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**Research Report on the Policy Climate and Legal Framework  
for Civil Society-Government Relations in Comparative Perspective**

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for Civil Society-Government Relations in Comparative Perspective**

**Compiled by Mark Sidel Doyle-  
Bascom Professor of Law  
University of Wisconsin-Madison  
Consultant, UNDP (Viet Nam)**

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## **Research Report on the Policy Climate and Legal Framework for Civil Society-Government Relations in Comparative Perspective**

### **Executive Summary and Introduction**

This project intends to fulfill the following objectives, as noted in the project's terms of reference. I quote the terms of reference below to provide readers with a clear understanding of the goals of this study and its intended audiences.

“Civil society organisations (CSOs) are playing a crucial role in the efforts to achieve the Millennium Development Goals. The significant contribution of civil society to poverty reduction, the empowerment of women, increasing accountability and transparency, and not least to promoting people's participation in policy and decision-making is broadly accepted by political leaders around the world. In most countries, civil society organisations and governments work side by side in such endeavors. The role of people's participation is an issue of increasing debate in Vietnam. As the reform process moves forward, unique opportunities are created for Vietnamese policy and lawmakers to promote an enabling environment for the establishment and growth of non-state organisations. Civil society in Vietnam was limited and weak before the *doi moi* period ('renovation') which put in place the first reforms towards a market-oriented society. Before *doi moi*, the state maintained the idea that associations should be an organic part of the state and that problems in society should be solved within this framework. It had little understanding of CSOs outside the state sphere, which created considerable obstacles to the emergence of a civil society. Since *doi moi*, the government has struggled to find a new balance between the market, State control and social liberties.”

“In recent years, the government has undergone a reorientation towards a structure in which the Party increasingly takes the role of formulating policy, while State administration

takes responsibility for implementing that policy. A gradually increasing space for some CSOs has begun to emerge because of the state's policy of encouraging "people funded" and "private establishments" to perform basic social services. CSOs are encouraged to engage in social services and some social issues that the state has limited means to handle and the role of CSOs is recognised as more important than before. The space for local initiatives has gradually broadened both for grassroots organisations and mass organisations, often serving the role as partners for development projects at the community level, as well as for new professional organisations and community-based organisations (CBOs). The Party and state retain firm control over the political role of CSOs, and have been cautious about strengthening the policy role of these groups. A present, the environment for civil society in Vietnam presents a mixed picture of conducive and less conducive factors. Despite pressure for a more enabling legal framework for CSOs, restrictive and complicated laws for establishing and operating organisations do not necessarily stimulate the emergence of civil society nor facilitate the work of CSOs. The work of CSOs is also hindered by a lack of adherence to rule of law, corruption and a highly centralized state administration as well as undeveloped linkages between the state and civil society groups and between the private sector and civil society groups. Civil society in Vietnam is thus at an early but important turning point in its role as an agent of positive social change. A more enabling legal environment is a key factor in this development and would certainly help develop CSOs' full potential."

"For these reasons comparative research to inform policy development on the legal environment for civil society is important for Viet Nam at this stage. While this research should describe and analyze the models and trends of legislation on civil society that other, relevant countries have adopted, the objective of commissioning this research study is not to identify a

single ‘best model,’ but to gain a better understanding, through comparative analysis, of the institutional structure and functioning of governance systems and their impact upon and government relationship with civil society. The research should therefore identify and discuss the factors in different legal systems, legislation and governance systems that shape the current conditions and future prospects for civil society development and which have a key role in strengthening, maintaining (or undermining) the relation between civil society and government....”

This study addresses a common set of questions and issues to capture the normative and legislative environment for civil society-government relations in a number of selected countries that are directly relevant to Vietnam. The countries covered, by agreement with UNDP and VUSTA, include China and Russia, as examples of transitioning socialist and post-socialist legal systems; the Philippines; and India, as comparator and contrasting models of public law on these important issues of government-civil society relations. The policy goal of this study is that, on the basis of the findings of this survey, VUSTA and UNDP will make recommendations on possibilities for reforming the legislative framework for civil society and thus providing a basis for enhancing people’s participation in decision-making at all levels, through a dialogue with the organizations, the Party and government.

In specific terms, the key objectives of this study are:

1. To describe the systems of nonprofit and civil society governance in a number of countries, including China, Russia, the Philippines and one other to be selected by the successful bidder, and to analyze the ways in which these governance systems (within their political, cultural and institutional contexts) enhance or undermine the emergence and development of civil society and the nonprofit sector, giving specific consideration to:

- The overall legal tradition, political, ideological, historical, cultural and socio-economic context of each country to be studied;
- The organization of civil society, including the roles and functions of the different organizational groups and sectors within it and the relationships among them, showing how the structure and functions of these associations and organizations have been shaped, reshaped and influenced by the legal traditions and political, social and ideological contexts;
- The strengths and weaknesses of each governance model for civil society and the nonprofit sector, including the primary challenges, emerging issues and approaches;
- The reform and transition processes that have taken place in each country studied, impacting the developments in legislative reforms and the relationship changes between civil society and government.

Finally, “[d]rawing on the country case studies discussed in paragraph 1 above, the research study will identify some key common factors which appear significant to improving (or weakening) the policy climate and legal framework for civil society-government relations; and to consider the degree to which such factors can be successfully implemented in the context of a political system like Viet Nam’s, in which the branches of government are unified rather than separated, with coordination and allocation of functions between them rather than subject to mutual checks and balances.”

### **Structure of this Report**

This report includes the following elements:

- Executive Summary.

- General Report summarising the main findings and conclusions of the research, identifying the key factors underlying the policy climate and legal framework for civil society-government relations in the countries studied and analysing their impact on supporting or undermining the development of civil society.
- A report on each selected country, addressing a common set of questions and presented in a coherent manner to analyse common themes and areas of difference, trends, strengths and weaknesses in order to provide useful recommendations for Viet Nam.

The General Report comprises Part I of the comparative research report, and the Country Reports forms Part II of the comparative research report. Part II also includes Annexes such as extracts from Constitutions and laws, data and any other relevant information in relation to the countries studied. In general terms, each country report (on China, Russia, the Philippines, and India) consists of a descriptive section (focusing in particular on the structure of civil society and the nonprofit system and the key legal and policy determinants in civil society-government relations) and includes sections on:

(1) Political, cultural, historical and socio-economic context, including the political and socio-economic context and on the main historical, cultural and constitutional framework that shapes its legal system, including information on (a) major historical events which have been significant in shaping the contemporary experience of the country under review; (b) economic system in the country under review (Transitional/“ free market” /regulated market/socialist-oriented market economy); and (c) political system: ideologies, philosophies, cultural and historical factors shaping the political system.

(2) The legal environment and state-civil society relations, examining to what extent the existing legal environment enables or inhibits civil society development and influences state-civil society relations, and addressing whether the legal environment and governance structures for CSOs is conducive or non-conducive to engaging in advocacy, monitoring and/or criticism of government policies. This section addresses some or all of the following questions: What is the degree of distance/independence of CSOs from the state? What are the requirements for registration and obtaining legal status, funding etc.? What types of advocacy are allowed and are actually being taken up by CSOs? To what degree does respect of civil liberties (and more specifically access to public information and freedom of expression) positively influence the emergence of civil society and impact on state-civil society relations?

(3) Each Country Report also includes sections on two key issues in contemporary state-civil society relations and the legal framework for the nonprofit sector and civil society:

- The role of nonprofit self-regulation; and
- The regulation of fundraising and charitable solicitation.

(4) Analysis and Conclusions: This section considers contemporary controversies and debates as well as calls for reform in the countries to be studied, including an overall assessment of the strengths and weaknesses of CSOs in the context of the country's institutional, cultural and political framework as set out above in enhancing, or undermining the role of civil society and the non-profit sector, including the primary current challenges and controversies for civil society-government relations and civil society governance and refer to current key reforms and key issues for future reform.

## **Executive Summary**

This Report discusses the policy climate and the legal framework for state-civil society relations in the Philippines, India, China and Russia.

The main findings and conclusions of the Report include:

- The nonprofit community and, in some countries, what may be identified as civil society, are emerging and in some cases flourishing in the countries studied in this Report. This is an undeniable trend, but the dynamics, pace and depth of the emergence of a nonprofit community and civil society differ dramatically by country and society.
- Country and societal context are crucially important. In each of the countries studied, the political, economic, historical and social dynamics of that nation and society play a key role in determining the freedom and autonomy accorded to the nonprofit sector and civil society, and those factors go a long way toward explaining the relative levels of legal freedom and restriction in those countries.
- The Philippines represents one end of the spectrum of state-civil society relations – a relatively politically and economically free country in which the nonprofit sector and civil society have generally flourished. The country report for the Philippines identifies key elements of that relative freedom, including relatively straightforward autonomy to register, operate, gather resources, and participate in various elements of national life. The special element of strong self-regulation, including the cooperation of the government and the nonprofit sector in using a self-regulatory process to determine done institution status for tax purposes, is detailed as well.
- India also represents a relatively free and autonomous nonprofit sector and civil society, in a relatively politically and economically free country in which the nonprofit sector and

civil society have generally flourished. The country report for India identifies key elements of that relative freedom, including relative liberty to register, operate, gather resources, and participate in national life. Yet there are countervailing elements in India, including a strong restrictive environment toward foreign funding (foreign contributions to domestic civil society), various legal and bureaucratic impediments to civil society, an ongoing government campaign against Maoist rebels that has at times targeted civil society organizations and individuals, and other restrictive issues.

- China represents very different patterns. In China, the Communist Party and state remain suspicious of the nonprofit sector and emerging civil society and differentiate clearly between nonprofit organizations that contribute to the state's social service, educational, medical and other priorities, and those civil society groups that are perceived to threaten the Party and state. It is clear, as the Report indicates, that the opening and liberalization of the domestic Chinese economy has helped to strengthen a nonprofit sector and emerging civil society that was virtually non-existent three decades ago. As the Report makes clear, the Party and state's clear differentiation of various types of nonprofits and civil society groups is reflected and facilitated in the legal regulation of the sector, which rather strictly governs registration, operation, supervision and reporting, and other key aspects of nonprofit life.
- The Russian scene for non-governmental organizations is complex. Nonprofits are highly regulated, and they are regulated on a differential basis by type of organization and at times by location within the Russian federation. Tax exemptions and deductions, for example, are available in part. In formal legal terms, many such organizations appear to have a significant range of freedom and autonomy. But there are at times significant

political pressures against groups that criticize or that are perceived to oppose the government. The result of this detailed regulatory framework and at times hostile state-civil society relations has been a strained relationship between the Russian government and some non-governmental groups, a situation that shows little signs of easing as the government (now undergoing transition back to Putin) seeks both to channel the activities of the nonprofit sector and to allow it some space to operate.

## **General Report**

This General Report summarises the main findings and conclusions of the research, identifying the key factors underlying the policy climate and legal framework for civil society-government relations in the countries studied and analysing their impact on supporting or undermining the development of civil society.

The main findings and conclusions of the Report include:

- The nonprofit community and, in some countries, what may be identified as civil society, are emerging and in some cases flourishing in the countries studied in this Report. This is an undeniable trend, but the dynamics, pace and depth of the emergence of a nonprofit community and civil society differ dramatically by country and society.
- Country and societal context are crucially important. In each of the countries studied, the political, economic, historical and social dynamics of that nation and society play a key role in determining the freedom and autonomy accorded to the nonprofit sector and civil society, and those factors go a long way toward explaining the relative levels of legal freedom and restriction in those countries.

## **The Philippines**

- The Philippines represents one end of the spectrum of state-civil society relations – a relatively politically and economically free country in which the nonprofit sector and civil society have generally flourished. The country report for the Philippines identifies key elements of that relative freedom, including relatively straightforward autonomy to register, operate, gather resources, and participate in various elements of national life. The special element of strong self-regulation, including the cooperation of the

government and the nonprofit sector in using a self-regulatory process to determine done institution status for tax purposes, is detailed as well.

- The Philippine context provides valuable information for Vietnam. In particular, the forms for organization and establishment of nonprofit and civil society organizations are diverse, clear, and well-defined; formation is relatively straightforward; operations of nonprofit and civil society groups are, in general, not hampered by over-extensive government interference (including supervision and reporting mechanisms that remain at a reasonable level); the state provides some funding to nonprofit and civil society groups for the provision of social and other services; nonprofits and civil society organizations retain relative freedom to participate in public debate and national life; a facilitative tax regime is generally in place; strong nonprofit and civil society umbrella groups serve the sector; and a self-regulatory ethos is strong, and, virtually unique in Asia, has become a vehicle for state-civil society cooperation on the granting of tax favorable status to qualified nonprofit and civil society groups.

### **India**

- India also represents a relatively free and autonomous nonprofit sector and civil society, in a relatively politically and economically free country in which the nonprofit sector and civil society have generally flourished. The country report for India identifies key elements of that relative freedom, including relative liberty to register, operate, gather resources, and participate in national life. Yet there are countervailing elements in India, including a strong restrictive environment toward foreign funding (foreign contributions to domestic civil society), various legal and bureaucratic impediments to civil society, an

ongoing government campaign against Maoist rebels that has at times targeted civil society organizations and individuals, and other restrictive issues.

- The Indian context provides valuable information for Vietnam. The forms for organization and establishment of nonprofit and civil society organizations are diverse, and they are relatively clear and well-defined. Formation is feasible if not always quite as easy as in other jurisdictions. Operations of nonprofit and civil society groups are, in general, not overly hampered by over-extensive government interference (including supervision and reporting mechanisms that remain at a reasonable level), but may, in some states and for some kinds of organizations, suffer from over-extensive government intervention and report. The state provides some funding to nonprofit and civil society groups for the provision of social and other services. Many nonprofits and civil society organizations retain relative freedom to participate in public debate and national life, but some are not allowed to do so or come under political or police pressure. A facilitative tax regime is generally in place. Some strong nonprofit and civil society umbrella groups serve the sector, but remain insufficient. Experiments with nonprofit self-regulation are underway but have not yet gained significant strength or scope.

### **China**

- China represents very different patterns. In China, the Communist Party and state remain suspicious of the nonprofit sector and emerging civil society and differentiate clearly between nonprofit organizations that contribute to the state's social service, educational, medical and other priorities, and those civil society groups that are perceived to threaten the Party and state. It is clear, as the Report indicates, that the opening and liberalization of the domestic Chinese economy has helped to strengthen a nonprofit sector and

emerging civil society that was virtually non-existent three decades ago. As the Report makes clear, the Party and state's clear differentiation of various types of nonprofits and civil society groups is reflected and facilitated in the legal regulation of the sector, which rather strictly governs registration, operation, supervision and reporting, and other key aspects of nonprofit life.

- The Chinese context also provides valuable information for Vietnam. China continues to invoke significant controls on the nonprofit sector and civil society organizations, but has perhaps allowed a greater range of groups to flourish than has occurred in Vietnam. The current legal forms for organization of nonprofit and civil society organizations are relatively clear, but formation is not easy. Operations of nonprofit and civil society groups are, in general, hampered by over-extensive government interference (including difficult supervision and reporting mechanisms that remain at a reasonable level). The government is only beginning to explore providing funding to nonprofit and civil society groups for the provision of social and other services. Nonprofits and civil society organizations have some leeway in providing input to legislative proposals and national and local policy, but relatively little broader political freedom to participate in public debate and national life. The nonprofit tax regime is just emerging and does not yet play a significant role in facilitating the formation and activities of the nonprofit community. Strong nonprofit and civil society umbrella groups are not yet in place. Self-regulation is now under intensive exploration, particularly in the philanthropic sector, but is not yet a serious force for strengthening nonprofits and civil society organizations.
- The Russian scene for non-governmental organizations is complex. Nonprofits are highly regulated, and they are regulated on a differential basis by type of organization

and at times by location within the Russian federation. Tax exemptions and deductions, for example, are available in part. In formal legal terms, many such organizations appear to have a significant range of freedom and autonomy. But there are at times significant political pressures against groups that criticize or that are perceived to oppose the government. The result of this detailed regulatory framework and at times hostile state-civil society relations has been a strained relationship between the Russian government and some non-governmental groups, a situation that shows little signs of easing as the government (now undergoing transition back to Putin) seeks both to channel the activities of the nonprofit sector and to allow it some space to operate.

- Social contracting appears to be an example of this dual situation – on the one hand, strong controls, and on the other, some legal freedoms and an understanding that even a limited nonprofit sector needs to emerge. Contracting for social services faces many issues in Russia, including the willingness of governments to move away from traditionally direct social service provision and the capacity of the voluntary sector, as well as the desire for control by the state, yet, with many fits and starts, a number of experiments and initiatives have been underway.

## **Country Reports**

### **The Philippines**

#### **I. Political, Cultural, Historical and Socio-Economic Context**

- (a) Major historical events which have been significant in shaping the contemporary experience of the country under review
- (b) Economic system in the country under review (Transitional/“ free market” /regulated market/socialist-oriented market economy)
- (c) Political system: ideologies, philosophies, cultural and historical factors shaping the political system.

The Philippines is a major Asian country of over 92 million people based on island territory in Southeast Asia. Most of the population is of Malay, Chinese or other Asian background, and about 80% are Roman Catholic (part of the result of centuries of Spanish and American influence before independence in 1946), with about 5% Muslim.<sup>1</sup> Key languages are Filipino and English, though many other languages are also spoken.

The Philippine government consists of executive, legislative and judicial branches, with a central government and multiple local governments. The political process is democratic, though as noted below civil society groups are at time under threat. The Philippines spent more than three centuries under Spanish rule (1521-1898), then another 48 years under U.S. rule (1898-1946, with Japanese occupation from 1942-1945), before becoming independent in 1946. The rule of Ferdinand Marcos deeply damaged democratic institutions in the Philippines before he was overthrown in 1986. The economy suffered as well: “[Y]ears of economic mismanagement

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<sup>1</sup> Information for this section on general conditions in the Philippines is based on the U.S. State Department’s Background Note on the Philippines, <http://www.state.gov/r/pa/ei/bgn/2794.htm>, and other materials.

and political volatility during the Marcos regime contributed to economic stagnation and resulted in macroeconomic instability.”<sup>2</sup>

Since 1986, the Philippines has struggled to build strong democratic and economic institutions, stability and prosperity in a democratic system. Currently, the Philippines has a three branch governmental structure that includes two legislative houses, a full executive branch, and judicial institutions.

The economy is based primarily on services (about 51%), agriculture (about 34%), and industry (about 15%). Economic reforms have been undertaken over the past two decades, though “long-term economic growth remains threatened by inadequate infrastructure and education systems, and trade and investment barriers.”<sup>3</sup> Services, industry, agriculture and energy are key components of the economy. Remittances by Filipino workers abroad remain a mainstay of the economy as well. “Potential foreign investors, as well as tourists, remain concerned about law and order, inadequate infrastructure, policy and regulatory instability, and governance issues. While trade liberalization presents significant opportunities, intensifying competition and the emergence of powerful regional economies also pose challenges....”<sup>4</sup>

Fely Soledad, the first leader of the Philippines Council for Nonprofit Certification (which is discussed extensively below), has produced an excellent summary of the political, historical and social context for nonprofit organizations in the Philippines. As Soledad noted, “[a]s early as the Spanish colonization, “proto-NGOs” already existed in the form of cooperatives, local reactions to colonialism, and the trade union movement. Then the Americans came and introduced some welfare agencies. A number of individuals and

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<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

families contributed to the relief, welfare, and reconstruction efforts. Religious and civic organizations then began to be recognized.

The martial law period (1972-1986) gave birth to more new issues and concerns, and therefore new arenas of struggle. By this time, the generic label NGO was already being used in international circles. New NGOs were set up by the mid-1970s, dealing with social development issues on a largely community-based level. The NGO community was relatively small then, and although there were politically independent NGOs, much of the action during this period was in conjunction with ideological forces. As such, NGOs were largely labeled as belonging to one force or another, further dividing the already factious groups. Hence, the felt need for networking.

Welfare organizations had already had a network from the 1950s. The Council of Welfare Foundations of the Philippines (CWAFFPI) was the forerunner for the National Council for Social Development Foundations (NCSD). But it was in the 1970s that the Philippine Business for Social Progress (PBSP), the Association of Foundations (AF), the National Secretariat for Social Action (NASSA), the National Council of Churches in the Philippines (NCCP), the Ecumenical Center for Development (ECD), the National Association of Training Centers of Cooperatives (NATCCO), and the Philippine Partnership for the Development of Human Resources in Rural Areas (PHILDHARRA) were formed.

As the Marcos dictatorship earned a notorious reputation even abroad and civil society began to awaken, more international support flowed into the country. The regime responded by becoming more repressive and violent, but it only led to the growth of the NGO community and the downfall of the dictator.

The assassination of Benigno Aquino, Jr. in 1983 and the assumption of power by his widow Corazon in 1986 were to herald the increase in number of NGOs in the Philippines. Buoyed by their role in the success of the EDSA People Power, encouraged by the available democratic space, enhanced by support from international donors which preferred to work with NGOs rather than with government agencies, and now formally recognized by the government via the 1987 Constitution and the Local Government Code of 1992 which requires the inclusion of NGOs in the decision-making process at the local level, NGOs have proliferated beyond anyone's accurate reckoning. The Securities and Exchange Commission (SEC) estimates that there are about 60,000 NGOs (the term also covers the so-called non-stock, non-profit corporations under the category under which NGOs register with the SEC), but other estimates cite more than a hundred thousand, including those which are not registered. The Philippines is now said to have the most active civil society in Asia.”<sup>5</sup>

Other analysts put the situation much more succinctly, but in a similar vein. In one of the first comparative studies of the nonprofit sector in Asia, conducted in the late 1990s with the Asia Pacific Philanthropy Consortium, Carol Lerma and Jessica Los Banos concluded in 1999 that

“[t]he Philippines is generally regarded as a civil law country, with a blend of Spanish, American, and Philippine law. Since the end of martial law in 1986, the Philippines has developed the most favorable legal framework for NPOs in the Asia Pacific region. It has

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<sup>5</sup> Fely I. Soledad, *The Philippines Council for NGO Certification: Civil Society and NGOs in the Philippines*, [http://www.icnl.org/knowledge/ijn/vol3iss2/cr\\_1.htm](http://www.icnl.org/knowledge/ijn/vol3iss2/cr_1.htm). Soledad in turn relies in part on Karina C. David, *Intra-Civil Society Relations: A Synoptic Paper*. For other work summarizing and discussing the Philippine nonprofit system and structure, see Abella, C., & Dimalanta, M. A. L. (2003). *Governance, organizational effectiveness and the nonprofit sector in the Philippines*. Manila, Philippines: Asia Pacific Philanthropy Consortium, <http://www.asianphilanthropy.org>; Carol C. Lerma and Jessica Los Banos, *The Philippines*, in Silk (ed.), *Philanthropy and Law in Asia* (Wiley, 1999).

the largest independent nonprofit sector in the region.... The 1987 Constitution commits the government to supporting the nonprofit sector with the provision that “the State shall encourage nongovernmental . . . organizations.” Registration has become less of an obstacle with the introduction of a twenty-four hour express procedure that satisfies one step in the two-part registration process. Until the enactment of the Tax Reform Act of 1997, tax deductions for charitable contributions were largely unavailable to individuals. Now, however, charitable contribution deductions for individuals and corporations are generous and, under some circumstances, without limit.... The Philippine nonprofit legal system is one of the most democratic and least regulated nonprofit systems in the world. Despite perceived inadequate implementation of laws, rules, and regulations governing the non-profit sector, nonprofit organizations have continued to flourish and increase in number.”<sup>6</sup>

There is significant constitutional support for nonprofit organizational activity and autonomy in the Philippines, as Lerma and Los Banos indicate: “The 1987 Philippine Constitution recognizes the important role of NGOs and other nonprofit organizations in nation building. Section 23 of Article II of the 1987 Philippine Constitution provides: “The state shall encourage nongovernmental, community-based, or sectoral organizations that promote the welfare of the nation.” Their roles and rights are enshrined in Article XIII of the Constitution, as follows: “The state shall respect the role of independent people’s organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means. The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and

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<sup>6</sup> Carol C. Lerma and Jessica Los Banos, *The Philippines*, in Silk (ed.), *Philanthropy and Law in Asia* (Wiley, 1999).

economic decision making shall not be abridged. The state shall, by law, facilitate the establishment of adequate consultation mechanisms. [And] [t]he Local Government Code of 1991 recognizes the role of nongovernmental units in local governance.”<sup>7</sup>

Likewise, in 2010, CIVICUS reported that “The Philippines civil society is seen as one of the most vibrant and active in Asia with its deep and expansive root[s] in society as shown by the high level of participation. The 1987 Constitution, which was enforced after the 1986 citizen-led non-violent and peaceful revolt, recognises the value of people's participation. This high level of participation can be seen to ultimately lead to strong perceptions of the impact of CSO work in the areas of poverty reduction and environmental protection.”

Yet CIVICUS reported on problems as well. “Despite these positives,” CIVICUS reports, “CSOs report that their work is hampered by low levels of trust in Filipino society, including lack of trust in CSOs. There is a gap in CSOs having publicly available codes of conduct or ethics to guide their operations. This is also coupled with a perception of pervasive corruption and is related to weak board governance within the NGO sector. Some of the recommendations cited to improve civil society in the country [have been]: to strengthen governance mechanisms within CSOs, develop consensus on labour and environmental standards for CSOs and to improve the financial and human resource capacity of CSOs.”<sup>8</sup>

We should not assume from this history, however, that all is well for the Philippine nonprofit sector. Some parts of the sector continue to come under significant government and military pressure. And for long periods of time significant numbers of rights advocates and political activists, most of them active in civil society and civil society organizations, have been abducted and killed in the Philippines.

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<sup>7</sup> Id.

<sup>8</sup> CIVICUS, CSI Country Report on the Philippines (2010), at [http://www.civicus.org/images/stories/csi/csi\\_phase2/philippines%20csi%20analytical%20country%20report.pdf](http://www.civicus.org/images/stories/csi/csi_phase2/philippines%20csi%20analytical%20country%20report.pdf).

In 2008, for example, the International Center for Not-for-Profit Law (ICNL) and the World Movement for Democracy (WMD), reported that in a number of countries, “[t]he conspicuous failure of states to protect individual activists and civil society representatives in the face of threats, intimidation, violent assault and even murder creates a climate of fear that can effectively undermine the strength of civil society.” A key example of this trend given was the Philippines where, according to the report, “since 2001 there have been a rising number of cases of unsolved extra-judicial killings and abductions of human rights and political activists. The government’s own Commission on Human Rights estimates the number of victims between 2001 and May 2007 at 403 people – more than one per week.”<sup>9</sup> The economic system, however, is relatively free, though it remains quite stratified.

## **II. The Legal Environment and State-Civil Society Relations**

This section examines to what extent the existing legal environment enables or inhibits civil society development and influences state-civil society relations, addressing whether the legal environment and governance structures for CSOs is conducive or non-conducive to engaging in advocacy, monitoring and/or criticism of government policies. It includes questions such as: What is the degree of distance/ independence of CSOs from the state? What are the requirements for registration and obtaining legal status, funding etc.? What types of advocacy are allowed and are actually being taken up by CSOs? To what degree does respect of civil liberties (and more specifically access to public information and freedom of expression) positively influence the emergence of civil society and impact on state-civil society relations?

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<sup>9</sup> International Center for Not-for-Profit Law (ICNL) and the World Movement for Democracy (WMD), Threats to Civil Society (2008), [http://www.icnl.org/knowledge/ijnl/vol10iss2/art\\_2.htm](http://www.icnl.org/knowledge/ijnl/vol10iss2/art_2.htm).

The best concise discussion of the legal environment for civil society organizations and philanthropy in the Philippines is the United States International Grantmaking project prepared by the International Center for Not-for-Profit Law (ICNL) in connection with the U.S. Council on Foundations. The discussion below relies on that excellent document.<sup>10</sup>

### **Key Elements of the Legal Environment for CSOs in the Philippines**

As outlined by the USIG note, the key applicable laws and regulations dealing with CSOs, nonprofits and philanthropy in the Philippines include the following:

- The Constitution of the Philippines, 1987;
- The Corporation Code of the Philippines (*Batas Pambansa Bilang 68*);
- Philippine Omnibus Election Code (*Batas Pambansa Bilang 881*);
- The Local Government Code (Republic Act 7160);
- National Internal Revenue Code Republic Act No. 8424 (“Tax Code”), as amended by Republic Act 9337;
- Tariff and Customs Code Republic Act No. 1937 (“Customs Code”);
- The Securities and Exchange Reorganization – (Presidential Decree No. 902-A);

as well as a variety of revenue regulations, Philippine SEC memoranda, and other regulatory documents.<sup>11</sup>

### **Types of Civil Society and Nonprofit Organizations in the Philippines**

The organization of nonprofits in the Philippines is as follows: “In the Philippines, not-for-profit organizations ... are typically organized as "non-stock corporations" registered under the Corporation Code. Non-stock corporations can be formed for charitable, religious,

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<sup>10</sup> USIG, The Philippines, available at [www.icnl.org](http://www.icnl.org). Punctuation and formatting changes have been made within quotations as well.

<sup>11</sup> USIG Philippines.

educational, professional, cultural, fraternal, literary, scientific, social, civic service, or similar purposes, such as trade, industry, agricultural and like chambers, or any combination thereof (Section 88, Corporation Code). In turn, the tax laws provide additional benefits to two categories of non-stock corporations: accredited “non-stock, non-profit corporations or organizations” ... and accredited “non-governmental organizations” (hereinafter “NGOs”).”

