

# NONPROFIT LEGAL REFORM IN INDIA:

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The legal treatment of for-profit entities and other approaches to the reform question

BY MARK SIDEL

Resource paper for the  
International Center for Not-for-Profit Law  
India nonprofit law reform workshops

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The legal treatment of for-profit entities and  
other approaches to the reform question

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Prepared for the International Center for Not-for-Profit Law (ICNL)  
India nonprofit law reform workshops



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# EXECUTIVE SUMMARY

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This paper highlights the differential regulatory approaches taken by the Indian government toward the nonprofit and for-profit sectors and seeks to help to determine whether regulatory practices adopted for the for-profit sector, appropriately modified, might lighten the regulatory burden faced by the not-for-profit sector, or whether other approaches to nonprofit law reform seem more resonant and possible within India at the current moment.

In this process, I have reviewed relevant existing research and analysis and have consulted with specialists in India and the United States. Here I begin the process of identifying approaches to nonprofit legal reform that have been advocated in India, and which approaches seem more resonant.

This report covers those comparisons and alternatives and provides some initial conclusions based on discussions with three diverse groups of Indian civil society colleagues during three roundtable meetings held in Delhi, Bangalore and Mumbai in December 2018.

## I. The for-profit legal regime: “Ease of doing business” has been enhanced

The complex Indian for-profit (corporate) legal regime is multifaceted but has, in general terms, resulted in more “ease of doing business.” Reforms have been undertaken in diversification of allowable entities; shareholder regulations and rights; the requirement of at least one female director; a minimum number of independent directors; enhanced fiduciary duties; and other reforms. The full paper discusses these issues at greater length, including remaining problems such as the complexities of the tax system.

## II. The not-for-profit legal regime: “Ease of doing good” remains a major problem

The problems of “ease of doing good” and the nonprofit legal regime are legion, and very well-covered by the eminent Noshir Dadrawala in his paper. Those include very complex registration and operating requirements; subjecting nonprofits to a wide range of authorities that make day-to-day work and reporting challenging; major tax complexities; issues of dissolution, termination and liquidation; government supervision of and enforcement against nonprofits; and the onerous Foreign Contribution Regulation Act (FCRA 2010) for foreign funding.

### III. Options for change in the nonprofit legal regime

Three approaches to reform and change in the Indian nonprofit legal regime stood out in the research and in discussions at the three roundtables in Delhi, Bangalore and Mumbai in December 2018. These are discussed in considerably greater length in the full paper.

**1. Seek a form of “convergence,” to make the Indian nonprofit legal regime more like the for-profit legal regime,** in effect bringing the nonprofit regime, at least in some areas, toward the more favorable and efficient approach of newer company law approaches in India (what might be called a “convergence” theory of nonprofit legal reform). In short, make “ease of doing good” look more like “ease of doing business” for donors, recipients and other nonprofit actors.

**2. Seek comprehensive nonprofit legal reform in its own terms,** generally without significant or detailed reference to the for-profit legal regime options and models, but an overall attempt to simplify and ease the nonprofit legal regime through an omnibus reform. Numerous observers point to the *Task Force Report on the Proposed Central Law for Registering VOs* [Voluntary Organisations], issued in 2010, as a possible template here, as well as the work of a committee appointed by the central government on the orders of the Supreme Court to recommend comprehensive reform steps.

**3. Seek more specific reforms to particular issues in the nonprofit legal regime,** such as registration, tax issues, enforcement, and other questions. Calls for specific (piecemeal) reforms on specific problems in the nonprofit legal regimes have been made on multiple occasions over the years, in areas such as incorporation and registration, taxation, governance and management, permissible activities, foreign funding, and a host of other areas. Sometimes they are posited as a preferred goal; sometimes as a secondary goal if comprehensive nonprofit legal reform is not feasible.

#### The options for nonprofit legal reform

Discussion of these options was a major theme in the December 2018 workshops. The full paper discusses this at more length; key issues appear to include the difficulty in bringing to bear a wide coalition for nonprofit legal reform as was done for corporate reform, as well as civil society suspicion of corporate paths and a range of other issues.

