

## WATCHING THE WATCHDOGS: IMPROVING REGULATION AND ACCOUNTABILITY OF NGOS

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### I. INTRODUCTION

India is estimated to have 3.3 million registered not for profit organizations, popularly known as NGOs.<sup>1</sup> The sector's credibility is often questioned by most stakeholder groups due to lack of information (about existence, performance, finances, output and outcome), absence of performance benchmarks, government licenses and permissions not being sufficient indicators of performance or credibility, media reports usually being centred around stories of what went wrong and the general lack of awareness of the common man about the voluntary sector.<sup>2</sup> One of the major criticisms of international non-governmental organizations ("INGOs") and local civil society organizations ("CSOs") has been that they are insufficiently accountable.<sup>3</sup> Unlike their counterparts in the private and public sectors, INGOs and CSOs do not have shareholders and are not elected;<sup>4</sup> thereby the stake of the general public in monetary terms is considerably reduced to provide for public accountability.

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<sup>1</sup>*A Survey on Non Profit Institutions in India - Some Findings*, Central Statistical Organisation, Ministry of Statistics and Programme Implementation, India, Sept. 2009.

<sup>2</sup>Pushpa Aman Singh, *NGO Accountability in the Indian Context* (Dec. 2009), <http://www.guidestarinternational.org/SiteImages/file/NGO%20Accountability%20in%20the%20Indian%20Context.pdf>.

<sup>3</sup>Michael Szporluk, *A Framework for Understanding Accountability of International NGOs and Global Good Governance*, 16 IND. J. GLOBAL LEGAL STUD. 339 (2009).

<sup>4</sup>I.R.C. § 501(c)(3).

The governance of NGOs implies the totality of functions that are required to be carried out in relation to the internal functioning and external relations of organizations. The governance of NGOs focuses on issues of policy and identity, rather than the issues of day-to-day implementation of programmes. Thus, governance implies addressing the issue of NGO vision, mission and strategy; it focuses on future directions and long-term strategic considerations; it addresses the issues of policy in relation to internal programming, staffing and resources; it defines norms and values that are the basis of institutional functioning; it includes obligations entailed in fulfilling statutory requirements applicable to the NGO; and focuses on defining the external positions that are consistent with the overall thrust of the NGO as an institution in civil society. Most importantly, the governance of an NGO is concerned with its effective functioning and performance in society. This is both a legal and a moral obligation. Therefore, governance requires the creation of structures and processes which enable the NGO to monitor performance and remain accountable to its stakeholders.<sup>5</sup> This article deals with the various aspects dealing with the need of effective governance principles and accountability standards in order to enable NGOs and CSOs to restore themselves as effective means of governance and growth in any developing country.

*Role of NGOs and CSOs* Non-governmental organizations (NGOs) are increasingly injected into many areas of national and international affairs.<sup>6</sup>

### ***A. Policy formulation***

Although direct NGO involvement is “*less frequent in the areas of rule setting and implementation*”,<sup>7</sup> it nevertheless exists and is likely

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<sup>5</sup>Rajesh Tandon, *Board Games: Governance and Accountability of NGOs*, <http://www.wtrc-tmed.org/wtrc/resources/Board%20Games.pdf>.

<sup>6</sup>Christopher Tracy, *The Growing Role of Non-Governmental Organisations*, 89 AM. SOC'Y INT'L L. PROC. 413 (1995).

to increase in the future.<sup>8</sup> There are a number of different functions falling within the broad category of policy formulation relying upon the purpose and representativeness of the NGOs seeking to perform those actions.

**Agenda-setting** is one of the most important governance functions an organization can perform, as it places items onto the table for discussion and analysis, initiating the possibility of governance changes.<sup>9</sup> Where NGOs are instrumental in the formulation of the overarching policy framework or where they are incorporated into a state's delegation directly, they may have the ability to set the agenda for discussion. The World Conservation Union (“IUCN”) is the proto-typical example of this. The IUCN drafted the first version of the Convention of Biological Diversity and then was successful in setting the agenda of the Convention's negotiations.<sup>10</sup>

**Norm and rule formation**, or rule-setting, is the most contentious role NGOs play in governance. NGOs are primarily involved as rule setters through incorporation into official delegations, which has occurred in the nuclear non-proliferation treaty regime, for instance.<sup>11</sup> Amnesty International was crucial in shaping the Convention against Torture and in establishing the International Criminal Court.<sup>12</sup> Similarly, the International Campaign to Ban Landmines had the right to make statements and table treaty language during negotiations of

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<sup>7</sup>TANJA A. BORZEL & THOMAS RISSE, COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY-FIRST CENTURY 195, 203-06 (Edgar Grande & Louis W. Pauly eds., 2004).

