CIVIC ASSOCIATIONS AND THE STATE IN BRAZIL:
SOME RECENT CHANGES IN THE LEGAL FRAMEWORK AND AN AGENDA FOR RESEARCH

Marisa von Bülow* and Rebecca Abers**

bulow@abordo.com.br
abers@zaz.com.br

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*Assistant Professor at the Department of Political Science, University of Brasilia
**Associate Researcher at the Center for Public Policy Research at the University of Brasília
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“Civic associations,” “civil society,” “non-government organizations,” “the third sector,” “associationalism,” “solidary economy.” It has many names and no hard definition. But in the last decade, there has emerged a general consensus in social science and policy making circles that an important space of social organizing exists outside the realms of state and market which have until recently received most of the attention. Civic associations are private in the legal sense of the word but unlike firms, are not driven by the profit motive. Some of them seek to benefit their membership alone. Others have essentially “public” objectives: the improvement of social and economic conditions, the promotion of human rights, environmental protection, democratization, and the like. Though they pride themselves on their independence from the state, like private firms, the way the so-called “third sector” functions in each country depends greatly on both the general legal framework in which they are embedded and on opportunities for receiving financial resources directly or indirectly from government.

This paper examines some very recent changes in Brazilian legislation governing civic associations. In March of 1999, the Brazilian Congress approved legislation that had three objectives. First, it clearly distinguished publicly oriented non-profit organizations, which were labeled Organizations of Civil Society of Public Interest (Organizações da Sociedade Civil de Interesse Público-- OSCIPs) from non-profits that seek to benefit specific groups and set up a public register of them. Second, it defined specific rules of public accounting for formally recognized OSCIPs. Third, it created a new arrangement for the transfer of government funds to the new OSCIPs. This last aspect is considered by many to be the crux of the law, since previously contracts between non-profits and the state were bound by complex bureaucratic rules that severely limited the capacity of non-profits to receive public funds.

At the time of this writing, it is still unclear what the impact of the year-old law will be. Instead of seeking to make a definitive evaluation of the law, therefore, our objective here is to develop an analytic framework for examining it in future research. The following section of the paper presents two groupings of arguments made by political theorists and policy makers for what social contribution civic associations can have and what kinds of state support (if any) they need in order for such a contribution to be effective. The paper then goes on to describe the process of public discussion that occurred around the new Brazilian legislation and

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to examine the law that resulted. Finally, in light of the issues posed both by the more general theoretical and policy literature on civic associations and by those civic groups that participated in formulating the legislation, it puts forth a set of questions that should be asked in future research on the topic in order to evaluate if the changes indeed will help foster the pursuit of “public” goals outside the immediate realm of the state.

I. Arguments for Promoting Civil Society: Two Starting Points

There are two general points of departure in the literature on the “third sector”. On the one hand are arguments for how the transfer of state activities to civic associations will contribute to a broader project of “state reform.” On the other hand are arguments that give value to civil society “for its own sake”: a stronger civil society, rather than a reformed state, is the means to achieve social and political goals. Clearly, these two perspectives have much overlap: both focus on how the “third sector” can contribute to social development. Indeed, many authors seem to fall into both camps. Nevertheless, it is worth dividing the literature into visions that focus on NGOs as part of a broader project of state reform and “civil society-centered” visions, that see the third sector as an “autonomous” space worth promoting for its own sake.

State Reform Visions

Public debate on social policy in the United States has been dominated in the 1990s by a discourse against “big spending” government and a variety of proposals for how to reduce government inefficiency and bureaucracy. One of the solutions that politicians on all sides have appealed to is that more social policy should be carried out by non-profits organizations. For example, the Republican candidate for the 2000 presidential elections, George W. Bush, has called for promoting charitable giving to finance “little armies of compassion.” At the same time, Democratic nominee Al Gore has emphasized the need for promoting “partnership” between government and faith-based organizations to solve social problems. (Koppell, 1999). In practice, the United States government has been channeling large amounts of money to non-profits since the 1960s in order to carry out local level social policy. More recently, these practices have been bolstered by the “reinventing government movement” that has called for a general restructuring of government activities to increase effectiveness, efficiency, flexibility and innovativeness through administrative decentralization, reduction of “red-tape” and incentives for “customer satisfaction” in the provision of state services.²

