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India

LAWS AND REGULATIONS FOR THE VOLUNTARY SECTOR IN SOUTH ASIA: "THE INDIAN SCENARIO"

Ms Upala Devi

PREFACE:

The Voluntary Sector and its discontents:

A prefatory comment on the role of NGOs outside their incarnation as legal entities, recipients of funds and claimants of tax deduction is needed. In this context, the pivotal role of NGOs needs to be specially understood.

One might consider the following:

a) The age-old distinction between civil and political society has been over-written in favour of the later. Political society stalks over India, leviathan-like in its posture and full of disease in its body politics. Given the relative collapse of the formal institutions of democracy, political society is riddled with a lack of accountability and democratic sensitivity. Political parties have no financial accountability and do not observe even the legal accountability which is ordained by their constitutions -- much to the chagrin of Mr T.N Seshan, the Chief Election Commissioner , who, in the Janata Party Case (1994), reminded them of their legal accountability. Elections - rather than day-to-day accountability - signal the temper and tone of Indian democracy.

What holds Indian democracy in place is not political but civil society. It is the campaigns fought by ordinary people in ordinary locations which sustain the struggle for democratic justice.

b) What holds Indian democracy in place is not political but civil society. It is the campaigns fought by ordinary people in ordinary locations which sustain the struggle for democratic justice. Yet, the complexity of modern democracy requires some of this activity - though not necessarily all of it - to take the form of institutions which can be the repositary of knowledge, power and initiative which can partake of democratic discourse, strengthen its content and make "people" and not just politicians the spokespersons of Indian democracy.

c) Over the past few years, we have seen that NGOs (or Social Action Groups (SAGs)) have moved from the "welfare" model to the "activist" model. The welfare model is founded on notions of marginality: the welfare-oriented SAGs were suppossed to supplement the shortcomings and shortfalls of the State programme. But, as the programmes became more entropic and misdirected by corruption, the "welfare" model had to transit into an activist mode (which, in its best form) provided avenues for people to fight for their claims of justice. Unfortunately, so much of our laws and policy continue to be based on the concept of "welfare" rather than by activism. An example of this is the "tax" definition of charity which is based on an old English decision of 1894.

d) What is equally significant is the fact that "politicians" and the "State" have been very wary of NGOs. The State has tried to:

i) squeeze the SAG movement into the neat legal categories;

ii) build in forms of accountability which has less to do with the internal democracy that a SAG owes to itself and more to do with the insidious oversight which the State wishes to impose on NGOs. This is self-evident from the manner in which the Foreign Contribution Regulation Act (FCRA) rules are operated and which strikes terror within SAGs over small niggly details — which often brings their operations to a halt (an example of this was the blitz-krieg against SAGs in the mid-eighties);

iii) control of the flow of State funds in ways that suffer a sense of disaster for notions of public accountability (an example of this is implicated in the recent controversies over the distribution of funds by an Indian government body, Council for the Advancement of Rural Technology (CAPART); and,

iv) control the flow of both "indigenous" and foreign funds inways which make the State much too crucial a decision-maker in respect of the flow of funds.

Oversight and control rather than democratic accountability and the opportunity to breathe are countenanced in every aspect of the working of the apparatus of control.

e) The legal form of SAG activity is sought to be placed within the legal categories of "trusts" (under the Trusts Act), "societies" (under the Societies Registration Act, 1860), "corporations", and the like.

But, much public activity takes the form of "unincorporated associations", i.e. people getting together to do things a) whether spontaneously b) as part of a short-term or long-term campaigns c) as platforms which get

people together — trace their strength and pedigree to such a coming together of people. These activities go back to the campaigns of Gandhiji and Ambedkar (and let us spare the cynicism of today) and traces their strength and pedigree to such a coming together of people.

The "law" with its typical lack of imagination for the free flowing of democratic forces fails to recognise this fundamental life-force of – and, indeed, any form of Indian democracy.

INTRODUCTION:

The Revolt of 1857, variously described as the "Sepoy Mutiny" and the "First War of Independence", caught the British Imperial law and order machinery in India by surprise. After the rebellion was crushed with an iron hand, an analysis of how it happened led to what was an amazing discovery for the British Government! The colonial masters realised that the intellectual underpinings of the rebellion came from the numerous arts and culture societies that had sprung up in India in the middle of the nineteenth century. To their utter horror, analysts discovered that most of these societies served as front organisations for radical elements attempting to free India of the British yoke. Thus, two years after the rebellion was put down in 1858, the Societies Registration Act of 1860 was born -- a provision that required all associations of 7 or more people to be formally registered with the government. This Act was modelled after the English Literary and Scientific Institutions Act, 1854, and it was hoped by the British Government that it would be able to monitor and prevent the proliferation of insidious activities.

India became a free country in 1947. However, it remains an abiding irony that even a century and a half later, the Government of free India uses the same provision - the Societies Registration Act, 1860 - to monitor and control the formation of service-oriented non-profit voluntary organisations. In fact, at present, the provisio has been fortified using additional legislation like the Public Trust Act, the Foreign Contribution Regulation Act (1976) and the Income Tax Act (1961). These Acts have contributed a great deal in making the problems faced by voluntary organisations in India more back-breaking and tedious. Various provisions in each of these Acts have proved to be major hindarances in the effectiveness of work carried out by non-profit voluntary organisations. In fact, the manner in which these laws operate have led to a chequered relationship between the Indian Government and the voluntary organisations.