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

<sup>9</sup>P.J. SIMMONA & CHANTAL DE JONGE OUDRAAT, MANAGING GLOBAL ISSUES: LESSONS LEARNED 3, 12 (P.J. Simmons & Chantal de Jonge Oudraat eds., 2001).

<sup>10</sup>TANJA BRUHL, PROCEEDINGS OF THE 2001 BERLIN CONFERENCE ON THE HUMAN DIMENSIONS OF GLOBAL ENVIRONMENTAL CHANGE: GLOBAL ENVIRONMENTAL CHANGE AND THE NATION STATE 371, 376-77 (Frank Biermann et al. eds., 2002).

<sup>11</sup>BORZEL & RISSE, *supra* note 7.

<sup>12</sup>WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CURIOUS GRAPEVINE (Palgrave, New York, 1998).

the Convention on the Prohibition of Anti-Personnel Landmines.<sup>13</sup> NGOs are also involved in the World Trade Organization and help to shape its outcomes.<sup>14</sup>

**General Participation and Lobbying** is most widely recognized role of NGO participation in governance.<sup>15</sup> NGOs are renowned for their ability to mobilize public awareness and opinion and catalyze action on particular issues.<sup>16</sup>

### **B. Administrative duties**

Administrative duties differ from political activities because rule-implementation is the function, rather than rule-setting.

**Certification** of actors for participation in the regime itself is a powerful role NGOs may play in the administration of international governance. The power to enable participation is significant.<sup>17</sup> For instance, the Framework Convention on Climate Change, under which the Kyoto Protocol on climate change operates, provides the opportunity for NGO participation as a certification body, without significant co-regulation by the regime, though delegation authority is retained by the regime.<sup>18</sup>

NGOs are involved on a somewhat limited basis in actual *standard setting* in the administrative context. A powerful example of NGO involvement in standard-setting is the International Labour

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<sup>13</sup>MOTOKO MEKATA, *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* 143 (Ann M. Florini ed., 2000).

<sup>14</sup>Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System- A Cosmopolitan Perspective*, 8 J. INT'L ECON. L. 363, 374 (2005). (Discussing the WTO Secretariat's interest in creating a low-level partnership between the WTO and NGOs).

<sup>15</sup>SIMON ZADEK & MURDOCH GATWARD, *BEYOND THE MAGIC BULLET: NGO PERFORMANCE AND ACCOUNTABILITY IN THE POST-COLD WAR WORLD* 169 (Michael Edwards & David Hulme eds., 1996).

<sup>16</sup>Ann Marie Clark, *Non-Governmental Organizations and their Influence on International Society*, 48 J. INT'L AFF. 507 (1997).

<sup>17</sup>Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997).

<sup>18</sup>Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution under the Kyoto Protocol*, 27 ECOLOGY L.Q. 53 (2000).

Organization (“ILO”), designed to protect workers from exploitation and poor working conditions.<sup>19</sup>

### *C. Enforcement*

NGO involvement in the enforcement of established codes has been characterized as moderate in scope and nature.<sup>20</sup>

*Arbitration* is a major way international regimes are enforced.<sup>21</sup> The leading international arbitration organization providing for the settlement of these disputes is the International Centre for the Settlement of Investment Disputes (“ICSID”), which is an “*autonomous international organization*”, established by the World Bank through an international convention and comprised of World Bank Member States.<sup>22</sup>

In some regimes, NGOs have been provided the authority to act as *enforcement agents*,<sup>23</sup> where States are believed to have violated international rules.<sup>24</sup> For instance, under the Montreal Protocol, NGOs may act as enforcement agents by notifying the Secretariat of non-conforming States, who in turn may sanction the non-conforming States.<sup>25</sup>

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<sup>19</sup>Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 BROOK. J. INT'L L. 139 (2005).

<sup>20</sup>Jonathan P. Doh & Terrence R. Guay, *Globalization and Corporate Social Responsibility: How Nongovernmental Organizations Influence Labor and Environmental Codes of Conduct*, 44 (2) MIR 7-29, (2004).