The accredited non-stock, non-profit corporations “must be organized exclusively for one or more of the following purposes: religious, charitable, scientific, athletic, social welfare, cultural purposes, or the rehabilitation of veterans (Section 1(a), Revenue Regulation No. 13-98). Accredited NGOs must be organized and operated exclusively for one or more of the following purposes: scientific, research, educational, character-building, youth and sports development, health, social welfare, cultural, or charitable purposes (Section 1(b), Revenue Regulation No. 13-98).”<sup>12</sup>

### **General Aspects of Tax Treatment of Nonprofit Organizations**

As the USIG note makes clear, “[e]xemption from income tax is extended to a broad range of organizational forms, including: Non-stock corporations organized exclusively for religious, charitable, scientific, athletic or cultural purposes, or for the rehabilitation of veterans; Civic leagues or organizations operated exclusively for the promotion of social welfare; and Non-stock, non-profit educational institutions (Sec. 30 (e), (g), and (h), Tax Code).” The favorable tax treatment is broad: “Each of these entities is exempt from income tax on donations, grants, and gifts, provided that the organization's net income does not inure to the benefit of any private shareholder or individual. Profits generated from business activities are

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<sup>12</sup> This discussion, like the USIG discussion, does not include other kinds of nonprofits such as unregistered NPOs, labor unions, trade unions, mutual savings banks, cooperatives, entities established or governed by special laws, and “mutual benefit associations” which, under Philippine law, are a form of insurance company. Several of these forms may, however, be discussed at the workshop in Hanoi.

taxed, regardless of the disposition of the income (Sec. 30, Tax Code).” And even more favorable treatment is also possible: “An NPO may seek additional tax benefits by becoming an accredited non-stock, non-profit corporation or an accredited NGO (together, hereinafter "accredited NPOs"). This certification vests the organization with donee institution status, which entitles it to receive tax-deductible donations.<sup>13</sup> In the case of an accredited non-stock, non-profit corporation, donations are deductible up to 5% of taxable income for corporate donors and 10% for individual donors (Section 3(a), Revenue Regulation No.13-98)... In the case of an accredited NGO, donations are deductible in full, subject to additional restrictions (Section 3(b), Revenue Regulation No. 13-98). For example, in order to qualify to receive fully deductible donations, an accredited NGO cannot devote more than 30% of its total expenses for the taxable year to administrative expenses (Section 1(b)(ii), Revenue Regulation No. 13-98).”<sup>14</sup>

### **Legal Forms of Nonprofit and Civil Society Organizations**

These entities may be formed in several ways and under strict conditions. As USIG notes, “Under the Corporation Code, a non-stock corporation may be formed or organized for charitable, religious, educational, professional, cultural, fraternal, literary, scientific, social, civil service, or similar purposes, like trade, industry, agriculture and like chambers, or any combination thereof (Section 88, Corporation Code). By definition: 1. No part of the income of non-stock corporations shall be distributed as dividends to their members, trustees, or officers; and 2. Any profit incidental to their operations shall be used in furtherance of their purpose or purposes (Section 87, Corporation Code).”

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<sup>13</sup> In an important wrinkle in the Philippines, a self-regulatory body is empowered to play a major role in the determination of donee institution status (and thus the ability of the donor to take a tax deduction) for Philippine NPOs. As ICNL notes, “[t]o acquire donee institution status, an NGO must first receive certification from the Philippine Council for NGO Certification (PCNC), an accrediting entity, on the basis of which the Bureau of Internal Revenue will issue the Certification of Registration as a Qualified Donee Institution (Executive Order 720, April 11, 2008).” USIG Philippines.

<sup>14</sup> USIG Philippines.

Foundations require even more conditions. “In the SEC-registered foundation context, the term “foundation” refers to a non-stock, non-profit corporation established for the purpose of extending grants, or endowments to support its goals or raising funds to accomplish charitable, religious, educational, athletic, cultural, literary, scientific, social welfare or other similar objectives (SEC Memorandum Circular No. 8, series of 2006). A non-stock, non-profit corporation, including an NGO, that intends to engage in microfinance activities, is required to state in its incorporation papers that it is conducting microfinance operations pursuant to Republic Act No. 8425 (otherwise known as the Social Reform and Poverty Alleviation Act). For this purpose, an NGO is defined under RA 8425 as a duly registered non-stock, non-profit organization that focuses on the upliftment of the basic or disadvantaged sectors of society by providing advocacy, training, community organizing, research, access to resources and other similar activities (SEC Memorandum Circular No. 2, series of 2006).”<sup>15</sup>

### **Public Benefit Status**

Crucially important in the Philippine context is that “[a]n NPO may seek to become an accredited non-stock, non-profit corporation or an accredited NGO (Section 1, Revenue Regulation No. 13-98). To qualify for accreditation, a non-stock, non-profit corporation must be organized” for religious, charitable, scientific, athletic, cultural, veterans rehabilitation, or social welfare purposes. Also, “no part of the net income or assets of the accredited organization may belong to or inure to the benefit of any member, organizer, officer, or specific person (Tax Code sec 30 (E), Section 1(a), Revenue Regulation No. 13-98).”

To become an NGO, “an NPO must be organized and operated exclusively” for scientific, research, educational, character building, youth and sports development, health, social welfare, cultural, or charitable purposes. (Section 34(H)(2)(c)(1), Tax Code). And, as with the

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<sup>15</sup> USIG Philippines.

non-stock, non-profit corporations, “no part of the net income of the NGO may inure to the benefit of any private individual.” But, in addition, “[a]ccredited NGOs are also subject to other requirements, including restrictions on the amount of administrative expenses that can be incurred (limited to 30% of total expenses) and limitations on the distribution of assets upon the organization’s dissolution.”<sup>16</sup> (Section 1(b), Revenue Regulation No. 13-98). [3]

### **Specific Legal Environment Issues**

In addition to the general framework for establishing these forms of NPOs, described above, there are specific legal issues applicable to most such NPOs. These include questions of

- Private inurement to an organization’s members, trustees, or officers
- Proprietary interests in the organization;
- Dissolution; and
- Permitted and prohibited activities.

### **Private in u rem en t t o an organ izat ion ’s m em bers, tru stees, or officers**

Private inurement is prohibited. As the USIG note states clearly, “[n]o part of the income of an NPO may inure to the organization’s members, trustees, or officers. Any earnings of the organization must be used exclusively to promote its statutory objectives (Section 87, Corporation Code).” In addition, “[a]ccredited NPOs are prohibited from undertaking a variety of transactions that would lead to direct or indirect private inurement. These include: lending any part of the organization’s income or property without adequate consideration (with an exception for some formal micro-credit or micro-finance programs); purchasing any security and/or property for more than adequate consideration; selling any of the organization’s property for less than adequate consideration; diverting income or property rights of the organization to

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<sup>16</sup> USIG Philippines.

founders, principle officers, directors, and persons closely related to them or to any corporation controlled directly or indirectly by those same individuals; using any part of its property, income or seed capital for any purpose other than that for which the corporation was created or organized; or engaging in any activity which is contrary to law, public order or public policy (Section 10, Revenue Regulation No. 13-98).” And trustee compensation or other pay is not permitted as well, though reasonable per diem payments are allowed.<sup>17</sup>

With respect to accredited NGOs, “administrative expenses, including compensation and remuneration, may not exceed, on an annual basis, 30% of total expenses for the taxable year (Section 1(b)(ii), Revenue Regulation No. 13-98).”

#### **Proprietary interests in an organization**

Philippine NPOs may not have stockholders, and “[n]o part of the income of an NPO is distributable as dividends to its members, trustees or officers; and all profits shall be used in furtherance of the organization’s objectives (Section 87, Corporation Code). In addition, for accredited non-stock, non-profit corporations, the law specifically states that no part of the net income or assets may “belong” to any member, organizer, officer, or specific person (Section 1(a), Revenue Regulation No. 13-98 and Sec 30(E) and (G) of the Tax Code).”<sup>18</sup>

#### **Dissolution of a nonprofit organization or NGO**

Dissolution can be a complex issue for nonprofit organizations. In general, in the Philippines, “[a]n NPO’s assets remaining after the satisfaction of liabilities and other obligations are generally distributed in the following manner: When the assets are held upon a condition requiring a return, transfer or conveyance, [they] shall be returned, transferred or conveyed in accordance with such requirements (Section 94(2), Corporation Code). When the

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<sup>17</sup> USIG Philippines. Punctuation and formatting amended.

<sup>18</sup> USIG Philippines.

assets are received or held subject to limitations permitting their use only for charitable or similar purposes but not held upon a condition requiring return, they shall be transferred or conveyed to one or more corporations, societies, or organizations engaged in activities in the Philippines substantially similar to those of the dissolving corporation (Section 94(3), Corporation Code). Otherwise, the remaining assets of non-stock corporations may be distributed in the manner and to those individuals or organizations indicated in the Articles of Incorporation (Section 94(4), Corporation Code).”<sup>19</sup>

As is true in a number of contexts in the Philippines, rules are “[m]ore restrictive” for “accredited NGOs. Assets remaining upon dissolution must be distributed to another accredited NGO for similar purposes, or distributed by a competent court to another accredited NGO to be used in such manner as in the judgment of the court shall best accomplish the general purpose for which the dissolved NGO was organized (Section 1(b)(iii), Revenue Regulation No. 13-98.)” The government may also receive NGO assets for “public purpose[s].”<sup>20</sup>

### **Permitted and prohibited activities**

Many of the permitted activities for an NPO in the Philippines will not come as a surprise to observers of nonprofits in other contexts. In particular:

- “An NPO can sue and be sued in the corporate name, admit members, buy and sell real and personal property, and ‘exercise such other powers as may be essential or necessary to carry out its purpose or purposes as stated in the articles of incorporation’ (Sections 36, 87, Corporation Code).”<sup>21</sup>
- “NPOs may be formed or organized for charitable, religious, educational, professional, cultural, fraternal, literary, scientific, social, civic service, or similar purposes (such as

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<sup>19</sup> USIG Philippines. Punctuation and formatting amended.

<sup>20</sup> USIG Philippines.

<sup>21</sup> USIG Philippines.

trade, industry, agricultural and like chambers), or any combination thereof (Sec. 88, Corporation Code). Those with NPO accreditation, however, are limited to narrower lists of purposes (Section 1 (a) and (b), Revenue Regulation No. 13-98).<sup>22</sup>

### **The question of public benefit activities**

While general NPOs may engage in a wide array of activities, the permitted activities for accredited non-stock, non-profit corporations “must exclusively advance one or more of the following purposes: religious, charitable, scientific, athletic, cultural, or social welfare purposes, or the rehabilitation of veterans (Section 1(a), Revenue Regulation No. 13-98).” And there are similar restrictions for accredited NGOs, which also receive favorable tax treatment: They “must be organized and operate exclusively for one or more of the following purposes: scientific, research, educational, character-building, youth and sports development, health, social welfare, cultural or charitable purposes (Section 1(b), Revenue Regulation No. 13-98).”<sup>23</sup>

### **Engaging in business and economic activities**

In general, Philippine NPOs are not permitted to engage “primarily” in business or economic activities. Both accredited and unaccredited NPOs may, according to ICNL, “engage only in those income-generating activities expressly allowed in their governing documents (i.e., Articles of Incorporation) or necessary or incidental to the statutory objectives of the organization. Any profit generated from economic activities must be used in furtherance of the organization’s objectives (Section 87, Corporation Code).”<sup>24</sup>

### **Engaging in political activities**

Philippine NPOs can participate in lobbying “but not directly expend funds on ‘any political party or candidate or for purposes of partisan political activity’ (Section 36(9),

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<sup>22</sup> USIG Philippines.

<sup>23</sup> USIG Philippines.

<sup>24</sup> USIG Philippines.

Corporation Code).” Lobbying “must conform to the norms for acceptable advocacy under Article 19 of the Civil Code,” according to ICNL. On the specific problem of political campaigns, “NPOs receiving government funding and those receiving tax benefits are prohibited from making indirect or direct contributions for purposes of partisan political activity (Section 95 (b to f) and (h), Philippine Omnibus Election Code).”<sup>25</sup>

Election and political activity is largely prohibited to foreigners. According to ICNL, “Section 81 of the Election Code states that it is unlawful for any foreigner, whether a judicial or natural person, to aid any candidate or political party, directly or indirectly, or take part in or influence any election, or to contribute or make any expenditure in connection with any election campaign or partisan political activity. The Election Code also states that it is unlawful for any person, including a political party or public or private entity to solicit or receive, directly or indirectly, any aid or contribution of whatever form or nature from any foreign national, government or entity for the purposes of influencing the results of an election.”<sup>26</sup>

### **Foreign Control of Nonprofit Organizations**

It is actually possible for a foreign organization or individual to control a Philippine NPO. “There are no provisions under Philippine law restricting the ability of foreign entities or individuals to control NPOs. It is thus possible that a Philippine NPO may be controlled by a for-profit entity or by an American grantor charity (which requires that the charity specifically so provide in the affidavit).”<sup>27</sup>

### **Tax Law Applicable to Nonprofit Organizations in the Philippines**

As in many other countries, tax law is important for the financial and programmatic flexibility to be accorded to the nonprofit sector in the Philippines. The Philippines has some

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<sup>25</sup> USIG Philippines.

<sup>26</sup> USIG Philippines.

<sup>27</sup> USIG Philippines.

interesting features in this regard that are not replicated in other Asian states and that have received significant attention around the region and beyond.

### **Tax exemption**

Most Philippine NGOs are exempt from most items of taxation. The exempt organizations include:

- “[N]on-stock corporations and associations organized exclusively for religious, charitable, scientific, athletic or cultural purposes, or for the rehabilitation of veterans, provided that no part of the organization’s net income or assets shall belong to or inure to the benefit of any member, organizer, officer or any specific person (Section 30 (e), Tax Code)
- [C]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare (Section 30 (g), Tax Code); and
- [N]on-stock, nonprofit educational institutions (Section 30 (h), Tax Code).”

What kinds of taxation are exempt for these organizations? In general, they are exempt from taxation on their grants and contributions received from the Philippines or abroad. But, as indicated above, Philippine NPOs must “pay tax on their activities ‘conducted for profit’ regardless of the disposition of such income (Section 30, Tax Code).”<sup>28</sup>

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<sup>28</sup> USIG Philippines. ICNL notes that “A complication arises with regard to non-stock, nonprofit educational institutions. Under the Constitution, *all* revenues and assets of such entities used actually, directly and exclusively for educational purposes shall be exempt from taxes and duties (Philippine Constitution 1987, Article XIV, Section 4). Privately owned educational institutions are allotted similar exemptions, though limited by restrictions on dividends and reinvestment. Notwithstanding the constitutional provision, however, Section 30(f) of the Tax Reform Act of 1997 imposes tax on the income of non-stock educational institutions derived from any of their properties (real or personal) or their economic activities. The constitutional dilemma created by this provision has yet to be resolved, and the provision in the tax code is still enforced by the Bureau of Internal Revenue.”

A related problem arises with respect to the tax treatment of nonprofit proprietary educational institutions and hospitals. According to ICNL, “a ten percent (10%) tax [is payable] on their taxable income (except passive sources of income) with the further limitation that, if the gross income from unrelated trade, business or other activity exceeds fifty percent (50%) of the total gross income derived by such educational institutions or hospitals from all sources, the tax applicable to for-profit entities shall be imposed on the entire taxable income. The term ‘unrelated

### **Tax deductions and other incentives for giving and philanthropy**

Tax deductions are a significant part of NPO and philanthropic life and management in the Philippines. In general terms, “[c]orporations and individuals ... may deduct gifts, donations or contributions to accredited non-stock, non-profit corporations up to 5% of taxable income for corporate donors and 10% for individual donors (Section 3(a), Revenue Regulation No.13-98). “Income” refers to the donor’s income derived from a trade, business or profession.... Donations to accredited NGOs, by contrast, can be deducted in full, subject to some limitations. (Section 3(b), Revenue Regulation No. 13-98).” In addition to deductions from income tax, there is a “donor’s tax” in the Philippines. “[D]onations and gifts to accredited NPOs (and certain other entities) are also exempt from the donor’s tax, provided that not more than 30% of the donations and gifts for the taxable year are used by the accredited NPO for administrative expenses (Section 3(c), Revenue Regulation No. 13-98).”<sup>29</sup>

As noted above, a Philippine NPO may provide donors with the ability to take tax deductions on their donations by becoming an accredited non-stock, non-profit corporation, or an accredited NGO, and thus be having “donee institution status.” Donors to such organizations may take the standard tax deductions. In an important wrinkle in the Philippines, a self-regulatory body is empowered to play a major role in the determination of donee institution status (and thus the ability of the donor to take a tax deduction) for Philippine NPOs. As ICNL notes, “[t]o acquire donee institution status, an NGO must first receive certification from the Philippine Council for NGO Certification (PCNC), an accrediting entity, on the basis of which the Bureau

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trade, business or other activity' means any trade, business or other activity, the conduct of which is not substantially related to the exercise or performance by such educational institution or hospital of its primary purpose or function. A 'Proprietary educational institution' is any private school maintained and administered by private individuals or groups with an issued permit to operate from the Department of Education, Culture and Sports, or the Commission on Higher Education, or the Technical Education and Skills Development Authority, as the case may be, in accordance with existing laws and regulations.” USIG Philippines.

<sup>29</sup> USIG Philippines.

of Internal Revenue will issue the Certification of Registration as a Qualified Donee Institution (Executive Order 720, April 11, 2008).”<sup>30</sup>

### **Value added taxes and tax on gross receipts**

The Philippines has a system of value-added tax and tax on gross receipts. In general terms, “[a]n[y] organization regularly engaged in commercial or economic activities with gross sales (for sale of goods) or receipts (for sale of services) in excess of PHP 1,500,000 during any 12-month period must register as a VAT taxpayer.... The standard VAT rate is 12 percent. Certain goods and services are exempted from VAT ... including medical, dental, and hospital services except those rendered by professionals; and educational services provided by private and government educational institutions....

For Philippine nonprofits, the situation is somewhat different. “Non-stock, non-profit organizations and associations engaged in trade or business whose gross sales or receipts do not exceed PHP1,500,000 for any 12-month period or ... as adjusted ... depending on the annual Consumer Price Index are required to register with the Bureau of Internal Revenue as Non-VAT entities....” They pay a tax of 3 percent of monthly gross sales or receipts, rather than the regular 12% -- a substantial reduction but not a total exemption.”<sup>31</sup>

### **Import and customs duties**

Tax exemption for Philippine NPOs extends to many customs duties, including:

- “[B]ooks imported for use by educational institutions;
- [A]rticles donated to public or private institutions established solely for educational, scientific, cultural, charitable, health, relief, philanthropic or religious purposes, for free distribution among, or exclusive use of, the needy; and

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<sup>30</sup> USIG Philippines.

<sup>31</sup> USIG Philippines.

- [F]ood, clothing, house-building and sanitary-construction materials, and medical, surgical and other supplies for use in emergency relief work, when imported by or directly for the account of any victim, sufferer, refugee, survivor or any other person affected thereby (Sec. 105, Customs Code).”<sup>32</sup>

### **Civil Society-Government Relations in the Philippines: The Issue of Government Contracting with Nonprofits to Provide Social Services**

The situation for social contracting for the delivery of social services in the Philippines is in some ways similar to that discussed for India below. There are a diversity of mechanisms by which government (at both national and sub-national levels) work with the nonprofit community to provide social services, and they are pursued across a variety of social services and government programs, though contracting with NGOs for the delivery of services (public funding/private service delivery and management) seems to remain the most common form.

In these developments the Philippines, like India, have been among the countries to lead the way in Asia. As ESCAP noted as far back as 2001, “[t]he broad trend in the region has been a gradual increase in the delivery of social services where private sector agents participate, either as contractors, partners or as competitors. The pace and level vary from country to country. In some countries, there is an increased recognition of the issue, while in others, the actual delivery is being increasingly organized through private sector participation. For example, the Medium-term Philippine Development Plan, 1999-2004, aimed at involving local communities and NGOs in improving the efficiency and effectiveness of the social services delivery system....”<sup>33</sup>

The use of social contracting has accelerated in the Philippines in the 1990s and in the past decade. There are now examples available in virtually every field of social services. Some

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<sup>32</sup> USIG Philippines.

<sup>33</sup> Economic and Social Commission for Asia and the Pacific, *The Emerging Role of the Private Sector in Delivering Social Services in the ESCAP Region* (Social Policy Paper No. 4), 2001, at <http://www.unescap.org/esid/psis/publications/spps/04/2166.pdf>.

of these show relatively traditional social contracting relations, in which governments in effect buy social service provision from voluntary organizations. But, given the strength and vitality of the Philippine voluntary sector, it is not surprising that other such arrangements appear to be more cooperative in nature, in which voluntary organizations appear to serve as partners with government rather than merely as social service contractors. In the Philippines as in other countries, the factors affecting government-nonprofit social contracting include voluntary organization capacity; the willingness of the state to move away from implementing as well as funding social service provision; guaranteeing quality in the provision of services by voluntary organizations funded by the state, and a host of other issues. We do not yet see the true “synergy” of government-NGO collaboration on working on social problems that some (Robinson and others) have called for in the social contracting arena, but the diversity of approaches and experiments in the Philippines goes beyond what is displayed in most of the rest of Asia and most if not all of the other countries described in this paper.

### **Civil Society-Government Relations in the Philippines: The Issue of Nonprofit Self-Regulation and Accreditation**

A special feature of government-nonprofit sector relations in the Philippines is the devolution of important authority from the Philippine government to the nonprofit sector on a key issue – the determination of “donee institution status” such that donors to accredited NPOs may take full tax deductions for their donations.<sup>34</sup>

In general terms, the expansion of nonprofit self-regulation in the Philippines is part of a rapid expansion of self-regulation and accreditation throughout Asia, as an expression of collective action to defend against encroaching and increasing state pressures; to strengthen the

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<sup>34</sup> This section draws upon Mark Sidel, *The Promise and Limits of Collective Action for Nonprofit Self-Regulation: Evidence From Asia*, *Nonprofit and Voluntary Sector Quarterly* (2010) 39(6), 1040. For a longer and more detailed treatment, see that full article.

quality of sectoral governance, services, financial management, and fundraising; to improve public, corporate, media, and other perceptions of nonprofits and charities; to organize an unruly sphere and marginalize lower quality actors or other outliers; to access governmental or donor funding; to act as a market mechanism to exclude competitive or unproductive actors for the benefit of remaining players or to marginalize organizations causing reputational damage to the sector; as a learning opportunity for nonprofits and their networks; and as a means to clarify and strengthen shared identity.

Until quite recently, however, there was virtually no self-regulation by the nonprofit sector in Asia. In the 1970s, 1980s, and throughout most of the 1990s, the voluntary sector in most Asian countries focused primarily on trying to fend off strong states and strong governmental regulation through political appeals and social mobilization – a reflection of the social movement origins of many indigenous Asian nongovernmental organizations in an era before managerial and “professional” dynamics became a major force in the sector. Efforts by nonprofit communities to defend themselves and their work, to unify the sector, and to enhance the quality of their efforts focused on responding to regulation and policy and seeking to carve out a somewhat wider and more stable – though often still tenuous – space for nonprofit formation and operation.

Thus the scholarly literature of the late 1980s and much of the 1990s on the voluntary sector in Asia rarely refers to self-regulatory initiatives, for there was little to discuss (Baron, 1991, 2002; Jung, 1994; Yamamoto, 1995). The initial comprehensive study of the legal regulation of philanthropy and the nonprofit sector in East and Southeast Asia was bereft of references to self-regulation, and so were the country-level surveys undertaken by the Center for

Civil Society Studies at Johns Hopkins or more specialized studies on NGOs or philanthropy in the region (Silk, 1999).

Nonprofit self-regulation began to emerge in the Asian voluntary sector in the late 1990s, initially in the Philippines and India and then in a number of other countries. A genealogy of discussion of nonprofit self-regulation in Asia shows intensive attention given to the experience of one institution in one national context, the Philippine Council for Nonprofit Certification (PCNC), which is also discussed further below. In the late 1990s and the early part of this decade, the PCNC experience in the Philippines was virtually the only known example of nonprofit self-regulation generally considered successful and available for discussion around the region.

The first broad-based meeting in Asia to discuss comparative models of nonprofit self-regulation was held in New Delhi in August 2000, focusing on experience in India and the Philippines. An initial survey of nonprofit self-regulation in Asia was conducted in 2003 for the Asia Pacific Philanthropy Consortium. It concluded that “nonprofit self-regulation is on the agenda as never before . . . . [N]o one pattern fits or describes the variety of nonprofit self-regulation mechanisms in the Asia Pacific region. The nonprofit sector in each country is discussing, considering, debating, experimenting or adopting self-regulation structures on its own pace and based on its own conditions and needs.”

And it continued as follows: “[T]here are a wide, exciting array of dialogues, debates, experiments, and initiatives underway on nonprofit self-regulation around the Asia Pacific region—ranging from systems in place in the Philippines, Australia and elsewhere, to a wide range of experiments and pilot projects in India, Indonesia and other countries, to active dialogues underway where they might be expected (such as in Hong Kong and China) and where

they might be a bit surprising to find (such as Vietnam and Laos).” (Sidel, 2003; internal italics omitted)<sup>35</sup>

By 2004, when the first comprehensive report on the regulation of philanthropy and the nonprofit sector in South Asia was produced, self-regulation was a significant theme, and the authors could report on specific self-regulatory initiatives and experiments in Bangladesh, India, Nepal, Pakistan, and Sri Lanka.<sup>36</sup> Today, nonprofit self-regulatory initiatives have expanded in a number of countries around the region. Self-regulatory mechanisms remain experimental, diverse, and in many cases fragile.

Yet nowhere in Asia has that force for self-regulation and accreditation proceeded more quickly than in the Philippines, where the government has, in effect, supported nonprofit sector collective action through self-regulation. The Philippines has the single most well-known experience in self-regulation anywhere in Asia – the successful if complex story of the Philippine Center for Nonprofit Certification (PCNC). At the same time, the applicability of the PCNC “model” elsewhere in Asia may be considerably more limited than is sometimes recognized – in large part because the PCNC and its process are the result of direct cooperation with government backed up by government reliance on that certification process to issue favorable tax treatment. In addition, lost in the frequent discussion of this particular collective action model are the wide array of self-regulation experiments and initiatives underway in the Philippines well beyond the PCNC approach and the complexity of their interplay with the PCNC certification process.

### ***The Philippine Council for Nonprofit Certification***

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<sup>35</sup> Sidel, *Trends in nonprofit self-regulation in the Asia Pacific region: Initial data on initiatives, experiments and models in seventeen countries* (APPC, 2003, available at <http://zunia.org/uploads/media/knowledge/marksegal.pdf>). For another discussion, see Sidel, *The guardians guarding themselves: Nonprofit self-regulation in comparative perspective*, *Chicago-Kent Law Review*, 80, 803-835 (2005).

<sup>36</sup> Sidel and Zaman (eds.), *Philanthropy and Law in South Asia* (APPC, 2004, updated report 2007).

Concern with self-regulation in the Philippines goes back at least as far as the inauguration of the Corason Aquino government in 1986, when a number of nonprofit leaders joined the Aquino administration in one of the earliest and most prominent forms of friendly alliance between the state and the voluntary sector in Asia. In the early 1990s, the government suggested a nonprofit certification mechanism and government–nonprofit cooperation as the primary criteria for determining nonprofit “donee institution status”—the tax status that confers deductibility for donations, providing direct government backing for a form of nonprofit certification and self-regulation.<sup>37</sup>

That idea for government–nonprofit collaboration matured into the Philippine Council for Nonprofit Certification, which was founded in 1998 and assigned the task of certifying nonprofits for donee institution status under the Philippine tax code. The crucial role of the PCNC in this process and in raising standards in the sector arises out of an agreement with government for the nonprofit sector to play a significant role in a traditional government responsibility – the granting of nonprofit tax status – and it operates with official government support. In this way, a portion of the Filipino nonprofit sector took charge of its own certification process for nonprofit tax status, expanding that intensive examination and certification process to include a “Good Housekeeping” type of seal for nonprofit organizations.<sup>38</sup>

PCNC has certified more than 400 organizations thus far, with more in the pipeline.

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<sup>37</sup> <http://www.pcnc.com.ph>. See also Sidel (2003); Caroline Hartnell, *The Philippines: Self-Regulation on Trial*, Alliance 8(3) (December 2003); Fely I. Soledad, *The Philippines Council for NGO Certification*, [http://www.icnl.org/knowledge/jin/vol3iss2/er\\_1.htm](http://www.icnl.org/knowledge/jin/vol3iss2/er_1.htm).

<sup>38</sup> I am indebted to several friends and colleagues in the Philippines for discussions of the PCNC process over the years and more recently, among them Fely Soledad, Rory Tolentino, Marianne Quebral, Eugene Caccam, Jaime Faustino, and others. See also the useful review in Abella and Dimalanta et al. (2003).

And its goals have expanded: Today the PCNC certification process is “not only [intended] to pursue tax incentives for donors to NGOs but also, and even more importantly, to promote professionalism, accountability, and transparency among [NGO network] members, and the Philippine non-profit sector.”<sup>39</sup> PCNC pursues these goals through the tax certification process, by evaluating nonprofits for a “Good Housekeeping”-type seal of approval, through capacity-building mechanisms, by involving nonprofit personnel as peer evaluators and capacity builders, by speaking for the sector and for nonprofit self-regulation, and in other ways.