This India report, prepared for the South Asian conference on the "Laws and Regulations for the Voluntary Sector in South Asia" aims to identify and review the major provisions and policies in each of the above-mentioned Acts which have proved to be irritants/constraints in the functioning of the voluntary sector in the Indian scenario. It also aims to suggest appropriate amendements/changes in the laws and regulations governing the voluntary sector. Moreover, it seeks to mobilise voluntary organisations to exert pressure on the Indian Government to review the existing Acts and

suggest appropriate amendments, changes and removals as and where required. Such a redressal of grievances of the voluntary sector by the Indian Government would provide the much-needed succor which has been sadly lacking in the Indian voluntary scenario since 1860, when the first Act came into force.

Various recommendations have been suggested at the end of each Act. It should be borne in mind that these recommendations are purely based on the understanding of the Acts by the author and through discussions with other experts on the subject.

THE SOCIETIES REGISTRATION ACT AND THE PUBLIC TRUST ACT :

The Societies Registration Act, 1860 and the Public Trust Act was set up to register organisations working in the literary, scientific and charitable fields. The Preamble for the Societies Registration Act states that "Whereas it is expedient that provision should be made for improving the legal condition of societies established for the promotion of literature, science, or the fine arts, or for the diffusion of political education or for charitable purposes". But, what the Societies Registration Act as well as the Public Trust Act fails to recognise even in the present context is that they do not cover organisations working in the area of developmental support and activities. Thus, at present, there is no seperate legislation under which voluntary organisations working in the field of developmental activities can register themselves.

Moreover, the nature of voluntary developmental work and their activities has changed significantly since the inception of the Societies Registration Act and the Public Trust Act. Developmental organisations now encompass a wide-ranging field of activities and includes designing and implementing innovative developmental programmes in various sectors of development. It also includes work in the various areas of research, reporting, documentation and training to support grass-root initiatives and also involves high technical and technological outputs. But, the Societies Registration Act, which was initially conceptualised as a membership entity for professional and faternal associations dealing in areas of literature, charity and science, has been used in recent years for entry of development implementing agencies.

A survey of other existing Acts - the Indian Trust Act (1882); the State Trusts Acts in Maharashtra, Gujarat and Madhya Pradesh; and, the West Bengal Societies Registration Act (1861) - also shows that there is no legislation enabling entry of developmental organisations. The Indian Trusts Act covers private trusts and trustees and was historically created for putting in trust property which could be used for public purposes. It was also passed to define and amend the law relating to private trusts and trustees. As such, it is inappropriate for dealing with developmental organisations. Similarly, the West Bengal Societies Registration Act and the State Acts of Madhya Pradesh and Maharashtra deal specifically with issues related to public trust, with an emphasis on the religious, scientific, literary and charitable fields.

The nature of voluntary developmental work and their activities has changed significantly since the inception of the Societies Registration Act and the Public Trust Act

Restrictions and Difficulties Under the Existing Acts for Voluntary Organisations: There are severe restrictions and difficulties in operation under the existing framework. These restrictions exist both in the legal and operational fields.

In the *legal* field, the difficulties which exist are manifold, since these Acts do not contain any legal provisions under which developmental organisations can come into operation. Thus, the operation of these Acts are not designed to cover their activities.

In the area of *administrative* or *operational* activities, several difficulties arise and these are illustrated as follows:

a) Registration:

1. Some registering organisations find faults with the existing Memorandum of Association, which is basically the charter of a society and sets out its constitution. Its main purpose is to enable the members who deal with the society to know what its permitted range of enterprise is. It should be made obligatory that whatever faults the members find and raise with the Memorandum of Association should be challenged formally.

2. Another difficulty arises in clearing the "name of the society". The sponsors are asked to give affidavits that the name proposed by them does not already exist. In the absence of such an affidavit, the registering authority takes its own time to write to various officers. Administrative backlogs and redtapism in India ensures that such a process takes a long time. This process can be simplified through computerisation of records and fixing a time limit within which, objections, if any, should be reported.

3. The process of registering of an organisation, as mentioned above, takes a very long time. In Delhi, for instance, this can take upto a year. The process is also not helped much due to inefficiency and corruption. It, therefore, becomes necessary that a time limit should be ensured (60 days), within which period the documents and other details necessary for registration should be furnished by the society. These requirements should be clearly published and made uniform in all the Indian States.

b) Operations:

In India, legislation on registration of societies or regulation of trusts confers extensive powers on the registering authorities under which they call upon the societies to submit reports, records, furnish details of accounts and seek unlimited information on operational details. Such activities hinders the working process of voluntary organistions and subjects them to unnecessary harassment. It is absolutely imperative that only such information which is relevant for government purposes and

necessary for the authorities to perform their duties entrusted to them under the Acts are called for from voluntary organisations.

2. In some Indian States, it is necessary that operating societies seek fresh registration at the end of a specified period (in this instance, five years). This piece of legislation is not provided for in the Central Legislation and is a source of unnecessary harassment and expense for the societies. In fact, in some states like West Bengal and Uttar Pradesh, NGOs have to register each year! Such a periodic re-registration of societies should be abolished. Moreover, action can be taken by the authorities against any society which engages in malpractices. Thus, it is not imperative for organisations to provide and furnish bonafides every five years or at the end of a specified period of time.

3. Submission of an audited statement of accounts entails a lot of expenses and other problems, especially for small, rural and remote organisations which cannot employ trained accountants and auditors to submit their accounts. It would be helpful if such an obligation is limited to bigger organisations which have more resources at their disposal. For smaller rural and remote organisations, the office bearers may themselves attest the accounts, take responsibilty for their veracity and submit them to the prescribed authorities.

4. In India, politics assumes different hues and colours from State to State. At times, registering authorities get involved in dealing with disputes in the election of office bearers of a particular society or the other. Since these office bearers may belong to a different political party from the one the registering authority belongs to, it imparts a political hue to the whole process. It should be laid down that election disputes be settled by Civil Courts and not by the registering authorities, who, at the local level, tend to be biased in favour of ruling politcial parties.