<sup>21</sup>Joanne K. Leweler, *International Commercial Arbitration as a Model for Resolving Treaty Disputes*, 21 N.Y.U. J. INT'L L. & POL. 379 (1989).

<sup>22</sup>Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1996, 17 U.S.T. 1270, 575 U.N.T.S. 159.

<sup>23</sup>RUTH MAYNE, *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION* 235 (Sol Picciotto & Ruth Mayne eds., 1999).

<sup>24</sup>Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311 (1995).

<sup>25</sup>*Montreal Protocol on Substances that Deplete the Ozone Layer*, Art. 11(5), Annex III, para. 1, Annex IV(10), Sept. 16, 1987, 1522 U.N.T.S. 3, 26 I.L.M. 1541, adjusted by London Amendments, June 29, 1990, 20 I.L.M. 537, Nairobi Amendments, June 21, 1991, and Copenhagen Amendments, Nov. 23-25, 1993, 32 I.L.M. 874.

## II. NGOs IN INDIA

NGOs in India are engaged in diverse activities- education, health, family planning, environment, human rights, women and children welfare, population control, development, water conservation, agriculture, natural resources, microfinance, disabilities, housing, emergency relief, etc.<sup>26</sup> Most NGOs rely upon funds received from the government and other foreign sources, like international NGOs, development partners, foreign private organizations, and multinational organizations.<sup>27</sup>

NGOs are required to register with the Income Tax Department under Section 12-A, however the registration is spread across 100+ locations. Moreover, the annual returns of Income Tax filed by NGOs are not subject to public disclosure. NGOs need permission from the Ministry of Home Affairs under the Foreign Contribution Regulation Act (“FCRA”) to receive any form of foreign contribution. These registrations are centralized and require annual filings, however this covers only a very small number (35,972 NGOs as of September 2008). The scenario described above indicates that the statutory framework does not require NGOs to be accountable directly to the public and in many cases, the administrative authority is not equipped with resources to monitor and penalize those defaulting in making necessary filings.<sup>28</sup>

In India, the state has consistently viewed the role of NGOs to be that of a gap-filler, stepping in where the government has stepped out and serving as a bridge between the state and the people.<sup>29</sup> Because of the wide variety of functions of NGOs, and the dependence of the overall

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<sup>26</sup>NGOs India, <http://www.ngosindia.com/a-z/index-D.htm>

<sup>27</sup>Problems of Governance in the NGO Sector: The Way Out, (Transparency International, Executive Summary), <http://www.ti-bangladesh.org/research/ExecSum-NGO-English.pdf>.

<sup>28</sup>*Supra* note 2.

<sup>29</sup>Qiusha Ma, *The Governance of NGOs in China Since 1978: How Much Autonomy?* 31 NONPROFIT & VOLUNTARY SECTOR Q. 305 (2002).

governance structure on them, it becomes absolutely necessary to provide a sound regulatory framework for the NGOs for them to function effectively fulfilling their goals and objectives.

### III. CHALLENGES FOR NGOS

NGOs work under many constraints and challenges. Some of these challenges are: (a) lack of financial sustainability; (b) shortage of efficient employees and high employee attrition; (c) inadequate infrastructure; (d) undue interference and control by the government; (e) lengthy fund release process; (f) low level of inter-sectoral cooperation; (g) inadequate training and low level of true professionalism among employees often aggravated by lack of job security; (h) lack of information and relevant research; (i) religious conservatism and militancy, and threat of terrorism; (j) political pressure and political instability; (k) Unfavourable tax regime; (l) natural calamities, (m) misplaced focus on compliance reporting, and (n) lack of institutional infrastructure.<sup>30</sup>

### IV. CURRENT REGULATORY FRAMEWORK

In India, public charitable organizations can be registered as trusts,<sup>31</sup> societies,<sup>32</sup> or not-for-profit companies.<sup>33</sup> NGOs in India (a) exist independently of the state; (b) are self-governed by a board of trustees or ‘managing committee’/ governing council, comprising individuals who generally serve in a fiduciary capacity; (c) produce benefits for others, generally outside the membership of the organisation; and (d),

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<sup>30</sup>*Supra* note 27.

