

The Regulation of Organised Civil Society

by Jonathan Garton

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THE DUST JACKET OF PROFESSOR GARTON'S BOOK IS GRACED BY A REPRODUCTION of a lovely 1852 watercolour, *Alms House*, by Charles Hopton. It is an idyllic scene, evoking noble altruism. But it is ironic. While the book is a study of regulating organized civil society, the idea that civil society requires rules and governing seems oddly out of place.

The book started life as a doctoral dissertation and reveals both the benefit and burden of that pedigree.¹ On the one hand, it is remarkably comprehensive. It asks penetrating questions about the place of charities in civil society. On the other hand, the work is less detailed about the means to design and implement a regulatory regime for charities and civil society.

There has been a great deal written in the last 30 years on organized civil society – the loose collection of groups operating outside the public sector, the private market, and the family. Despite the degree of study in the area, there is a dearth of jurisprudential analysis. This is so even though a number of places (including England, Ireland, New Zealand, Northern Ireland, and Scotland) have recently made major reforms to their respective regulatory frameworks, with a particular focus on the charitable sector.

Jonathan Garton's book, *The Regulation of Organised Civil Society*, is written to fill the gap. It is intended to be a principled examination of when it is appropriate to regulate and how that regulation might be best accomplished. The book is organized to integrate civil society theory and regulation theory and to answer four broad questions. In doing so, the author puts forward a rudimentary theory of regulation for organized civil society, based on the questions

- a) whether the activities undertaken by civil society organizations are distinct from the activities undertaken by the state or the market, either because they are pursued in unique ways, or because they produce unique outcomes;
- b) if so, whether it is justifiable to regulate organized civil society activities in a sector-specific way;
- c) if it is, whether the peculiar characteristics of these activities make one type of regulation more appropriate than another; and
- d) whether it is appropriate to distinguish between charities and other civil society organizations for regulatory purposes.

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The book canvasses legal history, substantive law, and sociology in an attempt to provide answers as it reviews the components of civil society. The aim is to determine what regime of legal regulation would be appropriate. But as a number of commentators have pointed out, there is a great deal missing in the theoretical and analytical basis of the concept of civil society itself. In the words of another reviewer, “[t]his meticulous attempt to define civil society in order to consider its relationship to legality ultimately reveals its inadequacies as a fig leaf” (Dingwall, 2010).

Like Robert Dingwall, the author of that comment, I read this book with increasing fascination. The extensive details of the history of the law and the structural characteristics of civil society – particularly charities – constitute a useful compendium to have on hand. But the intriguing feature of the book and why it should be widely read and considered is for the questions it should provoke.

We live in a world that presumes regulation is a good thing and something that is well understood. Most people assume there is always a clear, causal link between a topic and the regulatory devices proposed to achieve desired outcomes regarding that subject. This seems especially so in non-market contexts.² But across the philosophic spectrum this connection has only limited consideration. When we regulate, does it work?³ This question of linking regulation to intended outcome is increasingly the focus of academic concern, with significant implications for practitioners and parliamentarians.⁴

One consequential and intriguing issue with the regulation of civil society and charities stems from the historic presumption of the need to maintain organizational independence from the state. This raises Weber’s central insight: a controlling characteristic of modern organizational life is that bureaucracy is so efficient and powerful a means of control that once established, the momentum of bureaucratization seems irreversible and independence a chimera. This is especially the case where public policy is concerned with state-sanctioned public benefit.

Yet there is little examination of this tendency operating in the regulatory sphere.⁵ After asking, “Does it work?” when we regulate, we also need to ask, “What do we limit or prevent?” Another important query in an era where accountability is the unexamined litmus test of regulatory initiative is, “What are the costs of compliance?”⁶

Regulation – to be or not to be – is all the rage. Some would argue, in this context, it is another instance of market mechanisms inappropriately applied in non-market contexts.⁷ Not having a clear sense whether, if when we regulate, it works, or knowing what alternatives are foreclosed by doing so, is a high stakes game. A lesson from genetic science is instructive here. Like the fear of a homogeneous and thereby a fragile gene pool, the result of reducing the number and the complexity of life forms, so too the reduction of organizational forms is much more dangerous than a mere hardening of attitudes. Civil society and charities are characterized, in part, by rough edges and uncertainty and struggles to achieve and to know. That foment speaks to who we might become.

Professor Garton’s book should be widely read, discussed, and debated, both for what it says and what it should prompt us to ask.

NOTES

1. An earlier and possibly more accessible summary of Professor Garton's work can be found in his article "The Legal Definition of Charity and the Regulation of Civil Society" (2005).
2. An early first foray into looking at this question is John Davis' Presidential Address to the Royal Anthropological Institute, "Administering Creativity" (1999).
3. An interesting consideration is an essay by Jenkins (1980), see pp. xiv and 390. See also Surowiecki (2010).
4. See for example: Mayer and Wilson (2010).
5. For an overview that begins to examine this issue see DiMaggio and (1983) and Leiter (2005).
6. See on this point Goldscheid (2006). As to accountability, the recent experience with Bill C-470 is an object lesson. Consider the paper: "Why is performance-based accountability so popular in theory and difficult in practice?" (Thomas, 2007).
7. A recent review essay in the *New York Review of Books* starts with the following admonition:

The British universities, Oxford and Cambridge included, are under siege from a system of state control that is undermining the one thing upon which their worldwide reputation depends: the calibre of their scholarship. The theories and practices that are driving this assault are mostly American in origin, conceived in American business schools and management consulting firms. ... They are then sold to clients such as the UK government and its bureaucracies, including the universities. This alliance between the public and private sector has become a threat to academic freedom in the UK, and a warning to the American academy about how its own freedoms can be threatened. (Head, 2011, para. 1)

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