5. Various States have different provisions relating to payment of salary/ honorarium to members of the organisations and societies. It is necessary to adopt a uniform policy in this regard and adopt safeguards to prevent abuse and mismanagement of allotted funds.

c) Provisions to Deal with Extreme Cases:

1. The Societies Registration Act and the Public Trust Act contains certain legislations to deal with extreme cases. The nature and severity of these legislations vary from State to State. But, there are some aspects on which a common national policy is clearly required. For instance, in the South Indian State of Tamil Nadu, a current legislation exists by which management of a registered society can be taken

over by the State Government through a designated officer who is not necessarily a public servant. On the grounds of political considerations, such a legislation is objectionable. While there is no objection of a State Government taking over a society in extreme cases of misuse, such a legislation is objectionable on the grounds that there should be no provision for an officer to take over any such society. Experience has shown that such provisions applicable to local bodies and cooperatives has not yeilded satisfactory results. It is a fervant wish that such an experience does not overtake voluntary agencies.

2. A uniform policy throughout India is also necessary by which powers of dissolution of a registered society can be vested in Civil Courts rather than in the registering authorities, who often act under politcial influence and personal bias and tend to impart a partisan hue to the whole process.

3. A very important aspect on which legislation specifically needs to be framed is in the area dealing with developmental organisations. This is absolutely imperative on the ground that the existing legislations only deal with societies who are engaged in cultural, literary, charitable and scientific work. Such a proposed legislation should be national in scope and leave enough scope for the State authorities to formulate their own legislations, provided such legislations do not contravene the provisions of the Central Legislation and that nothing should be introduced in the State Legislation that is inconsistent with the spirit of the Central Legislation. Such a proposed legislation will cover the three main aspects of registration,operations and management of extreme situations including cancellation and dissolution.

Registration under the proposed legislation should be voluntary in nature and confined to developmental organisations.

Recommendations:

Registration under the proposed legislation should be voluntary in nature and confined to developmental organisations. These voluntary organisations should be broad-based in its field of operations and satisfy the requirements of public accountability and social audit, especially in terms of how the organisations are managed and the funds are utilised. Specific guidelines for these purposes should be spelt out in the Central Legislation, after prior consultations with the voluntary sector. In case of grass-root organisations, the procedures for evolving and ensuring public accountabilty may take a local shape. Public disclosures and local relevance can be ensured, for instance, by sending statements of accounts and annual reports to a local body. In the case of state or national-level organisations, other provisions can be thought of. For instance, priviledges and concessions under relevant provisions on taxation, on receiving foreign funding, etc., should be made available automatically or after satisfying minimum procedural requirements. Such requirements should be transparent and easy to comply with. All of the above is

absolutely imperative since the invaluable work of voluntary organisations strengthens the demand for it to be distinguished from other organisations and hence, seperate legislations should exist for them under the Societies Registration Act.

FOREIGN CONTRIBUTION REGULATION ACT,(FCRA) 1976:

Throughout the world, the receipt of funds from foreign sources for religious, educational, cultural, scientific and other kindred purposes has been an accepted and widely prevalent practice. Such funds have helped build and establish institutions of repute for constructive and laudable purposes. But, in recent years, many a doubt has surfaced as to the manner in which funds recieved from abroad have been utilised. In India, the media abounds in stories of diversion of funds received from abroad for other purposes other than the ones mentioned above. Thus, the Foreign Contribution Regulation Act was introduced as a Bill in 1973. After closer scrutiny, the Bill became an Act by the Joint Select Committee of Parliament in 1976. Basically, this Act was an excess of the Emergency, aimed at crippling Gandhian institutions which supported Jayprakash Narayan's movement against the former Prime Minister, Mrs Indira Gandhi. This Act contains salient provisions designed to ban receipt of foreign funds by certain specified individuals/associations/ organisations/acceptance of foreign contributions / hospitality / by persons occupying important positions in public life. Prior permission for receipt of foreign contributions and to enjoy foreign hospitality and maintainence of proper records and accounts by organisations are stipulated in the Act, so as to facilitate the verification of the source, the amount received and the manner of spending of the funds received.

Due to certain shortcomings and practical difficulties in the operation of the Act, the Indian Government brought about comprehensive amendments to the Act in 1984. The amendment seeks to enlarge the defination of "Foreign contribution" so as to include contributions received by an organisation from foreign contributions received by another organisation; enlarge the definition of the term "political party" so as to include political parties in the State of Jammu and Kashmir and political parties not covered by the Election Symbols (Reservation and Allotment) Order, 1968; impose the condition of prior permission of the Central Government by certain organisations which fail to file timely returns or file false returns; empower audit of accounts by gazatted officers in order to ensure propriety of receipt and use of foreign contributions obtained by certain associations; and, to include a judge and a government servant for purposes of the ban on receipt of foreign funds under Section 4 and for other purposes of the Act.

In its totality, the Act stipulates that it is :

"An Act to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations with a view to ensuring that parliamentary institutions, political associations and

academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic, and for matters connected therewith or incidental thereto".

Some of the sections which are of relevance to the voluntary sector are:

Section 2 (c) defines the term "foreign contribution";

Section 3A deals with the procedure for application of registration;

Section 4 (a) states the term under which foreign funding is given;

Section 6 (1) defines the type of organisations which are entitled to an FCRA;

Section 8 (b) and 8 (2) deals with accounts which are to be maintained, exclusively for foreign contribution recieved and utilised and yearly accounts which are to be duely certified by a chartered accountant; and,

Section 11 (1) deals with prior permission of the Central Government by an organisation who wants to obtain foreign funding.

