

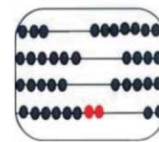
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AccountAid

NGO regulation is a touchy subject all over the world, and especially so in India. Some people believe that NGOs should be regulated more extensively. Others differ.

This issue of AccountAble tries to present some thoughts¹ on the need and design of a regulatory framework for NGO sector.

Dharma versus Law

Robert Lingat (1892-1972) studied traditional legal systems in India and South East Asia for more than thirty years. He produced several insightful works. In one, he argued² that the Indian system of *Dharma* was not quite on the same footing as the system of Roman law³.

Dharma does not start off with the coercive element, which is an essential ingredient of the Roman law.

As India moved through the 20th century, it gradually left behind its own traditions and embraced Anglo Roman model of law. This model was designed for (or emerged in) sparsely populated nations. Is it relevant or practical in a country teeming with a billion people?

The Context of Philanthropy Laws in India

How do our laws affect development and accountability of Indian philanthropy? Essentially, these laws can be divided into three categories: first, those that provide identity to an organisation; second, those that seek to affect the growth and direction of charity; and, third, those that seek to regulate its behavior. We have termed these organizational,

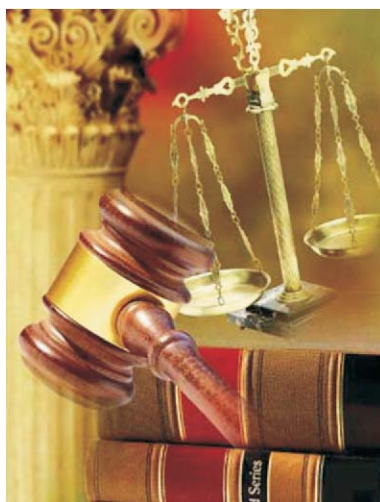
facilitative, and regulatory respectively.

1. Organisational

These laws are designed to provide a legal identity to a charitable organisation, and help referee the relations between its constituents.

However, we must not forget that all charity does not fall into an organizational framework. Thus, an enormous amount of private, direct giving occurs across the country, which does not require any organizational identity. A part of this giving goes to charitable organisations, while another part is spent directly by the donor.

One of the earliest models of organizational laws is the Societies Registration Act, 1860. In its original form, it was relatively simple, requiring little paperwork or formalities. However, over the years, many states have replaced this law with new statutes. Without exception, the new laws have tended to be more interventionist. These combine some kind of regulation along with basic registration.



¹ This issue is largely based on Shri Sanjay Agarwal's essay titled 'Implications of the legal and fiscal regime for Indian philanthropy and accountability', published earlier in Sampradaan – Annual Issue No. 50

² The Classical Law of India, Tr. J. Duncan M. Derrett, Munshiram Manoharlal, New Delhi, 1993.

³ Law is a relatively simple concept based on the concept of prescribed conduct. *Dharma* is multi-dimensional and dynamic, as demonstrated with great insight by Chaturvedi Badrinath in The Mahabharata (2006).

2. Facilitative

Benevolence begets benevolence – the philanthropy sector is no exception to this rule. Across the world, Governments have tended to be charitable to the charities, some more so than others. The main form of encouragement appears to be that of exemption from income tax. A second form of encouragement has been tax incentives to encourage giving to charities.

In many countries, Governments also encourage charities by providing them with financial support. Increasingly, this is seen partly as a question of economics and outreach (where charities have an edge over the Governments), especially where the State is delegating its welfare role to charities.

3. Regulatory

As charities have grown in size, sophistication and reach over the past few decades, they have also tended to attract increasing amounts of regulation. This regulation has essentially taken two directions. The first involves regulations to protect the interests of the donors, living or dead. This may take the form of oversight regulations over disposal of assets or of public audit and disclosure.

The second form of regulation has been a direct fallout of the cross-border movement of charity funds. As international agencies and charities have become involved in political, national or cultural issues, there have been calls for restricting their reach. This attitude is more visible in poorer countries, which are mostly at the receiving end of international aid, in more ways than one! A unique example of such a law is Foreign Contribution Regulation Act, 1976. Curiously, shades of this law appear in rich countries such as UK⁴ and US⁵ and have recently surfaced in Uzbekistan, Russia⁶, Peru and Venezuela as well.