Most participants in the workshops seemed to favor either comprehensive nonprofit legal reform (such as that embodied in the 2010 Proposal Central Law for VOs and currently being discussed by the Supreme Court-ordered committee) or specific (piecemeal) reforms to specific problems in the nonprofit legal regime, rather than pressing forward with a “convergence” (modeling after corporate law reforms) approach.

# INTRODUCTION

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The goals of this paper are to highlight the differential regulatory approaches taken by the Indian government toward the nonprofit and for-profit sectors and help determine whether regulatory practices adopted for the for-profit sector, appropriately modified, might lighten the regulatory burden faced by the not-for-profit sector, or whether other approaches to nonprofit law reform seem more resonant and possible within India at the current moment.<sup>1</sup>

In this process, I have reviewed relevant existing research and analysis and have consulted with specialists in India and the United States. Here I begin the process of identifying approaches to nonprofit legal reform that have been advocated in India, and which approaches seem more resonant.

This report covers those comparisons and alternatives and provides some initial conclusions based on discussions with three diverse groups of Indian civil society colleagues during three roundtable meetings held in Delhi, Bangalore and Mumbai in December 2018. An original draft report, on which this final report is based, along with a draft report prepared by the eminent Indian specialist Noshir Dadrawala, formed a basis for discussions in the three roundtable meetings in December 2018. I am grateful for the detailed and astute comments and discussion by the civil society specialists in those three roundtables, and to my ICNL colleagues Noshir Dadrawala, David Moore, and Nicholas Robinson.

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1 On the nonprofit and philanthropic situation in India, I have benefited greatly from important recent work by the Centre for Advancement of Philanthropy (CAP, Mumbai); AccountAid (Delhi); the Centre for Social Impact and Philanthropy at Ashoka University (CSIP, Delhi); and individual work by Ingrid Srinath, including *Making Indian Philanthropy Matter*, *Stanford Social Innovation Review* (April 2018), at [https://ssir.org/articles/entry/making\\_indian\\_philanthropy\\_matter](https://ssir.org/articles/entry/making_indian_philanthropy_matter); Caroline Hartnell, *Philanthropy in India: A Working Paper* (Philanthropy for Social Justice and Peace, in association with Alliance, WINGS, and the Centre for Social Impact and Philanthropy, Ashoka University, 2017), at <http://www.psjp.org/wp-content/uploads/2017/10/Philanthropy-in-India-October-2017-1.pdf>; and other colleagues.

On legal and regulatory issues I have benefited greatly, for many years, from the work on the Indian nonprofit law regime by my colleagues Noshir Dadrawala and Sanjay Agarwal, particularly Noshir Dadrawala's excellent and authoritative series of reports on the nonprofit and philanthropic legal regime in India, Noshir Dadrawala, *India*, at <https://www.cof.org/sites/default/files/India-201809.pdf>; Dadrawala, *Civic Freedom Monitor: India*, at <http://www.icnl.org/research/monitor/india.html>; Dadrawala, *India: Philanthropy Law Report*, at <http://www.icnl.org/research/Philanthropy/india.html>. and Sanjay Agarwal's exceptional AccountAble reports and authoritative books, including Sanjay Agarwal, *Accountable Handbook FCRA 2010: Theory and Practice*, and Agarwal, *Daan and Other Giving Traditions in India*, both available via [www.sanjayaditya.com](http://www.sanjayaditya.com).



# I. OVERVIEW OF THE FOR-PROFIT LEGAL REGIME

## 'EASE OF DOING BUSINESS' HAS BEEN ENHANCED

The complex Indian for-profit (corporate) legal regime is multifaceted. Some highlights are discussed here, with a focus on the 2013 corporate law reforms in the Companies Act 2013. Indian corporate law as updated in the Companies Act 2013 allows for various types of corporate entities, now including small entities and one-person shareholder entities. The maximum number of shareholders is generally set at fifteen, subject to shareholder alteration, and companies above a certain size are required to have at least one female director. There are minimum numbers of independent directors for both public listed and unlisted entities.

Company directors have enhanced fiduciary duties under the Companies Act 2013 regime, including, as one commentator summarizes the situation, “acting in good faith in order to promote the objects of the company, act[ing] in the interests of its employees, shareholders, community and for the protection of the environment and exercising due and reasonable care, diligence and skill as well as independent judgment.”<sup>2</sup> Certain managerial personnel are now required under the 2013 reforms. Audit requirements have been increased. A range of intra-company transactions now require shareholder or enhanced shareholder approval. Minority shareholder rights have been strengthened.