Certain provisions of the FCRA are totally opposed to the functioning of voluntary organisations in India, so much so that day-to-day Functioning of voluntary organisations becomes problematic

However, certain provisions of the Act are totally opposed to the functioning of voluntary organisations in India, so much so that day-to-day functioning of voluntary organisations becomes problematic. Some of the basic problems encountered by voluntary organisations in the wake of the FCRA are as follows:

a) Registration:

At present, the procedure of registration for an FCRA states that non-governmental organisations have to send in an application made in Form FC-8, alongwith the details required as per Rule 3A of the Act. However, the Indian government has not stated any time limit for the disposal of such applications, so much so that in certain cases, disposal has not been given even after three years. Voluntary organisations are also refused registration at times on the ground that they are too new to be registered under the Act. There have been instances when voluntary organisations then apply for grants from various governmental departments and are refused on the grounds that they lack a minimum of three years experience essential for obtaining such a grant!

At times, government discretion also allows certain new organisations to be registered while older organisations, who have applied before, are relegated to queing up in the sidelines.

It has been often seen that certain factors operate when an organisation seeks registration under the Act. Government indifference and arbitrariness is just one of the factors. For instance, the South Asia Human Rights Documentation Centre, based in New Delhi, has applied for an FCRA but has never been granted one, though suitable reasons for its denial has never been provided by the Home Ministry. Police enquiries, harassment and corruption by offcials dealing with the registration are some of the other factors.

Delays in sending replies as also a lack of well-defined criteria and procedures in selecting, accepting and rejecting registration forms are some of the serious problems Indian voluntary organisations face while applying for a registration.

b) Prior Permission:

In the aspect of 'prior permission', voluntary organisations face some major hurdles. At times, applications for prior permission are rejected by the authorities without any reason. Some are granted prior permission for only a part of the total amount applied for. There have been instances of prior permission been granted for the first instalment and long delays involved in securing the second or even being faced the risk of rejection.

Evidences, at present, show that the department dealing with FCRA are not utilising any set criteria or procedure in systematically scrutinising applications recieved for prior permission.

c) Reporting:

The revised FC-3 form stipulates several heads of expenditure for purpose-wise utilisation by voluntary organisations, eg., rural development and agriculture. Recently, the FCRA authorities have started sending notes to certain organisations, asking them to clarify what is meant by "rural development"! It is indeed ironical that when the Home Ministry has itself made the categorisation, it should again ask organisations to define those very categories!

Form FC-6 is so designed that the filing of the same is quite cumbersome.

Moreover, several organisations, in the past few years, have recieved instructions from the Home Ministry that it should send "nil" reports of Form FC-3, even if those organisations have not recieved any grants in that year. This has never been stipulated either in the Act or in the Rules.

d) Bank accounts:

FCRA states that any organisation recieving foreign grants should do so in only one approved bank account. This, in itself, creates problems. Many agencies work in remote corners, away from the headquarters. Thus, for the parent organisation to transfer funds to its agencies' bank accounts proves to be a herculean task considering the fact that cash payments in excess of Rs 10,000 cannot be made to other bank accounts standing in the name of the organisation. It is time that the Ministry realises that operating from one specific account for all transactions creates insurmountable problems.

It is imperative that an organisation which has different agencies working in various places should be allowed to operate with their own accounts since funds are required at short notice at times and these cannot be dispersed from a centralised account.

e) Cancellation:

Furthermore, voluntary organisations often run the risk of their FCRA being cancelled. Several

cancellations have been reported, either in "public interest" or for those orgnisations which are being construed as being of a "political nature". Sometimes, complaints against an organisation to the FCRA authorities by disgruntled persons may also result in such cancellations.

f) Intimidation and Harassment:

The Home Ministry often requests the Intelligence Bureau (IB) to investigate organisations and report back. Generally, the IB sends a lower staffer such as a constable, for such investigations. Reports have been recieved from various organisations in which it has been categorically stated that harassment and threatening has become an open game, specially if the organisations do not concede to the demands made by the investigating authorities. Failure to concede to these demands leads to negative and distorted reporting by the investigating authorities to the Home Ministry.

g) Reporting of Bank Interest:

There have been instances of voluntary organisations recieving threatening letters from the Home Ministry to report bank interest earned by an organisation. However, bank interest is not foreign exchange earned under the definition of the Act and therefore, is not subject to reporting. Though the FCRA authorities had agreed to scrape this demand way back in 1988-89, it has since, cropped up again.

The FCRA and its jurisdiction should fall under the Finance Ministry and not under the Home Ministry

h) Staff Salary and Administration:

Certain objections are raised by the Home Ministry about the way in which the funds recieved have been utilised by the organisations concerned. One organisation was told not to spend more than a certain percentage of its funds on staff salary and programme administration. Yet another was told that the level of expenditure incurred by them is too high! Such observations are clearly beyond the purview of FCRA scrutiny since any organisation is entitled to spend the funds recieved from the donors for the activities specified by them.

Recommendations:

Judging from the above, it can be clearly seen that major hurdles exist in the way of recieving foreign funding by Indian voluntary organisations. Hence, the following recommedations are necessary:

1) In the area of registration, voluntary organisations are of the opinion that any application for registration referred to in sub-section (1) of Section 6 made in form FC-8 should be disposed of within 90 days of reciept and an extended period of 30 days. Within the expiry of such a period, the application will be deemed to have been granted by the central government. In case of rejection, reasons for the same should be clearly stated in the communication.

2) In the case of prior permission also, the above recommendations are applicable.

3) It is absolutely essential that operative freedom be granted to open and operate subsidiary accounts into which foreign contribution originally credited into the approved account are transferred. This should be made operational unless the concerned organisation agrees to receive funds only through one of the branches of a bank as it may specify in its application for such registration. It is also necessary to mention in this regard that the FCRA and its jurisdiction should fall under the Finance Ministry and not under the Home Ministry.

