modes of funding, any business or trade activities it undertakes, and a guarantee that no income or property is being used to benefit any person associated with the organization. After obtaining a tax exemption, the organization may also obtain section 80G tax deduction certificate, which it may provide to prospective donors.

Foreign NPOs may likewise apply for tax exemption, if they have established and registered a separate legal entity in India (as opposed to a branch or liaison office).

I. Goods & Services Tax

The Goods & Services Tax (GST) Act came into effect from 1st July 2017. This indirect tax law has implications on nonprofits in two ways:

1. As providers of goods and services
2. As purchasers of goods and services

A "taxable person" under GST is a person who carries out any business at any place in India and who is registered or required to be registered under the GST Act. Any person who engages in economic activity including trade and commerce is treated as a taxable person.

"Person" here includes individuals, Hindu undivided families, companies, firms, limited liability partnerships, an association of persons/body of individuals, any corporation or government company, corporate bodies incorporated under the laws of a foreign country, co-operative societies, local authorities, governments, trusts, and artificial juridical persons.

While the definition of "taxable person" under the GST includes a trust, society, or Section 8 company, they should not be treated as a taxable person under GST if they are not engaged in economic activity including trade and commerce.

However, the Authority of Advanced Ruling (AAR) for GST in Maharashtra has ruled that goods and services provided by charitable organizations for a fee classify as supply, making them liable for the GST. Even if a nonprofit is charitable, the GST will be applied on their products if their turnover is more than Rs two million. The ruling further states that all charitable organizations need to register under the GST if their annual turnover from the sale of goods and services is above the threshold of Rs two million (proposed to be increased to four million for goods from 1 April 2019). Therefore, a nonprofit that sells products is liable to register under the GST if its income from the sale of these products is more than Rs two million in any financial year. Similarly, a nonprofit that provides services such as a consultancy service is liable under the GST in the same way.

The burden of paying the GST is on the consumer. However, it does add to accounting and compliance-related costs for the nonprofit.

Certain "charitable activities" as defined under the GST Act are exempt from this indirect tax, regardless of the size of their fee-based turnover.

Unfortunately, the list of "charitable activities" under the GST Act is very narrow and restrictive, and only covers activities relating to:

> (i) Public health by way of:
>
> (a) care or counseling of terminally ill persons or persons with severe physical or mental disability, persons afflicted with HIV or AIDS, persons addicted to

a dependence-forming substance such as narcotics drugs or alcohol;

(b) public awareness of preventive health, family planning or prevention of HIV infection;

(ii) Advancement of religion, spirituality or yoga

(iii) Advancement of educational programs or skill development relating to:

(a) abandoned, orphaned or homeless children;

(b) physically or mentally abused and traumatized persons;

(c) prisoners; or

(d) persons over the age of 65 years residing in a rural area;

(iv) Preservation of the environment including watersheds, forests, and wildlife.

The process of registering and complying (including filing several returns with the regulating authorities) under the GST is laborious, and requires time, money, and skills that most nonprofits do not possess. The burden of GST compliance therefore is quite steep for nonprofits that do not fall under the categories listed above.

Nonprofits registered under Section 12A or 12AA of the Income Tax Act 1961 may be recognized as "tax exempt" by the Income Tax Department. However, the tax exemption is limited to the income of the nonprofit from direct taxation. It offers no exemption from indirect taxes in the form of the GST. For example, if the nonprofit operates from a commercial office space, it cannot use its 12A or 12AA certificate and claim exemption from the GST on the rent.

Similarly, tax-exempt status from direct tax does not offer any cover against the GST while buying products such as computers, laptops, tablets, or a vehicle for a nonprofit's charitable activities.

GST is applicable to nonprofits for all goods purchased or services received. Thus, to a supplier of goods or a provider of services, a nonprofit is just a regular customer or client.

The GST subjects "supply" of certain goods and services, including by NPOs, to an average of eighteen percent.

GST is applicable to nonprofits for all goods purchased or services received. Thus, to a supplier of goods or a provider of services, a nonprofit is just a regular customer or client.

The GST therefore impacts nonprofits on two counts:

1. It imposes an additional compliance burden and related costs, such as the cost of engaging GST consultant or accounting personnel to handle GST-related compliance.
2. There is an additional GST cost factor on goods and services purchased by nonprofits.

AAR RULING ON GST

In November 2021, the Maharashtra Authority for Advance Ruling (AAR) ruled that grants to non-profits are also subject to the GST, raising concerns from both funders and recipient organizations that NPOs would be required to register under the GST. This would constitute yet another compliance burden for NPOs, while potentially forcing donors to pay GST at eighteen percent for services provided by their grantees. Grants are in the nature of a "gift," not a commercial good or service, and the NPO should not be mistaken for a "vendor of commercial services." A grant is a non-commercial agreement between the giver and recipient. The NPO carries out activities (mistaken for "services") according to its charitable objects. The donor too sets terms and conditions (timelines, goals, objects, deliverables) but as a donor. Hopefully a higher judicial forum will understand the finer nuances of this matter and set aside this ambiguity.

XIII. CONCLUSION

About twenty years ago, Dr. Lester M. Salamon, former Director, and Dr. Helmut K. Anheier, former Associate Director of the Johns Hopkins Comparative Nonprofit Sector Project, conducted a detailed research study to understand the scope, structure, and role of the nonprofit sector in twenty countries, including India, using a common framework and approach.

