

THE LEGAL FRAMEWORK OF THE NONPROFIT SECTOR IN PAKISTAN

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1 Introduction

The origins of charity and philanthropy are probably based on religious underpinnings - the gift to the gods for an act of largesse to benefit the community as a whole such as a good harvest or relief from a natural disaster or in thanksgiving for such munificence. Over time the role of the temples increased to include the care of the sick, the feeding of the hungry and sustenance for the weary, and much later as places of learning and healing - the schools and hospitals. These activities were funded through charitable donations, thus creating the confusion between charity and philanthropy, both terms often used synonymously. Charity is used for the relief of an immediate need or a lack of something. Philanthropy, on the other hand, has a wider context "for the public benefit". Both involve giving.

While all religions have encouraged both, it was codified only in Islam. The concepts of, one, Zakat, a mandatory tax on wealth, to be used for providing relief to the indigent, the widow and the orphan; of, two, Ushr, a mandatory tax on the gross produce from agriculture; three, Fitra, a voluntary contribution on the occasion of Eid-ul-Fitr (the festival immediately after Ramadan) as a contribution to ensure that the poor and indigent also enjoy the occasion; four, Khairat, the voluntary giving of charity for charity's sake; and of, five, Sadaqa, the voluntary giving of charity in expiation of sins or to ward off evil, are all enshrined in the Holy Quran². Where it became difficult for the individual to distribute Zakat and Ushr, it was the responsibility of the state to collect this and distribute it as required. The rules governing the giving differentiated between charity and philanthropy. Fitra, Khairat and Sadaqa are charitable in nature as these are to be distributed for the relief of an immediate need. Zakat and Khairat, on the other hand, have connotations of philanthropy. These are meant to be used to empower the recipient such that (s)he is able to earn a livelihood, and is, therefore, not listed among the needy. This would make the recipient a productive member of society thereby contributing to the larger public well being.

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²For a more detailed explanation see Nanji in AKDN 2000

The interventions of the temple, the church and the state in the dispensation of charitable or public services were the beginnings of institutions devoted to public well-being. These were the beginnings of privately funded public trusts and foundations the incomes of which were to be used for the distribution of charity, and for undertaking works of public interest. Over time all governments, particularly in developing countries where in general these are faced with a situation of a paucity of resources and the existence of ossified and archaic systems and procedures, which lead to waste and the generation of economic rents to vested interests, have recognised this role. Research and experiment around the world has shown that the involvement of NPOs in taking over some of the responsibility of government is more beneficial and ensures sustainability. As such governments have encouraged such organisations by giving them special consideration and have provided for enabling legislation and fiscal space.

With these principles of charity and philanthropy grounded in religion, it is not surprising that the terms charity and philanthropy are used synonymously for each other. Yet, *“this overlap in meaning and use misses a crucial distinction between the two words. Charity is aimed at providing immediate relief to some lack or need. This commonly occurs in the shape of welfare disbursements, where people ‘in need’ are typically provided with food, shelter or money. Philanthropy has the broader and longer-term connotation of ‘social investing’ – actions that move beyond charity towards building human and social capital.”* (Qureshi, 2000)

Since charity and philanthropy are synonymously used in most of the world, the legal and fiscal frameworks, by and large, do not differentiate between them. Both the legal and fiscal frameworks designed to facilitate the operations of “charitable” organisations are equally applicable to those involved in “philanthropic” activities. Since this distinction is not made in most of the frameworks governing philanthropy around the world, this chapter will also not attempt to do so and the term philanthropic, charitable and non-profit organisations synonymously.

In Pakistan, as elsewhere in most developing countries, the role of the non-profit sector has been growing and has evolved over the years from the limited sphere of charitable and philanthropic organisations to the wider public welfare-oriented and development roles to complement the state’s effort. Over the years not for profit organisations (NPOs) have become more involved in community-based initiatives to improve the quality of life, or to help alleviate poverty, or advocate for access to basic rights. Community contributions, local donors, and government funds support most of these organisations. In recent years, direct support from the international donor community has increased.

The sector organisations can be categorised into four categories: one, internationally funded policy research and advocacy; two, well endowed umbrella organisations at the national level which are catalytic and leaders in nature; three, the Rural Support Programmes as contractors for government and international donors helping support poverty reduction, thrift and savings associations, community development and micro-enterprise development; and four, the foot soldiers - the small community based organisation which implement and operate projects and schemes.

At independence Pakistan had only a few organisations involved in philanthropic activities, largely devoted to the maintenance of shrines, temples, churches and madaris, and to the provision of social services in the education and health fields. It is estimated that by June 2000 the total number of active organisations engaged in philanthropic activities in Pakistan is about 45,000 of which more than a third (34.1 percent) are not willing to be registered under any one of the four laws for registration and more than half (55.7 percent) are registered under two laws (Ghaus-Pasha, Jamal and Iqbal 2002). The services offered by these 46,000 organisations span the full range of services envisaged in the internationally defined list of philanthropic organisations (Salamon and Anheier 1996).

This paper discusses the overall legal framework governing the sector in Section 2. Section 3 analyses the four principal pieces of legislation which are avenues for registration. Section 4

2 The Legal Regime

The plethora of laws which impact, or at the very least, marginally impinge on philanthropic organisations consist of a total of 18 federal acts some of which are derivative of laws enacted in the United Kingdom in the first half of the nineteenth century. For instance, in 1860, the British government passed the Societies Registration Act (initially only in Madras, Bombay and Calcutta) in an attempt to control voluntary associations, especially the cultural societies that it blamed for the insurrection of the sepoys in 1857. This was followed by a series of acts (until the middle of the twentieth century) governing Trusts, Religious Endowments and Auqaf to recognise the philanthropic and charity in the Sub-continent. The post-partition laws were draconian laws used primarily either to intimidate philanthropic organisations or pursue a vendetta against those which were critical of the government of the day and were dependant on either government largesse or collected donations through bazaars, melas (fêtes) and other socio-cultural gatherings (Hasan and Junejo 1996; Ismail 2002).