<sup>31</sup>No national law governs public charitable trusts in India, although many states (particularly Maharashtra, Gujarat, Rajasthan, and Madhya Pradesh) have Public Trusts Acts. In the absence of a Trusts Act in any particular state or territory the general principles of the Indian Trusts Act, 1882 are applied.

<sup>32</sup>Societies Registration Act, 1860, No. 21, Acts of Parliament, § 20 (1860).

<sup>33</sup>Companies Act, 1956, No. 1, Acts of Parliament, § 25 (1956).

are ‘non-profit-making’, in as much as they are prohibited from distributing a monetary residual to their own members.

Charitable purpose includes ‘relief of the poor, education, medical relief and the advancement of any other object of general public utility.’<sup>34</sup> A purpose that relates exclusively to religious teaching or worship is not considered as charitable. A public charitable purpose has to benefit a sufficiently large section of the public as distinguished from specified individuals.

The main instrument of any *public charitable trust* is the *trust deed*, wherein the aims and objects and mode of management (of the trust) should be enshrined. In every trust deed, the minimum and maximum number of trustees has to be specified. The trust deed should clearly spell out the aims and objects of the trust, how the trust should be managed, how other trustees may be appointed or removed, etc.<sup>35</sup>

The main instrument of any *society* is the *memorandum of association* and rules and regulations (no stamp paper required), wherein the aims and objects and mode of management (of the society) should be enshrined. Registration can be done either at the state level (i.e., in the office of the Registrar of Societies) or at the district level (in the office of the District Magistrate or the local office of the Registrar of Societies).<sup>36</sup>

According to Section 25(1)(a) and (b) of the Indian Companies Act, 1956, a company can be established ‘for promoting commerce, art, science, religion, charity or any other useful object’, provided the profits, if any, or other income is applied for promoting only the objects of the company and no dividend is paid to its members. The main instrument is a *Memorandum and articles of association* (no stamp paper required).<sup>37</sup>

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<sup>34</sup>Income Tax Act, 1961, No. 43, Acts of Parliament, § 2(15) (1961).

<sup>35</sup>Microfinance

Gateway,

<http://www.microfinancegateway.org/redirect.php?mode=link&id=32967>

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*



In certain cases, special licensing of NGOs through the Inner Line Permit, or registration under the Shop and Establishment Act, may be allowed.

## V. MODELLING LEGAL FRAMEWORK FOR NGO REGULATION

A vibrant NGO sector has a significant economic and political value to a country.<sup>38</sup> The rapid growth in the number, influence and effectiveness of non-governmental organizations (“NGOs”) in recent years has produced greater demands for NGO accountability and governance. These demands call for assurance that NGOs are responding to the needs and expectations of their many stakeholders and fulfilling their varying missions and objectives.<sup>39</sup>

### A. *Why NGO Regulation is Important?*

There are many reasons why a country should want to have laws that assure the existence of a strong, vigorous, and independent civic sector. The most important of these is to protect the internationally recognized freedoms of expression, association, and peaceful assembly;<sup>40</sup> along with encouraging pluralism, promoting respect for the rule of law, supporting democracy, promoting economic efficiency, and addressing “*public sector market failure*.” A clearly defined operating space allows NGOs to be more ambitious in their work, and promotes good governance, both directly through improvements to the local regulator and to the NGOs, as well as

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<sup>38</sup>NGO Regulation Network, <http://www.ngoregnet.org/>

<sup>39</sup>JEFFREY E. GARTEN, *GLOBALIZATION WITHOUT TEARS – A NEW SOCIAL COMPACT FOR CEOs* (Harvard Business School Press, 2002).

<sup>40</sup>INDIA CONST. art 19.

indirectly by improving an NGO sector's ability to suggest change in governance.<sup>41</sup>

## ***B. Principles of NGO Regulation***

### ***a) Establishment***

In order to acquire the status of a legal entity and to have limited liability, legal systems generally require that an organization be formally established.<sup>42</sup> For a civic organization to become established as a legal entity, the founders ordinarily must hold a founding meeting and adopt the governing documents of the organization.<sup>43</sup>

The principal documents that should be required for establishment are the governing documents of the organization (e.g., charter or statute, deed of trust, bylaws, articles of incorporation, etc.). Those documents should be updated periodically, state the nature and purpose of the organization; provide an adequate governance structure; identify the founders, board members, and managers; state