Sense and Sensibility

The relationship between the philanthropic sector and Indian public (including the State), has by and large, been a positive one. We have not seen any significant persecution of one by the other. The sector has also played a very balanced and responsible role, and has been a disciplined spender. However,

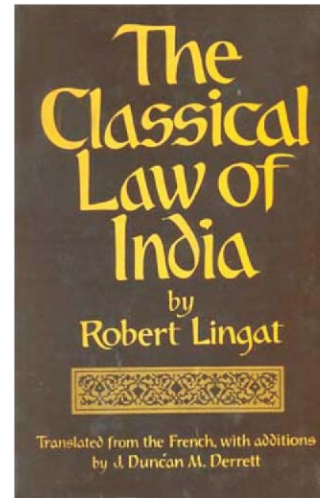
the sector has seen phenomenal growth in its size, influence and prestige over the last twenty years. A question therefore arises: Is the Indian legal system equipped to deal with the sector's needs?

Before going into specifics of this question, let us go back to insight which Robert Lingat has offered, this being especially relevant in the matter of laws relating to the civil society.

A curious event occurred in Scotland recently. A lady was breast-feeding her baby while traveling in a public bus. Some of the gentlemen passengers on the bus objected to this. And they persisted in their objections till the lady was forced off the bus! This caused an outcry in the media. The matter reached the Scottish Parliament. They then drafted and passed a law – anyone who allowed such a thing to happen on their premises will be fined up to 2,000 pounds⁷.

Clearly, Robert Lingat had hit the nail on the head. The West prefers to coerce its citizens into behaving. It is difficult to say what the Eastern response would have been in a similar case – it's difficult to visualize a mother being forced out of anywhere in India because she is breast-feeding a child.

The question for us, then, is how coercive should our laws be? Is common sense and *dharma* enough to hold our civil society on to the right path? Or do we need something more directive and forceful, such as the Scottish Breast-feeding law? Perhaps the answer need not be spelt out for an Indian audience.



⁴ AccountAid Capsule 70, 71 (Feb-02), www.AccountAid.net

⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001

⁶ AccountAid Capsule 183 (Nov-05), www.AccountAid.net

⁷ 'Breastfeeding Bill Gains Approval', http://news.bbc.co.uk/2/hi/uk_news/scotland/4021137.stm; See also 'End public breastfeed prejudice', http://news.bbc.co.uk/2/hi/uk_news/politics/4418370.stm for news about a similar bill in UK, In parts of USA, similar laws already exists.

A Creaky System

Let us now look at the important legal and accountability issues that perplex and confound us when dealing with philanthropy in India. It is possible to argue, these are partly due to the nature of our society and culture, and partly due to the legal structure that we have inherited. A listing could look like the one below:

1. Multiplicity and diversity of laws
2. Ineffective administration of the laws
3. Misuse of fiscal incentives
4. Lack of transparency and accountability
5. Outdated and out of tune with real operating conditions
6. Lack of vision

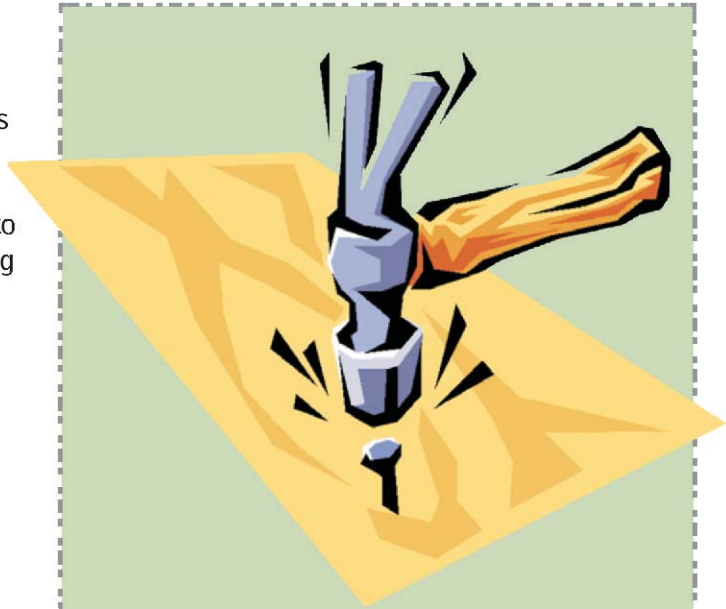
We take up each of these in the following paragraphs:

1. Multiplicity and Diversity

The diversity of India's cultures and geography has also led to an expected diversity in its laws. This causes a certain amount of confusion. The laws change as you move from one state to another. This is especially a problem for people located in the bordering regions of a state – their work with communities does not conveniently follow the lines drawn by the State cartographer.

This also sometimes creates a mirage of multiplicity of regulation. Many people in the philanthropic sector feel that they have too many laws to deal with. In reality such is not the case. This impression arises really out of a lack of harmonization of the different state laws. In fact it could be argued⁸ that this diversity really leads to more choice for an organizational form – you could shop around and choose the state and organizational form, which you feel comfortable with.

⁸ *Philanthropy and Law in South Asia*, Mark Sidel and Iftekhar Zaman, Ed., APPC, Philippines, 2004



Hitting the nail on the head

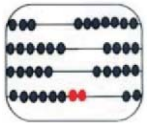
The known history of nails goes back to at least Ancient Roman period. Till quite recently (18th century), these were made by hand. However, nails are now made out of wire, which is machine-cut into pieces and sharpened at one end. The other end is flattened into what is called a head.

You must hit a nail accurately on the head for it to sink in the wood. If the hammer hits slightly to the side, the nail will not go in straight, but will start bending.

This gave rise to the phrase 'hitting the nail on the head'. It means that one has guessed correctly, or has come to the right conclusion.

Sources: Wikipedia, Brewer's Dictionary of Phrase & Fable.

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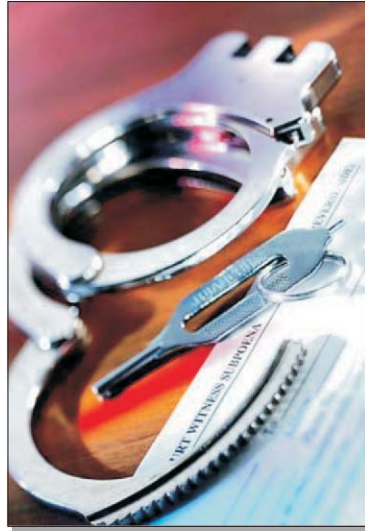


2. Ineffective administration

Khalil Gibran once wrote⁹ of the people 'to whom life is rock, and the law a chisel with which they would carve it in their own likeness.' It is useful to keep this thought in mind when we talk of ineffective administration of laws in India. Would we really be happier if the marshals were watching us carefully all the time, ready to pounce on us at the slightest misstep? Perhaps not.

From this perspective, perhaps it is all the better that our law enforcement machinery is not well-oiled – it may become unbearably efficient if it was!

Yet there is a difference in letting people break the law in minor ways, as a matter of policy, and in being



unable to do anything about it because of inefficient systems. We all know that the Registrars' offices across India are unable to even file the documents that people keep submitting to them. In such a case, can we really expect them to provide an oversight or any systematic record-keeping? It would seem that what works well in a country of 49 million may not work at all in a country of more than a 1000 million. Yet such is the system we inherited from the

British and constantly struggle to implement.

Continued in AccountAble 135...

⁹The Prophet

What is AccountAble?

Each issue of 'AccountAble' covers a different topic related to NGO regulation or accounting and is mailed to about 3,500 persons in NGOs, Agencies and audit firms. AccountAid encourages reproduction or re-distribution of 'AccountAble' in workshops or NGO newsletters for non-commercial use, provided the source is acknowledged.

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AccountAble in Hindi

अकाउण्टेबल हिन्दी में 'लेखा-योग' के नाम से उपलब्ध है।

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