

Legal and Regulatory Environment for NGOs in Bangladesh

**Irish/Simon/Firoze Consultancy
(December 2004-February 2005)**

**Final Report
17 April 2005**

**Report Prepared
by**

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Executive Summary

This Report describes the results of a Consultancy by two international consultants, Dr. Leon E. Irish and Prof. Karla W. Simon, and one Bangladeshi consultant, Fawzia Karim Feroze, who were hired by the Local Consultative Group (LCG) of donors in Bangladesh to do a "Scoping Study of the Legal and Regulatory Environment for NGOs in Bangladesh." The consultancy took place between December 2004 and February 2005. The contracting agency was UNDP, and the contributing donors were NORAD, SIDA, and USAID.

The Consultancy consisted of the following:

- A desk analysis of various documents with regard to the legal and regulatory framework.
- Interviews conducted with NGO leaders, donors, government officials, lawyers, and academics.
- Site visits to NGO facilities in Dhaka and the country-side.
- Preparation and distribution of a lengthy questionnaire to collect hard data on the effect on NGO operations of the current legal and fiscal framework. Evaluation of the questionnaire results.
- Preparation and dissemination of a questionnaire for donors (together with Frank Matsuert of DfID, who is preparing a similar analysis for the World Bank.)
- Holding four workshops - three of which were open to the public and were attended by NGO leaders, government officials, and donor representatives; the fourth workshop was for donors only.
- Holding one large consultative conference, which was attended by NGO leaders, government officials, and donor representatives.
- Discussion of a proposed "Way Forward," which will include the setting up of Law Reform Task Force; this body will consist of NGO leaders, government officials, lawyers, and academics.

The general conclusions of the Consultancy are as follows:

1. The current legal framework for NGOs in Bangladesh is outdated, confusing, and in need of complete revision. Not only does it tend to

focus attention and money on issues that are relatively unimportant – the foreign funding of a few NGOs by legitimate multilaterals and bilateral donors – it also does not impose high enough standards of accountability and transparency on the vast majority of NGOs that receive no foreign funds but that do affect the public interest. With the apparent shift toward more domestic funding for Bangladeshi NGOs, the current regulatory system seems improperly focused.

2. The fiscal framework for NGOs in Bangladesh is not supportive enough of the sector. While income tax exemption is available, there are virtually no provisions for deduction of corporate or individual contributions to NGOs. This is inconsistent with good international practice. In addition, the taxability of income-generating activities needs clarification, and the law should then be consistently applied to all NGOs.
3. There are currently no provisions in law clearly dealing with the issue of political activities by NGOs. This needs to be remedied by adopting rules that clearly forbid public benefit NGOs (PBOs)¹ from engaging in partisan political activities. On the other hand, the rules on political activities should also clearly permit PBOs to engage in a wide range of democratic development activities, such as voter education, grass roots lobbying, etc.
4. The effort to reform the current legal and fiscal framework for NGOs in Bangladesh should be undertaken by a Law Reform Task Force. This Task Force should be comprised of NGO leaders (including top officials from the two apex bodies), government officials from ministries with a strong interest in NGO activities, parliamentarians, lawyers, and academics. It should be housed in a neutral secretariat and have a small staff. Technical assistance to the Task Force to structure and inform the process could be provided by the International Center for Civil Society Law.
5. As a part of the legal and fiscal reform efforts, the information technology (IT) capacity of government agencies charged with NGO oversight (including the proposed PBO Commission) should be strengthened and modernized.
6. The law reform process should closely tie into the process of vetting and developing the Bangladesh Enterprise Institute (BEI) standards for NGO governance. Although the proposed standards are both too complex and

¹ This is a terminological issue, because the term “PBO” is not in use in Bangladesh at the present time. The general consensus coming out of the workshops and conference, however, is that use of the term “PBO” is acceptable in Bangladesh to differentiate public-interest-serving NGOs from ordinary citizen associations, such as clubs and professional societies.

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too weak in enforcement powers, they represent a good start in developing good and enforceable standards for NGO internal governance.

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I. Introduction

This Report describes the results of a Consultancy by two international consultants, Dr. Leon E. Irish and Prof. Karla W. Simon, and one Bangladeshi consultant, Fawzia Karim Feroze,² who were hired by the Local Consultative Group (LCG) of donors in Bangladesh to do a “Scoping Study of the Legal and Regulatory Environment for NGOs in Bangladesh.”³ The consultancy took place between December 2004 and February 2005. The contracting agency was UNDP, and the contributing donors were NORAD, SIDA, and USAID.

The consultancy consisted of the following:

- A desk analysis of various documents, including case law, with regard to the legal and regulatory framework.
- Interviews conducted with NGO leaders, donors, government officials, lawyers, and academics.
- Site visits to NGO facilities in Dhaka and the country-side.
- Preparation and distribution of a lengthy questionnaire to collect hard data on the effect on NGO operations of the current legal and fiscal framework. Evaluation of the questionnaire results.
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- Holding four workshops - three of which were open to the public and were attended by NGO leaders, government officials, and donor representatives; the fourth workshop was for donors only.

² Ms Feroze was also assisted by her Junior, Ms Rebeka Khan. Throughout the Report the researchers/consultants are identified by their initials with respect to notes of interviews and other meetings. Biographies of the Consultants are available from UNDP. The International Consultants are the authors (with Robert Kushen) of the Open Society Institute’s GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS, which is the widely used textbook of international standards for “NGO Laws.” Copies were made available to many persons contacted throughout the Consultancy. The book is available to be downloaded from the OSI website.

http://www.soros.org/resources/articles_publications/publications/lawguide_20040215.

³ The Terms of Reference are attached as Appendix A.

- Holding one large consultative conference, which was attended by NGO leaders, government officials, and donor representatives.
- Discussion of a proposed “Way Forward,” which will include the setting up of a Law Reform Task Force; this body will consist of NGO leaders, government officials, parliamentarians, lawyers, and academics.

The Consultancy consisted of two phases – the first phase occurred in November/December 2004, when the international consultants and the local consultant conducted their desk review and the initial visit was held. The second phase occurred in January/February 2005, when follow-up meetings, workshops, and a consultative conference were held. Subsequent to the final conference, the results of the questionnaire were analyzed by Rebeka Khan, Junior to Fawzia Karim Feroze, and that analysis is attached to this report. An interim report⁴ was prepared after the first phase as well as a Work Plan for the second phase.⁵ This final report describes the activities conducted in the second phase, with reference to certain activities conducted during the first phase, including the preparation, translation, and distribution of the questionnaire.⁶

II. Discussion of the Current Legal and Fiscal Framework for NGOs in Bangladesh

A. The Sector Itself

The NGO sector in Bangladesh is one of the largest and most influential in the world; it is also one of the most-studied NGO sectors, with reports on it and its legal and regulatory framework having been published in recent years by the World Bank (1996), VANI (1996), the Asian Development Bank (1997), Allavida (2002), and the Asian Pacific Philanthropy Consortium (APPC) (2003 and 2004⁷). The World Bank is in the process of conducting a major new study of the sector, which is expected to be published in May 2005.

The size of the NGO sector in Bangladesh is remarkable; it consists of the following organizations:

⁴ Attached as Appendix B.

⁵ Attached as Appendix C. The dates for the two workshops and conference included in the Work Plan had to be altered. When the Work Plan was prepared the consultants had not been informed about the timing of Eid El-Azha, which interfered with the original suggested timing of events. Furthermore, the fact that there were several days of hartal after the assassination of the Awami League’s former Finance Minister SAMS Kibria on January 27, 2005, greatly interfered with the last few days of work in Dhaka.

⁶ Attached as Appendix D.

⁷ The APPC publication, PHILANTHROPY AND LAW IN SOUTH ASIA, came out in late 2004 and was useful for this study, despite the fact that the Bangladesh chapter contains several inaccuracies.