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<sup>41</sup>NGO Regulation Net, *Why is Regulation Important*, [http://www.ngoregnet.org/About\\_effective\\_regulation/Why\\_it\\_is\\_important/Why\\_regulation\\_is\\_important.asp](http://www.ngoregnet.org/About_effective_regulation/Why_it_is_important/Why_regulation_is_important.asp)

<sup>42</sup>The opposite is true in, e.g., *Switzerland*. C. Civ., tit. II, ch. 2, art. 60(1). ("Associations which have a political, religious, scientific, artistic, charitable, social, or any other than an industrial object, acquire the status of a person as soon as they show by their constitution their intention to have a corporate existence.") *Mongolia* is similar: "An NGO shall be considered established after the founders have issued a decision to establish the NGO and have approved the NGO's by-laws." Such an organization cannot exercise its rights as a legal entity, however, until it has completed the establishment process. The Law of the State of Mongolia on Non- Governmental Organizations, ch. 1, art. 6 (January 31, 1997). Under these laws a civic organization is established when a group of individuals completes required acts, such as the adoption of a constitution, without any involvement of the state.

<sup>43</sup>The Law of the *Kyrgyz Republic* on Non-Commercial Organizations, Ch. 2, art. 18 (October 1, 1999). ("Founders of a public association shall convene a constituent meeting and adopt a decision on establishing a public association, approving its Charter, and forming governing and audit bodies.").

the location of the headquarters; and identify the general representative(s) of the organization.<sup>44</sup>

Decision-making authority regarding establishment should be carefully circumscribed so that it is only concerned with meeting legal requirements, and civic organizations should be entitled to appeal adverse decisions.<sup>45</sup> Refusal to permit establishment should occur during the stated time period and be accompanied by a written explanation and an opportunity to correct any defects in the application.<sup>46</sup>

The law should ordinarily have a broad list of purposes that constitute public benefit activities and there should be a catchall category so that the law will be flexible.<sup>47</sup> The law should clearly state which obligations incurred between actual creation and formal establishment will be considered to carry over to the organization once it becomes a legal entity.<sup>48</sup>

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<sup>44</sup>*Kenya Societies Act*, part IV, § 17 (1998).

<sup>45</sup>The system in *Mongolia* may serve as an example. After a completed application is filed, the establishing authority has 30 days within which to establish the civic organization or to refuse establishment. Refusal must be on one of two grounds: The purpose of the organization violates the Mongolian law or another organization with the same name is already established. If neither of these conditions is met, the authority must establish the organization. (Mongolian NGO Law, Art. 16(2)).

<sup>46</sup>The law of the *Republic of Yemen* provides (“In the event that the application is refused pursuant to this Law [the Ministry] should notify the founders of the decision to reject the application in writing, giving the reason thereof, and should post this in its bulletin board of the Ministry or the relevant office within ten days of the date of decision.”) Article 11 creates a 60-day appeal period from the day that the applicants are notified of the rejection.

<sup>47</sup>The *European Parliament* issued a resolution requesting that “all discriminatory measures based on nationality that affect the right to belong to, form or administer an association be rapidly abolished throughout the Community, in respect of citizens of Member States.” Eur. Parl. Doc. A2 196/86 (March 13, 1987). The European Court of Justice ruled against Belgium’s nationality restrictions for participation in civic organizations. Case C-172/98, *Kingdom of Belgium v. Commission* (June 29, 1999); On June 30, 2000, the existing legislation was amended to remove the requirements.

<sup>48</sup>The *Estonian* law provides that people acting on behalf of an association in the process of establishment are liable for the actions on behalf of the organization. When the organization is established, the obligations automatically transfer to the

***b) Responsible state agency***

There is considerable variety among legal systems in the choice of the responsible state agency that is empowered to establish civic organizations. Civic organizations may seek establishment with a variety of agencies like the ministry responsible for the subject matter of their proposed activity;<sup>49</sup> courts;<sup>50</sup> a single ministry in charge of establishing and supervising civic organizations;<sup>51</sup> or the local branches of a single ministry (e.g., the ministry of justice).<sup>52</sup>

There is no uniformly correct answer to the question of where to place authority for establishment of civic organizations; the system chosen will depend on the legal and political traditions and realities of the

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organization “if the persons who entered into the transaction had the right to enter into the transaction in the name of the association.” If the person did not have that right, then the obligations only transfer from the individual to the organization if all the members agree. The law does not specify what constitutes “having the right” to enter into a transaction on behalf of an organization. (The Non-Profit Association Acts of the Republic of Estonia, ch. 1, Section 11(2-3) (June 6, 1996, amended June 5, 2002).

