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## Regulatory Waves

*An Introduction*

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## 1.1 INTRODUCTION

The same water – a different wave.

What matters is that it is a wave.

What matters is that the wave will return.

What matters is that it will always return different.

What matters most of all: however different the returning wave,  
it will always return as a wave of the sea.<sup>1</sup>

Regulatory intervention in the nonprofit sphere tends to come in waves. Such intervention often takes the form of statutory regulation and, in recent decades, frequently includes self-regulatory initiatives as well. In more recent years, combinations of self-regulation and statutory regulation – sometimes referred to as “hybrid” or “co-regulation” – have also begun to emerge. Academic scholarship has tended to focus on these forms of regulation as distinct entities, examining their strengths and weaknesses in the context of individual models of regulatory governance.<sup>2</sup> To date, however, there has been no scholarly attempt to undertake an examination of both kinds of nonprofit regulatory frameworks with a view to discerning the contributing factors that might cause a state to switch between one form of regulatory regime (for example, statutory regulation) and another (for instance, self-regulation or co-regulation), or to combine them. Neither has there been a comparative analysis of the possible environmental factors that inform or perhaps influence the frequency, timing, or degree of switching between nonprofit regulatory regime types, nor how they influence each other in practice.

<sup>1</sup> Marina Tsvetaeva, “Poets with History and Poets without History,” (1934), first published as “Pesnici sa istorijom i pesnici bez istorije,” *Ruski Arhiv* 26–27 (1934): 104–142.

<sup>2</sup> Mary Kay Gugerty and Aseem Prakash eds., *Voluntary Regulation of NGOs and Nonprofits: An Accountability Club Framework* (Cambridge: Cambridge University Press, 2010).

A short word on terminology, as used in this book, is perhaps merited here. Statutory regulation is concerned with a government-driven process resulting in either primary or secondary legislation giving effect to the regulatory goals. The regulation, developed with or without nonprofit sector input, applies universally to those entities covered by the legislation. In the case of non-statutory regulation, the sector rather than the state takes up the role of developer and enforcer of the regulatory regime. The democratic nature of nonstatutory regimes depends on the sector's composition and its commitment to collective action. Once initiated, unlike statutory regulation, non-statutory regimes are normally dependent on voluntary adherence and compliance. Enforcement and sanction imposition generally lack state imprimatur and may be dependent on a contractual enforcement basis. Between the polar ideals of pure statutory and nonstatutory regulatory regimes lies the emerging sphere of co-regulation or hybrid regulation. This regulatory form tends to be developed by or on behalf of the sector (like self-regulation) but with the active funding or participation of the state (like statutory regulation). While compliance and enforcement in the first instance lie with the sector, co-regulation is often viewed as complementary or supplementary to statutory regulation such that ineffective enforcement of co-regulation may result in the triggering of the state's default power to regulate statutorily.

This book explores whether there is an underlying relationship between statutory and nonstatutory regulation models in the context of nonprofit regulatory frameworks and sets out to investigate the extent to which the nature of the regulatory conversations occurring in sixteen jurisdictions inform the resulting regulatory models, influences, and regulatory relationships. By delving into the regulatory narrative and analyzing the factors that inform the interaction between statutory and nonstatutory regimes, we seek to glean a better understanding of the catalysts for regulatory change. Exploration of the country narratives at hand allows us to highlight the common trends emerging in these country case studies. Drawing on these shared experiences, we can begin to articulate policy principles that may assist decision makers to choose the best options for effective facilitation and management of the third sector from among the array of regulatory tools on offer.

This work posits that there is an ongoing causal relationship existing between statutory and nonstatutory regulation of the nonprofit sector. As with the ebb and flow of the tide, so with the ebb and flow of statutory and nonstatutory regulation; in some cases, one form growing in strength as the other lessens its hold over the sector, or the two co-existing in some uneasy or easy form. An initial hypothesis might be to view the relationship between regulatory forms as a zero sum game. When statutory regulation is in the