- ◆ 206,000 not-for-profits, 189,000 of which are religious (1999 Statistics Bureau);
- ◆ 45,536 organizations registered with the Social Welfare Ministry;⁸ and
- ◆ 1,925 NGOs registered with the NGO Affairs Bureau (2004 statistics from NGOAB).

In terms of GDP the NGO sector in Bangladesh is one of the world's largest -- 6%-8% of GDP is produced by the sector. The world's largest NGO, BRAC, is also located in and carries out most of its activities in Bangladesh.⁹

According to a recent study for the OECD, official development assistance to Bangladesh totaled about US \$1500m per year in the late 1990's down from a high of \$2000m per year in the 1980's.¹⁰ Aid channeled through NGOs -- which is not included in the government budget, nor in the Ministry of Finance's figures -- totaled US \$250m in 2000¹¹. While only a little over one-tenth of the money channeled to government, that number is nonetheless quite significant.

B. The legal and regulatory framework -- general aspects

Formation/Establishment NGOs in Bangladesh may be formed or established under the following pieces of legislation:

1. *Societies Registration Act of 1860*
 - i. Registrar of Joint Stock Companies, Ministry of Commerce
 - ii. For any "literary, science, or charitable purpose," including literature, fine arts, education, libraries, museums, etc.
 1. Environment, human rights, and historic preservation qualify only under a modern, progressive concept of "charitable"

⁸ Social Welfare Ministry (2004) *Agragatir Teen Bachhar*, Dhaka: Social Welfare Ministry, Democratic Government of Bangladesh, p.5.

⁹ BRAC is in all districts of the country and 70% of villages; it has 70 million beneficiaries and 28,000 staff plus 34,000 teachers, 30,000 health workers, 53,000 poultry workers, etc.; it operates 34,000 schools, 740 libraries, 270 handicraft production centers, 110 regional offices, 18 seed production centers, 121 hatcheries, 6 poultry farms, and 14 training centers, and a university; and it has annual turnover of about \$200,000,000. BRAC is one of the 5 largest private organizations in Bangladesh; it is involved in banking, real estate, printing, seed processing, dairies, etc.; according to its projections, BRAC will need no foreign grants after 2007. BRAC recently began activities in Afghanistan. See BRAC Annual Report 2003 and <http://www.brac.net/> after 2007. BRAC recently began activities in Afghanistan. See BRAC Annual Report 2003 and www.brac.net.

¹⁰ See Lara Green and Donald Curtis, "Bangladesh, A Country Case Study," a report published in December 2002 and funded by the OECD.

¹¹ NGO Affairs Bureau: Flow of Foreign Grant Fund data

2. No provision made for social or sporting clubs, self-help groups, contemplative societies, etc.
- iii. A society is not a true legal person; it must sue or be sued in name of officers, but judgments lie only against property of society
- iv. 7 or more individuals or legal persons
- v. Most NGOs are formed under this Act¹²

2. *Trusts Act of 1882*

- a. Trust can be “for any lawful purpose,” private or public
- b. Can be created by any person competent to form a contract.
- c. No government registration required
- d. Trustee is legal owner of property
- e. Trust is not a legal person
- f. Trustee must deal with the trust property “as carefully as a man of ordinary prudence would if it were his own.” S/he is personally liable for breach of trust
- g. Some NGOs are formed as trusts (e.g., PRIP Trust)
- h. No special provisions for charitable trusts

3. *Companies Act of 1913 (amended 1994)*

- a. Permits joint stock companies, companies limited by guaranty, nonprofit companies (sections 26& 27), and unlimited companies
- b. Nonprofit company must be “formed for promoting commerce, art, science, religion, charity, or any other useful object”
- c. 7 or more persons, or 2 or more if a private company
- d. Registrar of Joint Stock Companies, Ministry of Companies
- e. Full legal personality plus limited liability
- f. Increasingly popular for NGOs and other not-for-profits

4. *Other laws*¹³

- a. Waqf Ordinance of 1962
- b. Hindu Religious Welfare Trust Ordinance of 1983
- c. Christian Religious Welfare Trust Ordinance of 1983

¹² See Questionnaire Results Analysis, Appendix E.

¹³ Some reports refer to the Charitable Endowments Act 1890, as also being applicable. However, the consultants/researchers could find no reference to its continuing usage by NGOs. In addition, this Report does not deal with the Cooperative Societies Act of 1964 because NGOs registered under that act may distribute profits; the only NGOs to which this Report refers are non-profit-distributing entities.

d. Buddhist Religious Welfare Trust Ordinance of 1983

Registration In addition, NGOs must be “registered” under the following laws, in certain circumstances:

1. *The Voluntary Social Welfare Agencies (Registration and Control Ordinance), 1961 (SWO)*
 - a. Mandatory registration for any formal or informal organization formed to render welfare services for:
 - ♦ children, youth, women,¹⁴ family, physically or mentally handicapped, family planning, recreation, civic responsibility, released prisoners, juvenile delinquents, socially handicapped, beggars and the destitute, patients, the aged or infirm, social work, or co-ordination of social welfare agencies
 - ♦ Not applicable to, or available for, art, science, culture, environment, etc.
 - b. Administered by Social Welfare Department of the Ministry of Social Welfare and Human Development
 - ♦ Broad discretion and control
 - ♦ Right to suspend or dissolve
 - ♦ No judicial appeal stated permitted under the Act
 - c. Most NGOs are registered under this Ordinance¹⁵
2. *Foreign Donations (Voluntary Activities) Regulation Ordinance of 1977 (amended 1982)(known as FDR)*
 - a. Covers any formal or informal organization established to carry out voluntary activity
 - b. “Voluntary activity” means agricultural, relief, missionary, educational, cultural, vocational, social welfare, development, and any other activity specified by the Government
 - c. Forbids any voluntary activity using foreign donations unless the organization is registered with the NGO Affairs Bureau (NGOAB), which is established within the Prime Minister’s Office
 - d. Each foreign grant must be approved and monitored by the NGOAB
 - e. *Foreign Contributions (Regulation) Ordinance of 1982 (known as FCR)*

¹⁴ The Ministry of Women’s Affairs apparently registers and oversees NGOs dealing with women, though it is difficult to discover how it received this authority under the SWO.

¹⁵ See Questionnaire Results Analysis, Appendix E.

- f. Amendment to 1977 law to expand scope to cover every kind of contribution from abroad

Internal Governance and External Accountability The rules for internal governance and external accountability for NGOs in Bangladesh are fairly rudimentary, unless they are registered with DSW or NGOAB. The laws for establishment do very little to impose a workable internal governance regime or external accountability standards.

- Societies Act – requirement of annual meeting but no requirement of annual accounts¹⁶
- Trusts Act – clear accounts must be maintained; beneficiary may obtain on request (charitable trusts rules unclear)
- Nonprofit companies – extensive book-keeping, audit, report-filing requirements (as with for-profit companies); this is the only law that contains any fiduciary responsibility rules
- Waqfs and other religious trusts – annual audited accounts required by the Administrator

Role of NGOAB This agency was established in 1990 to oversee the FDR and FCR Ordinances. NGOAB was set up in the Prime Minister's Office¹⁷ in 1990. According to the World Bank's 1996 study, the rationale for setting up NGOAB was the "huge backlog of projects pending Government approval" under the then-existing system, which required multiple levels of government review.¹⁸ All sources refer to NGOAB as being set up to be a "one-stop shop" for NGOs seeking and administering foreign funds. The Government assigned NGOAB all responsibilities under the FDR and the FCR, but it was, of course, never the only "stop" an NGO would need to make on its way to carrying out its activities in Bangladesh. All NGOs seeking to be legal entities would also have to establish themselves under the Societies Act or the Companies Act. And NGOs engaged in activities defined by the Social Welfare Ordinance would still have to register with the Social Welfare Department.