<sup>49</sup>In *Japan*, special types of legal persons (e.g., “Public Interest Legal Persons” such as associations and foundations, social welfare corporations, educational corporations, religious corporations, and medical corporations) are all permitted to be established under different laws and by different ministries. The creation of the new “special nonprofit activities legal person” created in 1998 simply added another category and another responsible state agency (the Economic Planning Agency) to this already complex system. Thus, choice of form is a very important issue in Japan.

<sup>50</sup>*Greece* is one example. See the Greek Civil Code, C. Civ., ch. 4, § 79, § 81. Albania is another. See Law on the Registration of Non-profit Organizations, no. 8789, ch. 2, art. 5 (May 7, 2001).

<sup>51</sup>Some countries use the ministry of justice. See e.g., Law of *Mongolia* on Non-Governmental Organizations, ch. 3, art. 15 (Jan. 31, 1997); In *South Africa, Egypt, and Pakistan*, the ministry of social welfare or its equivalent is the place where civic organizations are established. (Nonprofit Organisations Act of the Republic of South Africa, ch. 3, Section 11 (1997); Law on Private Associations and Establishments Law No. 84 of 2002 of Egypt, ch. 1, art. 3; Registration as a Non-Profit Company under Section 42 of the Companies Ordinance Act 1984 of Pakistan, Section 4.3.1).

<sup>52</sup>The Regulations on the Registration of Social Organizations of the *Peoples’ Republic of China* state that the registration may occur at the national level or at local branches of the Ministry of Civil Affairs.

country involved. Any of the described arrangements can be made to work well by able people of good will, and any arrangement can also be administered badly or incompetently.

Some of the problems of agency expertise, regulatory capacity, and bias can be solved if supervisory powers over civic organizations are delegated to a specialized agency or commission whose members consist not only of government officials but also of representatives of the public and civic organizations themselves.<sup>53</sup>

The general purposes of such a commission are to establish civic organizations, determine the public benefit status of civic organizations, supervise legal compliance, and provide education and training to ensure compliance, impose sanctions in case of any violations of the law, and develop expertise in a staff whose only function is to deal with civic organizations. The existence of a single agency eliminates all too frequent inter-ministerial conflict and inconsistency, especially if each concerned ministry is represented on the commission. By having independent citizens sitting on the agency or commission, there can be greater public assurance that decisions will be made on principle and with consistency.<sup>54</sup>

**c) Public registry**

It is important that a single national registry<sup>55</sup> of all formal civic organizations be maintained and that the public has access to it. For

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<sup>53</sup>See, e.g., The Charity Commission in *Moldova* has nine members, with at least three members who represent the public sector and who are not employed by the state. Commission members have a five-year term, which permits a degree of professionalization that comes with time. (Law of the Republic of Moldova on Public Associations, No. 837-XIII, ch. 5, art. 34-37 (May 17, 1996).

<sup>54</sup>Leon E. Irish, Robert Kushen, Karla W. Simon, *Guidelines for Laws Affecting Civic Organisations*, (Prepared by Open Society Institute in cooperation with the International Center for Not-for-Profit Law, New York, Second Edition).

<sup>55</sup>*South Africa* has placed its registry on the Internet. The online registry lists each civic organization's name and address, the registration number, the date registered, and any date that the organization was deregistered, wound up, or dissolved. The online registry fulfills the legal obligation of the director of nonprofit organizations to publish annually the registry and the names of all organizations removed from the registry in the previous year "in the Gazette and at least one other widely

their own protection, citizens need to be able to check whether a purported civic organization is actually established as a legal person. The public would also benefit from being able to find out what the purposes of the organization are, where its headquarters are, who is on its governing body, who its legal representative is, etc.

***d) Termination, Dissolution and Liquidation***

Voluntary termination, dissolution, and liquidation of a civic organization should be allowed pursuant to reasonable procedures designed to protect creditors and other stakeholders of the organization. As to involuntary termination and dissolution, in order to assure a vigorous and independent civic sector, the law should provide for intermediate sanctions (e.g., fines) for various types of violations. Termination of legal existence and dissolution of a civic organization should be the last resort.<sup>56</sup>

If a state agency is given the right to terminate establishment administratively, there should be a right of judicial appeal from such a decision; or in all cases the state agency or the state attorney should apply to the court for a judicial termination of the organization.