ascendancy, one might think, there is less room (or need) for nonstatutory (self-regulatory) intervention; whereas when statutory regulation fails to deliver, space is created for more innovative self-regulation or co-regulatory options to come to the fore. An alternative explanation might posit the view that while statutory regulation remains solely within the domain of the state, the state and the nonprofit sector compete over self-regulation, making it a contested space for either the extension of state control or the extension of nonprofit autonomy from the state. Other plausible explanations for the seeming ebb and flow between the statutory and nonstatutory regulatory cycles of the nonprofit sector exist. For example, this may be a long game: in some jurisdictions, the nonprofit sector may recognize the ascendancy and dominance of state regulation, and set about building self-regulation and semi-autonomous nonprofit sector bodies over a long period (twenty to thirty years, for example), as a way of moving toward some more autonomy for the sector, even as the state highly and restrictively regulates. Additionally there are also broader environmental, political, and historical factors that influence and drive how the relationship between statutory and nonstatutory cycles of regulation is balanced. It remains the case, however, that the nature and mechanisms of this relationship and the rationale for the use of one form of regulation over another at a particular time has not been the subject of systematic study or comprehensive discussion.

## 1.2 THE WHAT, WHY, WHEN, AND HOW OF REGULATION

I Keep six honest serving-men  
 (They taught me all I knew);  
 Their names are What and Why and When  
 And How and Where and Who.  
 I send them over land and sea,  
 I send them east and west;  
 But after they have worked for me,  
 I give them all a rest.<sup>3</sup>

Many rationales exist for the regulation of the nonprofit sector. These rationales range from the state's concern to protect public trust and confidence in the integrity of the nonprofit sector, thereby encouraging greater giving, to safeguarding public funds devoted to charitable ends from fraudulent abuse. The government may also have an altogether less noble vested interest either in controlling

<sup>3</sup> Rudyard Kipling, "The Elephant's Child," in Rudyard Kipling, *Just So Stories* (New York: Country Life Press, 1902).

altruism and philanthropy, so as to minimize nonprofit challenge or dissent, or in ensuring alignment of sector activities with the state's objectives, and preventing the nonprofit sector (or elements of it) from joining forces with those who would challenge government. On a more neutral note, a government may wish to regulate to prevent unfair competition arising vis-à-vis charities and other sectors, to better protect vulnerable beneficiaries or to incentivize public giving toward certain causes, whether through fiscal policy or otherwise.

Achievement of these broad aims may be brought about through regulation that takes either an enabling form (thereby creating a supportive framework for the encouragement of a flourishing sector) or one that is more prescriptive in nature (limiting access to the benefits typically associated with public benefit or charitable status, or restricting the rights of such qualifying entities to engage in certain activities). Within this context, the common regulatory themes that emerge tend to focus on the need to promote better accountability and transparency among nonprofit organizations, the requirement to introduce or strengthen public benefit requirements, the push toward better nonprofit governance, the importance of enhanced fiscal regulation ensuring both transparency of funding sources and ultimate destination of donated funds, the creation of restrictions on and procedures for formation and registration of organizations, discretionary powers accorded to government, restrictions on activities, and other matters of regulation.

Common approaches to the meeting of these aims include the development of comprehensive statutory frameworks for nonprofits, the creation of new or the improvement of existing national registers and the strengthening of state agency supervisory and oversight powers, and detailed regulatory provisions for certain types of nonprofit organizations, such as foundations or advocacy groups. Yet regulation in these areas does not fall solely within the domain of the state; increasingly, the nonprofit sector has entered this sphere of oversight in its own right, seeking to create and impose its own self-regulatory norms or to work in conjunction with the state in the achievement of a co-supervisory regime. The "how" of regulation thus ranges widely from statutory legislation, both primary and secondary, overseen by an appointed regulator(s) or courts, to sector codes of conduct or certification and accreditation schemes, aimed at preempting or supplementing statutory regulation, to the encouragement of certain types of nonprofit conduct, the enforcement of which is not left entirely to the sector but depends rather on the cooperation of the state and nonprofit sector working together and without either of which the regime is simply unenforceable.

Important questions remain to be explored: How do regulation and self-regulation interact? How does that shifting mix between regulatory forms

impact the nonprofit sector, and particular parts of it, such as advocacy organizations, community-based groups, foundations, and others? Is there an ideal mix of statutory and nonstatutory regulation for the best governance of nonprofit organizations, and, if so, what is it? How suitable are these different forms of regulation for the specific requirements of the nonprofit sector and its regulatory goals? What burdens does each regime option impose on the nonprofit sector and on government?