All of these ideas have been very influential in Brazil. During Fernando Henrique Cardosos’ first term in office (1995-1998), a new Ministry of Administration and State Reform was created under the wing of Luiz Carlos

Bresser Pereira, the ideologue of the official version of “State Reform” in Brazil (Bresser Pereira, 1997). The *Plano Diretor de Reforma do Estado* laid out what changes should be made and declared that modern states engage in four kinds of activities: 1) the strategic center of the state, where laws and public policies are made (courts, high executive, legislature, etc); 2) activities which are “exclusive” to the state, since they guarantee that laws and public policies are enforced and financed (armed forces, taxation, regulating agencies, social security, etc); 3) services that are not exclusive to the state, since they could be and often are simultaneously provided by the private sector and non-profits (social services; garbage collection; research; etc); 4) production of goods and services for the market (state owned firms). For the first and second categories, the Plan follows much of the rhetoric of the American “reinventing government” movement about improving state performance. For the third and fourth categories, the emphasis is on reducing and even eliminating the governments’ direct role in providing “non-exclusive” goods and services.

The clear assumption here is that non-state organizations -- whether firms or non-profits -- are more flexible, innovative, and less costly than the state itself, and should therefore carry out all of those “public” activities that are not “exclusive” to the state. With respect to market production, the proposal is outright privatization of the state companies. With respect to the provision of social services, research, environmental protection, and the like, the Reform proposes the handing over control to formally private organizations that have “public” objectives.

These proposals have echoed the “international development literature” (largely produced by the agencies that finance much of social policy in Brazil) which also given much service in recent years to the idea that NGOs are better than states at conducting social policy. At least at the level of discourse, international agencies have suggested that NGOs have a greater capacity to reach the poor, more sympathy for them, more versatility and less bureaucracy than central governments, which are largely seen to be inefficient, stagnant, and ridden with corruption (Tendler, 1995:158). In 1997, for example, the World Bank produced a “Handbook on Good Practices for Laws Relating to Non-Governmental Organizations” urging countries to approve legislation that would strengthen and regulate NGOs (World Bank, 1997).

Some authors have questioned the extent to which simply handing over state resources to non-profits will effectively improve the way state resources are used in social policy. In the first place, some have argued that in order to take advantage of the benefits of NGOs, substantial changes within the state itself need to occur. Subjecting NGOs to the logic of state control, for example requiring the sort of “process-based” accountability and rigid spending controls typical of government bureaucracies can limit the capacity of NGOs to be innovative. (Cunill Grau, 1996:131)

In the second place, without some transparent process governing how funds are transferred, a system of funding NGOs for social work can become a new arena for clientelism, one of the vices of “unreformed” states. Mechanisms of accountability and transparency must be developed to insure that the transfer of
state funds does not reproduce clientelism. For some, transparency is not enough: mechanisms of social control of NGO funding must be developed to ensure that the process actually benefits the population as a whole, rather than the localized clientele of specific organizations (Cunill Grau, 1996; Santos, 1998).

Third, some authors have questioned whether NGOs are really “inherently” better at promoting social policy than the state. Tendler (1996:159) notes NGOs are few in number and tend to choose specific clientele, rather than the general population. They usually lack technical expertise, have high unit costs and poor administrative capacities. They also usually lack clear mechanisms of accountability to the communities they are supposed to support. These problems with the ways that NGOs function are rarely taken into consideration by those proponents of “state reform” that propose redirecting state social policy making towards the non-profit sector. While there has been much attention to the idea that non-profits can be cover-ups for diverting public money to private activities, little service has been given by state reformers to the idea that they may not be efficient or cost-effective ways to allocate social policy resources.