Upon termination, the assets of an organization should go to another civic organization with a similar purpose pursuant to the terms of the terminating organization's governing documents or a resolution of the highest governing body, or the state.

***e) Governing documents***

The law should stipulate the rights, powers, and limitations for civic organizations. The governing documents should include any

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circulated means of communication." (Nonprofit Organizations Act, no. 71, vol. 340, no. 18487, ch. 2, Section 24(7) (Dec. 3, 1997). The *Czech Republic* and a number of other countries in Central and Eastern Europe have also placed their registries on the Internet.

<sup>56</sup>For example, the law of the *Republic of Yemen* requires that the government, prior to suing for dissolution, issue "the association or foundation three notices within six months to remedy the violation." (The Law on Associations and Foundations of the Republic of Yemen, Law No. (1) for the Year 2001, ch. 4, Section I, art. 44 (2).

limitations imposed by law, such as a prohibition on the distribution of profits.<sup>57</sup> The law should require that the documents state the purpose(s) of the organization and set forth its basic governance structure.

A minimum number of members of a governing body may be defined, although this number should be kept quite small (e.g., three). The basic powers of the highest governing body should be spelled out, together with any restrictions on its power to delegate duties to others.

**f) Fundraising**

There are countervailing public interests that favour certain, though limited, regulation of fundraising. Similarly, rules requiring fundraisers to prove to a public agency that they have authority to fundraise from the public for a particular organization may ward off imposters seeking to capitalize on the good name of a particular civic organization.<sup>58</sup>

Organizations raising money from the general public may not only require registering their fundraising campaigns in advance but also to file reports about the monies received and how they are spent. Adopting accounting principles for civic organizations should be a priority. The next step should be to adopt voluntary standards for public disclosure of such key numbers as the amounts paid to fundraisers and the percentage of revenues spent on overhead and fundraising.<sup>59</sup>

If it is discovered that an individual or organization engaged in deceptive fundraising (e.g., fundraising for an organization that does not exist or intentionally misleading prospective donors about the

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<sup>57</sup>Law of the Republic of Indonesia, 2001, No. 16, Concerning Foundations, ch. 2, art. 17 (2001).

<sup>58</sup>The limits on fundraising regulation in the *United States* are largely a product of jurisprudence under the First Amendment to the Constitution, which protects freedom of speech.

<sup>59</sup>[unpan1.un.org/intradoc/groups/public/.../UNPAN016333.pdf](http://unpan1.un.org/intradoc/groups/public/.../UNPAN016333.pdf).

manner in which donations will be used), it should be possible to apply general fraud and criminal laws.

***g) Reporting, Supervision and Enforcement***

Delegation of detailed financial oversight to a responsible finance committee is permissible. The civic organization law or the accounting law or standards should make such audits mandatory for sizable PBOs.<sup>60</sup> The reporting requirements imposed by donors will be contractual obligations enforceable in court. By imposing appropriate contractual conditions, donors can play a significant role in assuring the health and proper operation of the civic sector.

***h) Tax preferences***

Tax preferences are sometimes available to all formal civic organizations, but more frequently to only a smaller class of formal civic organizations.<sup>61</sup> Typical sources of revenue for civic organizations include donations, membership dues, fees under government contracts, and interest, dividends, and capital gains on investments; which are generally not subject to tax.<sup>62</sup>

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<sup>60</sup>The United Nations Mission in *Kosovo* (UNMIK) decided not to require audited financial statements by civic organizations immediately after the transition precisely because of concerns over the availability of qualified, independent accountants. See UNMIK Administrative Direction No. 2002/9, Section 1 (Mar. 29, 2002). This is not, however, a common situation, given the range of accounting skills taught in modern universities around the world.

<sup>61</sup>A civic organization that receives some tax benefits need not be offered all available tax benefits in the jurisdiction. It may be that some tax benefits are offered to a subset of PBOs, and further tax benefits are extended to a smaller subset. In the *United States*, a distinction is made between “charitable” organizations, to which tax-deductible contributions can be made, and “social welfare” organizations, for which tax deduction is not available. (26 U.S.C. Section 501 (c)(3) & Section 501 (c)(4) (2000) Both types of organizations, however, are generally exempt from income taxes.