The questions posed here may be seen as broad regulatory governance questions common to both regulatory governance and multilevel governance models. Regulatory governance theorists are concerned with understanding the forms that regulation takes and the processes of delegation to independent regulatory institutions. Multilevel governance theorists, on the other hand, focus on arrangements “for making binding decisions that engage a multiplicity of politically independent but otherwise interdependent actors – private and public – at different levels of territorial aggregation in more or less continuous negotiation/deliberation/implementation, and that [do] not assign exclusive policy competence or assert a stable hierarchy of political authority to any of these levels.”<sup>4</sup> The interplay of both delegation of statutory control and the renegotiation of policy competences between state and nonstate actors has a particular resonance within the nonprofit sphere, particularly in light of new public management, making the sector an ideal forum in which to explore modern and emerging regulatory perspectives on government and nongovernment regulation.

In recent years, similarities between emerging nonprofit regulation regimes have led us to question whether regulatory patterns spread between countries, and, if so, what the underlying conditions are that encourage this regulatory domino effect. The first decade of this century saw a strong preference for the creation or enhancement of charity regulatory frameworks based on overarching regulator-based supervisory control, evidenced in New Zealand (2005), Scotland (2005), England and Wales (2006), Northern Ireland (2008), Ecuador (2008), and Ireland (2009). And this has been the long-term trend in other countries we discuss in this volume, including China, Vietnam, and parts of Latin America and Africa. The mid-2000s also saw the parallel emergence of greater community-based self-regulation or co-regulation in the different jurisdictions of the United Kingdom (2007), Ireland (2008), and Uganda (2006). Both patterns have been at work in China and Israel, first strong state regulation to the virtual exclusion of

<sup>4</sup> Philippe Schmitter, “Neo-Functionalism,” in *European Integration Theory*, ed. Antje Wiener and Thomas Diez (Oxford: Oxford University Press, 2004), 49.

self-regulation, and now some development of the self-regulatory side, though state regulation certainly remains dominant.

The second decade of the millennium continues to witness ongoing regulatory change. As some countries press ahead with new central regulators (Australia, Ireland, Scotland), others are retrenching by either dismantling independent regulators in favor of direct state control (New Zealand) or moving more toward the empowerment of the nonprofit sector to oversee itself through a variety of mechanisms framed as co-regulation partnerships (England and Wales). There continue to be longstanding patterns of dual and more control mechanisms over nonprofits, both regulatory and self-regulatory (as is prevalent in the United States, Brazil, and Ecuador), while there is also evidence of the emergence of nascent self-regulatory, transparency, and accountability frameworks (though not independent regulators) in state-dominated frameworks (the “long game” in China and Vietnam) and the emergence of competing self-regulatory initiatives in state-centered federal frameworks (India and Mexico). While government macro policies may recognize the vital role played by civil society organizations in advancing government policy, the realpolitik of state acceptance of broadened civil organization activities as well as their accrued public power can lead to increased tension between the state and the nonprofit sector (Israel, Ecuador).

The regulatory environment in a given jurisdiction is often shaped by the broader relationship that exists between the state and nonprofit sector. Thus, to understand the former, we may need to first categorize or classify the context in which nonprofits engage with the state. In terms of engagement, a number of options exist ranging from collaboration at one end of the spectrum to cooption and challenge at the other.

### 1.2.1 *Collaborative Relationships*

The types of problems that form the subject of government/nonprofit sector collaboration are often noncontractible and seemingly intractable. These problems, to which there are no easy answers, require policy solutions to issues concerning social exclusion, long-term unemployment, environmental concerns, and development aid assistance, to name a few. In some instances, it is difficult to formulate exactly what the policy question should be. Unlike commercial collaborative ventures in which the parties will agree on the intended product and decide clear performance indicators to guide their collaboration, the areas giving rise to nonprofit sector/government collaboration are often cases in which a government does not have a clear image of the specifics of the policy or project that it wants to produce. Government knows,

however, that it cannot find the answer on its own. This type of collaboration, in the words of Linden, requires “lateral and systemic thinking. It requires more partnerships, fewer rigid boundaries. It supports knowledge sharing, not knowledge hoarding ... [and] leaders who connect their work to a higher purpose.”<sup>5</sup> To this extent, partnership represents the new language of public governance.<sup>6</sup>

The reasons for government and nonprofit sector collaboration are as varied as they are complex. There are, for instance, moral motivations on both sides. Claims of democratic deficit – that is, the worrying trend of citizen detachment from involvement in and responsibility for government – confront governments in many societies.<sup>7</sup> In an effort to address this trend, governments see collaboration with nonprofit organizations as a way to bridge the perceived gap between bureaucracy and citizens.<sup>8</sup> By engaging with nonprofit organizations and utilizing their expertise on the ground, government reaches out to citizens active at local level, offering citizens a chance to be part of a policy solution and thereby reaffirming and encouraging active citizenship.<sup>9</sup> The nonprofit sector’s moral motivation lies in the desire to make policy outcomes more responsive to nonmajoritarian concerns regarding, for example, social exclusion, by representing voices that may not be otherwise adequately heard in the policy process.