4) The Home Ministry should clarify with a ruling that interest earned out of foreign funding need not fall under the purview of income tax returns.

5) The FC-3 statement, which is currently send to the Home Ministry within 60 days of the closure of the year, should be extended to seven months. This is imperative because of operational difficulties in submitting such a statement in such a limited period of time.

6) At times, NGOs have to utilise local funds to meet their needs until the next batch of funds arrive. It is suggested that the Government allows such a temporary deployment of local funds to carry on the programmes uninterrupted, provided such transactions are recorded in the cash books and ledger accounts and scrutinised by auditors.

Indian laws allow any person abroad to send remittances to an Indian citizen and such remittances now exceeds US$ 6 billion a year. Apart from this, the havala market handles billions more. These are the unchecked conduits used by dubious characters and which the law and order machinery needs to check upon. FCRA has only prevented genuine NGOs from getting funds and has enabled FCRA authorities to extract enormous bribes. It has been seen that voluntary organisations in India are facing tremendous problems due to the FCRA and all that it espouses. In fact, this Act is the most stringent among all the Acts and has caused great operational diffficulties to many an organisation. As Mr Ravi Nair, Executive Director of the South Asia Human Rights Documentation Centre states "even if our organisation is granted an FCRA, we still will not be free from its shackles". This statement goes a long way to prove that this Act indeed has some major defects and needs to be rectified so that voluntary agencies in India can carry on their work unhindered.

THE INCOME TAX ACT, 1961:

The financial difficulties following the Sepoy Mutiny in 1857 brought the law of taxation on income to India. After a few experiments, the year 1886 made Income Tax Law a permanent guest to this country. This Act was replaced again due to financial difficulties of the World War I by a more rigorous 53-section act of 1918. Super-tax was levied by the Super-tax Act of 1917, later replaced by the Super-tax Act of 1920. These two acts, levying income tax and super tax, were replaced by a consolidated act, the Indian

Income Tax Act, 1922 (XI of 1922). After gaining political independence in 1947, the ruling party in India felt the ever-increasing need for money. It was also felt that too many amendements and changes had made the 1922 Act an oddly compact piece of legislation which needed replacement. The matter was referred to the Law Commission in 1956. Two years later, the Law Commission submitted, on 26 September 1958, its Twelfth Report icorporating the Bill of a new Act. The Direct Taxes Administration Enquiry Committee constituted in 1958 under the chairmanship of Sri Mahabir Tyagi also considered the matter. Ultimately, the Income Tax Bill, 1961, successfully came out of the legislative anvil and the Income Tax Act, 1961, recieved the assent of the President on 13 September, 1961, to come into force from 1 April 1962, replacing the 1922 Act.

The Income Tax Act, 1961, was a turning point in tax laws. One of the many provisions of the Income Tax Act, 1961, was to recognise "charitable and religious organisations" and exempt the same from payment of income tax through the regulation of certain provisions and rules. Greater restrictions were imposed for eligibility of tax exemption for charities by the Finance Acts 1966, 1970, 1972; Taxation Laws (Amendment) Act 1975; Finance Acts, 1976, 1977, 1978, 1979, 1980, 1981, 1983, 1984, 1985 and the Direct Tax Laws Amendment Act, 1987. Some of these amendments are of great importance and in this connection, the submission of the interim report of the Chokshi Committee (December 1977) assumes significance. This report stated that "the provisions relating to the assessment of charitable and religious trusts are one of the most complicated group of sections in the Income-Tax Act. What was originally designed as a simple provision for totally exempting from tax the income of a charitable trust has, over the years, become a veritable maze of sections, provisions and explanations, with the result that neither the Income-Tax officer nor the tax practitioneer (not to speak of the hapless trustees of the charitable trust) is able to say with assurance what the law is at any particular point of time".

The main provisions of the Income Tax Act, 1961, relating to taxation of charitable and religious trusts are encompassed principally within sections 11, 12, 12A and 13.

The main provisions of the Income Tax Act, 1961, relating to taxation of charitable and religious trusts are encompassed principally within sections 11, 12, 12A and 13. Section 2(15) deals with the definition of the Act. This states that "charitable purpose" includes "relief of the poor, education, medical relief and the advancement of any other object of public utility not involving the carrying on of any activity for profit". Section 11 is the main section and it exempts under certain conditions, the income of public charitable or religious trusts. Section 12 deals with the income from voluntary contributions. Section 12A contains conditions as to registration of trusts, etc. Section 13 provides exceptions to section 11. Apart from these, certain other sections also have a specific bearing on charitable and religious trusts. These are sections 2(24)(iia) read with sections 13(3)(d), 10(21), 10(22), 10(22-AO, 10(23), 10(23-A), 10(23-B), 10(23-BB), 10(23-BBA), 10(23-C)(iv) and (v), 35, 60 to 63, 80G, 104(2)(iii), 139(4A), 164(2&3) and 165, 236A and 271(1) (i) (a).

Section 80G assumes special significance since the donors making contributions to charitable trusts or institutions are vitally interested in securing income-tax rebate on the donations made to the trust funds under this section. Trusts which are charitable in nature can secure income-tax exemptions for donations to trust funds on the fulfilment of certain conditions. In computing the total income of a donar, 50 percent of the amount of donation to the trust fund is deductible in computing his total income. There are certain special types of funds or trusts which are not required to fulfil any special conditions and entitle the donors to get a deduction under section 80G. These are the National Defence Fund, the Jawahar Lal Nehru Memorial Fund, the Prime Minister's Drought Relief Fund and a few others. In addition to these trusts and funds, it is laid down that donations to any other fund or institution to which section 80G 2(a)(iv) applies also qualify for deduction. Sub-section (5) of section 80G lays down the conditions on the fulfilment of which donations made to such trusts are eligible for deductions at 50%.