The PCNC government-supported model has been discussed throughout Asia by nonprofit networks and governments interested in self-regulation and certification. PCNC’s intensive certification model may be most usefully applicable around Asia when government–nonprofit relations are close enough for substantive cooperation and the government has directly sought voluntary sector assistance in fulfilling regulatory goals – in this case, certification for “donee institution status.” That merging of goals through an intensive certification process also helps solve the problem of financial sustainability that plagues discussions of most other certification and accreditation models around Asia, including in India and Cambodia.

The PCNC certification model is not the only nonprofit self-regulation initiative in the Philippines and, as in other countries, the interplay between PCNC certification and other self-regulatory mechanisms is complex, particularly where several self-regulatory processes or structures may apply to individual organizations.<sup>40</sup> But in recent years, the Philippine voluntary sector has made progress in resolving these overlapping requirements, often with the result that

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<sup>39</sup> <http://www.pcnc.com.ph>.

<sup>40</sup> The same conundrum faced the efforts by the Independent Sector Advisory Committee on Self-Regulation in the Nonprofit Sector to devise an implementable set of principles for nonprofit self-regulation in the United States when most of the nonprofits to which the principles would apply are already governed by self-regulatory norms within functional areas of work (i.e., associational standards and accreditation), federal standards, and state standards (both self-regulatory and regulatory).

the PCNC certification process has been strengthened as a core self-regulatory mechanism, a form of collective action that has become considerably broader and more secure over time. For example, the Code of Conduct for Development NGOs developed by the Caucus of Development NGOs (Code-NGO) in the 1990s, which was developed into the Code of Conduct became the *Code-NGO Covenant on Philippine Development* of which part III, Responsibilities of Development Non-Government Organizations, is generally referred to as the “Code of Conduct.” In the late 1990s and the early part of this decade, Code-NGO and its members faced questions about the overlapping nature of the PCNC certification process and adherence to the Code of Conduct. In 2003 Code-NGO – a core partner in the PCNC enterprise – sought to resolve these complexities by making adherence to the Code consistent with PCNC certification. Code-NGO “pass[ed] a landmark resolution that advocates for PCNC certification among the members, as the pillar and frontline strategy for promoting transparency and accountability within our ranks . . . . [Code-NGO] resolved to maximize a mechanism that already exists—the PCNC, rather than expending considerable effort and resources developing and implementing a separate monitoring system.”<sup>41</sup>

There are multiple additional nonprofit self-regulatory mechanisms in the Philippines that apply to particular subsectors of the voluntary sector. But in some of these cases as well intensive efforts have been underway to harmonize subsectoral self-regulatory requirements with PCNC certification. The Philippine Association of Foundations, for example, has its own Code of Ethics to which it requires adherence by members, but was also certified by PCNC in 2004 and in turn encourages its members to seek PCNC certification as a “top priority.”<sup>42</sup> And the PCNC process itself – one of the more successful nonprofit self-regulatory efforts anywhere in

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<sup>41</sup> See <http://www.code-ngo.org/> for a relatively comprehensive discussion of this process.

<sup>42</sup> PCNC Certification for Members Still Top AF Priority, Association of Foundation News, at <http://af.pfonline.org/news37.htm>.

Asia – has not been free from occasional attempts by governmental agencies to usurp its special role.<sup>43</sup> Illustrating the continuing complexities of nonprofit self-regulation in the Philippines, in 2007 PCNC and its process came under direct attack from a key government agency. In October 2007, the Philippine Department of Social Welfare and Development drafted and had signed by the Philippine President an Executive Order that divested PCNC of its role in determining nonprofit tax status and clawed back that authority to government and, at least temporarily, threatened to dissolve nearly a decade of close government–nonprofit collaboration on nonprofit certification.

In December 2007, PCNC responded with a letter to Philippine President Arroyo seeking recall or repeal of the Executive Order and a return to its previous role in accrediting nonprofit tax status, and in January 2008 the President’s office suspended enforcement of the Executive Order.<sup>44</sup>

### **Civil Society-Government Relations in the Philippines: The Issue of Fundraising by Voluntary Sector Organizations and Regulation by the State**

Asia is an exceptionally diverse and vast area. In the sphere of regulation of fundraising and charitable solicitation, however, we are seeing – both in Asia and beyond – some common elements in recent regulation across a number of countries as domestic and cross-border fundraising and charitable solicitation rapidly gathers speed throughout the region. Fundraising regulation for charitable activities, a new area of both activity and regulation, is a useful example of the ways in which state-civil society relations are developing both in Asia and beyond.<sup>45</sup>

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<sup>43</sup> Mark Sidel, *The Promise and Limits of Collective Action for Nonprofit Self-Regulation: Evidence From Asia, Nonprofit and Voluntary Sector Quarterly* (2010) 39(6), 1040.

<sup>44</sup> Executive Order No. 671 (October 22, 2007), PCNC’s letter to the President of the Philippines, November 19, 2007, and other relevant materials are available at [www.pcnc.com.ph](http://www.pcnc.com.ph).

<sup>45</sup> See Mark Sidel, *Diversifying and Strengthening Regulation of Fundraising and Charitable Solicitation in Asia: Recent Experience in India, China, Taiwan, Singapore, and the Philippines* (paper prepared for the conference on fundraising regulation at the Queensland University of Technology, Australia, April 2011)

Throughout the Asia Pacific region, in general terms and with substantial country differentiation, governments are gradually becoming more accustomed to sharing responsibility for social and human services with the nonprofit sector, and thus gradually becoming more comfortable with the idea that nonprofit organizations need to fundraise and solicit funds for their mission-driven activities.

The new regulation of fundraising and charitable solicitation in a number of countries is thus driven – sometimes in different ways and with different emphases – by both a recognition of the broader role that nonprofits and charities can play, and a continuing concern for maintenance of stability and political control. All these swirling, sometimes contradictory concerns are reflected in the growing regulation of fundraising and charitable solicitation in the region.

In brief, key recent developments in the regulation of fundraising and charitable solicitation in Asia include:

- New moves to drafts laws, regulations or other regulatory documents to project government regulation over the burgeoning area of fundraising and charitable solicitation
- Concern both for domestic fundraising and charitable solicitation and for cross-border fundraising and charitable solicitation transactions, though far more actual activity on the domestic side than on the cross-border donations
- Increasing concern for the commercial activities of nonprofits, and difficulty in differentiating commercial revenue that might (or should) be considered taxable from mission-oriented revenue that should not be considered taxable
- Increased attention to issues of accountability and transparency, as well as fraudulent or manipulative behavior by some charitable organizations

- Increasing concern for nonprofit fundraising and charitable solicitation that is focused on political or religious causes
- A stronger link, in a number of countries, between fundraising/CS regulation and anti-money laundering mandates relating in significant part to terrorism, and often spurred by international agreements after 2001 intended in part to reduce terrorism finance linked to charitable organizations
- Virtually all of the growing focus on regulation of fundraising and charitable solicitation is at the national level, since most of the countries in the region undertake most such regulatory activity at a national level – but in some key countries, such as China, there is increasing discussion of, and even action on, subnational (i.e. state or provincial) regulation of fundraising and charitable solicitation.

As in other areas, the elements of fundraising and charitable solicitation regulation in the Asia Pacific area include a wide array of possible regulatory goals and tools available for governmental use. They include regulation of reporting requirements; sales by nonprofits (and treatment of sales revenues); donations, including cash and anonymous giving; cross-border donative transactions; nonprofit/charitable expenses and reasonableness; expression by nonprofit and charities (including free speech and freedom expression issues); fundraising compensation; pledges and enforcement of pledges; registration of fundraisers; exemptions from charitable solicitation statutes (i.e. for churches, educational institutions, or others); strengthening government enforcement in the area; internet fundraising; broader charitable giving rules (including tax provisions) that affect fundraising and charitable solicitation; unrelated business rules and sales of products; and other tools for regulation.

### **State-civil society relations and fundraising regulation in the Philippines**

In brief terms, however, the Philippines has long regulated fundraising and charitable solicitation, particularly with a goal to prevent unfair fundraising practices and fraudulent or unscrupulous fundraisers, and in recent years has further enhanced and detailed that regulatory environment.

Philippines fundraising regulation goes back at least to the 1970s. The Solicitation Permit Law (1978), from the Marcos era, required fundraisers to obtain a permit to “solicit or receive contributions for charitable or public welfare purposes” from the then-Department of Social Services and Development, along with reporting requirements as defined by the Department. Violations were punishable by a prison term and/or fine.<sup>46</sup>

More recent regulations on public solicitations adopted in 2007 and gazetted in 2008<sup>47</sup> (and which amended 2003 regulations on the subject)<sup>48</sup> expanded the role of the Department of Social Welfare and Development in regulating fundraising and charitable solicitation, bringing virtually all non-governmental, public, education, professional and other organizations within their scope, including foreign fundraisers (IV(1)(2)).

In general terms, the 2008 regulations require permitting for fundraising and charitable solicitation (VI(3)); prohibit solicitation through lotteries, raffles and similar methods where the prize awarded would be drawn from such activity, as well as “all other means contrary to law, public policy and morals,” (3.2) and any solicitation materials “portray[ing] a dehumanizing picture or situation of the intended beneficiary/ies.” (3.3). Beneficiary/recipient groups may not have their names used without consent and a memorandum of agreement specifying the use of

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<sup>46</sup> Presidential Decree No. 1564 of 1978 (Amending Act No. 4075 otherwise known as Solicitation Permit Law.

<sup>47</sup> Admin. Order No. 14, Series of 2007 – Omnibus Rules and Regulations on Public Solicitations, as amended, issued on Dec. 17, 2007 (Department of Social Welfare and Development DSWD).

<sup>48</sup> Admin. Order No. 79, Series of 2003 – Omnibus Rules and Regulations on Public Solicitations (Department of Social Welfare and Development DSWD).

funds raised (3.4). Business groups may not obtain fundraising permits, though their welfare arms may (3.5). Individual inurement from funds raised is prohibited (3.7). Funds raised must be deposited in the banking system (4.2), and acknowledged to donors except for specified exceptions (4.3). “Administrative cost for the fund raising activity” may not exceed 15% of proceeds, and “the remaining eighty five percent (85%) shall be utilized entirely for the projects/programs of the targeted beneficiaries” (4.1)

Detailed regulations apply to the permitting process itself, including the requirement of a “work and financial plan stating ... the target funds to be generated and its utilization” for public fundraisers (VII(1)(d) and similar board requirements for non-governmental fundraisers. All fundraising materials must carry the “DSWD authority number, coverage and effectivity date.” (5.3(c)) Detailed rules apply to tickets, ballots and cards, raffles and other forms of charitable solicitation.

The 2008 Philippine regulations may be among the most detailed rules on fundraising anywhere in Asia. Yet they are still not considered sufficient to prevent unfair practices and deception in charitable solicitation. A new Public Solicitation Law has been proposed that would supplant the 2008 regulations and is aimed at “protect[ing] the general public from unscrupulous solicitation.”<sup>49</sup>

In specific terms, the proposed Law attacks four key problems: “(1) the need to intensify the monitoring of individuals/organizations/associations who were issued authority to conduct solicitation; (2) the need to religiously monitor the proceeds of the solicited funds to ensure that these are delivered to the intended beneficiaries or are all used for projects for which these are intended for and to protect the general public as well as the beneficiaries from being exploited; (3) the presence of several organizations conducting fund raising activities without the required

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<sup>49</sup> Explanatory Note, Senate Bill No. 508 (Introduced by Sen. Jinggoy Ejercito Estrada), July 7, 2010.

solicitation permit and (4) the need to increase the penalties or sanctions for violators and/or soliciting fund outside the country.”<sup>50</sup>

The draft Law applies broadly to virtually all kinds of fundraisers, like the 2008 Regulations (sec. 3); diversifies the authority to issue public solicitation permits to provincial governors and mayors as well as the Department of Social Welfare and Development depending on the scope of fundraising (sec. 6); makes clear that permits issued under the law are not valid for fundraising solicitations directed at the millions of Filipinos working abroad (sec. 7); confirms the availability of tax deductions for donors as specified in the national Internal Revenue Code (sec. 10); requires, like the 2008 Regulations, agreements between fundraisers and beneficiaries on the terms of the fundraising project and use of proceeds (sec. 11); maintains the limit of 15% of fundraising proceeds to be used for “the administrative cost of the ... fundraising activity or other operations of the agency” (sec. 12); mandates reporting on fundraising activities to the relevant permit agency (sec. 13); provides for a complaint process (secs. 14, 15); and prohibits fundraising without a required permit, beyond the permitted coverage area or mode of solicitation, the use of fake or expired solicitation permits (sec. 16); and provides for imprisonment of up to a year, and/or a fine, and/or banning from solicitation activity for violations of the Law (sec. 17).<sup>51</sup>

Of particular note in the Philippine context is that some fundraising and solicitation practices are covered by self-regulation initiatives such as the Philippine Council for Nonprofit Certification (PCNC), and the Code of Conduct for Development NGOs (Code NGO). Thus, over time, some aspects of regulation of fundraising will be covered by self-regulatory

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<sup>50</sup> Id.

<sup>51</sup> Id.

mechanisms in the Philippines, the first country in Asia where that appears to be taking place with any significant strength.

### **III. Analysis and Conclusions**

The Philippines represents one end of the spectrum of state-civil society relations – a relatively politically and economically free country in which the nonprofit sector and civil society have generally flourished. The country report for the Philippines identifies key elements of that relative freedom, including relatively straightforward autonomy to register, operate, gather resources, and participate in various elements of national life. The special element of strong self-regulation, including the cooperation of the government and the nonprofit sector in using a self-regulatory process to determine done institution status for tax purposes, is detailed as well.

The Philippine context provides valuable information for Vietnam. In particular, the forms for organization and establishment of nonprofit and civil society organizations are diverse, clear, and well-defined; formation is relatively straightforward; operations of nonprofit and civil society groups are, in general, not hampered by over-extensive government interference (including supervision and reporting mechanisms that remain at a reasonable level); the state provides some funding to nonprofit and civil society groups for the provision of social and other services; nonprofits and civil society organizations retain relative freedom to participate in public debate and national life; a facilitative tax regime is generally in place; strong nonprofit and civil society umbrella groups serve the sector; and a self-regulatory ethos is strong, and, virtually unique in Asia, has become a vehicle for state-civil society cooperation on the granting of tax favorable status to qualified nonprofit and civil society groups.

## **India**

### **I. Political, Cultural, Historical and Socio-Economic Context**

- (a) Major historical events which have been significant in shaping the contemporary experience of the country under review
- (b) Economic system in the country under review (Transitional/“ free market” /regulated market/socialist-oriented market economy)
- (c) Political system: ideologies, philosophies, cultural and historical factors shaping the political system.

India, founded in 1947, has a population of over 1.15 billion people (as of 2010), with about 30% of those in urban areas. It is a huge, multi-ethnic state with over 2,000 groups. It is also a multi-religious state; key religious groupings (and percentage of population as estimated by the US State Department) are Hindu 80.5%; Muslim 13.4% (138 million people); Christian 2.3%; Sikh 1.9%; and other groups including Buddhist, Jain, Parsi within 1.8%.<sup>52</sup> Many languages are spoken. India has 28 states and 7 Union territories (including the National Capital Territory – Delhi). The State Department points out that “[a]lthough India occupies only 2.4% of the world's land area, it supports over 15% of the world's population.”<sup>53</sup>

India is a federal republic with a President who is also chief of state, a Prime Minister who heads the government, and a cabinet (comprising the executive branch); a legislative branch that includes two sections of Parliament (Rajya Sabha (Council of States), and Lok Sabha (House of the People)); and a national judiciary headed by the Supreme Court. Key parties

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<sup>52</sup> US State Department, Background Note: India, <http://www.state.gov/r/pa/ei/bgn/3454.htm>. Data from the State Department Background Note and other sources are used in this brief description of general conditions in India.

<sup>53</sup> Id.

include the Indian National Congress (INC), Bharatiya Janata Party (BJP), Communist Party of India-Marxist, and other national and regional entities.

The state remains important in the Indian economy but the economy has been liberalized and privatized extensively since the 1990s. The growth rate in 2009 was estimated at 6.5% by the U.S. State Department. Agriculture accounts for 17% of GDP, industry for about 28% and services and transportation for about 55%. Key trade partners include the United States, China, U.A.E., the European Union, Russia, Japan.<sup>54</sup> India “has the world's 12th-largest economy--and the third-largest in Asia behind Japan and China-- with total GDP in 2009 of around \$1.095 trillion.”<sup>55</sup> A growing middle class shows some growing interest in civil society issues.

“Religion, caste, and language are major determinants of social and political organization in India today,” notes the State Department, though “India has begun a quiet social transformation in this area.”<sup>56</sup> Since independence in 1947 from British colonial rule, India has been an active and often sometimes violent democratic state, with strong central influence in governmental affairs, and its politics usually dominated by major national and regional political parties (few of which trust civil society organizations).

The Constitution of India, in Article 19(1)(c) protects the rights of citizens to form associations or unions. The historical context for nonprofit and civil society organizations is significantly shaped by the British colonial context. A significant range of Indian nonprofit and civil society organizations trace their genealogy to forms to those developed in the United Kingdom or under the British in India.

India’s economy has become considerably freer and less state-constrained in recent decades, and that relative liberalization has contributed to the growth of the nonprofit sector,

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<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Id.

civil society, and philanthropy in India. Growing wealth in India is beginning to provide growing resources for nonprofits and civil society organizations. At the same time, there are continuing aspects of the economy – including state bureaucratic control of licensing in major, sensitive industries, for example – that have their parallels in the “license raj” that applies to and constrains the Indian nonprofit and civil society sector as well.

India is a democratic state with a functioning and rambunctious political contention. Both the national and state governments are strong, and both exercise significant regulation over the nonprofit sector and civil society. The Indian state is also facing significant rebellion from Maoist rebels and others, and the crackdown on those forces has at times included repression of civil society organizations and individuals as well.

## **II. The Legal Environment and State-Civil Society Relations**

This section examines to what extent the existing legal environment enables or inhibits civil society development and influences state-civil society relations, addressing whether the legal environment and governance structures for CSOs is conducive or non-conducive to engaging in advocacy, monitoring and/or criticism of government policies. It includes questions such as: What is the degree of distance/ independence of CSOs from the state? What are the requirements for registration and obtaining legal status, funding etc.? What types of advocacy are allowed and are actually being taken up by CSOs? To what degree does respect of civil liberties (and more specifically access to public information and freedom of expression) positively influence the emergence of civil society and impact on state-civil society relations?

India is a complex state for the discussion of the legal environment for the civil society sector and state-civil society relations. This section covers that legal environment, primarily at

the national level. The Indian states also govern – in some cases in quite specific ways – the nonprofit sector, and many registration and supervision authorities (registrars, charity commissioners, and the like), are likewise based at the state level. But those regulatory efforts diverge and this discussion focuses on national regulation with some reference to state-level regulation as appropriate.

The best concise discussion of the legal environment for civil society organizations and philanthropy in India is the India note prepared by an eminent Indian specialist on the nonprofit sector, Noshir Dadrawala, for the United States International Grantmaking project prepared by the International Center for Not-for-Profit Law (ICNL) in connection with the U.S. Council on Foundations. The discussion below relies on that excellent document.<sup>57</sup>

### **Key Elements of the Legal Environment for CSOs in the India**

Although the legal regulation of civil society and nonprofit organizations in India is both detailed and broad, the following key laws and other documents are of particular importance:

- The Constitution of India
- Income Tax Act, 1961
- Public Trusts Acts in the various Indian states
- Societies Registration Act, 1860;
- Indian Companies Act, 1956, section 25;
- Foreign Contribution (Regulation) Act, 1976 (as amended)
- And other laws, regulations, and administrative documents.

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<sup>57</sup> Punctuation and formatting changes have been made within quotations as well.

## **Types of Civil Society and Nonprofit Organizations in India**

The Indian legal environment generally allows nonprofit and civil society organizations to be established in multiple forms. These include trusts, societies, and section 25 companies .

**Trusts.** In India, trusts, generally known as public charitable trusts, may be established, according to the ICNL report on nonprofit law in India, “for a number of purposes, including the relief of poverty, education, medical relief, provision of facilities for recreation, and any other object of general public utility.” In general terms, Indian public charitable trusts are governed by state law rather than national law (except for “the broad principles of the India Trusts Act 1882, which governs private trusts”). Some states, such as Maharashtra, Gujarat, Rajasthan, and Madhya Pradesh, have Public Trusts Acts.<sup>58</sup>

**Societies.** In India, “[s]ocieties are membership organizations that may be registered for charitable purposes. Societies are usually managed by a governing council or a managing committee.” Unlike the situation with trusts, societies are generally regulated by the Societies Registration Act, 1860, which has been enacted and amended at the state level.<sup>59</sup>

**Section 25 Companies.** Section 25 companies, which carried limited liability, “may be formed for ‘promoting commerce, art, science, religion, charity or any other useful object’ provided that no profits, if any, or other income derived through promoting the company's objects may be distributed in any form to its members.”<sup>60</sup>

## **Tax Provisions in General Terms**

In general, and subject to more detailed discussion below, many Indian nonprofit organizations which carry out certain kinds of activities and receive certain governmental approvals are exempted from corporate income tax. Certain business income to nonprofits

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<sup>58</sup> USIG India.

<sup>59</sup> USIG India.

<sup>60</sup> USIG India.

remains subject to tax in some situations. Value-added tax (VAT) on goods and services is generally exempted for approved nonprofits under certain circumstances. As ICNL notes, “[t]he rates range from 1 percent to 12.5 percent, with most goods and services taxed at 12.5 percent. VAT liability generally arises only if the total turnover of sales is Indian Rupees (Rs.) 500,000.” Tax deductions from personal income tax and corporate taxation are available to donors under certain prescribed regulations. And “NPOs involved in relief work and in the distribution of relief supplies to the needy are 100% exempt from Indian customs duty on the import of items such as food, medicine, clothing and blankets.”<sup>61</sup> More information on the tax situation is below.

### **General Information and Legal Forms of Nonprofit and Civil Society Organizations**

As noted above, most nonprofit and civil society organizations in India are formed as trusts, societies, or section 25 companies. I should also note, as ICNL does, that “cooperatives and trade unions are mutual benefit organizations” and I do not discuss them in detail here.

The broad structure of regulation of the Indian nonprofit sector is as follows: “Many state and central government agencies have regulatory authority over these not-for-profit entities. For example, all not-for-profit organizations are required to file annual tax returns and audited account statements with various agencies. At the state level, these agencies include the Charity Commissioner (for trusts), the Registrar of Societies (referred to in some states by different titles, including the Registrar of Joint Stock Companies), and the Registrar of Companies (for section 25 companies). At the national or federal level, the regulatory bodies include the income tax department and Ministry of Home Affairs (only for not-for-profit organizations receiving foreign contributions).”<sup>62</sup>

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<sup>61</sup> USIG India.

<sup>62</sup> USIG India.

## **Trusts**

In India, public charitable trusts “are designed to benefit members of an uncertain and fluctuating class.” As indicated above, many Indian states have Public Trusts Acts, though there is no national law on public charitable trusts. Procedures for establishment of a public charitable trust are fairly straightforward in many states: “Typically, a public charitable trust must register with the office of the Charity Commissioner having jurisdiction over the trust (generally the Charity Commissioner of the state in which the trustees register the trust) in order to be eligible to apply for tax-exemption. In general, trusts may register for one or more of the following purposes: Relief of poverty or distress; Education; Medical relief; Provision of facilities for recreation or other leisure-time occupation ... if the facilities are provided in the interest of social welfare and public benefit; and The advancement of any other object of general public utility, excluding purposes which relate exclusively to religious teaching or worship.”<sup>63</sup> Interestingly, according to the ICNL USIG report, there is no clear bar against foreigners serving as trustees of Indian public trusts.

The property of a public charitable trust “vests in the trustees,” but trustees are prohibited from “us[ing] trust property or their position for their own interest or private advantage. Trustees may not enter into agreements in which they may have a personal interest that conflicts or may possibly conflict with the interests of the beneficiaries of the trust (whose interests the trustees are bound to protect). Trustees may not delegate any of their duties, functions or powers to a co-trustee or any other person, except that trustees may delegate ministerial acts. In essence, trustees may not delegate authority with respect to duties requiring the exercise of discretion.”<sup>64</sup>

The ordinarily prudent person standard applies to trustees in carrying out their duties.

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<sup>63</sup> USIG India.

<sup>64</sup> USIG India.

Although public charitable trusts are “generally irrevocable,” the state Charity Commissioner “may take steps to revive” a trust due to inactivity, and “if it becomes too difficult to carry out the objects of a trust, the doctrine of *cy pres*, meaning “as near as possible,” may be applied to change the objects of the trust.”<sup>65</sup>

### **Societies**

The legal environment for societies is different from that of public charitable trusts. There is a national act, the Societies Registration Act, 1860, which governs Indian societies, and many Indian states have adopted their own state societies laws as well.

Indian societies require “a minimum of seven ‘members’ ... to form”; registration with the state-level Registrar of Societies to determine eligibility for tax exemption. As with trusts, “there is no prohibition in the Societies Registration Act against ... foreigners” directing societies or serving on their governing council or managing committee. “According to section 20 of the [Societies Registration] Act, the types of societies that may be registered under the Act include, but are not limited to, the following: Charitable societies; Societies established for the promotion of science, literature, education, or the fine arts; and Public art museums and galleries, and certain other types of museums. The governance of societies also differs from that of trusts; societies are usually managed by a governing council or managing committee, whereas trusts are governed by their trustees.”<sup>66</sup>

A managing committee or governing council generally manages a society, generally elected by its members. These and other management matters are determined by the society’s bylaws, which are in turn governed by state-level societies registration acts. Those acts generally

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<sup>65</sup> USIG India.

<sup>66</sup> USIG India.

require some regular reporting of managing committee members and other items. A society's "property is held in the name of the society, whereas all of the property of a trust legally vests in the trustees."

Indian public charitable trusts are irrevocable, but societies are dissolvable if the members approve. "Upon dissolution, and after settlement of all debts and liabilities, the funds and property of the society may not be distributed among the members of the society. Rather, the remaining funds and property must be given or transferred to some other society, preferably one with similar objects as the dissolved entity."<sup>67</sup>

### **Section 25 Companies**

Like societies, Section 25 nonprofit companies are governed by a national act, the Indian Companies Act, 1956. That act, "which principally governs for-profit entities, permits certain companies to obtain not-for-profit status as 'section 25 companies.' A section 25 company may be formed for 'promoting commerce, art, science, religion, charity or any other useful object.' A section 25 company must apply its profits, if any, or other income to the promotion of its objects, and should not pay any dividend to its members."<sup>68</sup> Procedures for the formation of a Section 25 company are set out in the Companies Act. "The internal governance of a section 25 company is similar to that of a society. It generally has members and is governed by directors or a managing committee or a governing council elected by its members."

Section 25 companies may be dissolved. As with societies, "[u]pon dissolution and after settlement of all debts and liabilities, the funds and property of the company may not be distributed among the members of the company. Rather, the remaining funds and property must

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<sup>67</sup> USIG India.

<sup>68</sup> USIG India.

be given or transferred to some other section 25 company, preferably one having similar objects as the dissolved entity.”<sup>69</sup>

### **Public Benefit Status**

Tax exemption for Indian nonprofit organizations is determined by the Income Tax Act, 1961, and requires that “a not-for-profit entity must be organized for religious or charitable purposes. Charitable purposes include ‘relief of the poor, education, medical relief, and the advancement of any other object of general public utility’ under the Income Tax Act.”

There has been extensive discussion, even controversy, on the appropriate criteria for nonprofit tax exemption in India. Noshir Dadrawala provides several recent and important examples. The Finance (No.2) Act 2009 “added the ‘preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest’ to the list of charitable purposes.” The Finance Act, 2008 “limited the definition of ‘charitable purpose’ by stating that if the ‘advancement of any other object of general public utility’ involves undertaking any trade, commerce, or business activities, or rendering any related service for a fee or any other condition (irrespective of use, application, or retention of income arising from such activities), it will not be considered a ‘charitable purpose.’ The Finance Act 2010, retrospectively effective from April 1, 2009, provided some relief by exempting the aggregate value of receipts from such activities up to one million rupees. Organizations established for and running programs for relief of poverty, education, and medical relief are not affected by the amendments of 2009 or 2010.”<sup>70</sup>

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<sup>69</sup> USIG India.

<sup>70</sup> USIG India.

### **Specific Issues in the Legal Environment for Civil Society in India**

In addition to the general framework for establishing these forms of NPOs, described above, there are specific legal issues applicable to public charitable trusts, societies, and Section 25 companies. These include questions of

- Private inurement to an organization's members, trustees, or officers
- Proprietary interests in the organization;
- Dissolution; and
- Permitted and prohibited activities.