The Companies Act 2013 introduced corporate social responsibility (CSR) provisions that were new to the Indian corporate law regime, and that have attracted significant attention in India and well beyond. Companies of a certain size, including Indian branches of overseas companies, are required to spend two percent of the company’s last three years average net profits on defined CSR activities, and form a CSR committee on the board. Failure to spend as required by such companies requires explanation in the company’s annual report. CSR activities may be carried out directly or through societies, nonprofit companies, or trusts. Reporting on CSR expenditures on the Ministry of Corporate Affairs’ website is one of the few highlights in an otherwise murky and complex situation for data on Indian nonprofit and charitable affairs.

Other shifts in the 2013 renewed corporate legal regime include permitting mergers between Indian companies and companies outside India in countries allowed by

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<sup>2</sup> See, among many other descriptions, the useful Lakshmikumuran & Sriharan, *The (Indian) Companies Act, 2013 – A Snapshot* (2014).

the government; and strengthened shareholder actions under the substantially strengthened National Company Law Tribunal.

Beyond these important shifts in 2013, a number of features of the Indian corporate law regime are worth briefly mentioning. Many of these have rough or more specific parallels in the not-for-profit legal regime. Names of companies and their memorandum of association and articles of association are generally filed with the Registrar of Companies in the primary state of activity. Incorporation usually takes several weeks after approval of a company's name. A certificate of incorporation then issues from the relevant Registrar of Companies. Companies also file for permanent account numbers and tax deduction account numbers from tax revenue authorities. Recent amendments to the legal regime have made the process of completing required procedures more rapid.

In addition to the Companies Act 2013, the World Bank has noted improvements in ease of doing business under the Indian corporate law regime. These include, as summarized by one commentator, "faster permits for construction; combining the application for the Permanent Account Number (PAN) and the Tax Account Number (TAN) into a single submission; a reduction in the time needed to complete the applications for Employee's Provident Fund Organisation (EPFO) and the Employee's State Insurance Corporation (ESIC); a reduction in import and export border compliance costs, and improved access to credit.... There is a new online investor website providing support for investment queries, and a single-window online portal – E-Biz – to access core services such as clearances, licences, mandatory tax registrations, regulatory filings etc. There is also an online portal for labour-related information."<sup>3</sup>

Despite these improvements in "ease of doing business," there remain many issues in the company law regime and its enforcement. "The World Bank says that enforcement of contract in India is still a concern. The time to enforce a contract has lengthened to 1445 days, compared with 1420 days, 15 years ago, placing India at 164th place on the Enforcing Contracts indicator." Other issues remain significantly problematic as well, including property registration and land registries. Although the time to start a business has been reduced, "entrepreneurs still need to go through 12 procedures to start a business, which is more than the five-procedure average in OECD countries." The tax regime remains quite complicated at both central and state levels, with different taxes owing at different levels. "[T]he tax environment in India remains challenging, with a high risk of confusion and error..."<sup>4</sup>

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<sup>3</sup> <https://www.tmf-group.com/en/news-insights/articles/2018/may/requirements-doing-business-india/>.

<sup>4</sup> Id.

# II. OVERVIEW OF THE NOT-FOR-PROFIT LEGAL REGIME

## 'EASE OF DOING GOOD' REMAINS A MAJOR PROBLEM

Noshir Dadrawala has discussed the not-for-profit legal regime and recommendations for improvement in his excellent report in detail, and so here I am outlining some of the key features of that nonprofit legal regime for comparison purposes and to discuss the relevance of the for-profit legal regime.

Indian not-for-profit organizations are generally organized as trusts, societies, or limited Section 8 companies.

A variety of sources discuss these options in considerably more detail, but I would note here that public charitable trusts are generally established for purposes including poverty relief, education, medical relief, and analogous purposes, often under state public trusts acts.<sup>5</sup> Societies are organized for charitable aims and governed by the Societies Registration Act, a national statute that has been enacted in numerous states in somewhat various terms.