Overall the laws may be divided into several categories. The first are those that primarily cover the registration, internal governance and

accountability of organisations, others cover how they are financed and managed and yet others cover the reporting relationship between the state and these organisations with respect to their operations or the manner in which they treat their employees. Some were created for the larger public good and some to control the benefits accruing to individuals, families or members, in other words, mutual benefit organisations. While the latter restrict the distribution of profits among the beneficiaries they are, however, not seen to be non-profit in the wider context of the term as they bestow substantial pecuniary benefits. It is argued that because these provide benefits resembling a subsidy as a result of the creation of economies of scale and are, thereby, either increasing savings, or are sharing profits among the beneficiaries on the principle that money saved is money earned. These laws, have, therefore been excluded from the analysis.

In addition a number of other laws also impact on them. For instance, if an organisation is involved in a public fund-raising activity, it requires to seek permission from the office of the Local Deputy Commissioner, under the Charitable Fund (Regulations of Collection) Act, 1953, and then apply for a waiver of Entertainment Duty on the sale of tickets from the provincial Excise Department. However, for private contributions the organisation would need to be registered under two different provisions of the Income Tax Ordinance - one granting it exemption from taxation on its income and the other endowing the giver exemption from taxation on the donations given or grants made to the exempt NPO. The latter opens the doors to institutional giving and to large donations from individual philanthropists. This procedure will change from 1 July 2003.

Nonprofit organisations are governed by the law through which they are registered and the internal governance is controlled by their own constitution, memorandum, rules or bye laws submitted for registration or as amended and approved thereafter. While a body of laws governing various types of nonprofit organisations exist through which these organisations are registered or are recognised, what needs to be recognised is that the fundamental right of an individual to associate with others in order to pursue common goals is recognised by Article 17 of the Constitution³ of Pakistan. Otherwise, all laws have been categorised as Type A laws in the following list of Acts and Ordinances. These have been further categorised into Type A1 (registration), Type A2 (recognition or regulation), Type A3 (redressal), and Type A4 (fiscal regime). Some of the laws (Type B), which require registration, but endow members with the right to gain from benefits either financially or in kind (such as from purchases in bulk on behalf of members, thereby giving each member the benefit from the bulk rate, which is somewhat

³Article 17(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

lower than the retail price) have been excluded from the analysis. The Registration Act, impinges only marginally. It governs the registration of documents without which title to property and assets cannot be established easily or which endows the organisations with the ability to enforce rights or benefits conferred by agreement. This has also been excluded from the analysis but is listed as Type C. Yet other laws, which are irritants to the NPOs and can be the cause of providing economic rents to the lower echelon government functionary,⁴ have also been excluded. These have been excluded from an in-depth analysis, as they are equally applicable to all organisations. However, they have been commented upon with reference to the general nature of the types of interference which are the cause of them being classified as “irritant” laws. These have been listed as Type D laws in the following list:

TYPE A1

- I The Societies Registration Act, 1860
- II The Trusts Act, 1882
- III The Voluntary Social Welfare Agencies (Registration and Control Ordinance), 1961
- IV The Companies Ordinance, 1984

TYPE A2

- I Religious Endowment Act, 1863
- II The Charitable Endowments Act, 1890
- III The Mussalman Wakf Validating Act, 1913
- IV The Mussalman Wakf Act, 1923
- V The Mussalman Wakf Validating Act, 1930

TYPE A3

- I The Charitable and Religious Trusts Act, 1920

TYPE A4

- I The Income Tax Ordinance, 1979
- II The Income Tax Ordinance, 2001

TYPE B

- I The Cooperative Societies Act, 1925
- II The Industrial Relations (Trade Unions) Ordinance, 1969

TYPE C

- I The Registration Act, 1908

TYPE D

- I The Charitable Funds (Registration of Collection) Act, 1953
- II Minimum Wages Ordinance, 1961
- III Employees' Social Security Ordinance, 1965

⁴such as the meticulous maintenance of records which would require the employment of additional staff specifically for this purpose. Owing to their discretionary powers to accept or reject such records, it is cheaper to pay off the inspecting staff.

- IV The West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968
- V The West Pakistan Shops and Establishments Ordinance, 1969
- VI Employees' Old Age Benefits Act, 1976

A brief description of each of the major laws (excluding the taxation laws) follows.

The Societies Registration Act, 1860

This is the oldest of the four registration laws, and was promulgated by the British in pre-partition India. This was created largely to regulate professional, scientific and fine arts activities and was extended later on to encompass charitable and social organisations as well. Registration under this law is also open to organisations for mutual benefit, such as clubs and residents' association. Once the NPO receives its certificate of registration under the Societies Registration Act, 1860, its legal status is that of a registered society and as an artificial juridical person, which means it can enforce its rules against its members, sue and be sued in its own name, own property and keep accounts in the bank in the name of the society. However, the control of the property vests in the Managing Committee and not the members. In addition, if any judgement is passed against a person on behalf of the society, the judgement can only be enforced against the property of the society, not against the person. One major benefit of registration that is available only to registered societies in the province of Sindh is that they may apply for 'amenity plots' at half of the rate for residential plots, from the Karachi Development Authority (NGORC 1991). The only way to refute it being a society would be if there were any evidence of its members making private gains by setting up the society. The reporting requirements are limited to the list of the governing body members being filed with the Registrar. Basic accounting records of receipts, assets and expenditure are to be maintained and audited by a qualified auditor. These with a statement of its affairs must be presented to the members in an annual general meeting.

The Religious Endowment Act, 1863

The Act was created to relieve the Boards of Revenue from managing religious trusts and buildings and reverting authority to the Trustees and Boards of Governors. No organisation can be registered under this Act. The Act only recognises the existence of such Trusts, provides for how they are to be managed and regulates their activities.