Civil Society for its Own Sake

While the above discussions focus on how channeling state resources to civic organizations can contribute to a broader process of state reform, much of the literature on civic organizations see them having quite different objectives than the state, indeed often emerging in opposition to it. In their volume on Civil Society, for example, Cohen and Arato (1992) examine the emergence of associationalism in Poland, France, Germany and Latin America. In each case, they argue, civic groups emerged specifically to distinguish themselves from unresponsive or overly bureaucratic states. Even where states are formally democratic, civic groups outside the state are privileged spaces of public deliberation where ordinary people can directly experience citizenship. Other authors have also focussed on the idea that civic groups are spaces where relationships of solidarity, community identity, reciprocity, and the like are most likely to develop. In this sense, while the “state reform” perspective largely sees civic associations as “more effective” substitutes for the state, the “civil society” perspective, focuses on the potential of civil society as a space of its own, where the empowerment of communities occurs through alternative forms of public debate, economic development and social action.

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3 From a different perspective (which is very much influenced by the North American context) Cohen and Rogers (1995) argue that associations can indeed be more efficient and effective at certain kinds of activities than the state, but that they also tend to represent very specific groups. Channelling resources to them, they suggest, can create problems for equality and can promote factionalism. They suggest that government support of associations focus on those organizations that have broad constituencies rather than those that represent specific “factions” of society.

4 For example, an analysis by the Lawyers Committee for Human Rights (1997) of a draft of the World Bank “Handbook” (1997) proposing legislation governing the third sector notes that the document presumes that one of main problem with the third sector is corruption and therefore proposes an “over-regulation” of civic associations.
Much of early literature on social movements in Brazil and Latin America envisioned civil society as the only potential space where democracy could grow in hopelessly authoritarian contexts (Sader, 1988; Telles, 1987; Avritzer, 1997). As democratization has progressed, however, most authors have come to see civil society as a distinct but complementary social arena, where a different, but equally necessary, kind of democracy can flourish. Based on reciprocity, egalitarianism, communicative ethics and solidarity, these authors suggest, civil society promotes democratic values and democratic practice in ways that formal democracy cannot. For example, following Cohen and Arato’s framework, Avritzer and Olvera (1992), civic associations overtly seek to distinguish themselves from the state. However, unlike revolutionary theories of civil society, their goal is not to replace the state but to build an alternative sphere of public deliberation which is just as important for democratization as is the consolidation of competitive elections and other aspects of formal democracy.

Just as civil society provides an alternative political forum that follows different rules from those of the state, many authors have argued that civic organizations can be the source of a different sort of economic development from that promoted by the market and by the majority of government economic policies. Once again, key words here are solidarity, community, equality, and reciprocity. Friedmann and Salguero, for example, wrote of the “barrio economy”. They saw great promise in the rise of local economic activities carried out by community based organizations in poor neighborhoods where, according to the authors reciprocity and solidarity, rather than the profit motive, reign: community-based industries transportation networks, popular kitchens, and the like. The tone of the argument is distinctly oppositional, challenging the value of mainstream economic policies for poor neighborhoods and noting that “some barrios, such as in Chile, have even become a kind of ‘liberated’ zone where nonconventional resources based on mutual aid, dialogue, and donation of labor time are mobilized” (1988:115). Similarly, Coraggio (1994) has written of a “popular economy” in poor Latin American neighborhoods, a largely informal set of economic activities with a strong community base and much distance from the globalizing world of capitalist enterprise.

Although they are quick to distinguish civil society from the state and the market, most of these authors notes that a stronger civil society makes a difference for how states and markets work. For these authors, civil society is a privileged space of “empowerment”. Individuals who on their own have few resources to compete in the market world and little to expect from state policies are able to join up with others and develop collective capacities. They learn not only how to “solve their problems on their own”, but also how to participate in the state and market more effectively. As Wolfe (1991:6) puts it, civil society is “the arena in which people develop the capacities that will enable them to play a role in the economic and political choices that their societies will have to make”. Or as Putnam (1993) has argued, strong civic networks help promote the consolidation of responsive, democratic states.