Section 8 companies under the Companies Act 2013 (formerly Section 25 companies under the Companies Act 1956) are granted licenses by the central government to pursue the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, the promotion of the environment, or other such aims, which apply revenue to those purposes, and which bar payment of dividends to members.

The tax regime for not-for-profit organizations in India remains complex. As Noshir Dadrawala points out, “[t]he income of certain NPOs carrying out specific types of activities is exempt from corporate income tax, with the caveat that unrelated business income is subject to tax under certain circumstances.

India also subjects sales of certain goods and services to Goods & Services Tax (GST). Education and healthcare services are exempt under GST.... The income tax law and the corporate tax law provide tax benefits for donors.... NPOs involved in relief work and in the distribution of relief supplies to the needy are 100 percent exempt from Indian

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<sup>5</sup> For more on the issues in this brief synopsis of the not-for-profit legal regime, see, among many sources available, Noshir Dadrawala's authoritative series of reports on the nonprofit and philanthropic legal regime in India: Noshir Dadrawala, *India*, at <https://www.cof.org/sites/default/files/India-201809.pdf>; Dadrawala, *Civic Freedom Monitor: India*, at <http://www.icnl.org/research/monitor/india.html>; Dadrawala, *India: Philanthropy Law Report*, at <http://www.icnl.org/research/Philanthropy/india.html>.

customs duty on the import of a range of items....<sup>6</sup>


Tax exemption for NPOs requires that the entity be organized for religious or charitable purposes, with a variety of other requirements as well, including annual spending requirements, anti-inurement provisions, and record keeping and reporting requirements. There are also a range of provisions on such issues as inurement, proprietary interests, dissolution, economic activities by NPOs, investment activities, and political activities.<sup>7</sup>

In 2017 reforms to the Goods & Services Tax “incorporate[d] various indirect taxes under one law, ... [including] state levies such as the Value Added Tax (VAT), luxury tax, electricity duty, entertainment tax, and entry tax. Unlike income tax, which is a direct tax, GST is an indirect tax, charged by the vendor of goods or services to the consumer and paid to the government. Prior to GST, service tax was 15 percent and VAT was mostly around 12 percent. Under GST, goods and services are taxed at [a range of rates from 0-28 percent]. GST exempts services by organizations engaged in certain kinds of charitable activities.<sup>8</sup>

Tax deductions for donors are available under Section 80G of the Income Tax Act. In general terms, donors may deduct contributions to trusts, societies, and Section 8 companies at the level of 100% for donations to certain specified government funds (such as the Prime Minister’s National Relief Fund). Tax deductibility has been reduced in recent years.

Donations to non-governmental charitable entities are usually eligible for a 50% deduction, if the receiving organization was created for charitable purposes in India; is tax-exempt itself; does not permit the use of income or assets for other than charitable purposes; and is not working for the benefit of any particular religious community or caste; and maintains regular accounts. There are gross income limits on the amounts of deduction that may be taken.<sup>9</sup>

In general terms, Indian NPOs are subject to a range of authorities that may make day-to-day work and reporting



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<sup>6</sup> Noshir Dadrawala, *India*, at <https://www.cof.org/sites/default/files/India-201809.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

challenging. These state and central authorities include Charity Commissioners (for trusts) at the state level; Registrars of Societies, also at the state level, for societies; Registrars of Companies at the state level for Section 8 companies, and tax and other departments at the national level.

Nonprofit organizations of various kinds receiving foreign funding are also subject to significant and often onerous regulation by the Ministry of Home Affairs under the Foreign Contribution Regulation Act (FCRA 2010).<sup>10</sup> The FCRA was enhanced and strengthened in 2010, making it more difficult for domestic groups to access foreign funding. Enforcement and deregistration actions have further strengthened the use of the FCRA in recent years. The availability of foreign capital for nonprofit organizations in India is generally considerably more cumbersome and difficult than for investment in for-profit entities.

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<sup>10</sup> For more on the complex and specific rules under the FCRA, see particularly Sanjay Agarwal, Accountable Handbook FCRA 2010: Theory and Practice, at <http://www.sanjayaditya.com/Books/FCRA/AccountAble%20Handbook%20FCRA%202010%20-%20Select%20Pages.pdf> and the important AccountAble periodic reports.