The Trusts Act, 1882

The Trusts Act provides legal cover for private acts of public charity, and allows the creators of the trust tremendous flexibility in their operations. The procedure for the creation of the trust is very simple. A mere declaration on a stamp paper will ensure creation. Registration is optional and not

mandatory. The Act has also been used to establish public trusts and this has been vindicated through case law.

The Charitable Endowments Act, 1890

The Act grants authority to the Government to appoint a Treasurer for better financial management of Trusts, thus ensuring that the property of any Trust, which is in financial difficulty, is ensured.

The Charitable and Religious Trusts Act, 1920

The Act is yet another one, which governs the operations of both charitable and religious, Trusts. The Act permits any person claiming to have an interest in the benefits accruing from the Trust to file a suit for redress or for access to information, subject to the applicant first proving such interest. The Court (District Judge) in its judgement can specify the manner in which the future operations of the Trust will be conducted. This, therefore, ensures accountability.

The Mussalman Wakf Validating Acts, 1913 and 1930 and the Mussalman Wakf Act, 1923

The former two Acts confer recognition on Waqfs created by Muslims for their personal benefit, or for the benefit of the descendants and eventually or specifically for charitable purposes. The 1913 Act is pro-active and the 1930 Act retroactive. The Act of 1923 governs the financial management of Waqfs. It requires that annual accounts be audited by a licensed auditor (as provided in the Companies Ordinance, 1984) and submitted for scrutiny to the District Judge.

The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961

The Ordinance was conceived for controlling the grass roots level organisations providing welfare services to those in need. The registration authority lies with the Directorate of Social Welfare, who may be approached either directly or through a lawyer. This ordinance is based on the premise that the “poor and destitute” in society need institutional, rather than only charitable, support. The Ordinance requires that all organisations engaged in social welfare or charitable works must be registered with the Social Welfare Departments (SWDs) of the provincial governments. Registration is mandatory for organisations working in, and seeking funds from the government for any one of the twelve specified areas. The government has the discretionary right to dissolve an agency through due process or replace the governing body arbitrarily. The reporting requirements are stringent and require that even small organisations submit annual reports, audited accounts, statement of receipts and list of members.

Section 42 of the Companies Ordinance, 1984

Section 42 permits the registration of a Company for promoting commerce, art, science, religion, sports, social services, charity or other useful object. The procedure is cumbersome, as it requires a two-stage mechanism, one centered in Islamabad for the licence, and the second, the actual registration, at the regional offices located in the provinces. Registration confers on organisations the status of a non-profit company and the right to drop the use of the suffix 'Limited', '(Private) Limited' or '(Guarantee) Limited'. However, each company must clearly state in all its correspondence, bills and receipts that it is a "public company registered limited by guarantee under section 42 of the Companies' Ordinance, 1984". These Companies must have a minimum of 7 members and directors. The term of office of the Chief Executive Officer must be for not more than three years, similar to that of the directors. One-third of the Board is re-elected by rotation every third year. Bookkeeping and audit standards are at an internationally comparable level. All documents filed with the Registrar of Joint Stock Companies are available for public scrutiny on payment of fees.

3 Analysis of the Regime

a The Legal Framework

The laws and their rules, regulations and the implementing systems and procedures do not reflect recent changes in the non-profit sector from their historical role with an almost exclusive focus on service delivery to their recent excursion into development, advocacy and research. Moreover, there is no harmonisation in the body of legislation. For instance, the size of membership required for registration varies; definitions vary, e.g., section 42 of the Companies Ordinance refers to associations formed for "promoting commerce, art, science, religion, sports, social services, charity, or any other useful object", which the Societies Act, section 1, refers to as "any literary, scientific or charitable purpose", the Charitable Endowments Act, 1890 refers to "relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship", the Income Tax Ordinance, 1979 recognises organisations established only for charitable purpose which is defined as "relief of the poor, education, medical relief and the advancement of any other object of general public utility". It is for the first time that the Income Tax Ordinance, 2001 defines a non-profit organisation.

While the government has for some time been speaking of an enabling environment (the NGO Bill 1994, the NGO Bill 1999 and the under-consideration NGO Ordinance 2002 (generally referred to as Enabling Environment Initiative⁵) the government's outreach to the sector is not supportive of the sector. No changes have been made to ease the process of registration, reporting and obtaining tax exemptions. Discretionary

⁵Commissioned by the Government through the Pakistan Centre for Philanthropy in 2001

implementation is still rife. Both the Industries Department (responsible for registration of societies and companies) and the Social Welfare Department (responsible for registration of social welfare organisations) have procedures available in English only, which is foreign to most people, thus making them inaccessible to many people in both urban and rural communities. Procedures are cumbersome and costly. For instance, to register under section 42 of the Companies Ordinance requires that a draft of the Memorandum and Articles of Association (MAA) has to be printed and submitted to the Corporate Law Authority in Islamabad which may require several meetings protracted over several months, then result in changing and reprinting the MAA before a license is obtained and submission to the Registrar may proceed. Frequently, gentle hints are given to sponsors to adopt "suggested" constitutions, even though these are mere guidelines and organisations may use alternative forms as long as the required information is provided. Once the registration process has been completed an application for tax exemption is made to the Income Tax department. It is then that one realises that yet another set of conditions must be incorporated into the MAA. In the case of Companies, the modification requires fresh approval from the Securities and Exchange Commission of Pakistan. Another problem with the existing legislation is that the enforcement mechanisms in some are inadequate or unclear. For instance, the Societies Act, contains no requirement for periodic reporting of activities carried out by a society, save only a list of the members of the managing body to be filed annually. In many cases accountability mechanisms are only loosely enforced and inconsistently applied, such as the witch-hunt initiated by the provincial government of the Punjab in 1993/4.

b Status and Registration

Each of the eleven laws through which any philanthropic organisation can be registered or be deemed to be registered (implicitly), grants it a certain status and also limits its activities to those permitted by that specific law. While nonprofit organisations can seek registration through only four of the existing laws, three⁶ others grant recognition either ex-post or ex-ante. Four additional laws are corollary laws and imply registration as these either serve to provide a relief or govern the state/public/NPO relationship. The four principal acts through which registration may be sourced have been asterisked. The eleven laws are:

- 1* *societies, associations and clubs* under the **Societies Registration Act of 1860** which also grant the organisation the status of a *artificial juridical persona*⁷,

⁶The Income Tax Ordinance, 1979 is scheduled to be repealed by the end of June 2002

⁷It can own property and other assets in its own name and can be sued and be sued in its own name. In all other cases the assets are owned in the name of the members/trustees and only the members/trustees and the managing committee can be sued or sue in their persona

- 2 *religious societies* under the **Religious Societies Act of 1880**,
- 3* *Public Charitable Trusts* and *Private Trusts* under the **Trusts Act of 1882**,
- 4 *Charitable Endowment Trusts* under the **Charitable Endowments Act of 1890**,
- 5 *Waqfs* (Trusts) under the **Mussalman Wakf Act of 1923** and the **Mussalman Wakf Validating Acts of 1913 and 1930** (the former applicable to those created from 1913 onwards and the latter granting ex-post recognition to those created before 1913),
- 6* *Voluntary Social Welfare Agencies* under the **Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961**,
- 7* *Public Companies limited by guarantee* under **section 42 of the Companies Ordinance of 1984** which also grants the organisation the status of a *artificial juridical persona*, and
- 8 *Tax Exempt Charitable Organisation* under **sections 14 and 47 and the rules framed as part of the Income Tax Ordinance, 1979** and after 30 June 2002, under **clause 36 of section 2, section 53 and section 80 and the rules framed as part of the Income Tax Ordinance, 2001**.

In effect, every form of registration has different procedures and requirements for registration, along with basic rules for the functioning of the organisation. With the exception of trusts, all organisations lay down specified conditions for membership. Under most forms of registration, the NPO has some basic obligations with regard to the registration authority. Each type of registration also offers some benefits. Redress for grievance against any trust is through the **Charitable and Religious Trusts Act, 1920** irrespective of which act they have been created through.

The Social Welfare Agencies Ordinance, 1961 operates simultaneously with the other three primary laws. Thus "*organisations engaged in one of the scheduled activities listed under the Voluntary Social Welfare Agencies (Registration and Control) Ordinance of 1961, may register as social welfare organisations, but such registration does not confer legal personality on them. In consequence, many social welfare organisations are registered under another act as well, such as the Societies Act or the Companies Ordinance*" (Irish and Simon 2000). The legal implication of this is that one NPO can

have two separate constitutions for registration under this and a different registration act, each catering to the different requirements of the registration agency.

The requirements and procedure for registration under the four principal acts or ordinances are described below:

- 1 A society may be established under the **Societies Registration Act, 1860**, if seven or more persons join together of whom at least three must be members of the Managing Committee. To establish a society a Memorandum and Rules and Regulations of Association must be printed and filed with the Registrar of Societies. These documents must contain clauses, which not only state the objectives for which the society is being established, but also how it will operate. If an existing society or association, which may not be registered already, wishes to register itself under this act, an assent to its being so registered has to be given by three-fifths of the members present at a general meeting convened by the governing body for this purpose. This is considered to be one of the softest Acts with respect to registration requirements and to accounting and audit regulations.
- 2 A trust is established under the **Trusts Act, 1882**. For a trust the three conditions of a creator, trustee and beneficiary being present are unconditional requirements. A public charitable trust is a trust, which is established for the benefit of the society at large or at the very least a certain section of society. There are no particular laws relating to public trusts. However, the rules in the Trust Act of 1882 can be and have been applied to public charitable trusts, and the conditions governing private trusts are equally important. A Trust, in order to be valid, must fulfil these conditions or 'certainties'. This is strictly speaking not true of public charitable trusts which have been recognised through case law. The certainty as to the intention to declare a binding trust and the certainty as to the property to be bound by the trust are as strictly insisted upon in public charitable trusts as in private trusts. However, if the objectives are not clear, unlike private trusts, these trusts would be sustained as long as there is an intention of charity. The procedure for the creation of a trust is rather basic. A public and charitable trust can be created merely by a declaration to that effect on a non-judicial stamp paper of a value (which differs across provinces) stated in the Stamp Act. Registration is optional. The legal status of a trust is that some property is pledged to the benefit of a prescribed

group of people. Only the actual declaration of this intent (the trust deed) is registered.

- 3 The authority for registration under the **Voluntary Social Welfare Agencies Registration and Control Ordinance, 1961** lies with the Directorate of Social Welfare of the provincial governments. The application for registration must be accompanied by the constitution of the agency. This needs to contain all the provisions mentioned in the Elements of the Constitution of an Agency as per Schedule I of the rules. The minimum number of members required for registration under this Ordinance is 10 or 11. A further criteria is that it must have no more than 15 people on its Management Committee, following a pattern set by the Social Welfare Department. The minimum operating requirements are: one, make public its annual reports and audited accounts; and two, pay all funds received into a separate account with any nationalised commercial bank. Registration however does not confer the status of an *artificial juridical person*. Even though it can sue and be sued in its own name and institute other legal proceedings, it cannot own property. Further, it is protected from litigation and prosecution for anything done in 'good faith'. Under the Ordinance the Department of Social Welfare can make funding arrangements to the Social Welfare Councils through which grants for services are made. Without registration access to this body of funds is denied. The main role of the registration authority, vis-à-vis a registered NGO is that it can act as arbitrator in the case of disputes or winding up. This is an important advantage.
- 4 A **non-profit company** is registered under Section 42 of the **Companies Ordinance, 1984** as a public company with liability limited by guarantee provided it meets a set of criteria: one, it directs, or it intends to direct its profits, if any, or any other form of income, in advancing its objectives only; two, it vetoes the payment of any return to its members; and three, it does not distribute its assets on dissolution/winding up among its members. Registration is achieved in two stages: one, an application for a licence to the Securities and Exchange Commission of Pakistan (SECP) in Islamabad; and two, an application for registration to the Registrar, Joint Stock Companies at the Provincial Level. The concerned Member issues the licence on behalf of the SECP after the SECP is satisfied with the bonafides of the applicant, and after the Chairman has approved the application. No time limit has been specified for its acceptance. There is no appeal allowed after an application has been rejected. The licence specifics the terms

under which the company may be registered. Once the licence has been granted the Memorandum and Articles of Association may not be altered without prior approval of the SECP. Following registration the issue of a certificate of incorporation, the legal status of the concerned association becomes that of a '*body corporate, having established succession, and a common seal*'.

c Purposes - Limited of Unlimited?