There are also pragmatic motivations driving state/sector collaboration. Governments have a financial incentive to achieve greater efficiency. Modern welfare states face difficulties in satisfying the heterogeneous needs of citizens by themselves and have sought out nonprofit organizations, among others, to meet the demand. Two different rationales exist for this growing interdependence between state and sector.

<sup>5</sup> Russell M. Linden, *Working across Boundaries: Making Collaboration Work in Government and Nonprofit Organizations* (San Francisco, CA: Jossey-Bass, 2002), 238.

<sup>6</sup> Helen Sullivan and Chris Skelcher, *Working across Boundaries: Collaboration in Public Services* (Basingstoke: Palgrave Macmillan, 2002).

<sup>7</sup> See, for example, Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1994); Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000); Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Simon & Schuster, 1995).

<sup>8</sup> Putnam, *Bowling Alone*, n. 7, 49.

<sup>9</sup> David Hulme and Michael Edwards, “NGOs, States and Donors: An Overview,” in *NGOs, States and Donors: Too Close for Comfort*, ed. David Hulme and Michael Edwards (Basingstoke: Palgrave Macmillan, 1997), 6 (noting that “under the New Policy Agenda NGOs ... are seen as vehicles for ‘democratisation’ and essential components of a thriving ‘civil society’, which in turn are seen as essential to the success of the Agenda’s economic dimension”).

On the one hand, the contraction of the welfare state and the increased emphasis on value for money leads government to contract out more public service provision to the most competitive tender, which in many (though not all) cases results in a nonprofit partner providing the service.<sup>10</sup> Collaboration thus starts out as a cost-effective strategy that along the way is transformed into an ideology. Lowering expectations regarding new state funding, while encouraging greater cost-effectiveness and productivity (for the state, but not always for the collaborative partner delivering the service), the state encourages an ideology of “doing more with less.” Nonprofit organizations’ familiarity with this ideology makes them ideal partners when the question turns from delivery to the design of such services.<sup>11</sup> Examples abound in Australia, England and Wales, Brazil, and Israel.

On the other hand, those who view the welfare state as expanding rather than contracting argue that the state needs to make strategic alliances with the nonprofit sector in order to meet the expanded commitments of the welfare state. In other words, collaboration is necessary because of the state’s lack of capacity to meet sufficiently the individualistic and growing needs of citizens.<sup>12</sup> Given the finite level of resources, nonprofit sector incentives for collaboration lie in the possibility of influencing the future direction of public funding and being on the inside of policy delivery.

Strategically, the opportunity to contract around local elected representatives, although unlikely to be expressed as an explicit motivation for collaboration by either side, may appeal implicitly to both the nonprofit sector and central government when local government is seen as part of the policy problem. Working with nonprofit organizations allows a state to decentralize

<sup>10</sup> Lester M. Salamon, *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State* (Baltimore, MD: Johns Hopkins University Press, 1995), 198 (observing that in America, “[g]overnment-nonprofit cooperation took shape not as a matter of conscious policy but as an adaptation to powerful political realities – the political strength of the voluntary sector, the widespread public hostility to governmental bureaucracy, and the general tepidness of public support for welfare services”). See also Steven Rathgeb Smith and Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* (Cambridge, MA: Harvard University Press, 1993).

<sup>11</sup> See Arthur T. Himmelman, “On the Theory and Practice of Transformational Collaboration: From Social Service to Social Justice,” in *Creating Collaborative Advantage*, ed. Chris Huxham (London: Sage, 1996), 19–44.