# III. FOR-PROFIT & NOT-FOR-PROFIT REGULATION

## ARE THERE ANY POSSIBLE AREAS OF CONVERGENCE AND REFORM?

### Problems in the nonprofit legal regime

As noted above, Indian NPOs are subject to a range of authorities and required procedures that may make day-to-day work and reporting challenging. These state and central authorities include Charity Commissioners (for trusts) at the state level; Registrars of Societies, also at the state level, for societies; Registrars of Companies at the state level for Section 8 companies, and tax and other departments at the national level.

As Mr. Dadrawala outlines in his report on the nonprofit legal regime in India, and as ICNL has outlined elsewhere, there are significant issues with establishment requirements; registration and incorporation requirements; issues of dissolution, termination and liquidation; government supervision of and enforcement against nonprofits; and other issues.<sup>11</sup>

Nonprofit organizations of various kinds receiving foreign funding are also subject to significant and often onerous regulation by the Ministry of Home Affairs under the Foreign Contribution Regulation Act (2010, FCRA).<sup>12</sup> The availability of foreign capital for nonprofit organizations in India is often more cumbersome and difficult than for investment in for-profit entities.

Pushpa Sundar has recently provided an excellent outline of issues in regulatory and enforcement activity with respect to the nonprofit sector and the need for reform. The issues she very usefully outlines include increased enforcement by state and central governments based on a sense of a “lack of accountability” on the part of certain nonprofits, and the difficulties that nonprofit organizations have in coping with

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11 For more information on these issues in comparative perspective across Asia, see Sidel and Moore, *The Law Affecting Civil Society in Asia: Developments and Challenges for Nonprofit and Civil Society Organizations*, available at <http://www.icnl.org/programs/asia/index.html> and at <http://www.icnl.org/research/resources/regional/The%20Law%20Affecting%20Civil%20Society%20in%20Asia.pdf>. An earlier version is at <http://www.chinadevelopmentbrief.cn/wp-content/uploads/2015/11/Mark-Sidel-Discussion-Paper-Civil-Society-Regulation-and-Space-in-Asia2.pdf>. Some regional comparisons are at Sidel, *The state of Asian philanthropy*, *Alliance* (May 2018), at <https://www.alliancemagazine.org/analysis/state-asian-philanthropy/>.

12 See particularly Sanjay Agarwal, *Accountable Handbook FCRA 2010: Theory and Practice*, at <http://www.sanjayaditya.com/Books/FCRA/Accountable%20Handbook%20FCRA%202010%20-%20Select%20Pages.pdf>.

onerous regulatory and enforcement mechanisms at different levels of government.<sup>13</sup>

To provide some examples as to the nature of the onerous requirements and enforcement with respect to not-for-profit organizations, and to query whether the for-profit legal regime provides useful regulatory alternatives, I mention below several recent examples of problematic regulatory and enforcement activity with respect to the not-for-profit sector.

#### MAHARASHTRA - ERASING "CORRUPTION" AND "HUMAN RIGHTS"

As Mr. Dadrawala and ICNL write, “[i]n July 2018, the 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 a suspension under the Maharashtra Public Trusts Act, 1950. Earlier the Charity Commissioner’s office in Pune took a similar action against 16 NGOs with the word “corruption” in their names (or the Hindi equivalent), including Anna Hazare’s Bhrashtachar Virodhi Jan Andolan, which has been suspended. That NGO’s case to regain its registration is pending in court as of July 2018. According to press reports, the Maharashtra State Charity Commissioner is of the view that only the government has the capability and responsibility to prevent corruption and protect human rights.<sup>14</sup>

#### BAN ON PROTESTS AT JANTAR MANTAR

As ICNL has also reported, “[i]n October 2017, the National Green Tribunal (NGT) placed a ban on all protests at Jantar Mantar in the heart of New Delhi. NGT had directed the Delhi government, Delhi police and New Delhi Municipal Council to stop all protests at Jantar Mantar and to remove the protesters sitting there to Ramlila Ground. Social activists and environmentalists decried the move as yet another attempt by the government to curb protests and dissent and the freedom of assembly....