Eligibility for classification and recognition as a non-profit organisation is determined by the objectives for which it is created. Generally, it must confer and be seen to confer benefits to civil society at large and not to any particular segment of it, must state that on dissolution the assets would be transferred to a similar organisation, and that it would not distribute profits to its founders or members. For instance, if a trust is created solely to benefit members of a particular family, sect, religion or caste, then the trust will not be seen to be benefiting society as a whole. However, there are instances where this status is enjoyed by some special types of organisations. These are the foundations and trusts established by government and by its various departments and agencies for the benefit of either serving or retired officials. But this is limited to only that part which is devoted to "charitable, educational or medical relief" purposes.

The **Societies Registration Act, 1860** states that a society can be formed and registered if its purpose is to promote any one or more of the stated activities, namely : Science; Literature; Fine Arts. Instruction and the diffusion of useful knowledge; Diffusion of political education; Foundation or maintenance of libraries or reading rooms for use among members or open to the public; Public museums and galleries of paintings; Works of art; Collection of natural history; Mechanical and philosophical inventions; Instruments or designs; Educational and medical services

Trusts take two forms, the commonly understood Trust and the *Waqf* in Muslim Law. For the creation of a Trust, as defined in secular law, no religious motive is necessary. However, a *Waqf* under Muslim Law is generally made with a pious, charitable or religious purpose. While the former has no restrictions as to its intent and purpose, except that it is for lawful purpose, the latter is created for the ultimate benefit of mankind. A Trust property vests in Trustees, but a *Waqf* property vests in God. The Trustees have wider powers than the *Mutawalli* (manager or superintendent) of a *Waqf*. A Trust need not be perpetual and irrevocable. A *Waqf* once created cannot be altered or rescinded. What constitutes a Trust has been explained by Lord Macnaghten (see the Introduction to this Chapter). As stated earlier *Waqfs* cannot be registered under the three Mussalman Wakf Acts, but are best registered under the Registration Act, 1908 either in the form of a written Deed or as a verbal statement of intent, which, therefore, requires an affidavit.

A public charitable trust, under the **Trusts Act, 1882**, unlike other trusts created for the benefit of specific individuals, is for the benefit of society generally or for certain sections of society. Charitable objectives⁸ can be classified for the purposes of advancing one or more of four acts, namely: religion; knowledge; commerce, health and safety of the public; and any other object beneficial to mankind.

A non-profit company, under the **Companies Ordinance, 1984**, is registerable if it is established for furthering the development of commerce, art, science, religion, sports, social services, charity, or any other 'useful' objective.

The **Voluntary Social Welfare Agencies Registration and Control Ordinance, 1961** list thirteen activities or fields within which a VSWA may operate. These are largely social services, best delivered at the community level by the communities themselves with some external assistance in the form of funds and know-how. However, other areas of work are also permissible provided they fall into the category of 'social welfare'.

4 Analysis and Recommendations

a Legal Framework

The laws and their rules, regulations and the implementing systems and procedures do not reflect recent changes in the non-profit sector from their historical role with an almost exclusive focus on service delivery to their recent excursion into development, advocacy and research. Moreover, there is no harmonisation in the body of legislation. For instance, the size of membership required for registration varies; definitions vary, e.g., section 42 of the Companies Ordinance refers to associations formed for "promoting commerce, art, science, religion, sports, social services, charity, or any other useful object", which the Societies Act, section 1, refers to as "any literary, scientific or charitable purpose", the Charitable Endowments Act, 1890 refers to "relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship", the Income Tax Ordinance, 1979 recognises organisations established only for charitable purpose which is defined as "relief of the poor, education, medical relief and the advancement of any other object of general public utility". It is for the first time that the Income Tax Ordinance, 2001 defines a non-profit organisation.

While the government has for some time been speaking of an enabling environment (the NGO Bill 1994, the NGO Bill 1999 and the under-consideration NGO Ordinance 2002) the government's outreach to the sector is not supportive of the sector. No changes have been made to ease the

⁸Section 18 of the Transfer of Property Act

process of registration, reporting and obtaining tax exemptions. Discretionary implementation is still rife. Both the Industries Department (responsible for registration of societies and companies) and the Social Welfare Department (responsible for registration of social welfare organisations) have procedures available in English only, which is foreign to most people, thus making them inaccessible to many people in both urban and rural communities. Procedures are cumbersome and costly. For instance, to register under section 42 of the Companies Ordinance requires that a draft of the Memorandum and Articles of Association (MAA) has to be printed and submitted to the Corporate Law Authority in Islamabad which may require several meetings protracted over several months, then result in changing and reprinting the MAA before a license is obtained and submission to the Registrar may proceed. Frequently, gentle hints are given to sponsors to adopt "suggested" constitutions, even though these are mere guidelines and organisations may use alternative forms as long as the required information is provided. Once the registration process has been completed an application for tax exemption is made to the Income Tax department. It is then that one realises that yet another set of conditions must be incorporated into the MAA. In the case of Companies, the modification requires fresh approval from the Securities and Exchange Commission of Pakistan. Another problem with the existing legislation is that the enforcement mechanisms in some are inadequate or unclear. For instance, the Societies Act, contains no requirement for periodic reporting of activities carried out by a society, save only a list of the members of the managing body to be filed annually. In many cases accountability mechanisms are only loosely enforced and inconsistently applied, such as the witch-hunt initiated by the provincial government of the Punjab in 1993/4.

b Status and Registration

The first three routes for registration do not specify a time period for the acceptance or rejection of an application. Even the first stage for the fourth route suffers from this same lack.