¹⁶ Although the law itself does not require an annual report, it appears from an interview that the Registrar of Joint Stock Companies is now requiring such reports. He made clear, however, that only the largest NGOs are actually submitting reports. See RK interview, February 10, 2005. NGOs established under the Societies Act and speaking at the January 18 workshop also indicated that they are filing annual reports with the Registrar of Joint Stock Companies. See KWS notes of workshop. An interview with Safi Khan on February 4 indicates that he doubts the Registrar actually knows how many reports he receives from societies. See KWS notes of interview.

¹⁷ Two reports, including the recent PALISA chapter, incorrectly state that the NGOAB was set up within the Ministry of Establishment.

¹⁸ See PURSUING COMMON GOALS, World Bank 1996, p. 30.

Nevertheless, NGOAB became a focus of oversight for many NGOs because many of them were at the time largely supported by foreign funds. Its functions include the following:

- NGO registration;
- Approval of project proposals and releasing funds for them;
- Approval of expatriate consultants;
- Scrutiny and evaluation of statements and reports on projects;
- Monitoring and evaluating NGO projects;
- Receiving information on foreign travel by NGO personnel; and
- All other matters relating to NGOs receiving foreign funds.

To register with NGOAB, an NGO must be approved by Home Ministry and at least one line ministry; it must submit a 5-year plan along with its application. For each grant, an NGO must submit project proposal and letter of intent from donor. All foreign funds must go through specific bank account; the bank in which the NGO has its account must provide full reports to central bank, which reports to NGOAB. NGOs must submit annual audits done by auditors who are approved by NGOAB.

Naturally, delays by NGOAB are frequent and often prolonged¹⁹ despite strict deadlines being stated in the laws (FDR and FCR). NGOAB has the same number of staff in 2005 as in early 1990's – approximately 65 -- yet the number of registered NGOs has tripled. Analysis by the Asia Foundation, confirmed by an interview with the Staff Director and currently Acting Director General, indicates that NGOAB lacks capacity in the most fundamental aspects of its ability to perform its functions, such as accounting expertise; it is in need of IT assistance, in terms of both hardware and software.

Role of Department of Social Welfare (DSW) The principal work of the Directorate of this Department is to register and to deal with those NGOs whose purpose is to render welfare service in the fields listed above; the DSW also dispenses public funds under a program of government assistance to social welfare NGOs.

According to an interview with the DSW registration officials,²⁰ when an applicant for registration applies to the DSW for registration, the officers, departmental clerks, who are the best-informed people with respect to the process, give the applicant both oral and written guidelines. If the application form meets the guidelines, the inspector and the field officer of DSW process the

¹⁹ See Questionnaire Results Analysis, Appendix E.

²⁰ See RK interview report.

application and inspect the NGO's offices. On the basis of their report and site inspection, the decision on registration is taken. If there is some problem or objection to registration or in the application form, the DSW says that it works with the NGO to correct and or amend its application. The DSW also works with NGOs to develop their constitutions, though there is no indication that any formal recommendations are made with respect to internal governance standards.

All registered NGOs must file annual reports and audited accounts at the end of every year. The DSW has the power to inspect the books of accounts and other records of the agency, the securities, cash and other properties held by the agency and all related documents.

NGOs cite frequent delays and problems with registration, including rent-seeking by DSW officials.²¹ NGOs and others report that the DSW has only infrequently conducted audits of registered NGOs and that it does not have adequate capacity to do its work properly.²²

Penalties The following penalties are provided for in the legislation.

1. Societies Act – no provisions for fines, penalties, or involuntary dissolution are to be found in the Act
2. Nonprofit companies (NPCs)
 - Like all companies, NPCs may be wound up if they cannot pay their debts, if they are in default on filing a required report, etc.
 - The government may cancel the right of an NPC to omit use of “limited” after its name – but only after written notice and opportunity to respond
3. Trusts
 - A beneficiary may request a court to order a trustee to fulfill a duty or remove a trustee
 - Trusts may be wound up if their purposes become unlawful or impossible to achieve, but the doctrine of “cy pres” – reforming as near as may be -- applies to and may save charitable trusts

²¹ See Questionnaire Results Analysis, Appendix E.

²² See KWS workshop notes from January 18 workshop.

4. Waqfs²³

- dissolution is not provided for because waqfs are perpetual
- the Administrator can intervene if the *mutawalli* is improperly carrying out required functions

5. Social Welfare Organizations (SWOs)

- The Director of Social Welfare (DSW) may “suspend the governing body” of a SWO if it has committed any irregularity with funds, any mal-administration in the conduct of its affairs, or has failed to comply with the provisions of the Ordinance
- No SWO can be dissolved on its own motion
- The DSW may recommend that the Government dissolve a SWO because it has violated its constitution, the Ordinance, or rules made thereunder, or acted “in a manner prejudicial to the interest of the public”
- Before recommending dissolution, the DSW need only give the SWO such opportunity to be heard “as it thinks fit”
- An SWO ordered to be dissolved has 30 days to appeal to the Government, but there is no right to appeal to a court
- Any person who contravenes the Ordinance or any rule thereunder or makes a false statement to the DSW can be fined or imprisoned for up to six months
- Where an offense is committed by an SWO, every director or officer of it is deemed guilty of that offense unless s/he proves that the offense was committed without his/her knowledge or consent

6. Foreign Donations Ordinance

- For a “reason to be recorded in writing,” NGOAB can inspect or, acting under the Code of Criminal Procedure, seize accounts and other documents
- After providing a reasonable opportunity to be heard, NGOAB can cancel registration of an organization or stop any activities for a failure to submit required declarations, willful submission of false declarations, or any other contravention of the Ordinance
- Anyone who receives or uses a foreign donation in contravention of the Ordinance or any rules thereunder is

²³ The rules for religious trusts of other faiths appear to be similar, but the Consultants concentrated on Waqfs because they are far more numerous.

liable for a fine of double the amount of the donation or imprisonment for up to three years

Role of Apex Organizations in Promoting Internal Governance Standards

Although the current status of ADAB is in some doubt due to the fact that its funds were frozen in 2001, it is clear that it continues to exist, at least as a volunteer organization.²⁴ Thus, in this discussion both the newer Federation of NGOs in Bangladesh (FNB), which has to this date had good government relations, and the older ADAB (Association of NGOs in Bangladesh), which has fallen out of favor with government, will be referred to as apex organizations.

At the present time, only ADAB has a Code of Ethics/Conduct, which was promulgated in 1993. Of the NGOs surveyed in the questionnaire, about 75% said that they have adopted and follow the simple standard code of conduct. Although the ADAB Code of Ethics was originally structured so that it would go through several phases during which it would be strengthened and provided with enforcement procedures, the Code of Ethics remains both poorly defined and weak in terms of the possibility of enforcement.²⁵ This is now recognized by ADAB leadership, but lack of current capacity to develop and enforce a Code of Conduct is apparent. This is due in part to the Government's hostility to ADAB, which may be an insurmountable obstacle to working with the 1993 standards as a model for the future.

In addition, although this is part of FNB's mandate, FNB has not taken up an effort to create a code of conduct/ethics, which could be very unpopular and disruptive for a new organization. FNB has, however, agreed with the Bangladesh Enterprise Institute (BEI) to conduct a series of seminars and training sessions around the BEI Code of Conduct (see below) over the course of the next several months.²⁶

In the last couple of years, BEI, in the course of developing a Code of Conduct for business organizations in Bangladesh, turned its attention to the NGO sector. While the code proposed for NGOs is that the same time much too complex and lacking in enforcement mechanisms, it nonetheless provides an opportunity for a

²⁴ The ADAB response to the request by the Consultants to distribute the questionnaires was prompt, fully professional, and well-organized. In addition, ADAB was represented at all the workshops and the Consultative Conference. It clearly remains a force in the NGO community in Bangladesh, which means that it should be represented in the proposed Law Reform Task Force, as a full participant.

²⁵ Qazi Faruque Ahmed, the Chair of ADAB and CEO of Proshika, described situations in which attempted enforcement of the NGO Code of Ethics with regard to gender discrimination by member NGOs was ineffective because the members simply withdrew when threatened with sanctions by ADAB. See KWS interview notes.