13 Pushpa Sundar, *Why India's Non-Profit Sector Needs Comprehensive Legal Reform*, *The Wire*, May 10, 2017, at <https://thewire.in/politics/ngo-fcra-legal-reform>. Pushpa Sundar's work on the Indian nonprofit sector has been the academic lodestone for work in this area for many years. I and others have benefited greatly from her outstanding work over many years. Among many other works, see, for example, Pushpa Sundar, *Giving with a Thousand Hands: The Changing Face of Indian Philanthropy* (Oxford University Press, 2017).

14 Noshir Dadrawala, *Civic Freedom Monitor: India*, at <http://www.icnl.org/research/monitor/india.html>.



In July 2018, the 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.

NGT held that the protests were in violation of environmental laws including the Air (Prevention and Control of Pollution) Act, 1981 and upheld the right of the residents of the surrounding area to live peacefully and comfortably. NGT imposed the ban after hearing a plea filed by some residents of Jantar Mantar road, who had claimed that processions and agitations “violate their right to live in a peaceful and healthy environment, right to silence, right to sleep and right to life with dignity”. Questioning the logic behind the order, civil rights activist and co-convener of National Campaign for People’s Right to Information, Anjali Bharadwaj, stated, “the issue is not of noise pollution but of what kind of space people are getting to express themselves freely and it links to our fundamental right of speech and expression. From the civil society perspective it would be very regressive to shut down this space which is close to Parliament.” Also, there is no empirical data to support the alleged claim of noise pollution.<sup>15</sup>

#### CHARGES AGAINST AMNESTY INTERNATIONAL INDIA

As ICNL and others have also reported, “[a]cting on a complaint filed by the Akhil Bharatiya Vidyarthi Parishad (ABVP), the J.C. Nagar police on 15th August (India’s Independence Day) charged Amnesty International India under Section 124-A of the Indian Penal Code, which defines sedition as “bring[ing] or attempt[ing] to bring into hatred or contempt, or excit[ing] or attempt[ing] to excite disaffection towards the Government of India.” As detailed in the ICNL description of the case, several prominent Indian attorneys, including a senior Supreme Court advocate and a former Attorney General of India have criticized the application of sedition law to Amnesty International India.<sup>16</sup>

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<sup>15</sup> Id.

<sup>16</sup> Id. “Under Section 124-A of the Indian Penal Code (IPC) ‘Sedition’ covers: “Whoever, 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.” Id.



# IV. OPTIONS FOR CHANGE

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Over the years there have been a number of proposals made toward trying to ease over-regulation and over-enforcement of the nonprofit sector, to rationalize the currently highly complex regulatory system, and to facilitate accountable nonprofit and charitable activity.

Three approaches stood out in the original drafting of this report and in discussions at the three roundtables in Delhi, Bangalore and Mumbai in December 2018.

**1. Seek a form of “convergence,” to make the Indian nonprofit legal regime more like the for-profit legal regime**, in effect bringing the nonprofit regime, at least in some areas, toward the more favorable and efficient approach of newer company law approaches in India (what might be called a “convergence” theory of nonprofit legal reform). In short, make “ease of doing good” look more like “ease of doing business” for donors, recipients and other nonprofit actors.

I note with very considerable interest that from my research and from my discussions with Indian colleagues, the “convergence” approach – explicitly making the nonprofit legal regime more like the modernized for-profit legal regime – does not seem to spark significant discussion in India these days. This was confirmed in the roundtable discussions – while many participants would like the nonprofit legal regime to have some of the same efficiencies as the for-profit legal regime, a “convergence” approach is not drawing much attention these days.

Nor have I found or heard in recent years of specific recommendations that elements of the nonprofit legal regime – such as registration, or tax procedures – be amended or reformed to be more directly comparable (“convergent”) with the for-profit legal regime. This too seems to have been borne out in the three roundtable discussions in India in December 2018.

**2. Seek comprehensive nonprofit legal reform in its own terms**, generally without significant or detailed reference to the for-profit legal regime options and models, but an overall attempt to simplify and ease the nonprofit legal regime through an omnibus reform.