In the year 1997, the first ever sample survey of the size of the non-profit sector in India placed the number of voluntary organizations at 1.2 million. These organizations involved as many as 19.2 million people, many of whom worked on a voluntary basis. This was equivalent to 2.7 million paid employees and 3.4 million full-time volunteers, a total of 6.1 million which is considerable given the fact that central government employees numbered only 3.3 million in 2000. Contrary to popular perceptions, as much as fifty-one percent of the receipts were self-generated, and only thirty-six percent came from the government as grants and loans, with a mere seven percent from foreign sources.

Reportedly, this study on the voluntary sector in twenty countries led the United Nations to formulate the Millennium Goals, since replaced by the Sustainable Development Goals, demonstrating the United Nations' focus and valuing of voluntary organizations. However, voluntary organizations are still not sufficiently valued domestically.

The voluntary sector in India does not simply fill gaps in the government's service delivery system. As this study indicates, the voluntary sector contributes to the country's GDP and is a major provider of livelihoods to millions. The sector has grown exponentially in the past two decades. There is a need for a detailed study to measure the depth and magnitude of its work in order to tell the story of the voluntary sector more convincingly and positively to government and other stakeholders.

Just as the press is recognized as the Fourth Estate, voluntary organizations should be recognized as the Fifth Estate. Government should know (through reliable facts and figures) that "voluntary organizations go where market solutions don't go."

The Preamble to the Constitution of India lays down a vision for India's progress based on the values of justice, liberty, equality, and fraternity. In both pre- and post-independence India, social progress has been led by civil society institutions and not by the state. Nonetheless, Civil Society Institution/Organization (CSI/O) as a term has been neither defined nor recognized under the Constitution of India. Similarly, "charity" is a subject on the State and Concurrent list, but not CSO or CSI. "Cooperative Societies" was included under Part IX-B and inserted by the Constitution (97th Amendment) Act, 2011, with effect from 15 February 2012. It is now time that not-for-profit educational, healthcare, cultural, environment, sports, and social enterprises be brought under the ambit of Civil Society Institutions/Organizations and receive recognition under the Constitution of India.

Civil society is the glue that binds public and private activity together to strengthen the common good. Civil society in all its forms has an important role in holding all stakeholders, including itself, to the highest levels of accountability. Civil society is all about "collective private action for public good" and includes the spectrum of collective action from grassroots movements and community groups to research organizations, think tanks, structured philanthropies, non-profit organizations and social enterprises.

The State should strive to enable civil society institutions to promote the welfare of the people in India. The State should also establish mechanisms to consult, fund and collaborate with CSI/CSOs. A National Commission on Civil Society Institutions should be established and made answerable to Parliament.

While corporate laws have seen significant reform aimed at simplification, improving transparency and governance, and bringing laws in line with global trends, civil society laws have not seen similar reforms. While the national *mantra* is "ease of doing business," no one seems to be talking about the "ease of doing 'good.'"

Thus, while business startups receive a number of benefits, CSO startups face a number of obstacles under the FCRA and CSR law. Instead, government should play the role of an enabler and empowering agency.

Any effort to bring more rationality and consistency to the sector must rationalize and streamline registration, clearly differentiating between types of organizations, including clubs, associations, service delivery organizations such as schools, colleges, hospitals, development NGOs, campaigning/advocacy organizations, grant-making organizations, research organizations, think-tanks, social enterprises, and the like. Membership-based organizations like trades union and co-operative societies, among others, also need to be clearly differentiated, as do religious institutions.

Suggestions & Recommendations

Based on the above analysis, as well as multi-stakeholder discussions (including a broad range of civil society organizations, donors, academics, policymakers, and thinktanks) held in Delhi, Bangalore and Mumbai in 2018, 2019, and 2023, the following recommendations are put forth for consideration and further action:

- Service delivery organizations (SDOs) should be considered separately from large universities, hospitals, and organizations with political leanings etc.
- NPOs should avoid the "victim" or "savior" syndrome.
- There is no need to add laws or more compliance requirements, as the government has enough powers to investigate those it believes are not transparent enough through Comptroller Auditor General (CAG) and CBI agents.

- The Ministry of Home Affairs should consider constituting an appellate authority (like the Income Tax Appellate Tribunal) to address FCRA-related grievances.

- When granting tax exemption certificates, the Income Tax Authority should specify under which category of "charitable purpose" it has recognized the NGO: education, medical relief or any other object of general public utility.

- "Approval *Raj*" (raj meaning "regime"), "Inspector *Raj*" and "License *Raj*" are detrimental to the growth of the sector.

- The government listens to the corporate sector because it perceives companies as "contributing" to the country's economic growth, whereas the government erroneously perceives NPOs as contributing to dissent and thwarting growth, development, and progress. This inaccurate perspective needs to be changed through facts and data in terms of what NPOs are contributing to nation-building. Only then will NPOs be in a position to seek parity with the corporate sector.

- The government should understand that not all NPOs are advocacy organizations, who constitute only a tiny segment of the overall sector. Most NPOs are service delivery organizations.

- The government often questions what "public good" CSOs do apart from voicing dissent. However, the government should understand and accept that dissent itself is a public good in a democracy. Advocacy and free expression are integral to democracy.

There is clearly a need to collectively design new solutions to societal challenges. Civil society has a particularly powerful role to play in this process as an enabler and constructive challenger, creating the political and social space for collaborations that are based on the core values of trust, service, and the collective good. Both government and civil society urgently need to work together to build institutional relationships based on mutual trust and a shared vision.

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