²⁶ Interview with Safi Khan, Consultant to BEI, Feb. 4, 2005 (KWS notes).

process to look into developing a workable and enforceable standards for NGO internal governance. Thus, one strong recommendation of the Consultants is that the law reform process should closely tie into the process of vetting and developing the BEI standards.

In addition to the general apex bodies, there are sectoral apexes with representation from some of the development sub-sectors that are the focus of Bangladeshi NGOs. For example, micro-finance NGOs, such as ASA, reported that their sectoral apex has a clear Code of Conduct, which its members are required to follow.²⁷ This is a useful start and should be part of the analysis of how to create a Code of Conduct that can apply across the entire NGO sector in Bangladesh.

C. The fiscal framework for NGOs in Bangladesh

Tax Exemption under the Income Tax Bangladesh has a scheduler income tax under the Income Tax Act of 1984, as amended, which means that certain types of income may have special applicable exemptions.²⁸ According to the Income Tax Manual of the 1984 Income Tax Ordinance, as amended through July 2004, income that is applied or deemed to be applied for charitable or religious purposes is generally exempt from income tax.²⁹ This includes income from all sources, including business activities. Thus, according to the way the law is written, NGOs in Bangladesh should not be called upon to pay tax on any income, including income from “income-generating” activities.³⁰ On the other hand, some NGOs in the Consultants’ survey report paying income tax, though the rate of tax they report paying is 1.5 to 2.5 percent. About 70% of the NGOs say that they engage in income-generating activities, which may suggest that these are the activities that are taxed.³¹ These results require further analysis and

²⁷ KWS notes of statement by Md. Enamul Haque.

²⁸ See Section 1. (1) of Part A of the Sixth Schedule, which provides a special rule exempting income derived from house property; this special rule is, however, virtually swallowed up by the general exemptions provided in (2) and (3).

²⁹ The way the tax laws are set up, there is an exemption provided in Section 44, which refers to the types of income described in the Sixth Schedule. The Sixth Schedule generally exempts income spent or set aside for charitable and religious purposes. The set-aside provision allows an accumulation of income for up to ten years, a provision that could cause concern for any endowed foundation unless exceptions are permitted.

³⁰ There is a special exemption in Part A, 1. (1A) for micro-credit income earned by any NGO registered with NGOAB. In practice that means that any organization that finances its micro-credit operations from domestic sources would be subject to tax.

³¹ At least one eminent jurist in Bangladesh believes that the current law provides that business income of NGOs is subject to tax. In the majority decision in *BRAC v. Mozaffar Ahmed and Others*, 22 BLD (AD) 2002, Chief Justice Mahmudul Amin Choudhury, writing for the Court, noted that the Finance Act of 1999 made income from business conducted by a charity subject to tax. *Id.*, at p. 60. No other clear authority for this proposition could be found, however.

follow-up interviews before any real conclusions can be reached about the extent to which NGOs are taxed.³²

There are also clear indications that the Finance Acts of 1998 and 1999 made NGOs subject to tax on their income, even if the Income Tax Manual does not reflect these changes.³³ The source of the decision to tax NGOs on their business and other income was apparently made public through a Circular issued after the Finance Acts were passed. NGOs remain confused and concerned about this issue³⁴

Earlier research by the World Bank indicates that the issue of NGO taxability has been a matter of contention between NGOs and the revenue authorities for some time.³⁵ Dr. Abed reported that the question of whether the current law permits taxation of income from non-micro-credit income-generating activities is currently the subject of litigation between BRAC and the National Board of Revenue.³⁶ It is possible that the tax authorities are interpreting quite narrowly the legal requirement that revenues from various sources must be spent for charitable purposes in order to be exempt -- the meaning of the term "charitable purposes" is, of course, unclear. In any case, the situation with respect to income taxation of NGOs and particularly of the income from business activities that supports their public benefit activities is in need of clarification and possible amendment to conform it to international good practice.

Deductibility of Donations Donations to charitable NGOs in Bangladesh are generally not deductible. Part B of the Sixth Schedule permits certain allowances to be taken into account (within a limit of 2 lakh Taka (about \$3000). These include donations to charitable hospitals (within some special limits),³⁷ donations to organizations for the welfare of "retarded people" (within special limits),³⁸ transfers for Zakat,³⁹ and donations to "any socio-economic or cultural development institution established in Bangladesh by the Aga Khan Development Network."⁴⁰

³² The final questionnaire analysis indicates that 90% of NGOs surveyed report paying tax on their surplus generated from micro-credit activities. Eighty percent say that NGOs should not have to pay taxes as long as the surpluses are ploughed back into charitable activities.

³³ Interview with Dr. Abed, KWS notes. Dr. Abed suggested that the 1998 Act made income from commercial activities subject to tax, while the 1999 Act made all surpluses of NGOs subject to tax.

³⁴ KWS notes of FNB focus group meeting.

³⁵ See PURSUING COMMON GOALS, p. 50. Notes of NGO meetings; results from survey confirm the 1996 analysis.

³⁶ See KWS notes of Abed interview.

³⁷ Section 11A.

³⁸ Section 11B.

³⁹ Section 13.

⁴⁰ Section 21.

Each of these special rules dates from the early to mid-1990's. According to the World Bank's 1996 study, "To provide an incentive to the corporate sector, the Income Tax Act once provided for 100 per cent deduction of the amount of donations to charitable purposes.... In FY 1992-93 the Government withdrew this incentive without any prior notice or discussion."⁴¹ The claim at the time was that there was rampant tax abuse,⁴² but there has been no re-examination of the policy since the deduction was withdrawn. According to Barrister Rafique-ul Haque, the government is responsive to lobbying for additional special rules, but that does not resolve the need for a more careful look at this area of tax policy for the NGO sector. Providing tax incentives for donations to NGOs is good policy, and the current rules in Bangladesh need to be reconsidered in light of international good practice.⁴³

Other tax preferences NGOs and the Government are both subject to VAT on their purchases. Some NGOs are exempt from import VAT and customs duties on imports of goods used for relief and rehabilitation purposes.⁴⁴ There are no real (house) property tax exemptions, and almost 13% of respondents in the initial sample indicate that they paid such taxes. This is a fertile area for discussion as law reform proceeds.

Support Mechanisms – Government Grants and the New NGO Foundation

One of the ways in which the national government is making up for its lack of indirect subsidies to the sector through the tax system is by providing direct subsidies in the form of grants and contracts for NGOs (acquired through a competitive procurement process). There has been a practice of various ministries providing grants to the NGOs accredited to them. In fact, the DSW has described in elaborate detail the system for awarding grants and overseeing grantees.⁴⁵ The practice may need to be reviewed for fairness, but presumably the process of developing clear and transparent procurement practices for the entire government will make the systems at the DSW and other ministries making grants to NGOs more workable.

⁴¹ See PURSUING COMMON GOALS, p. 51.

⁴² Id.

⁴³ A result of this policy is that less than 7% of NGOs surveyed report receiving contributions from individuals or businesses. The fact that tax incentives can support increased donations to NGOs can be supported by data found on the website of the Pakistan Centre for Philanthropy <http://www.pcp.org.pk/>. Pakistan give significant tax incentives for donations; this report that Bangladesh adopt such incentives with the same numerical limits.

⁴⁴ Id., citing Government Order 61-Ain/92/1444/Custom, dated 17.03.92.

⁴⁵ RK interview notes.

A recent development, much discussed in recent years but finally becoming a reality, is the creation of the NGO Foundation.⁴⁶ This entity, which is modeled on the successful PKSf (micro-credit foundation), is intended to make grants to small NGOs whose budgets do not exceed 5 crore Taka and whose operations do not extend beyond 10 upazillas.⁴⁷ The initial endowment of the NGO Foundation will be 100 crore Taka, while the first tranche of grant money is to be 50 crore Taka.