However, one of the major drawbacks of this Act is that it fails to recognise the fact that there are a category of voluntary development organisations in India which are not engaged in religious and charitable works but are engaged in developmental programmes. Thus, a need has been felt to distinguish such organisations from the category which recognises religious and charitable organisations.

Amendements: As mentioned above, several governmental amendements have been carried on in this Act from time to time. Of these, the most noteworthy ones are:

In *1983*, the *Finance Act* undertook several modifications to this Act. Section 2 (15) of the Act underwent a sea change by the deletion of the controversial words "not involving the carrying on of any activity for profit". Section 2 (15) thus read: "charitable purpose includes relief of the poor, education, medical relief and advancement of any object of general public utility". The Finance Act, 1983 also inserted a new sub-section (4A) in section 11 of the Income-tax Act, 1961 to provide that the provisions of sub-section (1) of that section relating to exemption of income derived from property held under trust for charitable or religious purposes, or of sub-section (2) thereof relating to accumulation or setting part of such income for application to such purposes, or the connected provisions of sub-section (3) and (3A) of the said section will not apply in relation to profits and gains of business. The provision would apply irrespective of whether the profits and gains are derived from a business carried on by the trust or institution or from a business undertaking which is held under trust for such purposes. The following exceptions were, however, made in relation to profits and gains of business in respect of charitable and religious trusts:-

1. Where the business is carried on by a trust wholly for public religious purposes and the business consists of printing and publication of books or the business is of a kind notified by the Central Government in this behalf in the official Gazettee;

One of the major drawbacks of this Act is that it fails to recognise the fact that there are a category of voluntary development organisations in India which are not engaged in religious and charitable works but are engaged in developmental programmes

2. The business is carried on by an institution wholly for charitable purposes and the work in connection with the business is mainly carried on by the beneficiaries of the institution.

A common essential condition is that separate book of accounts must be maintained by the trust or institution in respect of a business, the income of which is desired to be exempted.

It may be noted that in consequence of the new provisions made in sub-section 4-A of section 11, clause (bb) of section 12(1) of the Income-Tax Act, (which restricted the exemption of business income in the case of charitable trusts and institution for the relief of the poor, education or medical relief, only in case where the business is carried on in the course of the actual carrying out of a primary purpose of the trust to institution) has been omitted.

The above amendment would take effect from 1st April, 1984, and will accordingly, apply in relation to the assessment year 1984-85 and subsequent year. It is relevant to note that the provisions of new sub-section (4A) of section 11 do not override the provisions of section 10 of the Income-Tax Act, and as such profits derived by any trust, institution, association etc. referred to in clauses (21), (22), (22A), (23), (23B) (23BB) and (23C) will continue to be exempted from income-tax.

It is submitted that both on principle and as a matter of policy, it would have been unfair to charitable trusts and institutions not to be allowed to generate some funds by carrying on bonafide business with the help of or for the benefit of their benefits. Making a charitable trust or institution totally or mainly dependent on charities for running their affairs and achieving their objects is certainly not desirable in a welfare state. These amendments were, therefore, quite proper and welcome. It was however noticed that the concession regarding the carrying on of business by a trust wholly for public religious purposes was limited only to the business or printing and publication of books.

The above amendments pertaining to business being carried on by trusts limited to only publication of religious books were subsequently withdrawn and the original provisions relating to business being carried on to achieve the objectives of the trust or institution were reverted to.

This Act also made some minor modifications in section 13 of the Income-tax Act, 1961 through clauses 5 and 6.

According to clause 5, sub-clause (a) which seeks to amend sub-section (1) of section 12, if any funds of a charitable or religious trust or institution are invested or deposited in any forms or modes other than those specified in sub-section 5 of section 13, such trust or institution will forfeit exemption from income-tax for the assessment year 1982-83. The effect of this amendment will be that charitable or religious trusts or institutions would forfeit exemption from income-tax for failure to comply with the provisions of sub-section 5 of section 13 only in relation to any assessment year commencing on or after 1st April 1983.

The Act, however, was indeed a landmark in plugging loopholes in the provisions relating to charitable and religious trusts which was used more and more as a medium for tax avoidance, accumulation of wealth and means of patronage.

The *Direct Tax Laws (Amendement) Act, 1987*, and passed by the Parliament in December 1987, also made several important changes to the Income Tax Act, 1961, in respect to voluntary agencies. These are:

1. Under the new amendments, all institutions, charitable organisations, trusts, voluntary organisations and commercial organisations are required to have their financial year from April to March. This uniformity is brought out for the whole country.

2. For the income of a voluntary agency to qualify as non-taxable, certain conditions were laid down:

   a) Audited accounts are to be available in respect of organisations having gross total income of more than Rs 100,000 during the year.

   b) The income tax authorities have been given powers to add other conditions, including the powers to appoint their nominees on the governing body of the voluntary agencies.

3. The voluntary agencies will be allowed to deduct expenses incurred during the year for charitable purposes as legitimate deduction of expenses from the income recieved during the year. Any amount not used directly for the charitable purposes during the year will have to be invested or deposited in a specified manner for six months before the "due date" which is 30 June every year.

4. The concept of corpus funding was also deleted since contributions recieved with specific direction that they shall form part of the corpus were excluded from income under Section 12. (However, later, with introduction of Section 11 22(1) (d) and consequent amendment to the word "income" under Section 2 (24), it was stated that such contributions will also be deemed as income in the event of the trust losing exemption under Section 11.