#### ***Private in u rem en t t o an organ izat ion 's m em bers, tru stees, or officers***

Public charitable trusts “must benefit a large class of beneficiaries and must be for the public benefit [and] trustees ... may not engage in self-dealing.” On the other hand, the Societies Registration Act “does not prohibit the inurement of any earnings of the society to any private shareholder or individual.” For Section 25 companies, the Indian Companies Act “provides that no profits ... or other income may be distributed by way of dividends to its members” and that “a not-for-profit entity will lose tax exempt status if the author, founder, or any trustee or his/her relative derives any personal benefit.” Under the Income Tax Act, remuneration to board members “must not be in excess of what may be reasonably paid for such services.”<sup>71</sup>

#### ***Proprietary interests in the organization***

As Noshir Dadrawala notes, “[w]hether an individual may have a proprietary interest in a not-for-profit entity relates to the issue of inurement. Trustees of a public charitable trust hold trust assets on behalf of the trust. Thus, although trustees have legal title to the trust's assets, they hold these assets for the beneficiaries of the trust, not for themselves. Members of the

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<sup>71</sup> USIG India.

managing committee or governing council of a society or section 25 company hold the assets of a society or section 25 company” not for themselves.<sup>72</sup>

### **Dissolution**

In general terms, public charitable trusts are irrevocable, though as noted above the state-level Charity Commission “may take steps to revive [inactive] trust[s]” and, “if it becomes too difficult to carry out the trust's objectives, the doctrine of *cy pres*, meaning "as near as possible," may be applied to change the objectives of the trust. Under certain circumstances a trust can also be officially declared as inoperative, defunct or moribund.”

Dissolution may be taken with respect to societies and Section 25 companies. The Societies Registration Act and the Indian Companies Act provide that “[u]pon dissolution and after settlement of all debts and liabilities, the funds and property of the society or company may not be distributed among the members.... Instead, the remaining funds and property must be given or transferred to some other society or section 25 company, preferably one with similar objectives.”<sup>73</sup>

### **Permitted and prohibited activities**

#### **Economic activities**

The question of the economic, business and commercial activities of the Indian nonprofit sector has assumed a more controversial position in recent years. The basic rule is that Indian nonprofits are generally free to engage in “incidental” business, commercial or economic activities as long as “the NPO is established for and primarily runs programs for relief of poverty or distress, education, or medical relief. However, profits must be applied fully towards charitable objects. If this is not done, then the NPO will lose its income tax exemption and its

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<sup>72</sup> USIG India.

<sup>73</sup> USIG India.

income will be liable to tax at the maximum marginal rate (30%). Further the NPO must maintain separate books of account for the business/commercial/economic activities. [Income Tax Act, 1961 (seventh provision to section 10(23C); section 11, subsection 4 and 4A)]”<sup>74</sup>

### **Investment activities**

The question of which investments nonprofits can make is also a difficult and, in recent years, contentious issue. India has traditionally restricted the investments nonprofits can engage in. “For example, Indian NPOs may not invest in shares of public or private limited companies. Furthermore, not-for-profit organizations registered in India may not invest abroad.” The Indian Finance Act in 2007 (retroactive to 1999) did allow “NPOs to invest in shares of public sector companies as well as to acquire equity shares of a ‘depository.’” These issues will continue to be discussed in India in the years ahead.

### **Political activities**

As in many other countries, the rules governing nonprofit organizational engagement in political campaigns and legislative activities in India can be complex. In general terms, Indian nonprofits “may not engage in political campaign activities or legislative activities. Indian not-for-profit entities may ‘lobby’ for non-political causes, however, provided that such activity promotes the ‘general public utility’ and is incidental to the attainment of the charity's objects. Societies may have as their primary objective the diffusion of political education.”<sup>75</sup>

This matter is also governed by the highly controversial Foreign Contributions (Regulation) Act, which is described further below. In general terms, foreign contributions to

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<sup>74</sup> USIG India.

<sup>75</sup> USIG India.

Indian nonprofits “cannot be received by political parties or not-for-profit organizations involved in political activities.”<sup>76</sup>

### **Tax Laws Applicable to Nonprofit Organizations in India**

As in many other countries, tax law is important for the financial and programmatic flexibility to be accorded to the nonprofit sector in India. India has some interesting features in this regard that are not replicated in other Asian states and that have received significant attention around the region and beyond.

#### **Tax Exemption**

Tax exemption for Indian nonprofit organizations is regulated by the national Income Tax Act, 1961 and by other enactments. In general terms, “[o]rganizations may qualify for tax-exempt status if all of the following conditions are met:

- The organization must be organized for religious or charitable purposes;
- The organization must spend 85% of its income in any financial year ... on the objects of the organization. The organization has until 12 months following the end of the financial year to comply with this requirement. Surplus income may be accumulated for specific projects for a period ranging from 1 to 5 years;
- The funds of the organization must be deposited as specified in section 11(5) of the Income Tax Act;
- No part of the income or property of the organization may be used or applied directly or indirectly for the benefit of the founder, trustee, relatives of the founder or trustee or a person who has contributed in excess of Rs.50,000 to the organization in a financial year;
- The organization must timely file its annual income return;

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<sup>76</sup> USIG India.

- The organization's income must be applied or accumulated in India. However, trust income may be applied outside India to promote international causes in which India has an interest, without being subject to income tax; and
- The organization must keep a basic record (name, address and telephone number) of all donors.” This implicates the very real problem of anonymous donations and donors in India: “According to section 115BBC, introduced with the Finance Act, 2006, all anonymous donations to charitable organizations are taxable at the maximum marginal rate of 30%. Finance (No. 2) Act, 2009, however, carves out the following exception: anonymous donations aggregating up to 5% of the total income of the organization or a sum of Rs. 100,000, whichever is higher, will not be taxed. Additionally, religious organizations (temples, churches, mosques) are exempt from the provisions of this section.”<sup>77</sup>

### **Business income**

In this difficult and controversial area, the Income Tax Act 1961 (Section 11(4A)) provides that, as Dadrawala indicates, “a not-for-profit organization is not taxed on income from a business that it operates that is incidental to the attainment of the objects of the not-for-profit organization, provided the entity maintains separate books and accounts with respect to the business. Furthermore, certain activities resulting in profit, such as renting out auditoriums, are not treated as income from a business.”<sup>78</sup>

But this knotty problem of business, economic and commercial income does not end here. The Indian Finance Act adopted in 2008 “changed the definition of ‘charitable purpose’ such that ‘[a]dvancement of any other object of general public utility’ would not be considered

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<sup>77</sup> USIG India.

<sup>78</sup> USIG India.

as ‘charitable purpose’ if it involved carrying on of any activity in the nature of trade, commerce, or business, or any activity rendering services in relation to trade, commerce, or business for fee, tax, or other consideration.” This was an attempt to restrict nonprofit business activities, and met with resistance from the sector. After some debate, “the Finance Act 2010 has now provided some relief by exempting the aggregate value of the receipts from such activities up to a million Indian rupees (approximately US\$22,000)” retroactive to April 1, 2009. This scuffling between nonprofits carrying out economic and commercial activities, and government agencies suspicious of their motives and income, will certainly continue.<sup>79</sup>

### **Organizations disqualified from tax exemption**

Private religious trusts, charitable trusts or organizations created after April 1, 1962, and charitable trusts “established for the benefit of any particular religious community or caste” are ineligible for tax exemption by law. But “a trust or organization established for the benefit of ‘Scheduled Castes, backward classes, Scheduled Tribes or women and children’ is an exception; such a trust or organization is not disqualified, and its income is exempt from taxation.”<sup>80</sup>

### **Value added taxation**

India has a value added taxation (VAT) system in which “certain sales of goods and services [are subject] to VAT, with a fairly broad range of exempt activities.” VAT rates “range from 1 percent to 12.5 percent, with most goods and services taxed at 12.5 percent. A [nonprofit] entity (including a public charitable trust) is liable under the VAT Act if its sales/purchase turnover in the previous year exceeded Rs.500,000. The threshold is lower, Rs.100,000, for importers.”<sup>81</sup>

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<sup>79</sup> USIG India.

<sup>80</sup> USIG India.

<sup>81</sup> USIG India.

### **Tax deductions and other incentives for giving and philanthropy**

The question of tax deductions for donors is a somewhat complicated area in Indian law. The Income Tax Act, section 80G, “permits donors to deduct contributions to trusts, societies and section 25 companies. Many institutions listed under 80G are government-related; donors are entitled to a 100% deduction for donations to some of these government funds. Donors are generally entitled to a 50% deduction for donations to non-governmental charities. Total deductions taken may not exceed 10% of the donor's total gross income.”

The government charities under section 80G to which contributions enable a donor to take a 100% deduction include the Prime Minister's National Relief Fund; the Prime Minister's Armenia Earthquake Relief Fund; the Africa (Public Contributions – India) Fund; and the National Foundation for Communal Harmony. For other organizations, “donors may deduct 50% of their contributions to such organizations, provided the following conditions are met:

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

As indicated above, donations to institutions or funds “for the benefit of any particular religious community or caste” are not tax-deductible. But a nonprofit “created exclusively for the benefit of a particular religious community or caste may ... create a separate fund for the

benefit of ‘Scheduled castes, backward classes, Scheduled Tribes or women and children.’ Donations to these funds may qualify for deduction under section 80G, even though the organization, as a whole, may be for the exclusive benefit of only a particular religious community or caste. The organization must maintain a separate account of the monies received and disbursed through such a fund.”<sup>82</sup>

In-kind donations have also provoked extensive discussion in India, where they are common. Such in-kind donations are “not tax-deductible under Section 80G.”<sup>83</sup>

But other contributions beyond those noted above may also lead to tax deductions. Section 35AC of the Income Tax Act permits donors to deduct “100% of contributions to various [types of] projects, including 1) construction and maintenance of drinking water projects in rural areas and in urban slums; 2) construction of dwelling units for the economically disadvantaged; and 3) construction of school buildings, primarily for economically disadvantaged children.”<sup>84</sup>

Section 35CCA of the Income Tax Act also permits donors to deduct “100% of ... contributions to associations and institutions carrying out rural development programs” and, Section 35CCB of the Act permits donors to deduct 100% of their donations to “associations and institutions carrying out programs of conservation of natural resources.”

In addition, deductions of 175% of contributions are permitted for “contributions to organizations approved under section 35(1)(ii) of the Income Tax Act (i.e., a research association or a university, college or other institution) specifically for ‘research,’ and for contributions made under section 35(1)(iii) of the Income Tax Act, specifically for ‘research in social science or statistical research.’”<sup>85</sup>

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<sup>82</sup> USIG India.

<sup>83</sup> USIG India.

<sup>84</sup> USIG India.

<sup>85</sup> USIG India.

Yet still further in the complex Indian system of tax deductions for charitable contributions, the Finance Act, 2008 introduced a tax deduction of 125% for “contributions for scientific research, made to a company registered in India, whose main objective is scientific research and development, when those contributions are approved by the prescribed authority and fulfill specified conditions. Previously, such a deduction was available only for payments made to scientific research associations or to universities, colleges, or other institutions.”<sup>86</sup>

**The Controversial Issue of Foreign Contributions to Nonprofit and Civil Society Organizations in India and the Foreign Contribution (Regulation) Act, 1976 (as amended)**

The single most controversial and hotly debated of all legal issues for the Indian nonprofit sector for several decades has been the Foreign Contribution (Regulation) Act, originally adopted during the Indian Emergency period in 1976, under which most Indian nonprofits must register or obtain government approval to receive contributions from abroad.

The requirements of the Act are detailed, restrictive, and, in the view of many in the Indian nonprofit sector, highly onerous. Noshir Dadrawala has provided among the best descriptions of the details of the Foreign Contribution (Regulation) Act and its implementation in connection with the U.S. International Grantmaking Project. In specific terms, under the Foreign Contribution (Regulation) Act, 1976 (FCRA), Indian nonprofit organizations in India, including public charitable trusts, societies and section 25 companies) that want to accept foreign contributions

“must: (a) register with the Central Government; (b) agree to accept contributions through designated banks; and (c) maintain separate books of accounts with regard to all receipts and disbursements of funds. Furthermore, not-for-profit entities must report to the Central Government all foreign contributions received within 30 days of the receipt of

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<sup>86</sup> USIG India.

the contribution, and must file annual reports with the Home Ministry. The entity must report the amount of the foreign contribution, its source, the manner in which it was received, the purpose for which it was intended, and the manner in which it was used. Foreign contributions include currency, securities, and articles, except personal gifts under Rs.1,000. Funds collected by an Indian citizen in a foreign country on behalf of a not-for-profit entity registered in India are considered foreign contributions. Moreover, funds received in India, in Indian currency, if from a foreign source, are considered foreign contributions. FC(R)A guidelines require that an organization allowed to receive funds from a foreign source may provide funds from its FC(R)A account to another organization, only if the other organization also has clearance from the Home Ministry to receive funds from a foreign source.”<sup>87</sup>

***New and controversial developments in the Foreign Contribution Regulation Act (FCRA) regime in 2010 and 2011***

2010 and 2011 saw major developments in the Foreign Contribution Regulation Act – in the text of the Act, its Rules, and its enforcement. Many of these changes were of significant concern to many in the Indian nonprofit sector. A significantly amended Act came into effect retroactive to September 2010, replacing the original FCRA 1976 (which itself had been substantially amended over the years).

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<sup>87</sup> USIG India. Other FCRA provisions state that “If the foreign donor agency specifies in writing that the whole or part of the grant may be directed to the recipient organization’s capital fund or endowment, the organization may do so. Such an endowment or capital fund may be invested in an approved security. The “interest” or “dividend” generated should be accounted for as an amount received by way of interest on a deposit drawn out of funds received from a foreign source. In other words, even the interest/dividend received in India in Indian rupees must be disclosed in the Return Form FC-3..... Contributions from expatriate Indians are not considered “foreign contributions” if an individual has become a citizen of a foreign country.” Id.

It is impossible to describe all of the details of the new FCRA here, but the eminent Indian commentator Noshir Dadrawala has pointed out four particular areas in which he believes “should be a cause of concern” for Indian nonprofits:

“(1) Section 3 specifies persons [including organizations] who are ineligible to receive foreign contribution. Of particular concern is the inclusion of “Organization of a political nature”. Since the term ‘Political Nature’ has not been defined there is reason for NGOs involved in ‘Advocacy’, ‘Activism’ etc., to feel a bit concerned;

(2) Administrative expenses should not exceed 50% and any expenditure of administrative nature in excess of 50% shall be defrayed [only] with prior approval of the Central Government.

(3) Registration under FCRA will require renewal every 5 years! However, the Act has provided relief to all the existing NGOs for the first 5 years from the date of enactment. Registration of all NGOs already registered under FCRA 1976 will be deemed to have expired on 27th September 2015.....

(4) Registration may be cancelled for various reasons including lack of activity for a period of 2 years.”<sup>88</sup>

At the same time – and this indicates that somewhat contradictory, and always complex nature of Indian regulatory action with respect to the nonprofit sector -- Dadrawala also identifies “[t]wo changes in the New Act [that] should make NGOs rejoice:

“(1) NGOs will now be allowed to maintain multiple bank accounts provided only one exclusive bank account is maintained for receiving/channeling all foreign contribution;

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<sup>88</sup> Noshir Dadrawala, *FCRA 2010 is Law* (2010) (formatting and punctuation amended).

(2) Both ‘Registration’ and ‘Prior Permission’ shall be granted or rejected within a period of 90 days from the date of receipt of application. Earlier, this time limit was provided under law only for disposal of ‘Prior Permission’ applications.”<sup>89</sup>

**Organizations of a political nature**

Others have also identified the new Section 3 of that Act, which prohibits “organization[s] of a political nature” from receiving foreign contributions, as being of particular concern. The highly regarded Delhi-based nonprofit consulting firm AccountAid notes that “[t]he proposed [new] FCRA rules [under the new Act] expand the definition of ‘political activities’ significantly.” And it gives multiple examples of how the new, proposed FCRA rules expand upon the unfortunate provision regarding “organizations of a political nature” in the new Act to include a wide range of Indian nonprofits that would now be ineligible to receive contributions from abroad.

Under the proposed new FCRA rules, AccountAid writes, “[a]part from organisations such as trade unions etc., a voluntary action group ‘which comments upon political activities’ can also be classified as an organisation of political nature. Further, various mass-based organisations can be [named] as organisations of a political nature, if their objectives or activities ‘include steps towards advancement of larger socio-economic or political interests of the organisation’. Going [even] further, an organisation which habitually engages itself in protests through “common methods of political action like ‘bandh’ or ‘hartal’, ‘rasta roko’, ‘rail roko’,

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<sup>89</sup> Noshir Dadrawala, *FCRA 2010 is Law* (2010) (formatting and punctuation amended). For a text of the new FCRA 2010 and further commentary, see [www.AccountAid.net](http://www.AccountAid.net), and Accountaid Capsule 323 (May 2011), referring to “the new FCRA 2010, more powerful than ever....”

‘jail bharo’ etc in support of public causes” can also be classified as an organisation of a political nature.” All such organizations would be ineligible to receive foreign contributions.<sup>90</sup>

**Certain government bodies, including universities, exempted from the new FCRA 2010**

On the other hand, the new FCRA may have introduced more flexible treatment for a very different type of Indian organization – certain government bodies that operate in nonprofit form. Under this new provision of the Act (Section 50, implemented by Order S.O.1492(E), dated 1-7-2011), it appears that some universities and other government bodies may no longer need to seek government permission to accept foreign donations.

AccountAid states: “With effect from 1-July-11, all Government bodies have been exempted from FCRA provisions. However, two conditions must be met for this:

1. The body should have been established by a Central or State Act.
2. Its accounts should be compulsorily audited by the CAG [Comptroller and Auditor General of India, the central auditing authority].”<sup>91</sup>

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<sup>90</sup> AccountAid Capsule 311 (March 2011). In specific terms, the proposed rules state: “Rule 3. Guidelines for declaration of an organisation to be of a political nature, not being a political party. - The Central Government may specify any organisation as organisation of political nature on one or more of the following grounds:-  
1. organisation having avowed political objectives in its Memorandum of Association or bylaws;  
2. any Trade Union whose objectives include activities for promoting political goals;  
3. any voluntary action group with objectives of a political nature or which comments upon or participates in political activities;  
4. front or mass organisations like Students Unions, Workers’ Unions, Youth Forums and Women’s wing of a political party;  
5. organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of larger socio-economic or political interests of the organisation;  
6. any organisation, by whatever name called, which habitually engages itself in or employs common methods of political action like ‘bandh’ or ‘hartal’, ‘rasta roko’, ‘rail roko’, ‘jail bharo’ etc in support of public causes.”  
Draft Foreign Contribution (Regulation) Rules, 2011 (available at [www.AccountAid.net](http://www.AccountAid.net)).

<sup>91</sup> AccountAid Capsule 338: Govt. Bodies Exempted from FCRA 2010 (July 2011). In formal terms, the Order states: Section 50 of the Foreign Contribution (Regulation) Act, 2010 – Power to Exempt in Certain Cases – Act Not to Apply to All Bodies Constituted or Established By or Under a Central Act or a State Act Requiring to Have Their Accounts Compulsorily Audited by the Comptroller and Auditor General of India.

### Restrictions on administrative expenses

We quickly return to the negative side, however. AccountAid notes that “The original FCRA 1976 was mainly about licensing of NGOs to receive foreign contribution. It did not really get into ensuring how the funds were to be used or managed. In that sense the old FCRA was more liberal than the new one. The new FCRA 2010 goes back to good old license Raj in India, when only the Government knew what was best for its citizens.”

“The restriction of 50% on administrative expenses is indicative of this approach. And what are administrative expenses? Any expense that does not involve direct program activities! Therefore, all salaries, rent, office expenses, most of the travel, etc. will be treated as administrative expenses. [However, if] you are engaged in research and training, then the salaries of the field researchers etc. will be exempted from this. Similarly, if you are running a hospital or school, then the salaries of doctors, nurses, teachers etc. will again be exempt.”<sup>92</sup>

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WHEREAS the Central Government is of the opinion that it is necessary and expedient in the interests of the general public to exempt all bodies constituted or established by or under a Central Act or a State Act requiring to have their accounts compulsorily audited by the Comptroller and Auditor General of India.

NOW, THEREFORE, in exercise of the powers conferred by section 50 of the Foreign Contribution (Regulation) Act, 2010 (42 of 2010), the Central Government hereby exempts all the said statutory bodies from the operation of all the provisions of the Foreign Contribution (Regulation) Act, 2010 (42 of 2010) with effect from the date of publication of this order in the Official Gazette. (26-Jul-11)

<sup>92</sup> Accountaid Capsule 313 March 2011. The new proposed rule states: “Rule 5. Administrative expenses. - The following shall constitute the administrative expenses:-

- (i) salaries, wages, travel expenses or any remuneration realised by the Members of the Executive Committee or Governing Council of the person;
- (ii) all expenses towards hiring of personnel for management of the activities of the person and salaries, wages or any kind of remuneration paid, including cost of travel by such personnel;
- (iii) all expenses related to consumables like electricity and water charges, telephone charges, postal charges, repairs to premise(s) from where the organisation or Association is functioning, stationery and printing charges, transport and travel charges by the Members of the Executive Committee or Governing Council and expenditure on office equipment;
- (iv) cost of accounting for and administering funds;
- (v) expenses towards running and maintenance of vehicles; cost of writing and filing reports;
- (vi) legal and professional charges; and
- (vii) rent of premises, repairs to premises and other utilities:

Provided that the expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training shall not be counted towards administrative expenses:

Finally, in another example of the restrictiveness of the new Act and particularly the restrictiveness of the proposed new Rules under the new Act, the Rules require that separate accounts and records be maintained for foreign contributions. AccountAid notes that the new Act, FCRA 2010, appeared to have eliminated this requirement: “For a moment it had seemed that separate FCRA accounts will no longer be needed. The moment passed. Rule 11 has been inserted into the final FCRA rules. This calls for maintaining ‘a separate set of accounts and records, exclusively’ for foreign contribution.”<sup>93</sup>

### **Customs duties**

Indian nonprofit organizations “involved in relief work and in the distribution of relief supplies to the needy are 100% exempt from customs duty on the import of items such as food, medicine, clothing and blankets.” But, in addition, “other exemptions may be available, such as an exemption from customs duty for scientific/technical equipment and components intended for research institutes.”<sup>94</sup>

### **Civil-Society Government Relations in India: The Issue of Government Contracting with Nonprofits to Provide Social Services**

In the past twenty years or so, social contracting in India has expanded across sectors of social services and Indian states and localities in highly diverse ways – too many, in fact, to discuss in detail here. Both national government and state government units contract with NGOs and other groups on the provision of social services, training, and other services. These practices expanded in the 1990s. But before that, according to the Economic Commission for Asia and the

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Provided further that the expenses incurred directly in furtherance of the stated objectives of the welfare oriented organization shall be excluded from the administrative expenses such as salaries to doctors of hospital, salaries to teachers of school etc.” Draft Foreign Contribution (Regulation) Rules, 2011 (available at [www.AccountAid.net](http://www.AccountAid.net)).

<sup>93</sup> AccountAid Capsule 330 (May 2011) FCRA Rule 11 - Separate Accounts. The new proposed Rule states: “Rule 11. Maintenance of accounts - Every person who has been granted registration or prior permission under section 12 shall maintain a separate set of accounts and records, exclusively, for the foreign contribution received and utilised.” Foreign Contribution (Regulation) Rules, 2011 (available at [www.AccountAid.net](http://www.AccountAid.net)).

<sup>94</sup> USIG India.

Pacific, “progress appear[ed] to be slow in India. An evaluation carried out by the World Bank of the Tamil Nadu Integrated Nutrition Development Project and Integrated Child Development Services shows that there was no noteworthy improvement in the delivery of services during the period from 1987 to 1996 and that progress towards involving the private sector and NGOs had been very slow.”<sup>95</sup> For many years the key vehicle for this work was, as the Indian Planning Commission put it in 2004, a traditional one: “a good many schemes being implemented in the PPP [public private partnership] mode in the social sector are in the nature of public funded with private service delivery and private management.”<sup>96</sup>

Lalit Kumar of the Planning Commission, a highly knowledgeable observer of Indian civil society-government relations, has also analyzed this trend in India.<sup>97</sup> He notes that “most NGOs in India ... do not want to be labeled as contractors but like to be treated as knowledgeable partners....” He cites a Planning Commission report that recommends: “VOs/NGOs should be shown proper dignity as knowledgeable partners in the development process and not treated as pawns, contractors or beneficiaries by the staff dealing with the voluntary sector.” And he concludes that “It is an interesting paradox that NGOs want to have contracts but do not want to be called as contractors.”<sup>98</sup>

Yet this phenomenon in India, no matter how diverse the ways in which it has played out, shares one key contradiction and problem. As Joel S.G.R. Bose puts it, “to keep in line with the process of privatization, the state has gradually been following the principle of social contracting

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<sup>95</sup> Economic and Social Commission for Asia and the Pacific, *The Emerging Role of the Private Sector in Delivering Social Services in the ESCAP Region* (Social Policy Paper No. 4), 2001, at <http://www.unescap.org/esid/psis/publications/spps/04/2166.pdf>.

<sup>96</sup> Government of India, Planning Commission, *Report of the PPP Sub-Group on Social Sector* (November 2004), [http://planningcommission.nic.in/reports/genrep/rep\\_ppp.pdf](http://planningcommission.nic.in/reports/genrep/rep_ppp.pdf). In this section, quotations from this key report generally omit italics (emphasis) in the original, and correct spelling and other mistakes in the original.

<sup>97</sup> Lalit Kumar, *Shifting Relationship Between the State and the Nonprofit Sector: Role of Contracts under the New Governance Paradigm* (ISTR, 2004).

<sup>98</sup> *Id.*

with the NGOs in implementing its anti-poverty programme, thus providing [a] lot of space for the NGOs to collaborate with the governments in power. At the same time, the NGOs together with the marginalized sections of the society are actively involved in opposing the policies of the State and Governments that are detrimental to the livelihood systems of the poor.”<sup>99</sup> Thus Indian civil society organizations that contract with the state to provide social services exist in both cooperation and, at times, opposition to the state. In fact, social contracting in India is certainly a means to cooperate with and even coopt the voluntary sector, as well as a means to deliver social services. Throughout India, many smaller and medium-sized NGOs remain partly or largely dependent on the state for their funds – and are among the backbones of social service delivery.

In India, these social contracting schemes are carried out largely through proposal or bidding and contractual arrangements, with government serving variously as a funding agency, as a buyer of services, or as a coordinator of service provision. Officially, they are regarded by the government as contributing to the “cost-effectiveness” of social services, “higher productivity,” “accelerated delivery,” “clear customer focus,” “enhanced social service[s],” and “recovery of user-charges.”<sup>100</sup>

The process of contracting and delivering services under the broad rubric of “social contracting” in India is carried out at least in the following four ways, mirroring the forms of social contracting that take place (in various ways) in other countries:

- “(i) Public funding with private service delivery and private management .
- (ii) Public as well as private funding with private service delivery and private management.
- (iii) Public as well as private funding with public/private service delivery and

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<sup>99</sup> Joel S.G.R. Bose, *NGOs and Rural Development: Theory and Practice* (Concept 2003), p. 15.

<sup>100</sup> Government of India, Planning Commission, Report of the PPP Sub-Group on Social Sector (November 2004), [http://planningcommission.nic.in/reports/genrep/rep\\_ppp.pdf](http://planningcommission.nic.in/reports/genrep/rep_ppp.pdf).

public/private/joint management.

- (iv) Private funding with private service delivery and private management.”<sup>101</sup>

The Planning Commission has recognized some of the advantages in undertaking this social contracting through and with voluntary organizations. Those advantages in “implementing PPP programmes through VOs [voluntary organizations] in preference to in-house government agency, especially in the social sector,” include

- “(a) VOs are closer to the disadvantaged sections of the society;
- (b) Staff of VOs are normally more motivated;
- (c) VOs are more successful in ensuring people’s participation;
- (d) VOs are more flexible and quick in decision making.”<sup>102</sup>

But the state is not wholly convinced. Some of the “disadvantages of implementing programmes through VOs” include:

- “(a) while the government may switch over to PPP to ensure cheaper services, services may no more be universally available. Provision of services would thus be linked to the ability to pay, and to that extent broader entitlement would get submerged and forgotten.
- (b) VOs may soon come to resemble profit organizations;
- (c) it undermines the accountability of government to the citizens;
- (d) VOs lose their autonomy and independence, as they cannot afford to go against their sponsors.”<sup>103</sup>

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<sup>101</sup> Id.  
<sup>102</sup> Id.  
<sup>103</sup> Id.

In India, social contracting by various levels of the state to voluntary sector and other organizations to carry out public services take place in a full range of fields, including elementary education and literacy, midday meal schemes, secondary education, child development, cultural development and management, health control and prevention schemes, family welfare programs, agriculture extension, seed production, afforestation, management and protection of wildlife areas, rural development, drinking water supply, urban development and poverty alleviation, services to people with disabilities, services to street children, and other social services.