According to an announcement made on 25 January, 2005, the initial Executive Board of the NGO Foundation will be made up of the following individuals:

- 1) Dr. Saadat Hussain, Secretary, Cabinet Division : Chairperson
- 2) Director General, NGO Affairs Bureau (ex-officio) : Member
- 3) Managing Director, PKSf (ex-officio) : Member
- 4) Chairperson, Federation of NGOs in Bangladesh (ex-officio) : Member
- 5) Managing Director, Social Development Foundation (ex-officio) : Member
- 6) Ms. Rasheda K. Choudhury, Director, Gono Shakkharata Ovijan (CAMPE) : Member
- 7) Ms. Rokeya A. Rahman, President, Women Entrepreneurs Association : Member
- 8) Mr. Khalid Shams, Managing Director, Grameen Telecom : Member
- 9) Mr. Md. Shafiqul Haque Choudhury, President, ASA : Member

Although it remains to be seen whether this development will be helpful for the NGO sector in Bangladesh, having such a grant-making mechanism is consistent with international good practice and represents a notable development.⁴⁸

Local government bodies also make grants to NGOs in Bangladesh, though not to the large ones. For example, 7.1% of the small NGOs in the World Bank's

⁴⁶ See Daily Star, December 23, 2004.

⁴⁷ Id.

⁴⁸ A similar support process is available for funds of the Republic of Korea, which are made available to the NPOs by a committee that is supervised by the Ministry of Government Affairs and Home Affairs (MOGAHA). For further information on this program in English, see the upcoming issues of the Int'l Journal of Civil Society Law (April 2005), which will be available at www.law.cua.edu/students/orgs/ijcsl/. Further information on government-civil society support mechanisms can also be found at http://www.ngo.ee/orb.aw/class=file/action=preview/id=4210/material_1st_day_EKAK_int_s_eminar_comparison_020305.doc. At this site there is a comparative chart showing such mechanisms in Canada, Croatia, England, Estonia, Scotland, and Wales. Analysis of support mechanisms in Central and Eastern Europe can also be found in C.J. Albertie, *Public Benefit Support Funds in the Czech Republic, Hungary & Croatia*, in 2 INT'L J. CIV. SOC. L. 4 (at 99), available at www.law.cua.edu/students/orgs/ijcsl/.

2004/05 survey indicated that they have received local government grants. This subsidy mechanism has not been thoroughly explored in any studies of the sector, but it is a part of the overall picture of NGO finances that bears further discussion.

D. Special issues of concern under the current rules

Political Activities Despite the fact that political activities seem to be the subject of the greatest contention between NGOs and the GOB, there are absolutely no rules currently on the books that forbid political activity by NGOs.⁴⁹ On the other hand, there is complete agreement between the GOB and the NGOs that “partisan political activity” by NGOs should not be permitted, but it is in the details of the definition of that term that the trouble lies.

At the workshops it was agreed that the following democratic development activities should be permitted -- public education, issue advocacy, voter registration, and certain kinds of lobbying.⁵⁰ The survey results bear this out, with 100% of the respondents agreeing that partisan activities should be banned, but that other types of political activities should not be. This is clearly an issue that needs to be addressed in the law reform process, and it would probably be good to deal with it before the next general elections.

Income-Generating Activities The other significant problem with the current legal framework is that there is no clarity about income-generating activities of NGOs and whether or not they are subject to tax. In litigation that was concluded as recently as 2002, the question of whether the Societies Act forbids an organization registered under it from engaging in income-generating activities was answered in the negative. The Appellate Division of the Supreme Court decided the case, which involved BRAC’s investment in the BRAC Bank, in favor of BRAC, interpreting the Societies Act to permit all sorts of investments as long as they are permitted by an organization’s charter.⁵¹

The outcome in the case is a rational one -- that an NGO may engage in any business activities it wishes as long as its charter permits. The issue of unfair

⁴⁹ It is possible to argue that the Societies Act, which refers to charitable activities, includes within that definition a ban on political activities. Such a rule would be consistent with outmoded definitions of “charity,” but throughout the common law world today it is widely accepted that public benefit organizations may engage in a wide range of political activities. At the same time, however, the laws in other common law countries (e.g., UK, US, Canada, Australia) forbid charities’ supporting or opposing candidates for public office and financing political parties.

⁵⁰ These terms are defined in the slides for the January 18th workshop. See Appendix J.

⁵¹ See *BRAC v. Mozaffar Ahmed and Others*, 22 BLD (AD) 2002. See also the discussion of the case in Mark Sidel, “Courts, states, markets and the nonprofit sector: Judiciaries and the struggle for capital in comparative perspective,” 78 *TULANE LAW REVIEW* 1611 (2004)

competition between the NGO sector and the business sector is not, however, resolved by this decision. What that means is that business enterprises will continue to complain unless there is greater clarity about the taxation of income from business enterprises conducted by NGOs.

Lack of Clear Accountability and Internal Governance Rules for NGOs As the description of the current legal framework indicates, there is very little in the principal registration laws (apart from the Companies Act), which deals with internal governance and external accountability for NGOs. This needs to be addressed in any legal reform effort. In addition, it is extremely important for NGOs to be required to use good accounting rules developed especially for them.⁵² NGOs in the survey report that they do follow certain established accounting standards, but there is wide variety of the standards used. It may be useful to adopt a set of clear standards strictly for use by NGOs, as has been done in India.

The “Crisis” One of the principal reasons for the decision to engage the Consultants to explore the issues raised in this Report was the crisis provoked

1. First, by the freezing of funds of five large NGOs by NGOAB; and
2. Second, by the government’s proposal in 2004 to introduce legislation that was agreed by the NGOs and donors to be unnecessarily restrictive as well as overly broad.⁵³

Although things have calmed down a bit with respect to both aspects of the crisis,⁵⁴ much bad will and suspicion remains between the NGOs and the GOB. This crisis may, however, provoke a systematic effort to engage in a collaborative legal reform process, as is proposed in this Report. The outstanding issues involving certain NGOs and certain personalities will not be worked out in the process of law reform -- indeed there is a risk that the difficulties of the past may politicize the process of law reform, and everyone recognizes that. But the consensus among NGO leaders, donors, and government officials seems to be that it is worth taking that risk at this time.

- E. Relationship of the current laws in Bangladesh to international good practice.

Throughout the consultancy the Consultants stressed the ways in which the current legal framework in Bangladesh meets neither international good practice standards (as outlined in the book written by the international Consultants,

⁵² This issue is due to be addressed in the upcoming World Bank report.

⁵³ Some commentators described it as “draconian and diabolical!” Key language from the GOB bill is quoted in the slides for the January 18th workshop. See Appendix J.

⁵⁴ As to the bill, Dr. Siddiqi said repeatedly that the Government has withdrawn the bill and does not intend to reintroduce it. KWS interview notes.

entitled Good Practices for Laws Affecting Civic Organizations) not the needs to Bangladeshi NGOs in the 21st Century. For example, the current legal framework does not:

- Permit easy, quick, non-discretionary establishment with full legal personality of a membership or non-membership not-for-profit organization to engage in any lawful activity
- Provide that a not-for-profit organization must be organized and operated primarily for not-for-profit purposes
- Clearly forbid the distribution of income from a not-for-profit organization
- Assure the independence and accountability of boards of directors of not-for-profit organizations
- Require all not-for-profit organizations to have internal governance rules that allocate rights, duties, and responsibilities in a clear, reasonable, and flexible manner
- Clarify that directors have fiduciary duties of due care and loyalty
- Establish clear rules that not-for-profits must follow for dealing with conflicts of interest
- Establish clear and consistent financial accounting standards for all not-for-profit organizations
- Require minimal external accountability and transparency for ordinary not-for-profit organizations, with higher standards for public benefit organizations
- Provide adequate tax incentives for the not-for-profit sector.