While such diversity may allow organisations the flexibility of choice for registration, there is, nevertheless a need to ensure that, one, the definitions used to describe "*charitable purposes*" and "*non-profit organisation*" are consistent across all of the 17 laws identified as having at the very least some implications on the organisations, and two, the term non-profit organisation is recognised in the body of the laws governing or impacting on the sector. The diversity in the laws relating to governance and accountability linked to the decay of government regulatory mechanisms and institutions in the 1990s has led to an environment of friction and hostility between the governments in Pakistan and the sector organisations. The former allege that the latter are engaged in "*anti-state*" activities and are largely opaque and non-accountable. Further, the state alleges that a large number of such organisations have been created solely for the purposes of seeking and siphoning economic rents

in the name of *charitable purposes*. The latter allege that the government is bent upon destroying the sector as it considers the sector organisations a threat to government agencies. There is merit to both sides. In the recent audit of organisations registered under the 1961 Act in both the Punjab and Sindh, a large number of organisations were found to exist on paper only. As a consequence the registrations of a majority were cancelled. There is, therefore, a strong justification for improving the monitoring capability of the Social Welfare Departments in the provinces, which administer the 1961 Act.

While no specific legislation permits the creation of public trusts, a number of laws implicitly recognise the phenomenon, public trusts can nevertheless be created as a result of the transfer of any property for the benefit of the public at large. This is regulated only by dispersed statutory provisions and a body of case law that is not easily accessible to the general public. Some examples of these are

a registration under the Societies Registration Act of 1860 which vests the property of the society in the governing body as *de facto* trustees (implicitly the creation of the equivalent of a public trust). Section 18 of the Transfer of Property Act, 1882 and Section 118 of the Succession Act, 1925 allows for the transfer of such property in perpetuity for public benefit. The doctrine of *cypres* (section 14 of the Act of 1860) further ensures that property once so vested will, even after dissolution, remain available for purposes similar to those for which the property was originally contributed. The fact that registration under the Act of 1860 allows for what is in effect a public trust regulated by statute is a valuable benefit flowing out of the act of registration. This is particularly so since the only statute expressly dealing with trusts, The Trusts Act of 1882, excludes public trusts from its purview. This coupling of registration with the grant of a benefit is an important regulatory strategy that remains relevant. Additionally, Section 92 of the Civil Procedure Code, 1908 allows for “two or more persons having an interest in the trust” to maintain, after having obtained the consent of the Advocate General or the Collector, as delegate of the provincial government, civil actions for the administration of a public trust.

b The Charitable Endowment Act of 1890 allows for property held or to be applied in trust for a charitable purpose to be vested in the Treasurer of Charitable Endowments, either voluntarily, or by order in response to a request of trustees/author. The Act also permits for, one, the administration of the property so vested to give effect to the wishes of the author of the trust, and two, the maintenance and audit of accounts by the Treasurer. These, therefore, only form a subset of public trusts in general. However, such action may appear to compromise the independence of trusts covered by the Act of 1890.

c The Charitable and Religious Trust Act of 1920 allows 'any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature' to apply to a specified court to obtain relief, thereby again implicitly recognising the existence of a public trust.

d While doctrines of classical Islamic law remain relevant to the creation and functioning of a waqf, the Mussalman Waqf Act of 1923 and the four provincial Waqf Properties Ordinance of 1979 provide the statutory framework for the regulation of waqf affairs. The Act of 1923 requires the *mutawalli* (trustee) to file in court a statement describing the waqf property, provide an audited statement of income from such property, annual expenses, classified into salaries, and for religious, charitable and other purposes, and of the taxes and rents payable annually. However, this relatively loose regulatory oversight was drastically supplemented by the Ordinance of 1979. Section 7 of the Ordinance of 1979 allows the government arbitrary and non-justiciable powers to takeover and assume the administration, control, management and maintenance of any waqf property after the lifetime of the person creating the waqf. The power to assume waqf property is not merely a penal or remedial measure but is based on the premise that the state has an overriding right to oust the mutawalli given that the property has in effect been gifted to Allah⁹. The assumption by the state cannot be said to violate any constitutional right as regards the ownership of property.

Seen in this perspective registration under the Act of 1860 provides an enclave of relative security for the functioning of what are in essence public trusts within the context of a statutory framework. It is of course true that, amendments to the Act of 1860 have hardly improved upon the uncertainty of the threat imposed by Section 92 of the Code of 1908 to public trusts. Section 16-A added to the Act of 1860 in the provinces of Punjab, Sindh and Baluchistan in 1976 has placed the power to supersede an allegedly errant governing body of a society in the hands of the provincial government without any threshold judicial inquiry. To this extent the incentive for seeking registration provided by the Act of 1860 has been diluted.

On its face the Voluntary Social Welfare Agencies Ordinance of 1961 places constitutionally objectionable restrictions on the exercise of the fundamental right to associate. The fact that the Ordinance of 1961 applies to organisations (operating in the 12 specified fields only) and is draconian in character clearly suggests that it violates the principle of 'reasonable restrictions' envisaged by Article 17 of the Constitution. Further, it is unclear

Check the case law in this.

whether the word 'donations' used in the definition of the organisations covered by the Ordinance is to be read with the word 'public' that precedes the word 'subscriptions'. Consequently, it is unclear whether only organisations dependant on public donations is covered or whether organisations depending on donations in general are also included. Any attempt to distinguish between contributions that may be described as 'donations' but not 'public donations' raises problems of definition with no certain answers. It can perhaps be said with confidence that donations made to an organisation by its members are not public donations. Seen in this perspective the only organisations (operating in the 12 specified fields only) excluded from the scope of the Ordinance of 1961, on the basis of the source of funds, would be those that depend on money raised as fees and donations from the membership.