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Though civil society is thus seen as to interact with the state and the market, much of the literature has focussed on its distinct and independent character. The greatest danger for civic groups, the literature suggests, is be to be “co-opted” by the state. Where groups feel obliged to please state actors, their critical capacity to say and do things that the state does not, and upon which much of the legitimacy of civil society stands, is jeopardized. Clearly, depending financially on state resources severely increases the risk of such loss of autonomy. Studies of government funding of non-profits in the United States, for example, have shown that the goals of civic organizations tend to change when they begin to receive state funding. Often they abandon their “advocacy” character and become “service providers” limiting their actions to those that are “fundable,” that is that attend state objectives rather than those of the organizations themselves (Lipsky and Smith 1989; Gitell, 1983; Cunill Grau, 1996).

Yet in recent years some of the same authors as those cited above have noted the difficulty for civic organizations that represent the poor to survive financially either by depending on the contributions of their own (poor) constituencies or on resources obtained by a small number of international foundations. Some authors have, for example, argued that the development of strong networks of civic ties often occurs precisely because of state actions that helped create an “enabling environment” (Fox, 1996; Abers, 2000) for civic associationalism. What might such an enabling environment involve? Most generally, the state can create beneficial tax and labor laws that help organizations that function without profit to survive financially and to receive donations. More specifically, the state can join up in partnerships with civic organizations in its policy making efforts in ways that encourage civic activism. Usually, this means calling for the participation of civic groups in making public decisions and executing policy actions. Although by definition, such efforts tend to begin with governments defining their policy goals, often partnerships with the state can encourage such civic groups to solidify and grow by giving incentives to civic groups to mobilize. A variety of case studies in Latin America have shown that such partnerships can have positive results for strengthening civil society, especially where reformist groups had decision-making control in the government (Abers, 2000; Ostrom 1996; Watson 1995; Fox, 1996; Tendler, 1996).

This proposal is likely to make “civil society centered” thinkers somewhat uncomfortable, since in most cases those designing policy are not concerned with promoting autonomous civil society which is, by definition, comprised of a vast spectrum of civic groups defending a variety of interests and constituencies. Ultimately, who decides what types of activities should be targeted for state-society partnerships? In this light, as Santos (1998:16-17) warns us, without a broader democratization of both the state and of civil society, increased opportunities for channeling social policy funding to non-profits might result in an “antidemocratic promiscuity between the state and the third sector, in which .. each one use the other as an alibi release itself of responsibility to its respective constituents, citizens in the case of the state and the members or communities in the case of the third sector.”
If on the one hand this means that civic groups that engage in partnerships with the state might tend to lose their “representative character” when they do not depend financially on their constituencies, it also means that social policies that involve channeling resources to non-profits may only reproduce clientelism and cronyism typical of Latin American public resource allocation if no democratization of how those decisions are made occurs.

Ultimately then, the “civil society-centered” perspective brings up many of the same questions about how to best channel funds to civic organizations that we saw in the previous section. Like the state-centered perspective, some civil-society centered theorists (and many activists themselves) argue that civic associations should obtain financial and legal support from the state, but for different reasons. While the first group focuses on such support as a way to improve the effectiveness of social policy, the second group sees it as a way to make the “alternative” civil society project, which has solidarity and reciprocity at its foundations, viable.

Even so, because of the problems related to the autonomy of civic associations, the second group tends to be much less optimistic about the potential of such arrangements when they involve direct government partnerships with non-profits. Both groups are concerned with developing transparent controls over how such partnerships evolve to avoid clientelism, but the first perspective focuses on clientelism as a vice of an inefficient state while the second sees it as a manner of privileging some civic organizations at the expense of others. The ‘civil society” perspective gives particular emphasis to the need to give society as much control as possible over how social policies are designed, and, hence, over what kinds of “partnerships” between state and civic associations are made. This would help avoid co-optation by insuring at least that funding decisions are not a matter of bureaucratic discretion but the result of a broader democratic process of decision-making over which, presumably, civic associations themselves would have a great deal of influence.