Given these deficiencies and others more carefully outlined in this report, the Consultants clearly believe it is time to engage in a serious law reform process that will update the current legal and fiscal framework for NGOs in Bangladesh

III. Activities in Phase Two of the Consultancy (January/February 2005)

This section of the Report discusses the activities conducted by the Consultants during phase two of the Project. It includes highlights of the discussion that were held rather than transcripts. The highlights deal with the most important of the substantive issues discussed.

A. Questionnaire

During the first phase of the Consultancy, two workshops were held in Dhaka with the purpose of obtaining insight into what additional research should be conducted and what form further research should take. The agenda for the public workshop, held on December 14, 2004, is attached.⁵⁵ In discussing the

⁵⁵ See Appendix F. The first workshop, which immediately preceded the second, was a private one for donors only. Additional insights into the issues were obtained from the donor workshop as well, and the discussions informed the development of the questionnaire.

questions raised at this workshop, with the NGOs and donors present, it became clear that there is a real need for hard data about government-NGO relations in Bangladesh. Despite the fact that the sector is one of the most studied in the world, much of the “data” that have been used to support conclusions are of uncertain validity; some of them are clearly wrong. The research for this Report has been based largely on the data that seem reliable, and extensive background notes back up the information relied upon. To supplement the information obtained in interviews and group meetings, the Consultants drafted a questionnaire for NGOs, which was reviewed and discussed by team members, including Amanda Edmunds of CIDA and Charlotte Duncan of UNDP.

It was decided that the questionnaire should be distributed through the networks of the two apex organizations, ADAB and FNB, and interviews were held with Mr. Md. Tajul Islam, CEO of FNB, and Mr. Qazi Faruque Ahmed, Chair of ADAB, concerning the distribution of the questionnaire. BNWLA agreed to do the translation of the questionnaire into Bangla but did not do so; it also failed to distribute the questionnaire, as agreed in December. The late translation, which was done by Ms Feroze, delayed the distribution of the questionnaire until after the first of the year. ADAB kindly added some questions, in both English and Bangla, and did a wide-spread distribution to its members on January 6. FNB, for internal reasons,⁵⁶ decided not to distribute the questionnaire until early February, which delayed the inclusion of analysis at the time of the original final report, which was submitted, as agreed, on February 15. The final analysis of the questionnaire results is attached to this Report (based on 83 questionnaires, 57 from ADAB members and 25 from FNB members) as Appendix E.

B. Workshop January 16 (held at CIDA PSU)

This workshop was held principally for NGOs, to discuss matters most relevant to them. The slides for the workshop are attached.⁵⁷ The discussion included issues about establishment and registration of NGOs, internal governance, and Codes of Conduct. The workshop also featured a presentation of the BEI Code of Conduct by Ms Lopa Rahman, Project Coordinator of the Corporate Governance Project at BEI.⁵⁸

This workshop was attended by about twenty-five people, including representatives of Proshika, FNB, PRIP Trust, ASA, Democracy Watch, and

⁵⁶ Certain members of the FNB leadership decided that it would be “better” to have a focus group session to “discuss” the questionnaire. That was indeed held, and it was informative. But the Consultants finally persuaded the FNB leadership to distribute the questionnaire. All the delay has meant that the final questionnaire results were not available until after February 15, when this report was first filed. Appendix E, Questionnaire Results Analysis, is now complete.

⁵⁷ Appendix G.

⁵⁸ Her slides are attached as Appendix H.

BRAC.⁵⁹ The discussion was lively, particularly around the issue of what an NGO Code of Conduct should contain. NGOs indicated that they believe most NGOs in Bangladesh do follow generally accepted governance principles, including those that require separation of functions between the CEO and the Board Chair. Others, however, vehemently objected to imposing such a requirement, given the state of civil society in Bangladesh at the present time and the lack of persons with adequate experience to serve as Board members.

Some of the participants cited lack of pay as a factor in causing NGO Board members to lack motivation to serve. Everyone recognized, however, that work needs to be done to develop a Code of Conduct for NGOs in Bangladesh, and that it must be enforceable. Various options for enforceability were discussed, but there was no consensus about this important subject. Nonetheless, the recognition of the need for a Code of Conduct indicates that efforts along these lines must be closely tied into the legal reform process.

C. Workshop January 18 (held at CIDA PSU)

This workshop was attended by NGO leaders, government officials, and donor representatives; about twenty-five people in all.⁶⁰ The varying issues of NGO-government relations that were the subject of this workshop⁶¹ evoked considerable discussion among the participants.

One of the issues for discussion was the extent to which the ODA is more recently going through the Government of Bangladesh and then being on-granted to NGOs for their projects. Although corruption in Bangladesh remains an important issue for donors, the GOB, and all Bangladeshi citizens,⁶² the ODA figures from a recent survey show that, although NGO funding by foreign governments is increasing somewhat, those grants constitute a dramatically declining percentage of the revenues of large NGOs.⁶³

Another issue for discussion was the fact that NGO employees are not protected under the current labor law in Bangladesh, making this a prime area for law reform ancillary to the main law reform efforts aimed at making the enabling environment more NGO-friendly. Alternatively, the lack of labor law coverage

⁵⁹ The attendance lists for the three conferences are attached as Appendix I.

⁶⁰ See Appendix I.

⁶¹ The slides can be found in Appendix J.

⁶² Bangladesh (with Haiti) ranks at the bottom of the 2004 Transparency International Corruption Perceptions Index, available at <http://www.transparency.org/cpi/2004/cpi2004.en.html#>.

⁶³ This is based on preliminary data from a survey commissioned by the World Bank in connection with its current study of the sector. After the data collected are analyzed it will be much easier to assess whether this is in fact indicative of a change in practices for funding development activities in Bangladesh.

for NGO employees means that any NGO Code of Conduct that is developed should include minimum standards for human resources policies.

A third issue was the proportionality of the current penalties for NGO misbehavior. NGO representatives agreed with the Consultants that the current penalty structure makes little sense. But some government officials defended it, and there was a lively debate about penalty policies and effectiveness.

A fourth issue was the proposed PBO⁶⁴ Commission – what should be its composition, what should it be empowered to do, would it replicate the Government-NGO Coordinating Committee (GNCC), that functioned for awhile but is now inoperative. All of the participants, including the government representatives, indicated that it is time to think about radical reforms for the legal framework – and that such radical reforms might well include developing a PBO Commission. This issue is discussed in more detail in Section IV. B., of this Report.

The issue that generated the most discussion was, of course, political activities. There was general agreement that any prohibition of political activities for NGOs should focus on electioneering activities (partisan political activities) and not such things as public education, issue advocacy, voter registration, or certain kinds of lobbying.⁶⁵ Nonetheless, the issue of how to define electioneering remains, and a lot of energy at the end of the workshop was directed to this matter, with understandably unclear answers.

D. Additional Interviews

In addition to the individual meetings conducted during phase one of the Consultancy (see Appendix B), the following individual meetings were held in January and February:

1. Dr. Sumaiya Khair, co-author of PALISA Chapter on Bangladesh, Associate Professor, Dhaka University School of Law
2. Mr. Iftekhar Zaman, head of TI-Bangladesh
3. Dr. Hamed Hossain, Dr. Sultana Kamal, Ain o Salish Kendra
4. Mr. Frank Matsuert, DFID (to discuss questionnaire for donors and working together to obtain answers)

⁶⁴ One ancillary issue was the use of the term “PBO” – many NGO leaders expressed a desire to adopt this term in Bangladesh because of its positive implications – they think it would raise the image of NGOs. Right now, with such a huge amount of negative publicity coming from the radical Islamists about NGOs, using “PBO” may well promote better perceptions of the sector.

⁶⁵ These are defined in the slides.