The scope of the VSWA Ordinance of 1961 is restricted to organisations working in one or more of the 12 fields listed in the schedule, Section 16 empowers the government to include or exclude any field of social service from the schedule through the issuance of a notification. Given the vast area of its applicability the mandatory registration stipulated by the Ordinance of 1961 is a serious negation of the fundamental right to associate guaranteed by Article 17 of the Constitution. In practice, however, the Ordinance of 1961 has rarely been implemented with any degree of vigour, underscoring the impossibility of implementing laws that seek intrusive degrees of control. It is this lack of implementation that has, in all probability, saved the Ordinance of 1961 from constitutional challenge.

Charitable companies under Section 42 of the Ordinance of 1984 exist in a regulatory framework that is primarily geared towards protection of the investment expectations of corporate shareholders. This results in a degree of regulation and compliance with regulatory procedures that is unfeasible for most civil society organisations. Hence, the need for a Not-for-Profit law that enables incorporation on less onerous terms. On the other hand, the high level of regulatory control to which charitable companies are subjected can be said to enhance the credibility of such companies. This signalling effect is of value to the best organised (and funded) civil society organisations that can afford the compliance costs of the Ordinance of 1984.

d Purposes

While the laws permit a range of activities, which interpreted liberally, do not appear to inhibit organisations from undertaking nearly everything, which is not illegal. However, they do prohibit certain activities and actions. These are categorised as follows:

1 Personal Benefits

Only the laws in the Category A body of legislation prohibit the payment of remuneration to the governing body and the members of the NPOs. These and the other laws prohibit

the sharing of left over assets after dissolution to the Members. Insider trading is allowed only if such disclosure has been made and permission sought from the governing body. Executive salaries are implicitly required to be reasonable, but there is no explicit bar on them by law. However, the Articles of Association or the Trust deed can lay down limits at the discretion of Members or the Creators of the Trust.

2 Business Activity

Each of the laws explicitly require a statement of objectives and purpose to be clearly specified. Only the various trust acts permit these to be not written down. However, in this case an affidavit has to be filed by the Trustees. Once registered these statements of intent are the binding constraints on the activities, which can be undertaken by the concerned NPO.

NPOs can undertake businesses, which are not necessarily related to their purpose, provided that their statements of intent (for instance, Trust deed, Memorandum of Association) permit such activity. Irrespective of whether they have been approved as a “charitable institution” under the Income Tax Ordinance income from such profit-making activities are liable to tax unless they can be shown to have been spent for the purposes of the activities for which the organisation has been established. An instance of this treatment is the tax levied on the business and industrial undertakings owned and operated by the charitable trusts and foundations established by the defence forces of Pakistan. This was notwithstanding their ploughing back the profits for the welfare of the retired defence forces personnel.

3 Funding Restrictions

All NPOs are required to seek approval for a concerted campaign to raise funds either through charity drives or through holding public gatherings for art, musical, theatrical or charitable purposes at which tickets/cards are sold in advance or gate money is collected. Such permission must be obtained from the Deputy Commissioner of the District in which the activity is to be undertaken. Application must be made under the Charitable Funds (Registration of Collection) Act, 1953 which then permits the NPO to apply for exemption from Entertainment Duty. The Deputy Commissioner has considerable discretion in either granting or rejecting the application without specifying any reason. Recent case laws have required that all decisions should be in the form of “*speaking*” orders (that is, must clearly

stipulate the rationale which governs the order. In other words, why and how).

4 Financial Accountability

Each law requires that accounts be maintained. The form and manner is specified in all but the various trusts acts. Audit requirements are also stated. However, the stringency for both the maintenance of accounts and its subsequent audit differs in each case. The rigour is directly proportional to the rigour in preparing the registration documents. Thus only rudimentary accounting and auditing is required under the various trusts acts. At the other end of the scale the Companies Ordinance requires that accounts be maintained using the International Accounting Standards which are used by the Chartered Accountants for auditing the books of accounts.

A statement of receipts by donor is required to be filed under the Voluntary Social Welfare Agencies Ordinance.

5 Political Activities

The body of law, other than the Voluntary Social Welfare Ordinance, does not prohibit the NPOs either from engaging in political activity or contributing. However, under the Income Tax Ordinance no NPO engaged in political activity will be granted an exemption from income tax on the campaign funds it may collect. The body of law which impacts on political activities is the Political Parties Act which is limited to political parties specifically set up to undertake only political activities.

5 Conclusions

The overall implications of the legal framework that governs the nonprofit sector appears to be a mixed bag of laws ranging from the draconian to the very lax. In conclusion one would not be wrong in stating that while the laws are generally supportive of the sector, the discretion permitted in implementation creates an environment which is not encouraging.. Specifically, there a number of specific conclusions that can be drawn. These are described in the following paragraphs of this paper.

Unregistered, unincorporated associations of individuals is not prohibited by law.. This is perhaps the most important existing public benefit sub-sector giving expression to the benevolent urge to perform acts of self-help, public benefit and philanthropy. A telling testimony to the cumbersome and inhibiting environment for registration has been recorded by Ghaus-Pasha, Jamal and Iqbal [2002] when they conclude that of the nearly 45,000 estimated number of organisations (excluding those involved in trade union

and political activities) working in the non-profit sector more than 34 percent have preferred not to register themselves, even under the VSAW Ordinance of 1961 where this is mandatory.

The Act of 1860 is largely benign and supportive of civil society organisations but has suffered on account of the amendments of 1976 that have placed the power to suspend the governing body of the society in the hands of the government without any judicial process. The Act also reflects its vintage in not providing for the possibility of creating incorporated juristic entities and limited liability of the members, even though it supports the concept of society property.

Public trusts are created through the expression of the will of one or more settlors. Public trust can come into existence both through the dedication of property by an individual, a family or a small group as well as through the contribution of assets to a fund by the community in general. At present property dedicated as public trust can be vested as the property of a society under the Act of 1860, a charitable company under Section 42 of the Companies Ordinance, 1984 or a public trust with one or more trustees not expressly regulated by any law except the threat of action under Section 92 of the Civil Procedure Code, 1908. A sub-set of public trusts are also subject to the Charitable Endowments Act of 1890 or the Official Trustee Act of 1864. While figures are not available at present the role of the Acts of 1864 and 1890 in the regulation of public trusts does not appear to be of any great significance.