The comprehensive nonprofit legal reform strategy has been raised on a number of occasions over the years. A very clear recent explication of this alternative is in Pushpa Sundar’s 2017 article *Why India’s Non-Profit Sector Needs Comprehensive Legal Reform*, though this view is also expressed in a number of other initiatives. As Sundar puts it, “[w]hat is needed is not just a law to regulate NGOs, but a comprehensive reform of the

entire NGO charity sector. This reform should include a new institutional mechanism to implement the law and reform already existent institutions.”<sup>17</sup>

In this regard, it is interesting to note that Sundar does not make explicit reference to useful provisions from the for-profit legal regime or to bringing/converging elements of the for-profit legal regime with the nonprofit legal regime. The goal of this alternative is a comprehensive effort to reform the nonprofit legal regime, not (or not so much) an attempt at convergence with for-profit legal models.

Ingrid Srinath also recently called for a version of comprehensive legal reform in a strategy paper on the sector, while leaving open the possibility of changes to specific pieces of the legal regime. “Rationalising and streamlining registration, and clearly differentiating between types of organisations would be a great place to start. Creating an independent, non-ministerial department accountable to Parliament to serve as registrar, regulator, monitor and facilitator to the sector should follow if non-profits are not to continually be subjected to the arbitrary regime of the regulatory authorities that presently control, rather than facilitate, their existence...”<sup>18</sup>

Srinath and others point out that a possible template for comprehensive legal reform already exists, in the form of the *Task Force Report on the Proposed Central Law for Registering VOs* [Voluntary Organisations], that was issued in 2010. The proposed *Central Law for Registering VOs* provided for uniform legislation, with national reach, and clearer, simplified national procedures for incorporation, registration, disclosure, management and governance, board matters, finance and accountability, audits, application to foreign charities, and other provisions – along with a National Charities and Voluntary Sector Commission to manage this new comprehensive approach.<sup>19</sup>

Related to this, in terms of an initiative, *the comprehensive legal reform approach* seems close to the approach taken by an initiative and report from a “committee appointed by the central government on the orders of the Supreme Court, [which] has recommended several steps to ensure the ‘light regulation’ of CSOs so as to reduce harassment against them... On the Supreme Court’s suggestion, the committee has also drawn up a framework of guidelines for the accreditation of CSOs..., auditing of their accounts, and procedures to initiate action for recovering grants in cases of misappropriation.

The committee has recommended the following:

- The registration procedures should be modernized so as to facilitate the seamless operation of the applicable provisions of the Income Tax Act and the Foreign Contribution Regulation Act (FCRA) with respect to CSOs,

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17 Pushpa Sundar, *Why India’s Non-Profit Sector Needs Comprehensive Legal Reform*, *The Wire*, May 10, 2017, at <https://thewire.in/politics/ngo-fcra-legal-reform>.

18 Ingrid Srinath, *Citizen Voices Need to be Heard in a Democracy*, *Hindustan Times*, December 1, 2018, at <https://www.hindustantimes.com/analysis/citizen-voices-need-to-be-heard-in-a-democracy/story-5tqZYe9sNnzrxvcadz14kL.html>.

19 *Task Force Report on the Proposed Central Law for Registering VOs* [Voluntary Organisations], 2010.

without the need for cumbersome and intrusive processes.

- Steps must be taken to reduce the need for physical interface between CSOs and public officials acting under the Income Tax Act and FCRA.
- A separate law is needed for voluntary agencies engaged in activities of a charitable or “public good” nature to enable more effective and efficient regulation of the sector.
- Regulation should be ‘light’ and consistent with fundamental rights, so as to give effect to the objects for which voluntarism is being promoted.
- Various state-level and existing central laws should be replaced by overarching legislation based on best practices.
- Details of CSOs should be available as searchable database information.
- The new framework should enable ‘national uniformity’ of approach following the principle of ‘cooperative federalism.’”<sup>20</sup>

**3. Seek more specific reforms to particular issues in the nonprofit legal regime**, such as registration, tax issues, enforcement, and other questions. Calls for specific (piecemeal) reforms on specific problems in the nonprofit legal regimes have been made on multiple occasions over the years, in areas such as incorporation and registration, taxation, governance and management, permissible activities, foreign funding, and a host of other areas. Sometimes they are posited as a preferred goal; sometimes as a secondary goal if comprehensive nonprofit legal reform is not feasible.<sup>21</sup>

## The options for nonprofit legal reform

A key issue for nonprofit legal reform in most countries, and in India, is political will. The interests that array behind corporate law reform can be significant, and even so they are not always able to make change happen. But they can be formidable interest groups. Something like this level of interest-based pressure from corporate interests seems to have played at least some role, for example, in the 2013 corporate law reforms in India.