A 2004 report by the Indian Government's National Planning Commission clearly laid out the detailed ways in which many of these social contracting mechanisms work. What is common among them is that many rely on "public funding with private (i.e. NGO) service delivery and private (i.e. NGO) management," while some also rely on some form of mixed private-public service delivery and management as well. Through contractual process virtually all indicate that the contracting government imposes detailed requirements for provision of services, monitoring, and quality control.<sup>104</sup>

Diverse mechanisms are used, often depending on the particular sector. There are of course many potential problems with these social contracting vehicles, and the Indian press has reported on these (including lack of control over actual delivery of services and quality; fraud and corruption; and other problems). For some in the Indian government, there is a recognition that social contracting means more for social services than merely a diversity of service delivery options. As the Planning Commission put it, "[a] closer look at the poor performance of public utilities and social services, in general, also shows that the disease lies in the 'monopoly' characteristic of such activities. Since there is no alternative to the existing (in-house) service

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<sup>104</sup> Id.

providers, the citizens are left with no option other than that of “take it or leave it”. The executives/bureaucracy ... may thus take the liberty to indulge in lethargy, corruption and high handedness. It has, therefore, been commented that the important distinction is not public versus private rather it is monopoly versus competition. In this respect, PPP may be looked at as a measure towards administrative reforms.”<sup>105</sup>

### **Civil Society-Government Relations in India: The Issue of Nonprofit Self-Regulation and Accreditation**

As in the Philippines, attention to nonprofit self-regulation and accreditation has been growing rapidly in India as well.<sup>106</sup> In India, that emphasis on self-regulation is, at least in part, an expression of collective action to defend against encroaching and increasing state pressures, as well as an attempt to strengthen the quality of sectoral governance, services, financial management, and fundraising; to organize an unruly sphere and marginalize lower quality actors or other outliers; to access governmental or donor funding; to act as a market mechanism to exclude competitive or unproductive actors for the benefit of remaining players or to marginalize organizations causing reputational damage to the sector; as a learning opportunity for nonprofits and their networks; and as a means to clarify and strengthen shared identity.

Nonprofit self-regulation began to emerge in the Asian voluntary sector in the late 1990s, initially in the Philippines and India and then in a number of other countries. A genealogy of discussion of nonprofit self-regulation in Asia shows intensive attention given to the experience of one institution in one national context, the Philippine Council for Nonprofit Certification

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<sup>105</sup> Id. Among the many other sources on these issues, see, e.g., Stephen Commins, *Community Participation in Service Delivery and Accountability* (2007); J.M. Brinkerhoff, *Donor-Funded Government-NGO Partnership for Public Service Improvement: Cases from India and Pakistan*, *Voluntas* 14(1): 105-22 (2003); J. Ferris, The Double-Edged Sword of Social service Contracting: Public Accountability versus Nonprofit Autonomy. *Nonprofit Management & Leadership* 3(4): 363-76 (1993).

<sup>106</sup> This section draws upon Mark Sidel, The Promise and Limits of Collective Action for Nonprofit Self-Regulation: Evidence From Asia, *Nonprofit and Voluntary Sector Quarterly* (2010) 39(6), 1040. For a longer and more detailed treatment, see that full article.

(PCNC), which is also discussed further below. In the late 1990s and the early part of this decade, the PCNC experience in the Philippines was virtually the only known example of nonprofit self-regulation generally considered successful and available for discussion around the region.

But, in fact, the first broad-based meeting in Asia to discuss comparative models of nonprofit self-regulation was held in New Delhi in August 2000, focusing on experience in India and the Philippines. An initial survey of nonprofit self-regulation in Asia was conducted in 2003 for the Asia Pacific Philanthropy Consortium. It concluded that “nonprofit self-regulation is on the agenda as never before . . . . [N]o one pattern fits or describes the variety of nonprofit self-regulation mechanisms in the Asia Pacific region. The nonprofit sector in each country is discussing, considering, debating, experimenting or adopting self-regulation structures on its own pace and based on its own conditions and needs.” (Sidel, 2003; internal italics omitted)<sup>107</sup>

By 2004, when the first comprehensive report on the regulation of philanthropy and the nonprofit sector in South Asia was produced, self-regulation was a significant theme, and the authors could report on specific self-regulatory initiatives and experiments in Bangladesh, India, Nepal, Pakistan, and Sri Lanka.<sup>108</sup> Today, nonprofit self-regulatory initiatives have expanded in a number of countries around the region. Self-regulatory mechanisms remain experimental, diverse, and in many cases fragile.

In India, the variety of experiments and initiatives involving nonprofit self-regulation and accreditation has increased dramatically over the past decade. While the Philippine experience with the Philippine Council for Nonprofit Certification (PCNC) may be more well-known around

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<sup>107</sup> Sidel, *Trends in nonprofit self-regulation in the Asia Pacific region: Initial data on initiatives, experiments and models in seventeen countries* (APPC, 2003, available at <http://zunia.org/uploads/media/knowledge/marksegal.pdf>). For another discussion, see Sidel, *The guardians guarding themselves: Nonprofit self-regulation in comparative perspective*, *Chicago-Kent Law Review*, 80, 803-835 (2005).

<sup>108</sup> Sidel and Zaman (eds.), *Philanthropy and Law in South Asia* (APPC, 2004, updated report 2007).

the region, India's initiatives in this area bear close watching as well – particularly because they occur in an environment quite different from the Philippines, where the government has collaborated directly with the nonprofit sector on getting self-regulation up and running so that it can assist in the determination of “donee institution status.” The national government in India has encouraged movement toward nonprofit self-regulation but has certainly not formally collaborated with it, or devolved any authority to self-regulatory processes, as in the Philippines.

**India: Self-regulation as collective action for sectoral defense**

India's large, diverse, and vibrant nonprofit sector is often in conflict with the national government and with state governments, over prerogatives for the sector, receipt of foreign funding, and other controversial issues. The Indian voluntary sector began discussion of self-regulation in the mid-1980s, when NGO activist Bunker Roy and others pressed for development of a voluntary sector code of conduct for the voluntary sector as a means to strengthen quality within the sector and eliminate fraudulent operators.<sup>109</sup>

Little came of that initial effort, but in the 1990s a wide array of experiments were conducted in nonprofit self-regulation. Those began with the development of “voluntary guiding principles” for the nonprofit sector by Voluntary Action Network India (VANI). That second wave of interest in nonprofit self-regulation also included a major joint project on nonprofit information disclosure and validation conducted by the Charities Aid Foundation/India and the Government of India's Planning Commission and a series of transparency and governance initiatives in the voluntary sector undertaken by Murray Culshaw Advisory Services in Bangalore that encouraged annual reports and means to provide

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<sup>109</sup> I am grateful to many Indian friends for helping me understand nonprofit self-regulation in India. They include Sanjay Agarwal, Niloy Banerjee, Mathew Cherian, Murray Culshaw, Noshir Dadrawala, Gopa Kumar, Priya Viswanath, and other colleagues. All interpretations are my own.

information on nonprofit activities.<sup>110</sup> These were all experiments in nonprofit collective action, overlapping and competing for domestic support and international funding but rarely hostile to each other.

A new, third wave of experiments began in about 2001. This diverse set of self-regulatory initiatives included a nonprofit rating scheme initiated by Indianngos.com,<sup>111</sup> ratings of microcredit finance institutions in India and around Asia undertaken by Micro-Credit Ratings International Ltd. (M-CRIL),<sup>112</sup> and the emergence of powerful domestic funding intermediaries that imposed or negotiated self-regulatory principles and rules on their downstream Indian funding recipients and partners.

I term this last model “intranet” regulation – private governance of a bounded range of NGOs brought together largely because of their relationship with a dominant funder, a form of collective action required, mandated, and led by powerful domestic funders. This process began with the India national NGO Child Relief and You (CRY), which established detailed procedures and expectations on program, fiscal, accounting, and other regulation for CRY’s grantees and required them to follow those rules and report back on to CRY. This was a form of domestic, donor-enforced, private governance with a defined grantee group. CAF India, the Give Foundation (Mumbai), and other large funding and programming intermediary organizations later adopted other and expanded forms of such a domestic funder-based “intranet” model of self-regulation on either a required or strongly encouraged basis.<sup>113</sup>

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<sup>110</sup> See, e.g., <http://www.fundraising-india.org>.

<sup>111</sup> See <http://www.indianngos.com>.

<sup>112</sup> See <http://www/m-cril.com>.

<sup>113</sup> On the Give initiative, see also Aarti Madhusudan, Noshir Dadrawala, and Priya Viswanath, India, in the background papers for the APPC (2003) conference, pp. 121-22, at [http://www.asianphilanthropy.org/files/india\\_2003.pdf](http://www.asianphilanthropy.org/files/india_2003.pdf).

By the middle of the decade, these diverse initiatives had begun to coalesce into several key self-regulatory initiatives underway in India:

- A code of conduct and validation exercise undertaken by a voluntary sector consortium called the Credibility Alliance;
- The self-regulatory norm-setting and verification process undertaken by GiveIndia;
- A transparency initiative undertaken by GuideStar India; and
- The strengthening of “intranet” self-regulatory methodologies in which major domestic donors, such as CAF India and CRY set self-regulatory norms for their funding recipient partners.

Throughout this complex trail of initiatives and experiments, the Indian NGO attention to self-regulation consistently reflects three interrelated concerns to which the sector is seeking to respond: increasing government scrutiny and regulation, both at the national and state levels; the perceived distrust of the nonprofit sector among the public, government, and media; and a strong sense in the nonprofit sector that standards and quality must be improved.

For many years the Indian government largely ignored virtually all of the self-regulation initiatives as irrelevant to its own regulatory role, except for the validation exercise conducted by CAF India and the Planning Commission in the 1990s, a project of farsighted actors on both sides. Today the Indian government has begun to embrace nonprofit self-regulation as a solution to its own regulatory needs. The government’s National Policy on the Voluntary Sector, adopted in 2007, encourages self-regulation by voluntary organizations (VOs):

“There has been much public debate on the voluntary sector, particularly its governance, accountability, and transparency. It is widely believed that the voluntary sector must address these issues through suitable self-regulation. The government will encourage the

evolution of, and subsequently accord recognition to, an independent, national level, self-regulatory agency for the voluntary sector.

There is reason to believe that accreditation of VOs will lead to better funding decisions and make the funding process more transparent. Furthermore, accreditation may provide incentives for better governance, management, and performance of VOs. No reliable accreditation system is in place at present. The Government will encourage various agencies, including those in the voluntary sector, to develop alternative accreditation methodologies. It will allow time for such methodologies to be debated and gain acceptability in the voluntary sector before considering their application to Government funding of VOs.<sup>114</sup>

### **Nonprofit Self-Regulatory Initiatives**

#### **The Credibility Alliance Initiative for Minimum Norms: The promise and limits of collective action**

A key self-regulation initiative in India by nonprofits concerned with governance, accountability and transparency is the Credibility Alliance, which seeks to “define norms that organizations should meet” and develop a set of “minimum norms for certification in the voluntary sector.”<sup>115</sup> The Alliance has developed the Minimum Norms for Enhancing Credibility of the Voluntary Sector, which cover formation and registration, objectives and performance, governance, programs, management and human resources, accountability and transparency. The Alliance is gradually moving toward an accreditation process or some

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<sup>114</sup> Sections 4.4 and 5.6.2 of the National Policy on the Voluntary Sector (2007, <http://planningcommission.nic.in/data/ngo/npvol07.pdf>). Compare the sophistication of these recommendations to the careless, simplistic, and potentially harmful discussion of nonprofit self-regulation in the U.S. Senate Finance Committee’s Staff Discussion Paper in 2004, including staff expression of a clear preference for one self-regulation entrepreneurial provider over many other models. See Sidel (2005).

<sup>115</sup> See Enhancing the Credibility of the Voluntary Sector in India (Need for Standards/Grading of NGOs), Credibility Alliance, at [www.credibilityalliance.org](http://www.credibilityalliance.org), and other CA documents on the website. For an initial discussion of this process two years after these explorations began, see Madhusudan et al., *supra* Note 52.

mechanism for evaluating compliance with the Alliance's minimum norms and now defines itself as "akin to a professional body that will set norms or standards of governance. These norms shall operate on the principle of self-regulation that respects ... autonomy and seeks to preserve the spirit of innovation in the voluntary sector."<sup>116</sup>

The Credibility Alliance now has about 450 institutional members, mostly medium to large-sized NGOs from around India. It has established minimum norms, desirable norms, and good practices for its voluntary sector members. And it has initiated a pilot program of independent review of compliance with norms and exploring the formation of an accreditation system and certifying capacity-building institutions to help nonprofits comply with the minimum norms. However, both face significant issues of financial sustainability and sectoral acceptability, an example of the power of collective action to formulate norms, along with difficulties of collective action in enforcing them and expanding their acceptance in the sector. Meanwhile, the Credibility Alliance is perhaps most well-known in India for its minimum self-regulatory norms. Several large Indian nonprofits are using the norms and their compliance by voluntary organizations in their work.

In addition, the National Policy on the Voluntary Sector, adopted in May 2007, may bring government at central and state levels into endorsement of the norms. Real take-up by national or state governments of self-regulatory norms would be a significant development in India. And government capture of self-regulatory norms developed by the sector itself for government's own regulatory purposes raises the question of whether these initiatives can still be considered "self"-regulation. Noting these developments, an Indian nonprofit sector specialist notes that "as long as the 'norms' and associated activities: verification/ training/promotion etc, remain largely under the control of the voluntary sector then I feel we can still say that it is being

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<sup>116</sup> [http://www.credall.org.in/about\\_us/aboutus.htm](http://www.credall.org.in/about_us/aboutus.htm).

‘self regulated’.” But implementation and enforcement, both within the bounded range of voluntary members and more broadly in the Indian voluntary sector, remain a substantial issue in this collective action approach to nonprofit self-regulation in India.

**GiveIndia: Norm setting, verification, and the link to donations**

Another Indian self-regulatory initiative is based in the intermediary GiveIndia, which helps channel donor funds to more than 200 Indian NGOs that have met self-regulatory standards set by GiveIndia and the Credibility Alliance. The GiveIndia approach emphasizes the tangible benefits to NGOs from participation in transparency and accountability initiatives – in the case of its program, the flow of donations through GiveIndia being a key motivator. Constraints include lack of resources for new groups to join the online GiveIndia reporting system and a lack of knowledge among donors that these mechanisms exist and should be supported.

**The GuideStar India initiative: Sectoral collective action for transparency**

From its successful base in the United States as a source of transparency on the nonprofit sector, GuideStar’s international expansion began with the United Kingdom and has now moved to India. The initial GuideStar India operation was established as a partnership to enhance transparency and is perceived as complementary to those other self-regulatory initiatives to “allow NGOs to report their work in a simple, ready to search manner so that all those interested in NGOs (donors, researchers, policy makers, government, and NGOs themselves) can access information instantly.” There are some high hopes for GuideStar in India. At present, GuideStar India is in the initial stages building a database of organizational documents and relations with government for launching later this year or in 2008. An advantage to the GuideStar India approach, at least for some organizations, is the low barrier to entry and the choices available to NGOs on the amount of disclosure to begin with. GuideStar India “allows NGOs to start

reporting with just two documents (registration certificate and address proof). At the same time, the site . . . would reward NGOs that report more information and make frequent updates” (Singh, 2009).

**“Intranet” collective action and networked self-regulation initiatives**

Along with these initiatives, another key step forward in Indian nonprofit self-regulation has been the emergence of internal, self-regulatory norms for networks of Indian funding recipients and partners imposed by powerful domestic funding intermediaries – a form of collective action driven by large domestic funder within their particular networks. This “intranet” private governance of downstream grantees is intended to raise quality within the sector, marginalize outliers, facilitate fundraising from domestic, diaspora, and foreign donors, and strengthen service delivery.

Private governance of grantees through “intranet” self-regulation in India began with the national NGO and funder CRY, which established detailed procedures and expectations on program, fiscal, accounting, and other rules for CRY’s grantees to follow in the 1990s. CRY has expanded its “intranet” structure to provide budgetary support to NGOs that want to publish their accounts in accordance with CRY’s standards, and CRY is encouraging its partners to post accounts on the Internet. Others have taken up “intranet” self-regulation in their spheres of funding, on both a required and semi-voluntary basis. Charities Aid Foundation India has also initiated a series of governance, financial, and programmatic policies for voluntary adoption by its grantees.

These are not the only initiatives in India – others include a new “Joy of Giving Week” that favors and highlights NGOs engaging in public disclosure, and the “CSO Partners’ Annual Report Awards” that reward superior annual reports issued by smaller, medium-sized and larger

NGOs and seek to encourage organizations to develop annual reports as a transparency and accountability tool. Other initiatives will likely emerge in the years ahead (Singh, 2009).

Indian conclusions on the results of these years of experimentation with self-regulation are mixed. Private governance for sectoral self-defense has been a key motivator in India, perhaps the dominant strand in the collective action that has led to self-regulation in India. Yet relatively little has been effectively and sustainably enforced or institutionalized, a key limit on the reach of collective action to benefit the voluntary sector. One knowledgeable Indian specialist notes that “the outlook for self governance in India . . . is a bit uncertain. As long as the voluntary sector . . . can get its act together, and reasonably quickly, . . . the Government will keep out – but our current efforts are still very small against the need. . . . At the micro-level i.e., individual organisation level there is evidence that following the norms is leading to improved fundraising; not yet sure there is evidence that adherence is leading to improved governance and management.”

One key participant in the GiveIndia and the GuideStar India initiatives has called for “convert[ing] its various initiatives for transparency [and] accountability from small disjointed steps into a coordinated and concerted movement to transform the sector. While NGOs had been successful in pushing for electoral reforms to make politicians accountable and played a key role in getting the Right to Information Act passed toward making the government machinery accountable, it has become . . . critical for the sector to pursue its own accountability with the same passion and zeal” (Singh 2009).

### **Civil Society-Government Relations in India: The Issue of Fundraising by Voluntary Sector Organizations and Regulation by the State**

India is a good example of the increasing tendency to impose regulatory restrictions on fundraising and charitable solicitation, the multiple motivations and concerns in doing so, and

the multiple tools used in that process. India has recently imposed some constraints relating to fundraising, anonymous donations, and sales of products by charities and, through a broad revision of the Foreign Contribution Registration Act (now FCRA 2010), has imposed some new restrictions on fundraising through that mechanism as well.<sup>117</sup>

### **Anonymous donations**

Concern about anonymous donations has been growing for years in India, related both to India's attempts to comply with international protocols on terrorist finance and money laundering and domestic concerns for political uses of donated funds, and nonprofit accountability. Under Section 115BBC of the Income Tax Act, introduced in 2006, if anonymous donations to an NGO or charitable trust exceed Rs.100,000 per year or 5% of total income (whichever is higher), then a tax of 30% is levied on the anonymous donations. A key reason for this tax-based incentive against anonymous donations is the concern about possible money-laundering and related tax evasion.<sup>118</sup>

But this provision restricting anonymous donations in fundraising started off even harsher than that. As originally proposed and enacted in early 2006, any anonymous donations to an Indian charitable trust or NGO was liable for tax payment of 30% of the value of the donation (proposed section 115BBC, Finance Bill, 2006, as described in AccountAid capsule 196). Religious organizations, which in India attract sizable anonymous, cash donations, were exempted from the proposed new rule.<sup>119</sup> In formal terms, according to AccountAid,

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<sup>117</sup> I am grateful to Sanjay Agarwal, Noshir Dadrawala, and Priya Viswanath for information on fundraising and charitable solicitation developments in India. All information on developments in India is preliminary and is subject to further confirmation for accuracy.

<sup>118</sup> AccountAid Capsules 196, 204, 284.

<sup>119</sup> *Religious charities exempt from new tax*, <http://www.asianews.it/news-en/Religious-charities-exempt-from-new-tax-5518.html>.

“anonymous donations are not eligible for deduction from taxable income under 35AC or 80G, as donations need to be itemised in the tax return before deduction can be claimed.”<sup>120</sup>

India’s Finance Minister outlined the government’s reasons for the shift:

“The Standing Committee on Finance has expressed concern that many charitable institutions misuse the provisions of the Income Tax Act. I propose to focus on one misuse, namely, receiving anonymous or pseudonymous donations. Accordingly, I propose that anonymous or pseudonymous donations to wholly charitable institutions will be taxed at the highest marginal rate. Such donations to partly religious and partly charitable institutions/trusts will be taxed only if the donation is specifically for an educational or medical purpose. However, I make it clear that such donations to wholly religious institutions and religious trusts will not be covered by the new provision.”<sup>121</sup>

The shift toward reducing anonymous donations was also connected to concerns about money laundering and terrorism, part of India’s attempt to modernize its regulatory and banking systems and to join the Financial Action Task Force, which was beefed up to combat terrorist finance (including through charitable organizations) in the years after the September 2001 terrorist attacks in the United States. India adopted 49 action points related to FATF’s protocols earlier in this decade as well.

AccountAid, India’s key nonprofit accounting and consulting firm, had a clear reaction to the proposed tax on anonymous donations: “The Minister [of Finance] has dealt a big blow to the practice of *'gupt daan'* [charitable donation] by blocking anonymous donations.... As it is worded, even coin-box collections will attract a tax of 30%. So don't be surprised if you are asked to show your voter card or driving license before dropping loose coins in a hospital

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<sup>120</sup> AccountAid capsule 196.

<sup>121</sup> Budget 2006-2007, Speech of P. Chidambaram, Minister of Finance, February 28, 2006, at <http://indiabudget.nic.in/ub2006-07/bs/speecha.htm>.

collection box! Apparently, the move is targeted at the practice of laundering business funds through charity. NGOs are not likely to be affected, as most of them maintain detailed records of their donors....<sup>122</sup>

The solution was to require the donor's identity, and to discourage anonymous cash giving. According to AccountAid, organizations "will be required to maintain a record showing the name and address of the donor [if the donations are to be tax exempt]. Also for their own protection, they may prefer to receive donations through account payee cheques."<sup>123</sup>

Section 115BBC of the Finance Bill 2006 was enacted as proposed in 2007. But it proved draconian, of course – the choice between all anonymous donations being taxable, or imposing onerous information or payment requirements on those who just want to put money into a donation box provoked opposition from the charitable sector, or just withdrawing from collecting money anonymously. As AccountAid put it, "[i]n 2006, all anonymous donations to charitable organisations became taxable [at] 30%. This included even coin-box collections of 2-5 rupees. Many NGOs withdrew their collection boxes in frustration."<sup>124</sup>

The NGO community protested. In January 2008, a group of organizations (including such prominent groups as AccountAid, Oxfam, National Foundation for India, and HelpAge India) pressed for a reversal of the shift to taxing anonymous donations, arguing that "[t]he government is trying to curtail crime, but it is a huge problem for people who want to remain anonymous...."<sup>125</sup> So in 2008 the Finance Ministry proposed a more moderate solution. Under this new amendment to Section 115BBC, charitable organizations are exempt on anonymous donations of Rs.100,000 or 5% of total income, whichever is higher.

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<sup>122</sup> AccountAid capsule 196. For further discussion, see Sidel, *Philanthropy and Law in South Asia* update 2007.

<sup>123</sup> AccountAid capsule 204.

<sup>124</sup> AccountAid capsule 284.

<sup>125</sup> Citation.

So, in the example AccountAid provides, an NGO with total income of ten million rupees can report anonymous donations of 500,000 rupees “without any bother of tax.” And “[a] smaller NGO with income of just [500,000 Rupees] can also report anonymous donations of [100,000 Rupees], without any tax.... So go ahead, and tap that shy donor – without any tax implication!”<sup>126</sup>

For some Indian NGOs, which had had to begin removing collection boxes because of concern with the new provision, even that somewhat ameliorated impact was still too onerous. In June 2010, the respected Executive Secretary of India’s Centre for Advancement of Philanthropy, Noshir Dadrawala, led a coalition of organizations in seeking a repeal of Section 115BBC, even in its amended form.<sup>127</sup>

Dadrawala and his colleagues sent a petition to the Indian Parliament, noting that “[w]e are of the view that Section 115BBC, even after the amendment made by Finance (No 2) Act 2009, is a deterrent for genuine charitable organisations to mobilise funds for welfare and developmental work from the general public or ordinary citizens who are motivated to give for altruistic and not money laundering reasons.... [A] very large number of genuine charitable organisations and NGOs raise funds through collection boxes and people who put money into these boxes mainly comprise children and ordinary citizens of this country who may have heard about 'black money' but don't have any and contribute to charitable institutions only out of a genuine charitable impulse.” Dadrawala pointed out the especially hard effects on “NGOs which

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<sup>126</sup> AccountAid capsule 284, Clause 42 of Finance Bill 2009, Proposed amendment to section 115BBC, effective from current Financial Year 2009-10. As described in another source, “Section 115BBC was introduced for the first time in the Finance Act, 2006, to tax anonymous donations to charitable organisations at the maximum marginal rate of 30%. Subsequently, a degree of relief was granted under the Finance (No 2) Act, 2009, that such anonymous donations aggregating up to five years of the total income of an organisation or a sum of Rs1,00,000- whichever is higher-will not be taxed.” *NGOs ask for ban on anonymous donations to be repealed*, citation.

<sup>127</sup> *NGOs ask for ban on anonymous donations to be repealed*, citation.

cater to orphans cancer patients, and the mentally disabled [since] these organisations get nearly 30% of their annual donations from charity boxes.”<sup>128</sup>

A senior official with the well-known national NGO Child Rights and You (CRY) agreed with this assessment: “Since the advent (of the new provisions) to the I-T Act in 2006, we have raised very limited funds through anonymous donations,” noted Kreeanne Rabadi, a CRY regional director. Another NGO leader said that “larger NGOs are affected by the provisions as they receive more anonymous donations, while smaller NGOs may not be affected [as much].”<sup>129</sup>

### **Prevention of Money Laundering Act and disclosure of funding sources**

2009 changes in the Indian Prevention of Money Laundering Act (PMLA) also had some implications for fundraising and charitable solicitation in India, indicating a broader range of measures to regulate fundraising than merely tightening up on anonymous donations. These amendments were part of India’s commitments to the Financial Action Task Force to try to eliminate terrorist finance through charitable organizations, and imposed greater accountability on Indian nonprofits, but could have more far-reaching impact on them as well.

Under the 2009 PMLA amendments, nonprofit companies, charitable trusts, NGOs, and societies were brought within the scope of the Act as part of a “global commitment to account for all finance flows.”<sup>130</sup> Under the PMLA’s requirements, these nonprofit and charitable groups would “not only have to disclose the source of their funds, but also be scrutinized for large monetary transactions.” Earlier, the PMLA had applied primarily to banking and financing institutions, with expansion to money transfer organizations. Under the PMLA, the nonprofits

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<sup>128</sup> Id.

<sup>129</sup> <http://www.moneylife.in/article/78/6717.html>.

<sup>130</sup> Section 25 Companies, Charitable Trust, NGO, Societies under the purview of Prevention of Money Laundering Act (PMLA) 2002, <http://taxguru.in/finance/section-25-companies-charitable-trust-ngo-societies-under-the-purview-of-prevention-of-money-laundering-act-pmla-2002.html>. The amendments were gazette on November 12, 2009.

and charities subject to the Act would need to observe the tightened post-September 11 “know your customer” provisions and provide disclosure where required.

Some supported this expansion of regulation. “Money laundering in India [is] rampant through NGOs and charitable trusts,” noted a Mumbai lawyer. “The majority of industrialists and even some top politicians [have been] using NGOs to launder their black money back into the country. The amendment would prove an effective tool in the hands of authorities and would take the veil off the racket.... Earlier, the NPOs were not forced to disclose the source of their funds, except in some specific cases.” Now, in addition to the know your customer rules and required disclosures, “[i]f the donation is too large and the authorities call on the organization to know the source of funding, then it cannot use the excuse that it had come from an unknown source.”<sup>131</sup>

#### **Sales of products and fees for provision of services for fundraising purposes**

Another set of developments potentially affecting fundraising and charitable solicitation in India began with a decision by the Indian Supreme Court in 2007. In *Commissioner of Income Tax v. Gujarat Maritime Board (Appeal (Civil 5656 2007))*,<sup>132</sup> the Supreme Court ruled that the Maritime Board – originally a statutory body serving a public function whose previous status as a “local authority” had been nullified by legislation – qualified as a “charitable” institution under the Income Tax Act, its income from rentals, stevedoring and other activities was used for public purposes, and thus that business income was not subject to taxation.

In the words of the Supreme Court, the “Gujarat Maritime Board is established for the predominant purpose of development of minor ports within the State of Gujarat, the management and control of the Board is essentially with the State Government and there is no profit

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<sup>131</sup> Id.

<sup>132</sup> *Commissioner of Tax v. Gujarat Maritime Board (2007)*, available at [source].

motive.... The income earned by the Board is deployed for the development of minor ports in India. In the circumstances, ... [since the] Gujarat Maritime Board is under legal obligation to apply the income which arises directly and substantially from the business held under trust for the development of minor port[s] in the State of Gujarat ... [t]herefore, they are entitled to be registered as [a] 'Charitable Trust' under Section 12A of the 1961 [Income Tax] Act.”<sup>133</sup>

That decision was regarded by many as an over-expansion of the definition of a charitable institution, and it led to a reaction – an amendment of the Income Tax Act in 2008 that implicates fundraising and the sale of products by charitable institutions. Under the [new/amended] section 2(15) of the Act, if a charity has annual receipts exceeding one million rupees (10 lakh) from the sale of products or from fees from provision of services, then it will lose its charitable exemption from taxation.<sup>134</sup>

These shifts have complicated revenue production and fundraising for some Indian charities. And there are some limitations. A key Indian nonprofit regulatory specialist describes the situation as follows: “This restraint does not apply to charities focusing on health services, education or working for the poor (traditional understanding of charity). It applies to modern charities which are sometimes difficult to distinguish from commercial enterprise. This change was made when a transport corporation managed to convince the Supreme Court that it was a charity serving a publicly useful purpose! To limit the tax implication of this for genuine charities, we are encouraging them to spin off the 'business units' as separate non-exempt trusts/NPOs.”<sup>135</sup>

Despite having outlined these various new restrictions on fundraising and charitable

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<sup>133</sup> Id.

<sup>134</sup> AccountAid capsules 268, 274, 285, 286, 289, 294.