<sup>12</sup> Claire F. Ullman, *The Welfare State’s Other Crisis: Explaining the New Partnership between Nonprofit Organizations and the State in France* (Bloomington: Indiana University Press, 1998).



programs even in areas where historically local government is weak, thereby empowering local communities.<sup>13</sup>

In the search for policy solutions, a further motivation for government to collaborate with the nonprofit sector stems from the knowledge that many policy problems are perennial and intractable. Involving the nonprofit sector in the policy process enables the government to share the burden of policy failure with the sector, even when the policy issue itself relates to the very regulation of the sector. The inability of a nonprofit organization to distance itself sufficiently from results it helped to broker can effectively silence stakeholder criticism,<sup>14</sup> a result often incorrectly classified as government cooption. As the state and sector begin to explore the contours of policy collaboration in many areas including nonprofit regulation, questions arise as to the efficacy of such hybrid regulation; the ground rules for its effective operation, including who creates them; and the relative challenges in ensuring collaborative regulation does not blur into cooption.

In some states, there is another dimension to this collaborative process. Here the state understands the substantive value of working with the nonprofit sector, but also understands that in working with and delegating provision of services to nonprofits, nonprofits are also guided (through fiscal and contractual mechanisms) toward provision of social services and away from advocacy. Thus “cooption” as a government strategy fits well with the other, and perhaps more public, rationales for state/nonprofit collaboration.

### 1.2.2 *Relationships of Cooption*

At the opposite end of the spectrum to collaboration, state cooption of the nonprofit sector is often driven by funding or political dependencies on government. Often the underdeveloped state of the sector, particularly in, but not limited to, post-transitional democracies means that the sector is both fragmented and fragile, lacking in autonomy and heavily dependent on the

<sup>13</sup> See Kathleen McLaughlin and Stephen Osborne, “A One-Way Street or Two-Way Traffic? Can Public-Private Partnerships Impact on the Policy-Making Process?,” in *Public-Private Partnerships: Theory and Practice in an International Perspective*, ed. Stephen Osborne (London: Routledge, 2000), 326.

<sup>14</sup> This outcome is particularly evident in nonprofit involvement in social partnership in Ireland: Oonagh B. Breen, *Crossing Borders: Comparative Perspectives on the Legal Regulation of Charities and the Role of State-Nonprofit Partnership in Public Policy Development* (New Haven, CT: Yale Law School, 2006), arguing that social partnership was used to implicate community/voluntary players who might otherwise have dissented. See also Martha S. Feldman and Anne M. Khademian, “Managing for Inclusion: Balancing Control and Participation,” *International Public Management Journal* 3(2) (2000): 149–167.

state, or sometimes international donors, for funding support whether by way of grant aid or contract. This, in turn, affects the nature of the relationship between state and sector and the form of regulation imposed. In the same way that one may question whether collaboration between state and nonprofit sector inevitably leads to cooption in all but the most robust regimes, one might equally ask whether in developing economies cooption of the nonprofit sector should always be viewed negatively as undermining the sector, or whether it might be viewed as an intermediate step in the development of the nonprofit sector and an incremental step toward future state/sector collaboration. The chapters on East Africa and Latin America (most notably the case studies of Ecuador and Brazil) provide excellent case studies and insights into these questions. Equally, the chapters considering Ireland, Israel, China, and Malawi point to the difficulties that a weak nonprofit sector infrastructure will face when it engages in self-regulation or co-regulation with government. Chronic lack of resources, leading to the sector's overreliance on the state for funding support not just for programmatic purposes but also for engagement in self-regulatory regimes, can seriously undermine the efficacy of the latter regimes at worst or, at best, skew the focus of the regulatory purpose. And yet the case studies of Ireland and Israel hold out some hope that from (repeated) lessons of failure can spring potential for renewed future engagement that seeks to succeed more on the collaborative than the cooption end of the scale. The case studies from China and Vietnam also indicate that, when viewed as a long process of strengthening the role of transparency and quality within the nonprofit sector, even the most nascent, episodic self-regulatory chapters can play a role in building the nonprofit sector over decades.

### 1.2.3 *Challenging Relationships*

Not all state/sector relationships fall into the mutual (collaborative) or forced (coopted) cooperation category. There are times when both sides view the other with distrust and as a threat to its authority (in the case of government) or its existence (in the case of nonprofits). The distrust may have historical roots (as in the case of Mexican government's distrust of the Church transferring in more modern times to distrust of secular nonprofit organizations engaged in the same poverty relief area as previous religious institutions) or it may be more cultural (as in Ecuador where public mistrust of government extends to public mistrust of nonprofit organizations as corrupt extensions of government). Or it may be directly political, in states that have known strong government, such as China and Vietnam, and where the government seeks to channel and mold