The legal situation as regards *waqfs* is not designed to promote the conduct of public benefit work outside the realm of the state. The power to assume *waqf* property granted by the Ordinance of 1979 implies that a *waqf* can really be maintained as a non-governmental operation during the lifetime of the *waqif* (creator). Given the state of the *waqf* law it is not feasible to consider the *waqf* as a major vehicle of non-governmental public benefit work for the future.

Charitable Companies under section 42 of the Companies Ordinance, 1984 remain an important subset of public benefit organisations and are likely to remain so as regards the larger nonprofit institutions.

Agencies under the VSAW Ordinance of 1961 are a numerically preponderant group, 40.5 percent of the universe of non-profit organisations (Ghaus-Pasha, Jamal and Iqbal, 2002). However, as explained earlier the present application of the Ordinance of 1961 is an amalgam of the text of the law and defacto practices that have emerged over time. In its own terms the Ordinance of 1961 could apply to all organisations or undertakings engaged in the activities specified in the Ordinance and generating resources through public subscription, donations or government aid. These organisations could

include societies as well as companies apart from associations of persons in general. As regards the aforementioned last category, the Ordinance of 1961 acts as the only law controlling initial creation as well as subsequent governance. For reasons briefly explained above we consider this law to be in violation of the fundamental right of association guaranteed by the Constitution and are of the view that it should be repealed.

Given the plethora of legislation and functionalities impacting on the sector organisations, it could be beneficial and create a supportive environment for the growth of the sector if a new law is enacted for the registration, facilitation and monitoring of sector organisation such as that currently being considered by the Government [PCP, 2002].

Definitional problems notwithstanding, it is recognised that the distinction between not-for-profit and public benefit will often be of significance. This is particularly true in the context of tax exemptions and other incentives that the state might be willing to provide to organisations engaged in public benefit work. The distinction between public benefit and not-for-profit is also of key importance in the context of cooperative societies. Mutual help societies set up to advance the economic interests of agricultural landowners in a particular area through the dissemination of useful information may well be not-for-profit but not qualify the public benefit test. One basis for making the distinction between public benefit cooperatives and the rest could be the classification of specified social categories as 'disadvantaged'. Cooperatives that promote the interests of members belonging to such disadvantaged categories could be held to be engaged in public benefit work. It would be useful if the new law being considered by the Government includes a definition of the term "public benefit" perhaps as indicated earlier.

References

Aleemullah, Qazi and Zafar H. Ismail; forthcoming; *The Fiscal Regime in* _____ ed. David Bonbright; Islamabad; The Pakistan Centre for Philanthropy

Baig, Qadeer and Zafar H. Ismail; forthcoming; "*Pakistan*" in *Philanthropy and the Law in South Asia* ed. Mark Sidel; The Asia Foundation, New York and the Asia Pacific Philanthropy Consortium, Manila

Ghaus-Pasha, Aisha, Haroon Jamal and Muhammad Asif Iqbal; 2002; "Dimensions of the Non-Profit Sector in Pakistan; *SPDC Working Paper No. 1*; Karachi; Social Policy and Development Centre and the Johns Hopkins Comparative Nonprofit Sector Project

Ghaus-Pasha, Aisha, Hafiz A. Pasha and Muhammad Asoif Iqbal; 2002; "Nonprofit Sector in Pakistan: Government Policy and Future Issues"; *SPDC Working Paper No. 2*; Karachi; Social Policy and Development Centre and the Johns Hopkins Comparative Nonprofit Sector Project

Government of Pakistan, Ministry of Finance, Planning, Economic Affairs and Statistics, Finance Division; 2001; Income Tax Ordinance, 2001 in the *Gazette of Pakistan*; Islamabad; Printing Corporation of Pakistan

Government of Pakistan, Ministry of Finance, Planning, Economic Affairs and Statistics, Finance Division; 2002; Finanace Ordinance, 2002 in the *Gazette of Pakistan*; Islamabad; Printing Corporation of Pakistan

Government of Pakistan, Ministry of Finance, Planning, Economic Affairs and Statistics, Central Board of Revenue; 2002; Income Tax Rules, 2002 in the *Gazette of Pakistan*; Islamabad; Printing Corporation of Pakistan

Hasan, Naheed and Zafar Junejo; July 1996; "The State of the Citizen Sector in Pakistan"; Karachi; NGO Resource Centre

Irish, Leon E. and Karla W. Simon; 2000; "Towards an Enabling Legal and Fiscal Framework for Development" in Philanthropy in Pakistan: A Report of the Initiative on Indigenous Philanthropy editor David Bonbright; Islamabad; The Aga Khan Foundation in Pakistan

Ismail, Zafar H.; 2002; "Law and the Non-profit Sector in Pakistan"; *SPDC Working Paper No. 3*; Karachi; Social Policy and Development Centre and the Johns Hopkins Comparative Nonprofit Sector Project

Nanji, A; August 2000; "Charitable Giving in Islamic Contexts" Chapter 2 in Philanthropy in Pakistan A Report of The Initiative on Indigenous

Philanthropy; editor David Bonbright; Islamabad; Aga Khan Development Network

NGO Resource Centre; 1991; "NGORC Registration Study" Volume IV; Karachi; The Aga Khan Foundation

Pasha, Hafiz A., ; 1999;

Qureshi, Saeed Ahmed; 16 October 2000; *The Meaning of Philanthropy*; Karachi, Pakistan; Business Recorder

Salamon, L.M. and Helmut K. Anheier; 1996; "The International Classification of Non-Profit Organization : ICNPO-Revision 1"; *Working Papers of the Johns Hopkins Comparative Non-Profit Sector Project* no. 19; Baltimore; The Johns Hopkins Center for Civil Society Studies