<sup>135</sup> Private discussion.

solicitation in India,<sup>136</sup> it is important to note that India remains relatively free for charitable fundraising. As one knowledgeable specialist puts it, “[i]n India organisations may fund raise in every creative and innovative way as long as long as it is not immoral or illegal (e.g: gambling etc.).... There are no specific rules setting limits on fundraising, allowable use of fundraising receipts, regulation of campaigns, hawkers, advertising, expenses, etc. associated with fundraising.” Nonetheless, over time, the situation in India appears to be shifting toward greater regulation and restriction on fundraising and charitable solicitation on a number of fronts.

### **III. Analysis and Conclusions**

India represents a relatively free and autonomous nonprofit sector and civil society, in a relatively politically and economically free country in which the nonprofit sector and civil society have generally flourished. The country report for India identifies key elements of that relative freedom, including relative liberty to register, operate, gather resources, and participate in national life. Yet there are countervailing elements in India, including a strong restrictive environment toward foreign funding (foreign contributions to domestic civil society), various legal and bureaucratic impediments to civil society, an ongoing government campaign against Maoist rebels that has at times targeted civil society organizations and individuals, and other restrictive issues.

The Indian context provides valuable information for Vietnam. The forms for organization and establishment of nonprofit and civil society organizations are diverse, and they are relatively clear and well-defined. Formation is feasible if not always quite as easy as in other

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<sup>136</sup> And, of course, there are some older regulations as well. To cite only one example, “the Bombay Entertainment Duty Act 1923 provides for levy of duty on ‘any payment made by way of Sponsorship amount for a program’. Technically ‘Sponsorship’ cannot be equated to ‘Donation’. Donation is voluntary and sans quid pro o. Sponsorship provides support similar to a benefactor but in exchange of advertisement. In fact, Sponsorship is a form of advertisement in which companies pay to be associated with a cause. It’s a form of Cause Related Marketing. Also, for companies, Sponsorship is a 100% write off as advertising expense. A donation would give them only 50% deduction u/s 80G of the Income Tax Act.” Discussion with Mumbai-based specialist.

jurisdictions. Operations of nonprofit and civil society groups are, in general, not overly hampered by over-extensive government interference (including supervision and reporting mechanisms that remain at a reasonable level), but may, in some states and for some kinds of organizations, suffer from over-extensive government intervention and report. The state provides some funding to nonprofit and civil society groups for the provision of social and other services. Many nonprofits and civil society organizations retain relative freedom to participate in public debate and national life, but some are not allowed to do so or come under political or police pressure. A facilitative tax regime is generally in place. Some strong nonprofit and civil society umbrella groups serve the sector, but remain insufficient. Experiments with nonprofit self-regulation are underway but have not yet gained significant strength or scope.

## **China**

### **I. Political, Cultural, Historical and Socio-Economic Context**

- (a) Major historical events which have been significant in shaping the contemporary experience of the country under review
- (b) Economic system in the country under review (Transitional/“ free market” /regulated market/socialist-oriented market economy)
- (c) Political system: ideologies, philosophies, cultural and historical factors shaping the political system.

The People’s Republic of China<sup>137</sup> is a major Asian state with a population of 1.33 billion people (as estimated by the U.S. State Department in mid-2011).<sup>138</sup> Most of China is Han Chinese (over 90%), with a large number of minority nationalities represented as well. Mandarin Chinese is the official language and many regional dialects and minority languages are used as well.

China is led by a Communist Party, itself headed by the Political Bureau and its Standing Committee and General Secretary, who are elected by the Party’s Central Committee. Under that authority, the Chinese state consists of an executive, in which most of the day-to-day work of the government is led by the Prime Minister (Premier) and handled through government ministries (cabinet). The national legislature is the National People’s Congress and the judiciary is headed by the Supreme People’s Court. These structures are replicated in China’s 22 provinces (including Taiwan as the PRC does makes that 23 provinces), as well as five

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<sup>137</sup> Taiwan and Hong Kong are not covered in this report, though both have very interesting nonprofit sectors and complex relationships between those nonprofit sectors and their respective governmental institutions. If VUSTA or others are interested in Taiwan or Hong Kong, reports on either of those jurisdictions could be added at a later stage.

<sup>138</sup> This introductory section is based on several sources, including the State Department’s Background Notes on China, <http://www.state.gov/r/pa/ei/bgn/18902.htm>.

autonomous regions, and four directly-administered municipalities which have provincial status (Beijing, Shanghai, Tianjin, Chongqing).<sup>139</sup>

China's economy has emerged as one of the largest and most powerful economies in the world. The growth rate in 2010 was 10.3%.<sup>140</sup> The economic is multi-faceted, including agriculture, industry, natural resources, and other sectors. Key trading partners are Japan, Hong Kong, South Korea, the United States, Taiwan, Germany and other areas, as listed by the U.S. State Department.<sup>141</sup>

The current 12th Five-Year Plan "seeks to transform China's development model from one reliant on exports and investment to a model based on domestic consumption. It also seeks to address rising inequality and create an environment for more sustainable growth by prioritizing more equitable wealth distribution, increased domestic consumption, and improved social infrastructure and social safety nets."<sup>142</sup> Export growth and foreign investment, as well as growing domestic markets, remain pillars of the economy and of economic policy.

In the midst of this unprecedented growth over several decades, social stability also remains a key priority for the Chinese Communist Party and for China's leaders. Thus economic vitality and increasing privatization have also been accompanied by a very strong continuing role for the state in preserving stability, in monopolizing political power, and in growing the economy as regulator and participant. All of these facets have implications for the role of the nonprofit sector, as we discuss further below.

The Chinese Constitution provides for freedom of association (Art. 35). It also provides for other rights and freedoms, including the freedom of speech, the press, assembly, association,

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<sup>139</sup> Id.

<sup>140</sup> Id.

<sup>141</sup> Id.

<sup>142</sup> Id.

procession and demonstration; the right to petition the state; the right to receive compensation for violation of civic rights; the right and duty to work and to rest; the right to assistance from the state for the elderly, ill, or disabled; rights to pursue scientific, literary, and artistic creation; equal rights for women; the right to defense for accused persons; and the right for minority nationalities to use their national languages, among other provisions.

In recent years, Chinese public interest lawyers have sought to enforce and detail some of these rights and freedoms through legal action. In most of those cases, the courts have declined to hear such petitions or have rejected them, and a number of public interest lawyers have been arrested, detained, or discouraged from undertaking rights-based cases.

Over its history, China has long sought to strengthen the role of its state vis-à-vis citizens and localities. These control and centralizing motivations, along with the dominant role of the Chinese Communist Party, and distrust of citizens' movements and action, have helped to shape the strong role of the state in state-civil society relations in China. Over the past thirty years, China has also embarked on significant economic reforms that have significantly freed economic activity for hundreds of millions of Chinese, contributed to rapidly rising prosperity for many, and deepening the stratification of Chinese society. Those economic changes have also helped fuel the growth of the nonprofit sector and philanthropy in China. The countervailing, continuing power of the Communist Party and the Chinese state has helped to mold the state's strong control over the sector and its careful delineation of those nonprofits and civil society organizations that it encourages and helps to flourish, and those that are suppressed.

## **II. The Legal Environment and State-Civil Society Relations**

This section examines to what extent the existing legal environment enables or inhibits civil society development and influences state-civil society relations, addressing whether

the legal environment and governance structures for CSOs is conducive or non-conducive to engaging in advocacy, monitoring and/or criticism of government policies. It includes questions such as: What is the degree of distance/ independence of CSOs from the state? What are the requirements for registration and obtaining legal status, funding etc.? What types of advocacy are allowed and are actually being taken up by CSOs? To what degree does respect of civil liberties (and more specifically access to public information and freedom of expression) positively influence the emergence of civil society and impact on state-civil society relations?

China is a complex state for the discussion of the legal environment for the civil society sector and state-civil society relations. The situation is changing, particularly in terms of the legal environment, and different kinds of organizations are treated quite differently, both in law and in practice, depending in large part on how such organizations are viewed by the state. The best concise discussion of the legal environment for civil society organizations and philanthropy in China is the United States International Grantmaking project prepared by the International Center for Not-for-Profit Law (ICNL) in connection with the U.S. Council on Foundations, which I have revised recently for ICNL. The discussion below relies significantly on that useful summary.<sup>143</sup>

### **Types of Organizations**

The People's Republic of China (PRC) is a civil law country<sup>144</sup> with three primary forms of recognized non-governmental, not-for-profit organizations (NPOs):

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<sup>143</sup> Punctuation and formatting changes have been made within quotations as well.

<sup>144</sup> As the ICNL note states, "After more than 2,000 years with its own unique legal tradition, China began to embrace the civil law tradition of the western world early in the 20th century. During the Republic of China period (1912-1949), systematic legislation placed China firmly in the civil law family. Since the establishment of the People's Republic of China in 1949, the legal tradition in China has remained mainly civil law, though with significant characteristics of socialism." USIG China.

- Social organizations (*shehui tuanti*);
- Foundations (*jijinhui*); and
- Civil non-enterprise institutions (*minban fei qiye danwei*).

As ICNL notes, “these are not government agencies, though they are generally closely linked to the state through various formation, registration, and oversight mechanisms. A fourth type of organization, the public institution (*shiye danwei*), is a quasi-government agency, generally formed by the government and staffed with government employees....<sup>145</sup> Legislation enacted in 2001 established a fifth type of NPO, the public benefit or charitable trust, which resembles the charitable trust in common law.”<sup>146</sup> Trusts are only gradually becoming more common in China and remain relatively infrequent. Many other non-governmental organizations in China are unrecognized by the government and unregistered and operate in the shadow, or outside of, the law. What some call “emerging civil society” in China would also include religious groups, trade unions, and other organizations, but these are not dealt with in this report in any detail.

Most legislation and regulation relating to nonprofit and civil society organizations in China is national in scope, issued by the National People’s Congress in Beijing, the State Council, or various ministries. At the same time, a growing body of provincial and local regulation dealing with the nonprofit community is emerging as well, and the China section of this report makes reference to several of those regulatory documents. Most regulation on the sector in China, however, is of national scope and application.

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<sup>145</sup> ICNL questions “whether a public institution qualifies as an NPO at all, given that the government provides a public institution’s original assets and exerts greater control over it than even over an ordinary NPO. Even so, a public institution is subject to certain taxes on the same basis as social organizations and civil non-enterprise institutions, and the Public Welfare Donations Law treats donations to institutions the same as donations to public benefit social organizations.” USIG China.

<sup>146</sup> USIG China.

As noted above, this is a period of review of the national regulation governing various forms of nonprofits in China. As ICNL notes, “[t]he key regulations under review include the Regulations on the Registration and Administration of Social Organizations (1998); Interim Regulations on the Registration and Administration of Civil Non-enterprise Institutions (1998); Regulations on the Management of Foundations (2004); and other documents. In addition, a Charity Law has been under drafting and consideration for a number of years.”<sup>147</sup>

### **Tax Legislation Relating to Nonprofit and Civil Society Organizations**

In practice, as ICNL notes, “donations, state subsidies, and some other forms of income are usually tax exempt. Contributions to NPOs are deductible from income tax, with limits depending on the type of taxpayer, the type of beneficiary, and the use of the contribution.... [Nonprofits] that engage in nursing, medical, educational, cultural, or religious activities or activities in which services are performed by the disabled are generally exempted from the business tax on the sale of services.”<sup>148</sup>

Like India and other countries, China also imposes a value-added tax (VAT) on many goods and services and levies duties on imports. Some exemptions from VAT and from customs duties are available to certain domestic Chinese nonprofits, depending on current regulations.

### **Key Elements of the Legal Environment for CSOs in China**

Although the legal regulation of civil society and nonprofit organizations in China is both detailed and broad, the following key laws and other documents are of particular importance:

- Constitution of the People’s Republic of China (1982, as revised), esp. Article 35

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<sup>147</sup> USIG China.

<sup>148</sup> For additional detailed information on nonprofit tax issues in China, see Leon Irish, Jin Dongsheng, and Karla Simon, China’s Tax Rules For Not-For-Profit Organizations. See also Karla W. Simon, *Reform of China’s Laws for NPOs: A Discussion of Issues Related to Shiye Danwei Reform*, Journal of Chinese Law (June 2005).

- Regulations on the Registration and Administration of Social Organizations (issued by the State Council, October 25, 1998)
- Interim Regulations on the Registration and Administration of Civil Non-enterprise Institutions (issued by the State Council, October 25, 1998)
- Interim Regulations on the Registration and Administration of Public Institutions (issued by the State Council, October 25, 1998)
- Public Welfare Donations Law (adopted by the Standing Committee of the National People's Congress, June 28, 1999)
- Trust Law of People's Republic of China (adopted by the Standing Committee of the National People's Congress, April 28, 2001)
- Non-State Education Promotion Law of the People's Republic of China (adopted by the Standing Committee of the National People's Congress, December 28, 2002)
- Regulations on the Management of Foundations (issued by the State Council, March 8, 2004)
- Provisions on the Administration of Names of Foundations (issued by the Ministry of Civil Affairs, June 23, 2004)
- Accounting System for Civil Not-for-Profit Organizations (issued by the Ministry of Finance, August 18, 2004)
- Measures of Annual Inspection of Private Non-enterprise Entities (issued by the Ministry of Civil Affairs, April 7, 2005)
- Measures for the Information Disclosure of Foundations (issued by the Ministry of Civil Affairs, January 12, 2006)

- Measures for the Annual Inspection of Foundations (issued by the Ministry of Civil Affairs, January 12, 2006)
- Law of the People's Republic of China on Individual Income Tax (1980, as amended), Article 6: and Detailed Rules for the Implementation of the Individual Income Tax Law of the People's Republic of China (revised in 2005), Art. 24
- Provisional Regulations of the People's Republic of China on Enterprise Income Tax (1993), Art. 6, and Detailed Rules for the Implementation of the Provisional Regulations of the People's Republic of China on Enterprise Income Tax (1994), Art. 12
- Notice of the Ministry of Finance and the State Administration of Taxation on the Policies and Relevant Management Issues Concerning the Pre-tax Deduction of Public Welfare Relief Donations (January 18, 2007)
- Enterprises Income Tax Law of the People's Republic of China, Arts. 9, 26 (promulgated by the National People's Congress March 16, 2007, effective January 1, 2008)
- Regulation on the Implementation of the Enterprise Income Tax Law of the People's Republic of China (issued by the State Council, 2007), Arts. 51, 52, 53, 84, 85
- Measures for the Administration of Donations for Disaster Relief (issued by the Ministry of Civil Affairs, April 28, 2008)
- Select Opinions of the General Office of the State Council on Accelerating and Promoting the Reform and Development of Trade Associations and Chambers of Commerce (September 24, 2007)
- Notice of the General Office of the Ministry of Health on the Provisions on the Administration of the Representative Agencies of Overseas Foundations whose Businesses are under the Charge of the Ministry of Health (March 27, 2008)

- Notice of the State Administration of Foreign Exchange on Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions (No. 63 [2009])

### **Types of Nonprofit and Civil Society Organizations in China**

As indicated above, China recognizes four primary forms of non-governmental, not-for-profit organizations:

- Social organizations (*shehui tuanti*);
- Foundations (*jijinhui*);
- Civil non-enterprise institutions (*minban fei qiye danwei*); and
- Quasi-governmental public institution (*shiye danwei*).

### **Social organizations (SOs)**

“Social organization, which are essentially associations of various kinds, are the primary NPO form in the PRC. They are formed to advance ‘the common desires of their members’ ... and may be formed for mutual benefit or public benefit.” Like many other Chinese nonprofits, social organizations are generally “subject to joint oversight by (1) their registration and administration agency, generally the Ministry of Civil Affairs in Beijing or a provincial, municipal, or local civil affairs bureau or office; and (2) a professional agency responsible for the organization, generally a line ministry or other state agency at the national, provincial, municipal, or local level with jurisdiction over the SO's sphere of activity. In general, SOs with nationwide activities or impact are regulated at the national level; other SOs are usually regulated at the provincial, city, or county level.”<sup>149</sup> However, new models involving not dual but single agency supervision of social organizations (and other forms of nonprofits) are beginning to

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<sup>149</sup> USIG China.

emerge at provincial and local levels in China, sometimes as experiments acquiesced in or encouraged by national level agencies in Beijing.

### **Foundations (jijinhui)**

“Foundations are not-for-profit organization that promote public benefit undertakings through grants and donations. Their assets are donated by individuals, legal persons, or other organizations [Regulations on the Administration of Foundations (RAF), Article 2].” They are also regulated through a system of dual administration – “usually the Ministry of Civil Affairs in Beijing or a provincial, municipal, or local civil affairs bureau or office, and by a professional agency such as the relevant government ministry or agency at the national, provincial, municipal, or local level.”<sup>150</sup> Currently, Chinese foundations are governed by the Regulations on the Administration of Foundations (2004, which differentiate between public fund-raising foundations and non-public fundraising foundations (often called private foundations).

### **Civil non-enterprise institutions (CNIs) (minban fei qiye danwei)**

CNIs are “social institutions established by enterprises, institutions, social organizations, or other social forces as well as individual citizens using non-state assets and conducting non-profit-making social service activities” [Interim Regulations on the Registration and Administration of Civil Non-enterprise Institutions].<sup>151</sup> They may include, among many other kinds of entities, “private schools, private not-for-profit research institutes, and private not-for-profit hospitals.”<sup>152</sup> CNIs are also jointly administered by dual registration and administration agencies, such as the Ministry of Civil Affairs or a provincial or local civil affairs authority and a professional agency like the Ministry of Health or a local health bureau.

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<sup>150</sup> USIG China.

<sup>151</sup> USIG China.

<sup>152</sup> USIG China.

### **Public institutions (*shiyè danwei*)**

Public institutions are “social service organizations sponsored by state organs or other organizations using state-owned assets that engage in educational, science and technological, cultural, medical, and other activities for the purpose of social benefit” [Interim Regulations on the Registration and Administration of Public Institutions (IRRAPI), Article 2]. Thus, they are commonly more closely linked to the state than are the other types of NPOs. Public schools and universities, scientific research institutes, and public social care institutions are generally public institutions.

### **Specific Issues in the Legal Environment for the Nonprofit Sector and Civil Society in China**

In addition to the general framework for establishing these forms of NPOs, described above, there are specific legal issues applicable to social organizations (*shehui tuanti*); foundations (*jijinhui*); civil non-enterprise institutions (*minban fei qiye danwei*); and quasi-governmental public institution (*shiyè danwei*). These include questions of

- Private inurement to an organization’s members, trustees, or officers
- Proprietary interests in the organization;
- Dissolution; and
- Permitted and prohibited activities.

### **Private in u rem en t t o an organ izat ion ’s m em bers, tru stees, or officers**

Chinese law “generally prohibits inurement for all NPOs except private schools, which are regulated by the Law to Promote Private Education....<sup>153</sup> The Regulations on the Registration and Administration of Social Organizations prohibit any action to ‘usurp, divide in

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<sup>153</sup> The founders of a private school are permitted to receive a "reasonable return" on their investment [Law to Promote Private Education, Art. 51].

secret or misappropriate the assets' of a social organization (Art. 29). All of a social organization's income must be devoted to the activities addressed in the organization's governing statute or constitution, and may not be divided among members. All donations and subsidies must be used in conformity with the organization's purposes and the agreements made with donors. In addition, employees' compensation must be set with reference to the salaries set for employees of the governing governmental agency or other unit, which means they generally mirror the salaries of civil servants.”<sup>154</sup> Similar terms prohibit inurement in the case of foundations and civil non-enterprise institutions, and for public welfare donations. But “[t]he legal framework does not generally contain rules that govern financial transactions or “self-dealing” between NPOs and their founders, donors, directors, officers, employees, or family members.”<sup>155</sup>

#### **Proprietary interests in the organization**

Proprietary interests are not extensively covered in the Chinese legal framework, but the Accounting System for Civil NPOs (2005) “states that ‘resource providers do not have ownership of [NPOs]’ [Art. 2(3)]. Though the law and regulations do not explicitly prohibit a donor from making a conditional donation, various regulations limit how an NPO can use its property and income, which may imply that donors cannot revoke their contributions. The Public Welfare Donations Law provides that if the recipient changes the nature and use of the donated property without the consent of the donor, and refuses to abide by competent authority’s order to cure the violation of the donor’s instructions, the authorities can transfer the property to another NPO with the same or similar purposes, after consulting the donor [Art. 28].”<sup>156</sup>

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<sup>154</sup> USIG China.

<sup>155</sup> USIG China.

<sup>156</sup> USIG China.

## **Dissolution**

Dissolution is also not well-covered by Chinese law for nonprofits. “One reason for this,” ICNL notes, “is the close link between the state and NPOs; the state has formed virtually all public institutions and most social organizations and foundations that exist today. In practice, the assets of a dissolved NPO generally are transferred to another NPO or to the state.”

In the case of social organizations, the Regulations on the Registration and Administration of Social Organizations provide that “[t]he remaining assets of a canceled social organization shall be disposed of in accordance with the relevant provisions of the State” [Art. 25]. In general, the relevant regulations provide that assets should not be returned to members or donors, and “should be used to support undertakings similar to those of the dissolved organization, under the supervision of the relevant government authorities.” The principles appear to be similar for civil non-enterprise institutions social organizations.

For foundations, the Regulations on the Administration of Foundations (2004) provide that “[t]he remaining assets of a canceled foundation shall be used for public benefit purpose designated in its constitution, or, when it is not feasible to do so, donated to public benefit organizations whose nature and purpose are similar to the one in question by the registration and administration agency” [Art. 33]. Because public institutions “are established with state-owned assets, the state typically acquires remaining assets upon dissolution, even in the absence of explicit provisions for their return.”<sup>157</sup>

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<sup>157</sup> USIG China. ICNL notes that “[p]rivate schools may be an exception. The Law to Promote Private Education provides that the remaining assets will be disposed of according to related laws or regulations, which have not been issued yet [Art. 59]. It is possible that the rules will allow founders to recover the property they contributed, but only to the extent of its original value.” Id.

### **Permitted and prohibited activities**

The extant regulations on social organizations, foundations, civil non-enterprise institutions generally provide that such organizations are authorized to conduct the activities that are provided for in their articles of association or bylaws. Most Chinese nonprofit statutes require that nonprofits not engage in anti-state or other broadly rendered limitations.

### **Economic, business and commercial activities**

As in India, the question of nonprofits conducting economic, business and commercial activities has emerged as a significant issue in China. In general terms, “[c]onducting commercial activities cannot be the principal purpose of an NPO.” An earlier regulation issued by the State Administration of Industry and Commerce provided that social organizations, civil non-enterprise institutions, foundations, and public institutions “cannot themselves engage in for-profit businesses, but they can invest in commercial entities unless the State Council provides otherwise.”<sup>158</sup> Nonprofit commercial activities, where taxed, are often on the same basis as ordinary commercial activities. These are growing issues for discussion in China.

### **Political activities**

Recognized nonprofits have begun to participate more significantly in the legislative process at the National People’s Congress in Beijing and provincial and local legislatures, as well as through the press. Nonprofits engaging in dissident, overly critical political expression have been shut down by the authorities and their leaders sent to prison or exiled from the country.

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<sup>158</sup> USIG China. Article 6 and 7, Opinions on Several Issues Concerning Registration and Administration of Enterprises (June 29, 1999).

### **Control of organizations**

Chinese nonprofits can and are often “controlled by a for-profit entity. For-profit organizations commonly form or join social organizations, such as guilds and chambers of commerce.” In particular, “[m]any civil non-enterprise units were established by for-profit organizations. Founders of a CNI or a foundation are permitted to control it throughout its existence; although this is not explicitly provided in the regulations, control may be established by the statute of a civil non-enterprise institution or a foundation. In practice, a public institution is wholly controlled by its founding organization, ordinarily a government agency.”

Foreign participation in and/or control of a Chinese nonprofit is an ongoing question. ICNL notes that “[i]n theory, a Chinese NPO could be controlled by an American charitable organization, which would have to be disclosed in the affidavit accompanying its establishment. According to the Regulations for the Administration of Foundations (2004), foreign individuals and organizations may establish foundations in China, and foreigners are eligible for the positions of president and officers of foundations as long as they reside in China no less than three months a year. Generally the only form of social organization that foreigners can legally join is a foreign chamber of commerce, such as the American Chamber of Commerce-People's Republic of China (AmCham China) and the British Chamber of Commerce in China. The discussions about the new regulations for social organizations indicate that foreigners may be permitted to join and perhaps to found certain kinds of social organizations.”<sup>159</sup>

### **Annual inspection and information disclosure**

Foundations, social organizations, and civil non-enterprise institutions are each subject to requirements that they provide periodic information disclosures and submit to inspection by their registration and management organizations.

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<sup>159</sup> USIG China.

## **Tax Laws Affecting Nonprofit and Civil Society Organizations**

### **Income Tax Exemption**

Chinese nonprofits may obtain exemption from Enterprise Income Tax, Foreign Invested Enterprise and Foreign Enterprise Income Tax, and Individual Income Tax. In general terms, under the Public Welfare Donations Law, the “state encourages the development of public benefit undertakings, and grants support and preferential treatment to public benefit social organizations and public benefit nonprofit institutions,” and mentions Enterprise Income Tax [Art. 24], Individual Income Tax [Art. 25], and Import Duties and VAT [Art. 26].

The details of exemptions are provided in the particular tax legislation. For example, the 2008 revised Enterprise Income Tax of the People's Republic of China and its implementing regulations exempt “qualified nonprofit organizations” from enterprise income tax if they meet certain conditions. Those conditions require the relevant nonprofit organization to:

- Complete registration for not-for-profit organizations according to law;
- Engages in public interest activities or not-for-profit activities;
- Income obtained is used entirely for the public interest or not-for-profit undertakings as registered, approved, or stipulated in the charter, with the exception of reasonable expenses related to the organization;
- Properties and the benefits thereof are not to be distributed;
- Pursuant to the registration, approval, or stipulations of its charter, the surplus properties of the organization after write-off shall be used for public interest or not-for-profit purposes or shall be donated via the administrative agency responsible for registration (usually the Ministry of Civil Affairs or local civil affairs bureau) to another organization of the same nature and with the same tenets, and shall be publicized to the general public;

- No sponsor shall reserve or enjoy any property rights to the properties the sponsor gave to the organization in question; and
- Expenses for the salaries and fringe benefits of staff members are controlled within prescribed limits, and none of the organization's properties shall be distributed in any disguised manner.<sup>160</sup>

Other regulatory documents specific that donations to a nonprofit organization, financial support from the government, membership dues, and some other income are exempt from Enterprise Income Tax.<sup>161</sup>

**Tax deductions and other incentives for giving and philanthropy**

Tax deductions are available for charitable giving. Those who pay individual income tax are permitted to “deduct up to 30 percent of their taxable income for public benefit contributions to NPOs [Regulations for the Implementation of the Individual Income Tax Law, Art. 24]” while those who pay enterprise income tax “can deduct up to 12 percent of their taxable income [Enterprise Income Tax Law, Art. 9].”<sup>162</sup> Those who pay Foreign Invested Enterprise and

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<sup>160</sup> Adapted from USIG China.

<sup>161</sup> USIG China.

<sup>162</sup> USIG China. According to ICNL, in the Regulations on the Implementation of the Enterprise Income Tax Law of the People's Republic of China, the term ‘public interest donations’ as used in Article 9 of the EIT Law refers to donations made by an enterprise via ‘public interest social bodies’ or the people's government on the county level or the instrumentalities thereof to the public interest undertakings as prescribed in the Public Welfare Donations Law. The term ‘public interest social bodies’ includes any foundation or charity organization that meets the following conditions:

1. It is lawfully registered and has the status of a legal person;
2. It serves the purpose of promoting public interest and does not adopt profit-making as its purpose;
3. All of its assets and profits belong to the legal person;
4. Its proceeds and operational surplus are used primarily for the cause for which the legal person was established;
5. The surplus property after the termination of the enterprise is not distributed to any individual or profit-making organization;
6. The organization refrains from engaging in any business that does not relate to its purpose of establishment;
7. It has a sound financial and accounting system;
8. The donor does not participate in the distribution of the property of the social body in any way; and
9. Other conditions as prescribed by the departments of finance and taxation of the State Council in collaboration with the civil affairs department of the State Council in charge of the administration of the registration of social bodies. Id.

Foreign Enterprise Income Tax “can also deduct up to 12 percent of their taxable income [Enterprise Income Tax Law, Art. 9].”

**Business tax, value added tax, and import and customs duties**

In general terms, “China subjects certain sales of goods and services to business tax (which relates to provision of services) and value-added tax (which relates to sales of goods), and offers few exemptions” for nonprofit organizations. “The general Business Tax law exempts NPOs and other entities that engage in nursing, medical, educational, cultural, or religious activities, or activities in which services are performed by the disabled [Interim Regulations on the Business Tax, Art. 6].” VAT may be exempt for goods used for “scientific research, experimentation, and education; antique books; and goods imported by organizations of the disabled to be used specifically for the disabled” as well as other goods donated by foreign governments and international organizations under certain circumstances.