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20 The description of this initiative is by Noshir Dadrawala in *Civic Freedom Monitor: India*, at <http://www.icnl.org/research/monitor/india.html>. In addition, Dadrawala writes, “NITI Aayog (formerly called the Planning Commission) has formed a Voluntary Action Cell (VAC) and constituted a working/standing committee on “Institutionalization of Engagement of Service Delivery Civil Society Organizations (CSOs).” The standing committee had its meeting on March 16, 2018 and it was decided that five sub-groups would be created. One of the sub-groups will deal with self-regulation and the national regulatory framework for the voluntary sector.” Id.

21 I should also note that the eminent civil society and finance specialist Vijay Mahajan proposes what may be considered an even deeper set of civil society legal reforms, beginning with a constitutional amendment to make civil society institutions a “defined term” in the Indian Constitution, combined with specific reforms as amendments to an array of laws. Vijay Mahajan, *The challenges before civil society in India*, Seminar issue no. 713 (January 2019), at <http://www.india-seminar.com/>. An adapted version is Mahajan, *The challenge for civil society*, *India Development Review*, February 7, 2019, at <https://idronline.org/the-challenge-for-civil-society>.

Traditionally, as I understand, the same level of interest-based political force has not been able to be brought to bear to support and push forward nonprofit legal reform. There have been attempts to push forward each of the three approaches I mention above – specific (piecemeal) reforms to specific problems in the nonprofit legal regime;<sup>22</sup> comprehensive nonprofit legal reform;<sup>23</sup> and legal reforms toward some more convergence with corporate law reforms<sup>24</sup> – but none have been particularly successful.

The nonprofit law workshops held in Delhi, Bangalore and Mumbai in December 2018 produced a wide range of views on the possibilities, goals and methods for nonprofit law reform. While it is difficult to fully characterize views based on several workshops, most participants seemed to favor either comprehensive nonprofit legal reform (such as that embodied in the 2010 Proposal Central Law for VOs and currently being discussed by the Supreme Court-ordered committee) or specific (piecemeal) reforms to specific problems in the nonprofit legal regime.

What we did not hear very much about, at least from these groups of workshop attendees, was the “convergence” approach – explicitly trying to make nonprofit law more like corporate law, bringing “ease of doing business” to “ease of doing good.”

In workshop and later discussions several reasons were given for this: a sense that political will is lacking for a convergence-based strategy; the difficulty in bringing together coalitions to advocate for a convergence strategy; and the continuing nonprofit and civil society suspicion of the corporate world and corporate approaches. Whatever the reasons given, the convergence approach seems to hold less sway these days in India than it may have some time ago, during corporate and corporate law reforms in India.

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22 For example, amendments to Societies Registration Acts at the state level, or Public Trust Acts, or the Income Tax Act at the central level as applied to certain kinds of nonprofits, or other specific enactments.

23 For example, the current Supreme Court-ordered committee approach, which seems more comprehensive in its intent than specific and piecemeal, including the call that “[v]arious state-level and existing central laws should be replaced by overarching legislation based on best practices,” and other calls for a more comprehensive, omnibus nonprofit statute over the years.

24 We do have examples of attempts to explicitly tie nonprofit legal reforms with the “better practices” of certain kinds of corporate law reforms over the years. For example, there have been attempts to argue for the replacement or revision of the Foreign Contribution Regulation Act (FCRA) by a more “modern” statute akin to the Foreign Exchange Management Act. See, for example, *Can FEMA replace FCRA?* [livemint.com](https://www.livemint.com/Politics/rKhIUvaoVOqEsJ9EjqfVaK/Can-Fema-replace-FCRA.html), July 23, 2015, at <https://www.livemint.com/Politics/rKhIUvaoVOqEsJ9EjqfVaK/Can-Fema-replace-FCRA.html>. These approaches do not seem to have worked. In fact, in recent years, some organizations may have been criticized for seeking treatment under the more “corporate” FEMA approach than submitting to regulation under the traditional (for nonprofits) FCRA approach.





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