<sup>62</sup>*Mongolia* exempts MBOs from taxation on membership fees and members’ contributions. It exempts PBOs from taxation on membership fees, all contributions and inherited funds, and income from mission related economic activities.



Provision should be made for tax reclaim schemes<sup>63</sup> or for tax designation schemes.<sup>64</sup> Such tax preferences are important and useful tools for encouraging NGO-business-government partnerships for social and economic development. Another question that must be dealt with in any scheme of taxation is the limit, if any, to put on the amount of tax benefit that can be achieved.<sup>65</sup> Floors have been used in some countries to avoid the necessity of keeping track of small contributions.<sup>66</sup>

In a country with a developing market economy, it may be appropriate to strike the balance in favour of a “destination of income” test for all profits used or set aside by a civic organization to carry out its purpose-related activities. Unfortunately, it is extremely difficult to distinguish “related” economic activities from “unrelated” economic activities, and hence the related/unrelated rule is very difficult to administer in practice.

Some countries require that business activities of civic organizations be conducted in a subsidiary rather than directly by the organization itself.<sup>67</sup> There are advantages to this system, in that it can provide greater transparency with respect to the activities. On the other hand, it is administratively burdensome, and it costs more to set up a

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<sup>63</sup>The International Centre For Not-for-Profit Law, [http://www.icnl.org/journal/vol3iss2/ar\\_bater.htm](http://www.icnl.org/journal/vol3iss2/ar_bater.htm).

<sup>64</sup>Under a tax designation scheme adopted in *Hungary*, however, an individual may direct that 1% of the taxes he or she pays go to an “eminent” PBO of his or her choice. (Act No. CXXXVI on the Public Application of a Certain Portion of Personal Income Tax upon Taxpayer’s Order, Section 3(1) (1996) *Lithuania, Slovakia, and Poland* have adopted similar laws. Such tax designation schemes do not give a deduction or credit and do not require the individual to file a tax return, which means that all taxpayers are able to participate in supporting civic organizations.

<sup>65</sup>In *Russia* individuals can claim deductions only up to 1 percent of their income, and business entities are limited to 3 percent. In the *United States*, by contrast, individuals can claim up to 50 percent and businesses can claim up to 10 percent. In *Australia*, there is no limit at all.

<sup>66</sup>Industry Commission, *Charitable Organizations in Australia*, APP. J 311-312 (1995).

<sup>67</sup>Europa, [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31977L0388&model=guichet](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31977L0388&model=guichet).

subsidiary to conduct business activities. The same transparency objective can be met by requiring that a civic organization maintain separate books and records for all of its economic activities.

## VI. CONCLUSION

In this article, the authors have laid emphasis on the pivotal roles of non-governmental organizations and other civil society organizations in national, international and transnational development, growth, rehabilitation, welfare policy formulation and their role as pressure groups. In the light of such functions, both assumed and delegated, these institutions assume a fundamental role in governance inside as well as outside the nation. In India, it is no different.

Although this article has dealt with many of the structural and administrative reforms required for efficient governance of such institutions, the authors state that there is no hard and fast rule towards providing a means of ensuring accountability and transparency in any organization. At the same time, it is essential that every *legal persona* (societies, trusts and other organizations) be subjected to some basic guidelines to ensure necessary public accountability and effective fulfilment of its goals. It is these basic principles that are the primary highlight of this paper. In spite of having a sound legislative setup and organizational structure, there is no way of guaranteeing absolutely successful functioning. Any system, however sound, can be put to abuse.

It is of crucial importance that NGOs, their supporters and their donors begin to understand the meaning and significance of effective governance and its contribution to NGO accountability. There is also a need to document, analyze and promote good practice in relation to NGO governance and accountability. Such interventions need to be viewed as part of the fabric of institutional development efforts needed to strengthen an NGO. Strategic planning and capacity-

building need to include interventions directed at making its structures and processes of governance more effective. A number of such efforts, studies and manuals developed and used in countries in the North can help to clarify and support this challenge in the South.<sup>68</sup> Furthermore, it is necessary to understand that improved governance of NGOs will invariably have a positive and affirmative effect on the governance at national and international levels.

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<sup>68</sup>*Supra* note 5.