The Customs Law permits exemption from customs duties for “[g]oods donated by foreign governments and international organizations.” More broadly, regulatory documents have exempted some charitable donations from customs duties when donated to the government, social organizations, or other groups. Originally the applicable donee institutions in China were quite narrow – a few national-level social organizations, including the Red Cross Society of China, the All-China Women’s Federation, the China Disabled People’s Federation, the China Charity Federation, the China Primary Health Care Foundation, and the Soong Ching Ling Foundation – but that range may now be expanding. Customs duties and VAT may also be exempted “if (1) [goods] are imported by scientific research institutes or schools, (2) they are directly for scientific research or education, and (3) they cannot be produced in China.” Finally, but not unimportantly, China – like other countries, including India – may also reduce or exempt

customs duties or other taxes after major disasters such as the 2008 earthquake in Sichuan Province.<sup>163</sup>

### **Use of foreign funds**

Foreign exchange is a highly regulated area in China. In 2010, notes ICNL, “new rules were released by the State Administration of Foreign Exchange governing the administration of foreign funds donated to or by domestic institutions [Notice of the State Administration of Foreign Exchange on Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions, No. 63 [2009]]. The Notice requires that foreign exchange donations not contravene social mortality, harm public interest, or the lawful rights and interests of citizens [Art. 2]. It requires that donated foreign exchange be transacted through identifiable bank accounts for donated foreign exchange [Art. 3].”

“With respect to funds donated from abroad by foreign nonprofits, domestic ‘enterprises’ (as the Notice terms them, though the term may apply to non-enterprise social organizations and other NPOs, whether registered or unregistered) receiving such funds shall file documentation with permitted banks to include [under Art. 5] an application; a copy of the domestic institution's business license; a notarized donation agreement with the purpose of the donation described (though the Notice does not make clear whether the notarization is required to take place in China or may take place abroad); a registration certificate for the overseas organization; and other raw materials that may be required.”<sup>164</sup>

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<sup>163</sup> USIG China. Chinese nonprofits may also be able to qualify from exemptions from real estate tax, urban land use tax, and tax on acquisition of real estate, among others. *Id.*

<sup>164</sup> USIG China. “Social organizations that are not required to register or have had their registration requirement waived may be subject to lesser requirements, involving an application but perhaps not the other documents required of enterprises [Art. 6 and Appendix 2].” *Id.* These institutions include organizations participating in the Chinese People's Political Consultative Conference, longtime government-related national social organizations with strong links to the Party and government, such as the All-China Federation of Trade Unions, Communist Youth League, Chinese Women's Federation, and similar groups. The groups exempt from registration based on decisions of the State Council include a range of long-standing social organizations with close ties to the Party and government, such

In addition, “[r]eligious organizations accepting funds at the level of 1 million RMB or above must obtain permission from the State Administration for Religious Affairs (for national-level religious groups) and from the relevant provincial government (for local religious groups and sites) [Art. 8].”

Much about this Notice and its potential impact remains unclear. ICNL notes that “[i]f the impact is such that a wide range of domestic unregistered and/or registered social organizations and other NPOs must go through the highly burdensome requirements of Article 5, including notarization of donation agreements, then the impact may be significant.”<sup>165</sup>

### **Civil Society-Government Relations in China: The Issue of Government Contracting with Nonprofits to Provide Social Services**

Of the four countries discussed in this report – China, Russia, the Philippines, and India – China is at by far the earliest stage of government contracting with voluntary organizations to provide social services. That process has recently begun in China, with experiments in Shanghai and several other cities.

So there is less that can be said about these developments in China at this point than for the other countries. But what can be said is as follows: China is beginning with a relatively traditional model of social contracting, in which the state contracts with and directly supervises the provision of services by largely compliant social service organizations, some of which began as grassroots groups and others are organizational creations of government departments and retired officials.

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as the Chinese Journalists Association, Soong Ching Ling Foundation, China Law Society, Red Cross Society of China, and others. Also subject to the reduced requirements are eleven artists' associations under the China Federation of Literary and Arts Circles and their provincial and municipal affiliates. “Other Chinese institutions receiving funds are subject to most of the more detailed requirements listed under Article 5, but not, it appears, the notarization requirement for the donation agreement, or the overseas organization's registration certificate [Art. 8].” Id.

<sup>165</sup> USIG China.

In some of these cases, the primary fiscal savings to the government appears to be in staffing, since it may cost less to “hire” voluntary organizations to perform certain kinds of social services than to have state employees provide the same services. Contracts are being signed for these arrangements, though it is not yet clear how much negotiating room – how much room for any real negotiations in the formulation of social services – the contracting voluntary organizations have, and we must assume, at least at this point, that it is not much.

Since this process is just beginning in China, it will bear close watching in the years ahead. Doubtless the range of experiments will expand, for this has been the trend in other aspects of social policy and social service provision. And, perhaps not surprisingly, it may well be the voluntary and mass organizations more closely tied to the Party and government that have the most freedom to try to engage in collaborative formulation of social policy with government through the contracting process, rather than being merely “hired” service providers. But that is merely a hypothesis pending the availability of research in China on these issues.

Among the few researchers to have looked at this issue in China, Jing and Chen note that “[i]n 1998, governmental grants, subsidies, and service fees combined accounted for roughly 54 percent of total nonprofit revenues.... A complementary relationship between government and nonprofit---nonprofit produces social services largely financed by government---is taking shape in China. These government-nonprofit collaborations are primarily informal, long-term relationships rather than formal contracts. They have been criticized by many due to excessive administrative intervention, lack of competition, and inferior quality of service delivery. Competitive bidding for social services only appeared in 2005 in China.... Since then, local governments in China’s developed metropolitan areas like Shanghai and Shenzhen have

experimented with introducing competitive contracting, with a belief that competition and formal contracts can restructure government-nonprofit relation[s] and improve service performance.”<sup>166</sup>

The results are, according to Jing and Chen, problematic thus far: “Government-nonprofit relations [as initially practiced in China] can be understood as an informal partnership based on non-contractual terms and subject to government control. Affiliated nonprofits can be considered as super-stewards since goal congruence with supervisory governmental agencies justifies their survival. Trust and good will are pervasively used as management strategies. While affiliated nonprofits are not formally accountable to governments, their compliance is safeguarded by their loyalty, reputation, and other kinds of informal ties. Co-option is not uncommon in that the leadership of nonprofits is often taken by a governmental official.”<sup>167</sup>

### **Civil Society-Government Relations in China: The Issue of Nonprofit Self-Regulation and Accreditation**

Nonprofit self-regulation is an active endeavor in the Philippines, and experiments and initiatives are underway to strengthen self-regulation in India. China has not moved that far, by any means, but a surprising array of self-regulatory dialogues and initiatives have been underway in China as well. This section provides a brief overview of those important developments.

Moves toward nonprofit self-regulation in China have accompanied the growth of an increasingly diverse nonprofit sector, including service provision, advocacy and other groups, that operate under a highly developed system of differentiated regulation (*fenlei guanli*). Until recently there were few self-regulatory efforts. The original push for self-regulation in the interests of transparency and accountability, to strengthen quality in the field, and to begin a long

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<sup>166</sup> Yijia Jing and Bin Chen, *Is Competitive Contracting Really Competitive? A Case Study of Restructuring Government-Nonprofit Relations in Shanghai* (2010), [http://www.baruch.cuny.edu/spa/researchcenters/nonprofitsstrategy/documents/JingChen\\_IsCompetitiveContractingReallyCompetitive-ACaseStudyofRestructuringGovernment-Nonpr.pdf](http://www.baruch.cuny.edu/spa/researchcenters/nonprofitsstrategy/documents/JingChen_IsCompetitiveContractingReallyCompetitive-ACaseStudyofRestructuringGovernment-Nonpr.pdf).

<sup>167</sup> Id.

process of convincing the state that the sector could regulate itself in part, came from the NGO umbrella leader Shang Yusheng in 2001. Professor Shang proposed the *Standards for NPO Self-Regulation* which called on nonprofit organizations to:

- (1) Observe the National Constitution and other laws and regulations and abide by their own organizational constitutions;
- (2) To uphold public-good mission to promote progress and justice of the society;
- (3) To stick to organization's not-for-profit principle, not to pursue interest for any individual or family
- (4) To insist on financial transparency and to expose annual reports to the public;
- (5) To insist on information exchange, resource sharing and mutual cooperation;
- (6) To insist on self-autonomy and independence and to build a regular board of directors;
- (7) To follow fair and reasonable sponsorship and evaluation, not to abuse written rules and process;
- (8) To provide high quality service, based on high professional capability.

Those proposed standards have percolated for ten years, but in recent years there have been additional developments as well. Those began with the rapid emergence of philanthropy and newer initiatives, including the China Private Foundation Forum (2009) and China Foundation Center (2010). The Private Foundation Forum initiated a private foundation self-regulation initiative (中国非公募基金会自律宣言 (2009年7月) ) called the *Self-Regulation Declaration of Chinese Private Foundations (2009)*. That Self-Regulation Declaration called on Chinese foundations to undertake compliance with law; public benefit mission; avoidance of conflicts of interest; role of charters (bylaws) and Boards; financing should be consistent with

mission and values; respect for donor wishes; public financial statements and audits; monitoring and assessment; establish HR policies; competition and partnerships; information disclosure; supervision and management by state authorities. There has been some acceptance of this self-regulatory proto-code by the Chinese private foundation community.

At the same time, both the philanthropic community and the government (through the Ministry of Civil Affairs) have been pressing for transparency initiatives in the philanthropic community, currently an important topic of discussion in the Chinese philanthropic world.

For the Chinese philanthropic community, the press toward self-regulation and transparency is, over a long period of time, a move toward seeking autonomy and self-governance. The pattern has been careful and step-by-step, from convening to discussing self-regulation to information collection and disclosure and other steps – moving, long-term, toward self-governance as a goal. That road will be long and hard, but nonprofit and philanthropic self-regulation is playing an important role in its development.

### **Civil Society-Government Relations in China: The Issue of Fundraising by Voluntary Sector Organizations and Regulation by the State**

The situation in China is, of course, quite different from India. The nonprofit community is both newer and more fragile, often with less space available from political authorities for their activities, especially advocacy work. The domestic funding community is growing rapidly, now with over 2,000 private foundations dotting the country, from a base of a few government-affiliated foundations in the 1990s and the early part of this decade. Fundraising and charitable solicitation regulation has not kept pace with these developments, but is under close attention from the government in Beijing, and in particular the Ministry of Civil Affairs, which is largely responsible for this area of legislation.

### **Statutory development**

The basic statutes have little to say about fundraising thus far. The *Regulations on the Registration and Management of Social Organizations* (1999), for example, require that social organizations have a source (or sources) of funds, and that funds be lawfully obtained, without seizure, division or diversion by other institutions or individuals, and used for organizational purposes (Art. 29). “Contributions or donations to social organisations must be used in compliance with the principles and areas of work laid down in the organisation’s charter, and in compliance with purposes, methods and timescale as agreed with donors. Social organisations must report to their professional leading unit on the receipt and use of contributions and donations, and must use appropriate means of publicising relevant information to society at large.” (Art. 29)<sup>168</sup>

In addition, “[s]ocial organisations must comply with the national financial management system and regulations, and accept the supervision of the Ministry of Finance; if an organisation’s capital resources also derive from national subsidies or public contributions and donations it must also accept the supervision of the National Audit Office.” (Art. 30) Sanctions are available if organizations engage in “profit seeking activities” or if contributions or donations are seized, divided up, or diverted (Art. 33). Otherwise there is virtually nothing on fundraising and charitable solicitation. Regulations on other forms of nonprofit organizations say little more on fundraising.

Separately from the organizational statutes, however, China did adopt a Public Welfare Donation Law in 1999, “to encourage donations; standardize the behavior of donors and recipients; protect the legal rights of donors, recipients and beneficiaries; and promote the

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<sup>168</sup> Regulations on the Registration and Management of Social Organizations (1999), available at <http://www.usig.org/countryinfo/china.asp>.

development of public welfare undertakings.” (Art. 1)<sup>169</sup> The Public Welfare Donation Law adopted some basic principles that are likely to be carried forward in future Chinese regulation of this topic – an area now under debate in China. Those principles include the following:

- “Donations should be used in a manner respecting the wishes of the donor, and conforming with the end purpose of public welfare. Donated property may not be diverted to other purposes.” (Art. 5)
- “Donors should abide by laws and regulations; they should not violate social mores, and should not work against the public interest, or any other people's lawful interests.” (Art. 6)
- “Donations received by public welfare organisations add to the value of society, and therefore receive the protection of the nation's laws from seizure, embezzlement, or damage by any work unit or individual.” (Art. 7)

Beyond such principles, the Public Welfare Donation Law permitted government organizations at the county level or above to accept and use donations on the occurrence of a natural disaster or when asked by donors (Art. 11). It provided donors with certain rights as well as obligations: “Donors may specify the quality, amount, and use of donations by means of contracts with recipients. The donor has the right to decide the type, use, and amount of the donation. Donors should fulfill the donation agreement, and according to the period of time and fashion arranged in the contract transfer the donated property to the recipient.” (Art. 12) Further rights were provided to donors to construction projects (Art. 13). Brief provisions referring to other government bodies and regulations are made to help facilitate donations from abroad and from overseas Chinese (Arts. 14, 15).

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<sup>169</sup> Public Welfare Donation Law of the People’s Republic of China (1998), available at <http://www.usig.org/countryinfo/china.asp>.

For recipients, the Public Welfare Donation Law provides that recipients should receipt and record donations (Art. 16); “make use of donations and financial aid in activities and undertakings that conform with the specified purpose,” including prompt use of disaster donations” (Art. 17); seek consent of donors before changing the use of donations (Art. 18); report to the government on donations as required by relevant regulation and submit to audits (Art. 20); respond truthfully to donor’s inquiries about the use of donations (Art. 21); “make public the conditions, use and management of donations and must accept the supervision of society (*jieshou shehui jiandu*)” (Art. 22). On administrative costs, the Law provides that “employees” salaries and office expenses should be derived from interest on donations and other income, and be commensurate with standards specified by the government.” (Art. 23) If recipients change the nature or use of donations without donor permission, they may be sanctioned by relevant government authorities or the funds seized for use by another organization (Art. 28). Other violations may bring criminal penalties (Arts. 29, 30)

On incentives for giving, at this early stage in 1999, the government provided only that “Corporations and other enterprises that ... make donations to public welfare undertakings, will ... enjoy business tax benefits,” (Art. 24), and that “Individuals and private small businesses (*gongshanghu*) that ... make donations to public welfare undertakings, will ... enjoy personal [individual] tax benefits.” (Art. 25) Chinese tax law and regulation has, in the years since 1999, begun the process of spelling out such incentives in increasingly generous ways.

Regulations on the management of foundations that were adopted in 2004 (and now under revision as well) provided some very preliminary rules for fundraising and use of raised funds by a certain type of public fundraising foundation.<sup>170</sup> Those public fundraising

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<sup>170</sup> Regulations on the Management of Foundations (2004), available at <http://www.usig.org/countryinfo/china.asp>.

foundations must begin with a minimum capital of 8 million Chinese *yuan* for national public fundraising foundations and 4 million Chinese yuan for local public fundraising foundations (Art. 8(2)). And the Regulations provided some basic principles for the use of funds raised:

- “When a foundation engages in fundraising or receives donations it should be in accordance with its mission and the scope of its activities as stipulated in its charter. Representative bodies of overseas foundations may not engage in fundraising or accept donations within China.” (Art. 25)
- “Public fundraising foundations when engaging in fundraising should make public the activities for which the money raised is intended to be used and details of how it is to be spent.” (Art. 25)
- “Foundations, their donors and beneficiaries enjoy tax benefits as stipulated by law and administrative regulations” – a general provision that has begun to be detailed with further tax regulation (Art 26)
- “The assets of a foundation and its other sources of income are protected under the law. No work unit or individual may take a portion or the whole thereof or misuse them in any way. A foundation should use its assets in accordance with its mission as stipulated in its charter and within the scope of public benefit activities so laid down. Donations that are given with an accompanying agreement giving clear instructions for their use must be used in line with the agreement. If a foundation receives donations in kind that it is impossible to use in accordance with their mission, they may auction or otherwise sell of the items and use the money raised to fulfill the purpose of the donation (Art 27)
- “A foundation should employ legal, safe and effective means to ensure that their original funds maintain their value or grow” (Art. 28)

- “Donors have the right to make inquiries to a foundation about how their donation was used and how it is being managed and offer opinions and suggestions concerning this. Foundations should respond to such inquiries in a timely and truthful fashion. If foundations violate agreements with donors concerning the use of their donations, the donor has the right to demand the foundation follow their agreement or to ask the courts to revoke the donation and annul the agreement” (Art. 39)<sup>171</sup>

Perhaps most important – and most specifically – the 2004 Regulations on the Management of Foundation specified that “[t]he amount ... spent annually by public fundraising foundations on the public benefit activities stipulated in their charter must not be less than 70% of the previous year’s income.... A foundation may not allocate more than 10% of its total expenditure to cover staff wages and benefits and overheads.” (Art. 29) These last provisions have proven controversial and difficult for the authorities to enforce.

In general, public fundraising foundations that are licensed at the provincial level may only fundraise within that area. But some such locally-licensed public fundraising foundations indeed do raise funds beyond their provincial (or municipal) borders, and at least one foreign researcher notes that the Ministry of Civil Affairs “is tacitly permitting fund raising across provincial boundaries despite provincial registration.” This is also an issue for drafting of national fundraising regulations or revision of the Public Welfare Donation Law that the Ministry of Civil Affairs is considering.

As ICNL notes, “[t]he Foundation Regulations are now under review and redrafting, and for good reason – they are general, limited, and have insufficiently facilitated the development of philanthropy in China. In a recent case that involved the difficulty that one well-known public fundraising foundation had in being registered by the government, even the official Chinese

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<sup>171</sup> USIG China.

news agency Xinhua noted the shortcomings of current legislation and the difficulties that organizations have in undertaking fundraising. “The Jet Li One Foundation had been operating as a special program under the Red Cross Society of China,” wrote Xinhua, “since China does not have laws or regulations which allow the establishment of non-governmental public fundraising foundations.”<sup>172</sup> The China Charity Law has been in draft for many years and is not yet enacted; it will probably include some provisions on fundraising and charitable solicitation.

The result of the burgeoning levels of nonprofit activities in China, and the preliminary regulatory framework and policies on fundraising adopted by the government, is a situation in which many nonprofit organizations are carrying out extensive fundraising that is not necessarily either permitted or prohibited by formal regulation. For larger charitable institutions that derive some of their funds from domestic or overseas corporates or from foundations or other NGOs, as most do, this can be a problem, since they need some clarity about their legal rights and obligations – and tax consequences. A 2010 survey by Corporate Citizenship in Action (CCIA), a Beijing-based group, identified some of these problems, including unwillingness to give without government tacit or formal approval and, for the nonprofit community, tight control over many aspects of their operations, including fundraising, by the government.<sup>173</sup>

**Drafting of national fundraising regulations; revision of Public Welfare Donation Law; and emergence of provincial and local regulation relating to charitable fundraising**

The Ministry of Civil Affairs is currently drafting national fundraising regulations, and may also amend the 1998 Public Welfare Donation Law. Until national fundraising regulations are promulgated and (or) the Public Welfare Donation Law is revised, the focus of activity for fundraising and charitable solicitation regulation has moved to the provincial and municipal

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<sup>172</sup> [http://news.xinhuanet.com/english2010/china/2011-01/12/c\\_13687548.htm](http://news.xinhuanet.com/english2010/china/2011-01/12/c_13687548.htm).

<sup>173</sup> Ivan Zhai, Beijing ‘keeps firm hand on NGO finances,’ South China Morning Post, March 7, 2011, at <http://www.scmp.com/portal/site/SCMP/menuitem.2af62ecb329d3d7733492d9253a0a0a0/?vgnextoid=d01344638d b8e210VgnVCM100000360a0a0aRCRD&ss=China&s=News>.

levels. With the full authorization and consent of the Ministry of Civil Affairs and other government agencies, a number of Chinese provinces and municipalities have begun drafting charity, nonprofit and even fundraising regulations that are required to be consistent with national law and regulations and that would be applicable within those provincial or municipal jurisdictions.

Shenzhen and Jiangsu have been two of the leaders in these efforts, with Shenzhen being particularly interesting because its local reforms of charitable regulation come under a formal agreement with the Ministry of Civil Affairs in which Shenzhen will serve as a trial area for charity law reform (民政部深圳市人民政府推进民政事业综合配套改革合作协议).

Several provinces and municipalities have begun drafting regulations that specifically focus on fundraising and charitable solicitation. Perhaps the most detailed (or the most far along) of these are the regulations drafted in Hunan Province. The draft provincial Regulations on Solicitation of Donations (湖南省募捐管理条例 (征求意见稿)) are considerably more detailed than the few national provisions available in the Public Welfare Donation Law or the organizational statutes.

The draft Hunan donations regulations, for example, providing direct guidance on what purposes funds can be raised for; the types of organizations allowed to solicit donations; a requirement of a “solicitation plan” be reported to the relevant civil affairs agency at the local level and released to the public; some provisions for donor’s rights and obligations; provisions on use of donations and recipients; limitations on permissible solicitation costs (by activity, not by amount); supervision by government agencies, the media, and donors; a general provision on tax incentives that refers back to national regulations without breaking new ground at the provincial level; sanctions for unauthorized solicitation and unauthorized use of donations;

and other provisions. The Hunan solicitation regulations are an important harbinger of fundraising regulatory developments in China, though national rules and other local rules are likely to differ in a number of ways. The Hunan regulations are reprinted in Chinese and in English translation at Appendix A.

## **Russia**

### **I. Political, cultural, historical and socio-economic context**

- (a) Major historical events which have been significant in shaping the contemporary experience of the country under review
- (b) Economic system in the country under review (Transitional/“ free market” /regulated market/socialist-oriented market economy)
- (c) Political system: ideologies, philosophies, cultural and historical factors shaping the political system.

The Russian Federation had a population of nearly 142 million (December 2009 estimate), of whom about 80% are Russians with more than 100 ethnic groups represented.<sup>174</sup> Russian and another 140 languages and dialects are spoken. The capital is Moscow, with a population of over 10 million. Until 1991, Russia was part of the Union of Soviet Socialist Republics (USSR). It became an independent state in December 1991. A new Constitution was adopted in 1993, while laws in force in the former Russian Republic of the USSR, as well as treaties, remained in force in the new Russian Federation.

Literacy is high at 99% and life expectancy is relatively high, at (2010 estimates) 66.16 average; 59.54 years for men, and 73.17 years for women. But the U.S. State Department notes that “The unraveling of the Soviet state in its last decades and the physical and psychological traumas of transition during the 1990s resulted in a steady decline in the health of the Russian people. Currently Russia faces a demographic crisis as births lag far behind deaths. While its population is aging, the high number of deaths of working-age males due to cardiovascular

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<sup>174</sup> This information is drawn from UNDP, Russia: About the Country; the U.S. State Department Background Note on Russia; and other information.

disease is a major cause of Russia's demographic woes. A rapid increase in HIV/AIDS infections and tuberculosis, added to rising deaths from cancer, compounds the problem.”<sup>175</sup>

Russia is led by a President and Prime Minister (Chairman of Government) on the executive side of the government, with a two-body legislative assembly that includes the Federation Council and the State Duma. The court system includes the Constitutional Court of the Russian Federation, constitutional courts of other parts of the Federation, four levels of courts of general jurisdiction headed by a Supreme Court, and arbitration courts. Other legal bodies include a powerful Prosecutor's Office of the Russian Federation.

Local levels of administration include 83 “federal administrative units,” also referred to as the “subjects of [the] Russian Federation.” They include 46 oblasts, 21 republics, four autonomous *okrug*, nine *krai*, two federal cities, and 1 autonomous oblast. The executive branch leaders for these units are appointed by the President, with confirmation by regional legislatures.

Russia formally allows political parties under the federal law on political parties, which recognizes as a party “an organization that consistently takes part in elections, has a membership of at least 10,000 and has branches in at least 50 regions, with each branch having a membership of at least 100....” In reality, the party of Putin and Medvedev, United Russia, is now by far the dominant party.

On the economy, UNDP notes that

“After bottoming out during the economic crisis and default of August 1998, the Russian economy demonstrated rather high, if not spectacular, economic growth over the following decade. Along with India and China, Russia became one of the world’s best performing emerging markets during a period when traditional powerhouse economies were falling on hard times.

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<sup>175</sup> Background Note.

Much of this positive economic news was the result of high world oil prices. Revenues from oil exports accounted for 25 percent of total Russian GDP. Another contributor to growth was the devaluation of the Russian ruble following the 1998 crisis, which priced many imports out of the range of Russian consumers and provided an advantage to domestic producers.

A number of government reform initiatives were also commonly credited with the improved performance, including a revamp of the personal tax system that involved the introduction of a 13 percent flat income tax rate, and a simplification and easing of the corporate tax system that made profit taxes less onerous....

The crash of world financial markets in 2008 immediately put both the banking sector and the corporate sector in a very dangerous position, making interference from the government and Central Bank necessary to stabilize the situation. These problems were highlighted by the drop in export revenues and a subsequent drop in the international ratings of Russian corporations and national economy in general, which made getting loans on the world markets very expensive and near impossible.

Although those consequences of the crisis are more or less successfully dealt with by the use of state reserve funds, much more serious and strategic decisions are needed to fight serious economic problems, caused by the falling prices of Russian exports and lack of investments in manufacture. Hereby, the current crisis, while having evident negative consequences, may have a positive impact on the Russian economy by facilitating delayed structural and institutional reforms and by making the Russian industry more efficient and competitive.<sup>176</sup>

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<sup>176</sup> UNDP, Russia: About the Country.

The U.S. State Department also notes that with “the 1991 collapse of the Soviet Union and the economic dislocation it engendered, the standard of living fell dramatically. Real disposable incomes then doubled between 1999 and 2009, and experts estimate that the middle class constitutes approximately one-fourth of the population. The economic crisis, however, interrupted this trend, as real disposable incomes grew by only 1.9% in 2009 and wages fell by 2.8% during the same period. The stock of wage arrears, which peaked during the crisis at almost 9 billion rubles, had fallen by almost half by February 2010. Government anti-crisis measures to bolster wages, pensions, and other benefits helped reduce the poverty rate in 2009 to an estimated 14%, bringing the number of people living below the subsistence minimum (equivalent to about \$169 per month) to below 20 million, and the World Bank estimated a return to the pre-crisis level of 12.5% in 2010.”<sup>177</sup>

Russia presents a mixed picture for state-civil society relations and the role of the non-governmental sector. The end of the Soviet Union and the rise of the Russian Federation both enabled a significant number of non-governmental groups to register and operate (or just to operate), while also, over time, re-strengthening a state that has at times proven unfriendly to the growing civil society sector. The result is a sector that has expanded over time but has also come under increasing pressure as well.

Russia is a transitional economy coming out of a centrally-planned socialist tradition. The state remains strong in many ways, including with respect to nonprofit and civil society groups. The political system has been shaped first by Leninist ideology, and then by the reaction to Leninism and the Soviet era, and now once again by dynamics pushing toward a strengthened central state and a suspicion of civil society.

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<sup>177</sup> Department of State, Background Note.

## **II. Legal environment and state-civil society relations**

This section examines to what extent the existing legal environment enables or inhibits civil society development and influences state-civil society relations, addressing whether the legal environment and governance structures for CSOs is conducive or non-conducive to engaging in advocacy, monitoring and/or criticism of government policies. It includes questions such as: What is the degree of distance/ independence of CSOs from the state? What are the requirements for registration and obtaining legal status, funding etc.? What types of advocacy are allowed and are actually being taken up by CSOs? To what degree does respect of civil liberties (and more specifically access to public information and freedom of expression) positively influence the emergence of civil society and impact on state-civil society relations? The best concise discussion of the legal environment for civil society organizations and philanthropy in Russia is the United States International Grantmaking project prepared by the International Center for Not-for-Profit Law (ICNL) in connection with the U.S. Council on Foundations, and the related Russia discussion in ICNL's NGO Law Monitor. The discussion below relies on those very useful documents and uses the format developed for the USIG Russia note.<sup>178</sup>

### **Key Elements of the Legal Environment for CSOs in the Philippines**

As outlined by the USIG note and the NGO Law Monitor, the key applicable laws and regulations dealing with CSOs, nonprofits and philanthropy in Russia include the following:

- Constitution of the Russian Federation, December 12, 1993
- Civil Code of the Russian Federation, Part I, Federal Law No. 51-FZ, November 30, 1994 as amended

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<sup>178</sup> Punctuation and formatting changes have been made within quotations as well.