5. FNB focus group (including representatives from SARPU, RDRS, Njera Kori, BELA, and CAMPE)
6. Dr. Qazi Faruque Ahmed, head of Proshika
7. Ms. Aroma Dutta, head of PRIP Trust (to obtain materials in PRIP library)
8. Mr. Mesbahul Islam (twice), NGOAB
9. Dr. Kamal Siddiqi, Prime Minister's Office
10. Dr. Fasle Hasan Abed, BRAC
11. Mr. Safi Khan, consultant to BEI
12. Registrar of SWOs (RK)
13. Registrar of Joint Stock Companies (RK)
14. Dr. Fida Kemal (RK)

Extensive notes were taken during these meetings, and the results of the interviews are included in Section IV., B.

There were also several meetings with various development partners (Amanda Edmunds, Charlotte Duncan, Naga Annamalai of the World Bank, and an additional telephone meeting with Frank Matsaert) as well as a final de-briefing of the LCG NGO Group on February 3, 2005.

E. Consultative Conference February 2

The final Consultative Conference was held at BRAC Centre on February 2, 2005. It was attended by about forty people, many of whom had attended one of more of the earlier workshops.⁶⁶ The slides for the conference are attached as Appendix K. The aim of this meeting was to review the discussions at the prior workshops and agree on "The Way Forward." The participants at the conference reached a consensus that it is now time to move forward as outlined at the Conference - by creating a "Law Reform Task Force," which would be comprised of representatives of key ministries, members of Parliament, representatives of the two NGO apex bodies, other key NGO leaders, academics, and lawyers. The work of the Task Force would be to develop a set of law reform proposals that would constitute a modern, rational, harmonized, and progressive legal environment for civil society and replace the current legal rules for NGOs in Bangladesh, as outlined in Part IV., B. below.

F. The Role of Donors

Materials for this section have been collected by Frank Matsaert of DfID, pursuant to an agreed questionnaire for use both by Mr. Matsaert and the Consultants. The final questionnaire used by Mr. Matsaert is available from him, and donor answers to the questionnaire are confidential. Mr. Matsaert will have

⁶⁶ See Appendix I.

a full analysis of the donor survey in the upcoming report for the World Bank. The donors surveyed are CIDA, DfID, EC, USAID, and the World Bank. The range of funding provided directly to Bangladeshi NGOs is between 16% and 90% of the aid portfolio of these institutions, and each has special and specific requirements for funding mechanisms, including wholesale funding through international NGOs, consortium funding, and “partnership” arrangements. There are a wealth of data collected in the survey that deserve careful study and analysis.

For purposes of this report the Consultants have looked at several specific issues that were addressed in the donor survey, all of which revolve around the extent to which donors can assist in assuring greater NGO accountability in Bangladesh. These consist not only of looking at procurement mechanisms (which are by and large not susceptible to fraud and corruption because of the stringent rules of the donors countries), but also back-end controls, monitoring, and evaluation.

In terms of front-end requirements, the issues addressed include the following:

- The extent to which donors might consider the requirement that NGOs adhere to a Code of Conduct that specifies certain internal governance requirements and standards for NGOs.

As one donor notes, “Governance – the power of individuals and lack of Board accountability – ...risks have increased as institutions have become bigger, and donors are more aware of problem. Difficult balance between donors’ interface and board acting as a shareholder & demanding performance. This seldom happens and needs to be developed. Governance risks also linked with political risk if Board is weak or biased.”

Nevertheless, the donors are split as to whether they think this may help develop the internal governance (and external accountability of NGOs). One donor, is, for example, piloting its own set of internal governance standards in Bangladesh. The analysis of the Consultants is that donors could contribute to the process of ensuring greater NGO accountability if they were to support the adoption of a clear and transparent sector-wide Code of Conduct, as suggested in our 6th major recommendation. According to the questionnaire analysis, most NGOs agree with this proposal.⁶⁷

⁶⁷ See Questionnaire analysis, question 16a.

- The extent to which donors can enforce transparency and accountability of NGOs by requiring adherence to special NGO accounting standards for Bangladesh and by specific new requirements for audits.

The Consultants and the donors are aware that accounting is one way in which NGOs can avoid proper reporting of funds flows and can engage in fraudulent practices vis à vis donors and beneficiaries. Detecting such devices can only be accomplished through thorough audits. It is in fact not enough to say, as donors have, that NGOs receiving funds are required to adhere to “international accounting standards,” when there are no international accounting standards for the not-for-profit sector. What donors in Bangladesh could do, on the other hand, is to begin looking at the possibility of adopting special accounting standards for NGOs (as has been done in Switzerland and China) and require that books and records be prepared by according to those standards. There has been a move in that direction in India as well.

In addition, it is clear that donors generally only require audits of project funds, unless, as one donor states, “where fraud is suspected.” The lack of capacity of local auditors on the NGOAB approved list (noted by one donor) is a problem, in particular where “double-dipping” may be possible. Donors should clearly do a better job of coordinating their different requirements on audits if at all possible. Certainly the creation of the LCG is a step in the right direction, but it is also possible that the separation between the funding arm of any agency and its monitoring arm may permit slippage. It may be possible to follow on the example of one donor and to develop capacity in Bangladesh not only for external monitoring and evaluation agencies but also NGO watch-dogs. There is a danger in Bangladesh that such a process would inevitably become too politicized, but it is something to consider.

Finally, one donor stressed repeatedly that small NGOs are incapable of complying with some of the highly developed standards discussed in this section. The Consultants consistently recommend that there be special rules for small NGOs, and that many of them be exempt under national law from stringent reporting and other accountability rules. That comes from a sense that the chances of fraud by such institutions are minimal. Given this concern, the Consultants recommend that further study be done among donors as to where such a cut-off could be made, as well as the extent to which wholesale funding mechanisms (e.g., through the new NGO Foundation) might help with this issue.

IV. Proposal for “The Way Forward”

A. Procedural Aspects

According to the consensus reached at the February 2 Consultative Conference, a “Law Reform Task Force” should be established by a Cabinet decision, with general characteristics described below. It would begin work immediately, and it could seek continuing technical assistance from the International Center for Civil Society Law. The process would be funded by a consortium of donors. The Task Force model discussed at the meetings is as follows:

- It would be an independent Task Force whose work would be to modernize, rationalize, and harmonize the laws and the government agencies affecting the not-for-profit sector, in order to --
 - Assure transparency, accountability, and good governance
 - Eliminate unnecessary cost and delay
 - Provide objective standards to replace bureaucratic discretion
 - Provide for judicial appeal from any adverse decision
 - Support sound growth of the sector in order to advance poverty alleviation, development, and citizen participation
 - Provide sound tax benefits, facilitate foreign and domestic grant mechanisms, and strengthen government relations with the sector at all levels
- Its composition – ideally between 9 and 15 members
 - Representatives of key ministries, parliament, and PBOs
 - Gender inclusive
- There would be public hearings and broad community discussion of drafts
- Small staff, plus technical advisors
- One-year deadline to produce report and proposed legislation

This proposal received support not only from the government officials who attended the conference but also from key persons in government who did not attend (Dr. Kamal Siddiqi and Mr. Mesbahul Islam). It also received support from Dr. Abed of BRAC, with whom the International Consultants met after the Consultative Conference. Everyone agreed that a rational process should be begun now, without delay, and that, in the words of Dr. Abed, “the time has

come for an independent Task Force to look at the entire regulatory framework.”⁶⁸

Additional issues raised in these meetings include the following:

- The ministries represented on the Task Force should be Finance, Law, Social Welfare, Home, and Local Government
- Both NGO apex bodies should be included
- The Secretariat of the Task Force should be located in a neutral place, such as the Law Commission

B. Substantive Aspects

The key issues to be considered by the Task Force include the following:⁶⁹

Framework laws

- How best to rationalize, harmonize, and modernize the current laws permitting the establishment of NGOs as legal persons
- What amendments are in order for the Societies Registration Act, the Trust Act, the Companies Act, etc.

Internal governance

- What should be the minimum requirements with respect to Board size, composition, meetings, duties and powers, etc?
- How much flexibility should be allowed?
- What allowances should be made for small not-for-profits?
- What is the best way to state and implement fiduciary duties, especially concerning conflicts of interest, self-dealing, excess benefits, and corporate opportunities?
- What is the most effective way to draft and implement an appropriate code of conduct for PBOs?