5. As far as income from business activities of charitable organisations is concerned, it will now not be possible for "interested persons" (members of the governing body of voluntary agencies) to get any remuneration or benefit from the income arising out of such business activities.

Scrapping of Section 80F and other detrimental sections: A new section 80F was proposed to be inserted in view of section 11, 12 and 13. This section stated that the gross total income of charitable trusts will be computed in terms of 80A of the Act. The trusts and institutions will now be allowed deductions for amounts actually spent, vide on fulfillment of its objects and amounts actually accumulated and invested in specified

securities only. Such investements must be held for a period of atleast six months ending on the due date and filing returns of income.

However, 80F did not come upto the approval of the Indian Government and was scrapped. Hence, this section does not hold any relevance in the present context. Moreover, mammoth protests were held by voluntary organisations in several parts of the country as a reaction to the draconian amendments imposed by the Government. Thus, the Government finally had to withdraw almost all the sections which were found detrimental to the interests of the voluntary sector.

Implications: The Income Tax Act, as it stands in force today, has serious implications for the voluntary sector. Some of the major difficulties these organisations are facing in the wake of the Act in general are:

a) The size of developmental organisations varies according to their geographical location and are involved in a variety of tasks and problems. They need to be distinguished from religious and charitable organisations in such that their modus operandi is obviously different from the latter. The registration of all under the Societies Registration Act or Trust does not make their character alike.

b) Funds are obtained through various sources by these organisations to pursue their activities. These funds are receipts of these organisations and not "Income" as classified under the Income Tax Act. Hence, to equate such funds as "income" as understood in the business context would do grave injustice to these organisations. At the end of every financial year, most of these voluntary developmental organisations are invariably left with some amount of money from the funds which have been alloted to them for developmental purposes. At times, savings also arise out of efficient and effective financial management. These "surplus funds" needs to be distinguished from profit in the business sense since it is not a commercial profit.

Recommendations:

Keeping the above characteristics in mind, certain amendments needs to be implemented in the Income Tax Act to modify the anomalies. These recommendations and amendments, more in the nature of an alternative legal framework and wholly suggested by Mr Anil Charnelia, a chartered accountant based in New Delhi and having a longstanding experience with tax laws are as follows:

a) Proposed Amendment of Section 2 (15): Under this section, "charitable purposes" shall cover any developmental activity undertaken for relief, self help and empowerment of the poor; education and public health; training and skill development; shelters; water and sanitation; natural resource management; rural development; dissemination of knowledge and information and advancement of any other object of general public utility.

b) Proposed Amendment of Section 2 (24) a: This will include any sum or contribution received by a trust or by an institution established solely for charitable purposes or by an association or institution referred to in clause (21) on clause (23) or a trust or institution referred to in sub-clause on (v) of clause (23C) of section 10.

c) Proposed Amendment of Section 11,12 and 13: Under Income from contributions received and amounts applied for charitable purposes it is proposed that a new section should be based on the lines of section 80 (f) as inserted by the Direct Tax Laws Amendment Act, 1987. Applicable from 1 April 1989, this should be again considered for implementation from April 1995, relevant to assessment year 1995-96 as follows:

1. If a person is in receipt of income derived from contributions received by a trust or an institution established for charitable purposes in India or by a trust a institution established for the benefit of Indian citizens abroad or which tends to promote international welfare, there shall be deductions in accordance with an subject to provisions of this section, sums specified as under:

i) Any amount applied by a person or a trust or an institution referred to in clause I during the previous year wholly and exclusively to the charitable purpose.

ii) Any amount interested or deposited during the previous year in such a form as prescribed in and in such a manner as appearing here after.

2. Deductions under sub-section (i) and (ii) shall not be allowed unless the following conditions are fulfilled:

i) The person, trust or organisation who is in receipt of the income should make an application for registration of the same in the prescribed format to the commissioner or any other authority prescribed in this behalf before the expiry of a period of a year from the date of the creation of the trust or the establishment of the institutions.

ii) The commissioner or the authority prescribed may, in his or its discretion, admit such an application for the registration of the same after the period aforesaid and that such an application for registration is disposed off by granting registration within 60 days of receipt of the same.

(iii) If an application for registration of the trust or institution has been made to the commissioner in accordance with the provisions of section 12 A as it stood immediately before 1 April 1995, the requirements of this clause shall be deemed to have been complied with.

3. Deductions under sub-section (i) and (ii) shall not be allowed in cases where:

i) If a trust or an institution has been established for charitable purposes after

the commencement of this Act, the trust or institution should be created for the benefit of a particular religous community or caste.

ii) If a trust or institution has been created or established after the commencement of this Act, any part of the income of the same, under the terms of the trust or the rules governing the institution, ensures the benefit of any interested person.

iii) If any funds of the trust or institution are invested or deposited for any period during the previous year, other than in any such form or manner other than as is prescribed in clause (ii) of sub-section (1).

iv) Without prejudice to the generality of the provisions of clause (b) of sub-section (3), the income or the property of the trust or institution or any part of such income or property shall, for the pruposes of that clause, be deemed to have been used or applied in a manner which results, either directly or indirectly, in conferring any benefit on any interested person if:-

a) Any part of the income or property of the trust or institution is, or continues to be lent to any interested person for any period during the previous year without either adequate security or interest or both;

b) any property of the trust or institution or continues to be made available for the use of any interested person for any period during the previous year without charging adequate rent or compensation;

c) any property is pruchased by or on behalf of the trust or institution from any interested person during the previous year for a consideration which is more than adequate;

d) any funds of the trust or institution are or continue to remain invested for any period during the previous year in any concern in which any interested person has a substantial interest.