- Civil Code of the Russian Federation, Part II, Federal Law No. 14-FZ, January 26, 1996, as amended
- Federal Law No. 7-FZ, "On Non-Commercial Organizations," January 12, 1996, as amended (NCO Law)
- Federal Law No. 135-FZ, "On Charitable Activities and Charitable Organizations," August 11, 1995, as amended (Charities Law)
- Federal Law No. 82-FZ, "On Public Associations," May 19, 1995, as amended (Law on Public Associations)
- Federal Law No. 95-FZ, "On Gratuitous Assistance," May 4, 1999, as amended (Law on Gratuitous Assistance)
- Federal Law No. 275-FZ, "On Procedure of Establishment and Use of Endowment for Designated Purpose by Non-commercial Organizations" of December 30, 2006 (Law on Endowments)
- Resolution of the Government of the Russian Federation # 485 of June 28, 2008 regarding the list of international organizations whose grants (free aid) obtained by Russian organizations shall be tax exempt and shall be accounted for as taxable income of taxpayers – recipients of such grants/ as amended
- Federal Law No. 3266-1, "On Education," July 7, 1992, as amended
- Tax Code of the Russian Federation No. 146-FZ, July 31, 1998, as amended

as well as a variety of other regulations and legal documents.<sup>179</sup>

While most law and regulation focusing on nonprofit groups in Russia is federal, the situation is more complicated than that. As ICNL notes, "Russia is a federation with 89

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<sup>179</sup> USIG Russia.

territorial jurisdictions. In theory, regional and local legislation should be consistent with federal law, but in practice inconsistencies have emerged. Local laws may provide benefits to NCOs beyond those offered under federal law.<sup>180</sup> Thus the full picture of Russia's nonprofit and civil society legislation can only be fully understood by reviewing Russian regional and local regulation in addition to federal law.<sup>181</sup>

### **Types of Civil Society and Nonprofit Organizations in Russia**

In Russia, non-governmental organizations may be formed and operate in a number of different ways. As ICNL notes, “[t]he Civil Code and the Federal Law on Non-commercial Organizations (NCO Law) establish the primary NCO legal framework and recognize a variety of NCO forms, including public associations, foundations, institutions, non-commercial partnerships, and autonomous non-commercial organizations.<sup>182</sup> The Federal Law on Public Associations builds upon this framework and carves out a sub-category of NCOs called ‘public associations’ which consist of public organizations, mass movements, public foundations, public institutions, and several other forms.”<sup>183</sup>

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<sup>180</sup> ICNL notes that, “[f]or example, some regions of the Russian Federation are granting tax deductions to legal entities supporting NCOs, up to 4 percent of the regional profit tax due. Under the tax code, local jurisdictions may offer tax benefits to donors that are legal persons but not to natural persons.” USIG Russia.

<sup>181</sup> In addition, the USIG Russia note points out that “[i]n analyzing the legal structure of NCOs in Russia, it is helpful to keep in mind a hierarchy of legal norms that moves from the general to the particular, beginning with the Civil Code, then the NCO Law, and finally the Law on Public Associations. As a rule, the provisions of the more general laws apply to all NCOs unless a more specific piece of legislation holds otherwise. In regards to tax treatment, Tax Code provisions have priority over provisions in other legislation.” USIG Russia.

<sup>182</sup> The ICNL USIG note recognizes that “[t]he Russian word “некоммерческая” has been translated multiple ways into English; inter alia, “nonprofit,” “non-commercial,” or “not-for-profit.” This Note uses the term Non-commercial Organization throughout but recognizes that these other terms may be used in translations to signify the same concept.”

<sup>183</sup> ICNL notes: “On October 2, 2009, the Council on Codification and Improving Civil Legislation with the President of Russian Federation, approved the Concept Of Development of Civil Legislation, which was prepared in compliance with the President’s Decree # 1108 dated July 18. In December 2010 - January 2011, the draft law of the Federal Law On Introducing Changes to Parts One, Two, Three, and Four of the Civil Code of the Russian Federation, as well as into other legislative acts of the Russian Federation was circulated amongst governmental agencies to solicit their input in order to finalize it for submission to the Russian parliament. The draft proposes various changes to Russia’s regulatory framework, including the framework governing NCO activities. Amongst the key changes affecting NCOs: a reduction of the number of legal organizational forms for NCOs (the following three forms for non-commercial corporate organizations will exist: consumer cooperatives, public organizations of

In general, five types of non-governmental organizations are most prevalent in Russia, named and defined as ICNL has done so in its useful materials, comprising the “complex and oftentimes contradictory regulatory framework” of Russian nonprofit law:

- Public associations
- Foundations
- Institutions
- Non-commercial partnerships
- Autonomous non-commercial organizations.

Key to all these forms is the concept that non-governmental groups, “whatever their type, do not have the generation of profit as their primary objective and do not distribute any such profit among their participants (Article 50(1), Civil Code).”<sup>184</sup>

Public associations are “membership-based organization[s] of individuals associated on the basis of common interests and goals stipulated in the organization’s charter (Article 117, Civil Code; Article 8, Law on Public Associations; and Article 6, NCO Law).” They may be registered at each governmental level in Russia.<sup>185</sup>

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citizens, and associations (unions)); as well as these three forms of non-commercial unitarian (not-membership based) organizations: foundations, institutions and religious organizations. The implementation of this change will require revisions of many laws governing NCOs, as well as the re-registration of the majority of Russian NGOs. The draft also proposes that all legal entities, including businesses, will have to register with the MOJ, instead of the tax authority. Registration of legal entities under the tax authority is very simple, and similar to registration of corporations in US, while the current registration process for NCOs under the ministry of justice is quite complicated. All non-commercial organizations will be required to have a statutory capital (“assets”) of at least 500,000 rubles (approximately USD \$17,000, the equivalent of capital for companies with limited liability in Russia.)” USIG Russia.

<sup>184</sup> USIG Russia.

<sup>185</sup> USIG Russia. “Public organizations are one form of “public associations,” as defined under the Law on Public Associations. Other forms of public associations include: “public foundations” and “public institutions,” which are similar to organizational forms regulated in the NCO Law (foundations and institutions), the key difference being that forms included in the NCO Law can be established by a single founder, while, all public associations should have at least three founders. Public associations in all forms are subject to different reporting requirements and other regulations compared to NCOs established under the NCO Law.”

Foundations are “are property-based, non-membership organizations created by individuals and/or legal persons to pursue social, charitable, cultural, educational, or other public benefit goals (Article 118(1), Civil Code; Article 7, NCO Law; and Article 10, Law on Public Associations).”<sup>186</sup>

Institutions, a particularly Soviet form (and similar to public institutions in China), are non-membership organizations and do “not acquire property rights in the property conveyed to it (Article 120, Civil Code, and Article 20, NCO Law).” In other similarities to Chinese public institutions (shiyè danwèi), Russian public institutions “are generally created using state assets. Schools, health care facilities, and cultural organizations are common examples of public institutions.” But here the form differs from the Chinese public institution type, for in Russia, the founder of an “institution” “is liable for any obligations of the institution that it cannot meet on its own.... Because of the founder’s inability to shield itself from the institution's liabilities, private founders tend not to use private institutions and generally seek other legal forms to undertake their activities.”<sup>187</sup>

Non-commercial partnerships (NPs) are “membership organization pursuing activities for the mutual benefit of members.” Autonomous non-commercial organizations (ANOs) are “non-membership organization[s] undertaking services in the field of education, social policy, culture, etc., which in practice often generates income by providing its services for a fee.”<sup>188</sup>

The forms are complicated. But this is separate from the question of registration as a charity in Russia. Organizations may seek to register as charities to pursue certain tax benefits, though those remain limited. As a general matter, ICNL notes, “a public association, foundation, or institution may also register as a charity pursuant to the Charities Law .... Other forms of

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<sup>186</sup> USIG Russia.

<sup>187</sup> USIG Russia.

<sup>188</sup> USIG Russia.

NCOs may register as charities only if ‘stipulated by the federal laws for charitable organizations.’ Russian legislation does not specifically permit NPs and ANOs to register as charities.”<sup>189</sup>

Thus registering as a charity under the Charity law may lead to more regulatory requirements “in terms of activities, expenditures, and internal governance in return for limited tax benefits.” To cite just one example, as ICNL notes, under the Charity Law “a registered charity must expend at least 80% of charitable donations (in monetary form) it receives within a year after the donation is received.”<sup>190</sup> Those restrictions are coupled with restricted benefits as well, which may exist more at the regional or local level than at the Russian federation level.

### **The Taxation of Voluntary Sector Organizations**

In general terms, the Russian Federation’s Tax Code of the Russian Federation excludes some forms of income from a non-governmental organization’s income for the calculation of income tax (called “tax on profits” in Russia). “Russian law exempts, for example, income derived from ‘donations’ and ‘grants.’” But non-governmental groups “pay tax on income generated from their economic activities in the same manner as commercial entities, without any benefits.” Tax exemptions also apply to property, goods and services donated to organizations under the value added tax (VAT).

Tax deductions are more limited than in some other countries. “Individuals may deduct up to 25% of their taxable income for monetary donations (in-kind contributions are not deductible), but the pool of eligible recipients is limited almost exclusively to state-owned or

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<sup>189</sup> USIG Russia.

<sup>190</sup> USIG Russia.

state-subsidized organizations.” Organizations are not generally eligible for tax deductions or credits.<sup>191</sup>

Up until recently, Russia did not use a designation like “public benefit” to provide a particular tax-favored status to specific groups of nonprofits, and even charitable registration through the Charity Law “[did] not in itself provide any unique tax benefits.” As noted above, there were no federal tax benefits to charities, though, as ICNL notes, “[v]arious regional and local authorities have enacted their own regulations that provide additional privileges and tax benefits to charities operating in their territory. Eligibility criteria for these benefits do not necessarily match those for federal tax benefit.”<sup>192</sup>

But this situation may have begun to change. As ICNL writes, “[i]n April, 2010, amendments were adopted to the NCO Law. These amendments established a new class of “socially oriented organizations” (SOOs) that, in the future, the government intends to afford preferences in obtaining governmental support and, potentially, tax benefits. Article 31(1) of the NCO Law contains a fairly broad list of qualifying purposes for SOOs, including “charitable activities, as well as activities facilitating charities and voluntarism.” Federal and local legislation may establish additional types of activities which would allow non-commercial organizations to qualify as SOOs.”<sup>193</sup> It is not clear yet whether and to what extent this designation will lead to real tax benefits for those qualifying organizations.

### **Specific Legal Environment Issues for Nonprofit Organizations in Russia**

In addition to the general framework for establishing various forms of non-governmental organizations, there are specific legal issues applicable to most such NPOs. These include questions of:

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<sup>191</sup> USIG Russia.

<sup>192</sup> USIG Russia.

<sup>193</sup> USIG Russia.

- Private inurement to an organization's members, trustees, or officers;
- Proprietary interests in the organization;
- Dissolution; and
- Permitted and prohibited activities.

**Private inurement to an organization's members, trustees, or officers**

Private inurement in the form of profits and self-dealing is generally prohibited to the various forms of non-governmental organizations in Russia under the Civil Code and other legislation, with the exception of “institutions.” The bar seems clearly to apply to public associations, public foundations, and non-commercial organizations. But institutions are different: “Founders of institutions by law have broad discretion in extracting surplus property or funds from the institution's asset base and using them at their discretion.” And, as ICNL notes, “[i]ssues of unreasonable compensation and other forms of private inurement are not explicitly addressed in Russian legislation.”<sup>194</sup>

**Proprietary interests in an organization**

In general, members of public organizations, public associations, and foundations may not have proprietary interests in property or assets belonging to those organizations. Again, however, the situation is more complicated for the public and private institutions, “since the founders maintain their property rights and merely assign them to the organization for operational purposes only” and “can reserve for themselves, dispose of, or reallocate any surplus or unused property or income earned in the course of the institution's activities.”<sup>195</sup>

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<sup>194</sup> USIG Russia.

<sup>195</sup> USIG Russia.

### **Dissolution of nonprofit organizations**

As in many other countries, in the case of dissolution, at least with respect to most Russian non-governmental groups, assets must be “distributed to another NCO that pursues the same objectives ... or to charitable purposes.” As in China and some other countries, if that is not possible then the state may take over the assets. For private and public institutions, the situation is different on dissolution as it is on other issues; for those groups, assets “generally revert back to the founder unless the charter stipulates otherwise.”<sup>196</sup>

### **Permitted and prohibited activities**

Permitted activities are not highly regulated for public associations and public and private institutions in Russia. ICNL notes that “foundations are required to engage in public benefit activities.” Charities are required to undertake charitable activities as defined by law.

With respect to business and commercial activities, non-governmental organizations “may generate profit from economic activities provided that (i) profit-making activities are a secondary objective of the NCO, and (ii) the profits are applied to pursuing the NCO's not-for-profit purposes.”

Non-governmental organizations “may carry out activities to serve multiple purposes, including: the pursuit of social, charitable, cultural, educational, scientific, and managerial activities; the protection of health and the development of fitness and sports activities; the satisfaction of spiritual and other non-material needs; protecting the rights and lawful interests of citizens and organizations; resolving disputes and conflicts, providing legal aid; and other purposes directed toward achievement of the public good.”<sup>197</sup>

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<sup>196</sup> USIG Russia.

<sup>197</sup> USIG Russia.

The recent amendments to the Non-commercial Organizations Law referred to above “identified activity areas in which NCOs should be primarily engaged in order to become eligible for governmental support (referred to as “socially oriented organizations” (SOOs).” The range appears to be relatively broad and flexible. Charities and foundations “are restricted to activities of general public benefit” and charities must participate in charitable activities as defined by law.

### **Economic activities**

A non-commercial organization “may not have the generation of profit as its primary purpose, but it may engage in economic activities to the extent they advance the purposes for which the organization was created.” Regular tax is generally owed on such revenues.

### **Political activities**

There appear to be no formal limits on non-governmental organizations taking part in political activities, advocacy, lobbying, and election campaigns, though of course the political situation in Russia (rather than the law) may discourage some such kinds of activities. Charities “are ... prohibited from using their assets to support political parties, movements, and campaigns ... [and] religious organizations, governmental and municipal institutions, international public associations, and international movements are prohibited from making donations to candidates,” though they are able to lobby or take part in other public activities.”<sup>198</sup>

### **Control of organizations**

Russia does have relatively clear provision on who may establish, become members of, or participate in associations and non-commercial organizations. Such individuals must be Russians or “foreign nationals [or] stateless persons who are ‘legally domiciled in the Russian Federation.’” There are stronger prohibitions against those who are “[f]oreign nationals or stateless persons whose stay is deemed “undesirable,” individuals on terrorist finance or money

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<sup>198</sup> USIG Russia.

laundering watch lists, suspended organizations, extremists as defined by a court judgment, and those currently in prison.

### **Restrictions on foreign funding**

Most non-governmental organizations are required to report funds received from abroad, and on their use, and to issue activity reports online. The government has wide latitude to close foreign foundation or NGO programs, and has used that authority on a number of occasions. A broad provision allows the government to prevent a foreign organization from “transferring funds or other resources to identified recipients, if doing so will ‘protect[] the basis of the Constitutional system, morality, ... with the aim of defending the country and the state security.’”<sup>199</sup>

### **Tax Law and Policy**

#### **Tax exemptions for non-governmental organizations**

In formal terms, “[t]he Tax Code of the Russian Federation provides that certain types of income shall not be included in the tax base of NCOs for the purpose of determining profits tax.... [That income] must be provided on a “gratuitous basis” and “for designated purposes,” and it must be used by the recipient for such designated purposes. It includes income received for the “maintenance of non-commercial organizations” and for “implementation of their statutory activities.” In order for this tax benefit to apply, the non-commercial organization is “required to maintain separate accounting” for its taxable and non-taxable income and expenditures.”<sup>200</sup> Grants are generally included in the tax exemption categories. But revenues from business, economic and commercial activities of nonprofits are not included in the tax exemption amounts and would attract income tax at standard 20% rate.

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<sup>199</sup> USIG Russia.

<sup>200</sup> USIG Russia. This is a complex area and the ICNL materials provide more detailed guidance on tax exemptions.

### **Tax deductions for charitable giving philanthropy**

A tax deduction is available for individuals donating funds to scientific, cultural, health care, educational, sports-related, and social security organizations of up to 25% of their income, but deductions are not available to entities. The restriction here is important, though: “[W]ith the exception of sports organizations, the recipient organization must be state-subsidized or state-owned for the donation to qualify as deductible. Thus, donations to not-for-profit private schools, museums, or health care providers do not qualify for a tax deduction.” And tax deductions are not granted for donations that are made through intermediary or umbrella groups, but only those “made directly to the beneficiary organization.” Deductions may not be taken for in-kind donations.<sup>201</sup>

### **Value added tax (VAT)**

Value added tax is payable in Russia, but “[t]he provision of assets on a gratuitous base to an NCO is not subject to VAT if they are provided for implementation of its statutory goals, unrelated to any commercial operation.... Thus, donations or grants meeting these criteria to NCOs, including those from abroad, would not be subject to VAT. In addition, the gratuitous provision of goods or services, with the exception of excisable goods, provided in conjunction with charitable activities in compliance with the Charities Law is exempt from VAT....” VAT exemptions may also be available for some educational and cultural institutions, health-care providers, and scientific institutions, as well as, in some cases, on “goods ... imported under an approved humanitarian or technical assistance program pursuant to the Gratuitous Assistance Law.”<sup>202</sup>

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<sup>201</sup> USIG Russia.

<sup>202</sup> USIG Russia.

### **Property taxes**

Property tax exemptions for nonprofit organizations in Russia appear to be few and far between. They are available for “property tax are granted on property of (1) religious organizations that use the property for religious activities; (2) national public associations of the disabled under certain circumstances; (3) some kinds of state scientific centers; and (4) cultural and social organizations that use the property to advance culture and the arts, education, physical education and sport, public health, or welfare.”<sup>203</sup>

### **Customs duties**

Customs duties are generally not reduced or exempted for Russian non-governmental groups. But, notes ICNL, “under the Law on Gratuitous Assistance ... donations of funds, goods, and services (with the exception of excisable goods) imported for not-for-profit and charitable purposes may be exempt from custom duties if they are provided in conjunction with an accredited project or program in the form of gratuitous technical or humanitarian assistance.”<sup>204</sup>

### **Civil Society-Government Relations in Russia: The Issue of Government Contracting with Nonprofits to Provide Social Services**

Social contracting for the provision of social services is of newer vintage in Russia than in such countries as the Philippines and India.<sup>205</sup> Reporting on pilot projects in this area in 2003,

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<sup>203</sup> USIG Russia.

<sup>204</sup> USIG Russia. “Humanitarian assistance is defined as health care or social support to help disadvantaged segments of the population as well as victims of natural disasters or other emergencies. Technical assistance is broadly defined and includes equipment and services designed to support economic and social reforms and disarmament (Article 1, Law on Gratuitous Assistance).”

<sup>205</sup> Raymond J. Struyk, Contracting with NGOs for Social Services: Building Civil Society and Efficient Local Government in Russia (The Urban Institute, 2003), at [http://www.urban.org/UploadedPDF/410871\\_ContractingwithNGOs.pdf](http://www.urban.org/UploadedPDF/410871_ContractingwithNGOs.pdf). See also “Russian Nonprofits as Contracted Providers of Municipal Social Services: Initial Experience,” *International Journal of Public Administration*, forthcoming; and “Russian Social Assistance Nonprofits as Potential Contractors to Local Governments,” *The Nonprofit Review*, vol. 2, 2002, pp. 63–72.

Struyk noted that social contracting in the Russian case accompanied and was spurred by the devolution and decentralization of social services from national to local governments. Yet this process would not come easily, for a number of reasons that included lack of capacity in the nonprofit sector, bureaucratic and other behavior by state authorities, and other factors. The Urban Institute study found, for example, a wide array of areas in which Russian NGOs needed significant training before significant social services could be contracted from government to them.

So the basic picture was mixed: “[M]any NGOs are unlikely to be attracted to serving as contractors to local governments. For capable NGOs with highly particular missions and corresponding operating rules, changing their service offerings or operational modes to comply with local government requirements is likely to be too disruptive to their core missions. For NGOs with extremely simplistic operations and a nearly complete lack of management systems, their leaders are unlikely to seek to achieve the level of professionalism necessary to compete successfully for contracts.... In between is a group of NGOs that have the basic capabilities and may have interest in serving as contracted service providers for whom training could accelerate the development of professionalism.”<sup>206</sup>

The basic situation in the early 2000s was not necessarily encouraging: “Contracting out by local governments for social services is certainly exceptional in the Eastern Europe-CIS region. The rule seems to be that NGOs have had some success in obtaining contracts where liberal democracy and NGO sector development is most advanced. Interestingly, even in these countries local governments typically prefer to award contracts without going through a competitive process. Among the sample countries, conditions have been comparatively unwelcoming for NGOs in Kyrgyzstan and, until recently, Croatia and Albania. But even in

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<sup>206</sup> Id., p. 40.

Russia and Armenia where the specific conditions for NGOs are better (even if Armenia ranks fairly low as a liberal democracy), traditions of public agency delivery of social services remains firmly in place.<sup>207</sup>

The initial experiments (now a decade old) indicated that “the results of these competitions indicated the extent of the challenge to improving service delivery in Russia. The tradition of monitoring service provision – regardless of the nature of the provider – was very weak. Municipalities clearly were not thinking that NGOs can be held to strict accountability for delivering a specified set of services to a particular population. So the contracts were vague and monitoring lax, and NGOs were being assigned new groups of clients rather than existing recipient populations....Clearly much remained to be done in terms of preparing and executing the competitions and improving contracts—and enforcing them....”<sup>208</sup> A second round of pilots confirmed some of those views and led to recommendations for more capacity building for governments and nonprofit agencies alike.<sup>209</sup>

The Urban Institute provided six main reasons for “the poor acceptance of contracting” (in addition to “the extent of the development of functioning liberal democracy”). Those included: “local governments think NGOs are not ready,” “NGOs may not be interested,” “legal systems are weak” (and thus “nonprofits may be realistically concerned about being in an inferior position in contract disputes with local governments” and “may also have concerns about their ability to defend themselves against allegations of poor performance...”), “local governments are not convinced about the ‘new public management,’” “local government agencies do not want the competition,” “local governments are not ready” (in terms of reliable program funding, fair processes, detailed monitoring, fair contracting systems, and other

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<sup>207</sup> Id., pp. 22-23.

<sup>208</sup> Id., p. 54.

<sup>209</sup> Id., pp. 65-66.

factors).<sup>210</sup> These problems continued into the second half of the decade, with more experiments underway.

Researcher Sarah Henderson has put these developments in a broader perspective. She notes the sense that Putin, in his first term as President of Russia, was willing to “stimulate citizen activism from above by passing regional and local legislation – in the absence of federal legislation – to allow NGOs to implement social policy.” In some areas, she notes, local governments and Moscow’s officials sought to develop “better connections with the citizenry and NGOs [through] the creation and use of mechanisms to relay citizen and NGO concerns; the effort to create grant competitions which drew on government, business, and private funds; and the effort to further regional legislation allowing for social service contracting for NGOs.....”<sup>211</sup>

In short, by about 2004, “many [Russian] NGOs, after spending the 1990s fighting for access to government administrators, the new opportunities offered by Putin’s changes meant they had to walk the fine line between cooperation and cooptation, but that this was an improvement from standing on the sidelines, watching policy made without their input.”<sup>212</sup>

Returning to a changed Russia some six years later, Henderson found some similarities and some differences in nonprofit-state relations and in contracting with NGOs to provide social services. “In terms of interaction, there has been a dramatic increase in ... the number, frequency, and type of interaction between NGOs and local and regional governments.” But there was also a “spike” in 2006 and 2007, and “wide variation” among regions.<sup>213</sup> Yet rather than solely repression under Putin and Medvedev, she saw something different. “In contrast to President Yeltsin, who put relatively little policy infrastructure in place to regulate NGOs,

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<sup>210</sup> Id., pp. 67-71.

<sup>211</sup> Sarah Henderson, *Civil Society in Russia: State Society Relations in the Post-Yeltsin Era* (2011), [http://www.ucis.pitt.edu/nceeer/2011\\_824-17\\_Henderson.pdf](http://www.ucis.pitt.edu/nceeer/2011_824-17_Henderson.pdf), p. 31.

<sup>212</sup> Id., p. 32.

<sup>213</sup> Id., p. 35.

President Putin implemented a much more directed, and many argue, repressive approach.... Yet, this paper maintains that the Putin administration's strategy is a bit more complex. It has designed a complex of policies to encourage and select for NGOs that are likely to support, not so much the Kremlin, but the national projects that the Kremlin has deemed compelling and important. These policies have been designed to reward "good" behavior for NGOs whose advocacy originates out of performing valuable social services that have the potential to improve the social and economic well-being of the population. Legislative policy also provides enough stipulations that the administration now has the capability of punishing (if it so chooses), or at least deterring, NGOs that pursue issues about which it is less than enthusiastic, which many argue are related to political rights and liberties. In other words, the government, rather than being anti-advocacy, is trying to select the advocacy that it prefers to see...."<sup>214</sup>

### **Civil Society-Government Relations in Russia: The Issue of Nonprofit Self-Regulation and Accreditation**

Although nonprofit self-regulation has developed quickly in the Philippines, experiments and initiatives are underway in India, and discussions and initiatives are underway in China, there appears to be relatively little activity with respect to nonprofit self-regulation in Russia thus far.

### **III. Analysis and Conclusions**

This section considers contemporary controversies and debates as well as calls for reform in the countries to be studied, including an overall assessment of the strengths and weaknesses of CSOs in the context of the country's institutional, cultural and political framework as set out above in enhancing, or undermining the role of civil society and the

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<sup>214</sup> Id., pp. 36-37.

non-profit sector, including the primary current challenges and controversies for civil society-government relations and civil society.

The Russian scene for non-governmental organizations is complex. Nonprofits are highly regulated, and they are regulated on a differential basis by type of organization and at times by location within the Russian federation. Tax exemptions and deductions, for example, are available in part. In formal legal terms, many such organizations appear to have a significant range of freedom and autonomy. But there are at times significant political pressures against groups that criticize or that are perceived to oppose the government. The result of this detailed regulatory framework and at times hostile state-civil society relations has been a strained relationship between the Russian government and some non-governmental groups, a situation that shows little signs of easing.

## **Appendices**

The Appendices are in a separate document.

## **Research Report on the Policy Climate and Legal Framework for Civil Society-Government Relations in Comparative Perspective**

### **Appendix**

#### **Key Legal and Regulatory Documents and Links to Full-Text Documents (where available)**

##### **The Philippines**

The Constitution of the Philippines, 1987

<http://www.chanrobles.com/philsupremelaw.htm>

The Corporation Code of the Philippines (Batas Pambansa Bilang 68)

<http://www.usig.org/countryinfo/laws/Philippines/Philippines%20Corporation%20Code.pdf>

Philippine Omnibus Election Code (Batas Pambansa Bilang 881)

<http://www.usig.org/countryinfo/laws/Philippines/Philippines%20Election%20Code.pdf>

The Local Government Code (Republic Act 7160)

<http://www.chanrobles.com/localgov.htm>

National Internal Revenue Code Republic Act No. 8424 (“Tax Code”), as amended by Republic Act 9337

[http://www.bir.gov.ph/lumangweb/nirc/issu\\_nir.html](http://www.bir.gov.ph/lumangweb/nirc/issu_nir.html)

Tariff and Customs Code Republic Act No. 1937 (“Customs Code”)

<http://www.chanrobles.com/republicactno1937book2title1.htm>

The Securities and Exchange Reorganization – (Presidential Decree No. 902-A)

<http://www.usig.org/countryinfo/laws/Philippines/Philippines%20SecExchReorg.pdf>

##### **India**

The Constitution of India

<http://indiacode.nic.in/coiweb/welcome.html>

Income Tax Act, 1961

<http://law.incometaxindia.gov.in/DIT/Income-tax-acts.aspx>

Public Trusts Acts in the various Indian states (Mumbai/Bombay as example)

[http://charity.mah.nic.in/static\\_pages/pdf/B.P.T.Act,1950.pdf](http://charity.mah.nic.in/static_pages/pdf/B.P.T.Act,1950.pdf)

Societies Registration Act, 1860

<http://uprfsc.up.nic.in/India%20Societies%20Registration%20Act.pdf>

Indian Companies Act, 1956, section 25

<http://www.vakilno1.com/bareacts/companiesact/companiesacts.htm>

Foreign Contribution (Regulation) Act, 1976 (as amended, with Rules)

[http://uttarayee.freewebspace.com/Accountaid\\_web/FCRA/Final%20FCRA%202010.pdf](http://uttarayee.freewebspace.com/Accountaid_web/FCRA/Final%20FCRA%202010.pdf)

[http://uttarayee.freewebspace.com/Accountaid\\_web/FCRA/Final%20FC-rules2011.pdf](http://uttarayee.freewebspace.com/Accountaid_web/FCRA/Final%20FC-rules2011.pdf)

## **China**

Constitution of the People's Republic of China (1982, as revised), esp. Article 35

<http://english.peopledaily.com.cn/constitution/constitution.html>

Regulations on the Registration and Administration of Social Organizations (issued by the State Council, October 25, 1998)

<http://www.chinadevelopmentbrief.com/node/298>

Interim Regulations on the Registration and Administration of Civil Non-enterprise Institutions (issued by the State Council, October 25, 1998)

<http://www.asianlii.org/cn/legis/cen/laws/prftraopnu999/>

Public Welfare Donations Law (adopted by the Standing Committee of the National People's Congress, June 28, 1999)

<http://www.asianlii.org/cn/legis/cen/laws/wdlotproc455/>

Trust Law of People's Republic of China (adopted by the Standing Committee of the National People's Congress, April 28, 2001)

[http://www.gov.cn/english/laws/2005-09/12/content\\_31194.htm](http://www.gov.cn/english/laws/2005-09/12/content_31194.htm)

Non-State Education Promotion Law of the People's Republic of China (adopted by the Standing Committee of the National People's Congress, December 28, 2002)

<http://www.lawinfochina.com/display.aspx?lib=law&id=2750>

Regulations on the Management of Foundations (issued by the State Council, March 8, 2004)

<http://www.chinadevelopmentbrief.com/node/301>

Provisions on the Administration of Names of Foundations (issued by the Ministry of Civil Affairs, June 23, 2004)

<http://www.lawinfochina.com>

Accounting System for Civil Not-for-Profit Organizations (issued by the Ministry of Finance, August 18, 2004)

<http://www.lawinfochina.com>

Measures of Annual Inspection of Private Non-enterprise Entities (issued by the Ministry of Civil Affairs, April 7, 2005)

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