Public Accountability

- Should general not-for-profit organizations (NPOs) that receive little or no public money or benefits from the state or foreign donors --
 - Be subject to strong internal reporting and governance rules, but

⁶⁸ Quote from Dr. Abed, KWS notes of interview.

⁶⁹ This is the list discussed at the Consultative Conference. There may be other options that need to be explored. The Consultants believe that the process must design results that are responsive to the needs and traditions of Bangladesh, taking into account international experiences and good practices that have been developed over the years.

- Not be required to file more than minimal annual reports with the government and the public (e.g., changes in board or headquarters)?
- Should more robust rules apply to all PBOs, i.e., require them to file annual financial and activity reports?
- Should these rules be less onerous for small PBOs (e.g., no requirement of external, certified financial audit)?
- Should annual reports of PBOs be made publicly available, with confidential information deleted (e.g., on organization's website)?

Public Benefit Organizations

- How best to reform and modernization of registration laws for PBOs?
 - Possibly Merge definitions of "social welfare agency" and "organization involved in voluntary activity" into a single, new definition of "public benefit organization" (PBO)
 - Other options?
- How define "public benefit" - (e.g., health, poverty, science, art, human rights, environment, etc.)?
- How define "public benefit organization" - (e.g., NPO exclusively devoted to public benefit activities with full transparency, accountability, and good governance, etc.)?
- Make determination of whether an organization is a PBO without regard to whether its funding is foreign or domestic and even if it does not engage in "social welfare"?
- Should certification as a PBO entitle an organization to receive significant tax and other benefits (e.g., foreign grant eligibility, tax exemption, deductible donations)?

Public Benefit Commission⁷⁰

- Should Bangladesh establish an independent commission to (1) certify PBOs, (2) publish rules, regulations and forms for PBOs, (3) exercise oversight over all PBOs, (4) impose appropriate sanctions, and (5) hear appeals?
- Which government ministries should be represented on the Commission and how should those representatives be chosen?

⁷⁰ The Parliament of New Zealand has recently passed the "Charities Act 2005," which will establish a "Charities Commission" from July 1. See <http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/108bar2.pdf>. At the present time both Scotland and Northern Ireland are considering adopting legislation to create a "charity commission." These models should also be reviewed as the process in Bangladesh moves forward. It will also be useful to the suggestions for something similar in Japan.

- How many representatives of the public and the not-for-profit sector should be members of the Commission and how should they be chosen?
- How large should the Commission be, to whom should it report (e.g., Parliament), etc?
- Should the Commission delegate to sectoral (e.g., health, education, etc) bodies composed of PBO representatives tasks (1), (3), and (4) above, with possible appeals to the Commission?
- Should the Commission be responsible for education, training, dispute resolution, and handling of financially troubled PBOs?

Foreign Funding

- Should Bangladesh provide by law that no foreign donor can make any grant except –
 - To a certified PBO and
 - For one or more of the purposes or programs agreed to by the Government at the Bangladesh Donors Forum (BDF) as part of an annual or 5-year plan (or some other relevant criterion acceptable to the GOB and the donors, such as the PRSP)?
- Should the PBO Commission be required to check to make sure foreign funding was properly spent?
- To protect against foreign funding for terrorism, political unrest, or international criminal activity, should Bangladesh implement FATF laws and procedures?
- Should Bangladesh eliminate the existing pre-approval process for foreign grants?

Political Activities

- Should general not-for-profit organizations (who are not Public Benefit Organizations) be permitted to engage freely in political activities, subject only to –
 - General restrictions placed on all individuals or business enterprises to control or limit funding or support for or against candidates for public office and assure the integrity of political parties and elections?
- Should PBOs be –
 - Permitted to engage in public education, issue advocacy, and voter registration,
 - Prohibited from engaging in electioneering and campaign funding, and

- Limited with respect to direct and grass-roots lobbying (e.g., only related to purposes and no more than 20%)?

Taxation

- Should Bangladesh adopt the following tax laws? ⁷¹
 - All not-for-profit organizations, including PBOs: Exclude from taxable income all donations, grants, membership dues, and proceeds from occasional fund raising activities
 - Passive investment income:
 - Tax general not-for-profit organizations (NPOs);
 - Exempt PBOs
 - Income from active trade or business:
 - Tax general not-for-profit organizations (NPOs)
 - Exempt PBOs, including on income from micro-credit, if profits are used for public benefit purposes
 - Allow deductions for donations to PBOs of up to 10% of income for business enterprises and 35% for individuals?
 - Similar to Pakistan
 - Should donations in kind be allowed for property with a determinable fair market value (e.g., traded securities)?
 - Import duties and VAT. Should the existing regime allowing exemption for relief and rehabilitation goods that are provided free be extended to all imports by PBOs for public benefit purposes (e.g., books for teaching)?
 - Domestic VAT. Should PBOs be allowed to seek a refund annually of 75% of the net VAT paid during the year provided it is above a minimum threshold?

⁷¹ The technical terms used in this section, such as “passive investment income,” are defined in the slides presented at the January 18th workshop. See Appendix J.

V. Conclusion

The Consultancy that produced this Report involved a rigorous examination of relevant materials describing the current legal and fiscal environment for NGOs in Bangladesh, as well as discussions with the entire range of interested parties. In addition, hard data have been developed as a result of the questionnaire and the analysis of its results; specific conclusions can be based on needs to be addressed. All of the information collected supports the general recommendations of the Consultancy:

1. The current legal framework for NGOs in Bangladesh is outdated, confusing, and in need of complete revision. Not only does it tend to focus attention and money on issues that are relatively unimportant – the foreign funding of a few NGOs by legitimate multilaterals and bilateral donors – it also does not impose high enough standards of accountability and transparency on the vast majority of NGOs that receive no foreign funds but that do affect the public interest. With the apparent shift toward more domestic funding for Bangladeshi NGOs, the current regulatory system seems improperly focused.
2. The fiscal framework for NGOs in Bangladesh is not supportive enough of the sector. While income tax exemption is available, there are virtually no provisions for deduction of corporate or individual contributions to NGOs. This is inconsistent with good international practice. In addition, the taxability of income-generating activities needs clarification, and the law should then be consistently applied to all NGOs.
3. There are currently no provisions in law clearly dealing with the issue of political activities by NGOs. This needs to be remedied by adopting rules that clearly forbid public benefit NGOs (PBOs) from engaging in partisan political activities. On the other hand, the rules on political activities should also clearly permit PBOs to engage in a wide range of democratic development activities, such as voter registration, issue advocacy, etc.
4. The effort to reform the current legal and fiscal framework for NGOs in Bangladesh should be undertaken by a Law Reform Task Force. This Task Force should be comprised of NGO leaders (including top officials from the two apex bodies), government officials from ministries with a strong interest in NGO activities, parliamentarians, lawyers, and academics. It should be housed in a neutral secretariat

and have a small staff. Technical assistance to the Task Force to structure and inform the process could continue to be provided by the International Center for Civil Society Law.

5. As a part of the legal and fiscal reform efforts, the information technology (IT) capacity of government agencies charged with NGO oversight (including the proposed PBO Commission) should be strengthened and modernized.
6. The law reform process should closely tie into the process of vetting and developing the Bangladesh Enterprise Institute (BEI) standards for NGO governance. Although the proposed standards are both too complex and too weak in enforcement powers, they represent a good start in developing good and enforceable standards for NGO internal governance.

Appendices attached

- A. TORs
- B. Interim Report
- C. Workplan
- D. Questionnaire
- E. Questionnaire Results Analysis
- F Agenda for Workshop 1 (December)
- G. January 16 slides
- H. Lopa Rahman slides
- I. Attendee lists for the workshops
- J. January 18 slides
- K. February 2 slides