4. If the income or contribution referred to in clause I consists wholly or partly of any business undertaken by a person; trust or organisation and if the same derives any income from such business, the following provisions of the section shall apply, subject to the following conditions:

i) That the business carried on is incidental to the affirment of the object of the trust or institution and that separate books of accounts are maintained.

Deductions under provisions of sub-section (i) shall not be allowed in cases where such business consists wholly or partly of:

i) the pruchase and sale of any securities and shares;
ii) money lending and financing in any form;
iii) Speculation in securities, shares or any other commodities;
iv) engaging in any form of business, and,
v) engaging in any business transaction with any interested person or with any concern in which any interested person has a substantial interest.

For the purposes of v)

a) interested person means:

i) any person who has made a substantial contribution to the trust or institution and which exceeds one hundred thousand rupees at the end of the relevant previous year

ii) any author or founder of the trust or institution but excluding any author of the trust who is also a trustee and founder of the institution who is engaged in providing full-time or part-time services to the trust or institution for any such author, founder or person who is from a Hindu undivided family, a member of the family or any relative of such a member;

iii) any relative of any such author, founder, member, trustee or manager of the trust or organisation;

iv) any concern in which any of the persons referred to in (i) (ii) and (iii) have some interest.

b) "relative" in relation to an individual means:-

i) Spouse, brother or sister of the individual;
ii) brother or sister of the spouse of the individual;
iii) any ascendent or descendent of the individual;
iv) any lineal ascendent or descendent of the spouse of the individual.

v) any lineal ascendent or descendent of a brother or sister of either the individual or of the spouse of the individual;

c) "trust includes any other legal obligation;

d) any reference to "institution" shall be construed as including also a reference to "fund"

Some specified modes of investments deposits are;

1. Investment in government saving certificates.
2. Investment in immovable property.
3. Deposits in any post office savings.
4. Deposits in any nationalised bank, Bank of India or any of its subsidiaries or any scheduled or cooperative bank.
5. Investments in central or state government security.
6. Investments in Unit Trust of India.
7. Investments in debentures of any company or cooperation, wherein the principle and interest are fully and unconditionally guaranteed by the central or state government.
8. Investments or deposits in any public sector company as defined under section 2 (36A).
9. Deposits or investments in any bonds issued by a financial cooperation which is engaged in providing long-term finance for industrial development in India and which is approved by the Indian government.
10. Deposits or investments in any bonds

issued by a public company formed and registered in India for the sole purpose of carrying on the business of providing long-term finance for construction or purchase of residential houses in India and which is approved by the Central Government.

11. Deposits with the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964.

12. Mutual funds set up by a public sector bank, or public financial institutions or authorised by the Securities and Exchange Board of India or the Reserve Bank of India.

13. Any other form or mode of investment or deposit as may be prescribed.

The above new proposals as put forward by Mr Charnelia, are, keeping in mind a unified scheme for taxation of charitable trusts which will be applicable to institutions of national importance including those involved in scientific research, rural development and conservation of natural resources. Since many developmental organisations work in rural and remote areas, the Act has to be simplified, so that operations become easier and also so that applications under this Act becomes simpler and more straightforward. Hence, the Income Tax Act has to be modified in order that the developmental organisations can continue with their programmes unhindered and the defaulters have no room for any lapses or error.

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GOVERNMENTAL INACTION: It is to be mentioned in the above context that a clear-cut comprehensive policy document to help the voluntary sector in pursuing their activities with a clear understanding was accepted by the Indian Government in March 1994. Entitled "Action Plan to bring about a collaborative relationship between voluntary organisations and Government", this document contains precise recommendations and guidelines by which the voluntary organisations and Government can coordinate with each other. In the area of laws and regulations governing the voluntary sector, the document stated that the Planning Commission should take the initiative for a dialogue with representives of the Home, Finance and Labour Ministries to recommend removal of irritants in the existing Societies Registration Act and Public Trusts Act, FCRA and the Income Tax Act and to finalise recommendations in these Acts within a period of three months. In Novemeber 1994, the Voluntary Action Network of India (VANI) also submitted its Task Force Report formally to the Prime Minister's Secretary, Mr K.R Venugopal and the Finance Secretary, Mr M.S Ahluwalia with a request to initiate a process for amending the existing Acts soon and help the voluntary organisations to function smoothly. However, more than a year later, the Government is still to make any headway in this direction and the laws have remained as they are — cumbersome and as bureaucratic as ever.

CONCLUSION:

India has around 20,000 to 30,000 NGOs

handling around Rs 3,000 crores per year. From these figures, it can be estimated that the nature and work of such organisations in a vast and diverse country has assumed great significance over the last two decades. In fact, NGOs are emerging as a third major force in the socio-economic sector after the government and business sectors. These organisations have emerged as a major actor in the national as well as the global political and socio-economic arena. It has been widely recognised that these organisations have supplemented the work of a welfare state. Thus, the need for preservation, support and encouragement of such organisations has been felt. Since, their contribution to long-term sustainable development, upliftment of the masses and human security is infinite, there is an urgent need to rectify the laws and regulations under which these organisations operate so that they can carry on their tasks and promote their cause. The Indian Government should lay down an appropriate policy and generate an environment conducive to the creation of self-supported and self-managed organisations for facilitating integrated development and thus, should do its outmost for removing constraints adversely affecting that process. Since officials and local political leaders have built up an arrogant attitude over the last few decades which has always been based on the predominant monopolistic role of the Government in socio-economic development, the need of the hour is for voluntary organisations to work along with the Government on the basis of mutual respect and trust.

It is hoped that through this report, the audience for whom it has been targetted would get a fair idea of the history and the conditions and constraints under which these organisations operate and thereby suggest ways and means to overcome such obstacles. If this report succeeds in generating awareness, it can be said that half the battle is already won!

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