II. The Proposal to Change the Third Sector Legal Framework in Brazil

The Participants

In July of 1997, the Brazilian government initiated a public discussion involving NGOs, government representatives and a number of specially invited participants to identify the principal legal difficulties faced by non-profit organizations and to gather suggestions for how to change that legislation. The process brought together groups that fell into both schools of thought analyzed in the last section. The debates were spearheaded by Comunidade Solidária, an innovative program within the federal government whose general goal is to promote social policies for the poorest sectors of the Brazilian population. They were part of a broader project financed by the World Bank with the objective of strengthening civic associations in Brazil. Both Comunidade Solidária and the World Bank could be characterized as organizations with a “state reform”
approach, focussing on the potential role that civic organizations could play in improving state capacity to implement public policies.

Although the initiative came from the government, the proposal to change the legal framework governing the third sector should be analyzed in light of changes occurring within Brazilian civil society itself during the last twenty-five years. In the 1970s, at the height of the dictatorship, a boom of new forms of collective action appeared on the political scene, principally in the form of urban social movements that proliferated in the favelas and the “new unionism” that emerged in industrial areas. These movements rallied around historic demands, such as employment, health, transportation, and wage increases, but they also challenged traditional forms of organizing in their critique of populism and their claim to autonomy with respect to the state. The negative experience with authoritarianism gave these organizations common ground: a severe critique of the state. In contrast to the previous period, the new organizations no longer sought to gain the support of the state, as had the official labor unions or the clientelist neighborhood associations of the populist period. Indeed, most of them sought to distance themselves from the government in every way, shape or form (Sader, 1988; Telles, 1987). Many of today’s NGOs had their origin in this period. Some were created to give technical support and advise to social movements. Others were founded by movement activists themselves over the course of the 1980s (Fernandes, 1994:66).

With the transition to democracy, the rejection of any kind of connection to the state began to be replaced by demands for greater influence in the design, implementation and evaluation of public policies and for more transparency in the use of public resources. This does not mean that the question of autonomy was no longer important, but that civic groups began to take advantage of new channels of participation and of partnership with the state at all levels.

It is extremely difficult to obtain data about these partnerships, which range from participation on formal decision-making councils to receiving government funds to conduct research, give policy advice and actually implement projects. It is certain, however, that some sectors of the federal government have conducted a great deal of policy design and implementation through NGOs. For example, AIDS policy in Brazil has been largely implemented through hundreds of NGOs. The Ministry of Environment also implements many projects, especially in the Amazon, with the participation of civic groups. It is in this context that the debate emerged about the need to promote legislation that would both facilitate contracting between civic groups and the government and make those relationships more transparent.

Compared to most legislation proposed by the federal government, the debates around revising the legislation governing the third sector were unusually participatory, open to the contributions of a diversity of organizations. Over time, representatives of nearly 100 NGOs participated in debates that were largely open to any group interested in joining up, although only a few NGOs participated in detailed negotiations (see below) and representatives of the Legislature and the Judiciary as well as political parties were notably absent altogether.
The Comunidade Solidária representatives who were organizing the debates proposed that the negotiations occur on the basis of consensus. The first step was an invitation sent out by Comunidade Solidária to all federal Ministries and other government agencies, to the members of Comunidade Solidária’s Council\(^6\) and to 32 representatives of non-profit organizations selected *ad hoc* by the government, ranging from social NGOs with their roots in urban social movements to charities and religious organizations. These “interlocutors”, as the organizers of the process called them, were asked to list the main problems in current legislation governing the third sector. Twenty-seven people responded, mostly NGO representatives, describing the problems their institutions faced. A Working Group out of Comunidade Solidária put together a document that listed the 63 problems cited and the proposals suggested for solving them. They also wrote a “base document” which listed the main “consensuses” they believed could be detected from the responses. These documents were sent back out to the list of “interlocutors” who in turn made amendments to the “base document” which was the basis of discussions at a meeting to which all the “interlocutors” were invited in October of 1997. Then, a much smaller working group divided into two “sub-groups” elaborated specific proposals to address the problems cited.

**Identifying the Problems**

From early on, it was clear that both the Comunidade Solidária Council and the participating non-profit organizations agreed about what kind of organizations they wanted to deal with. One of the first documents produced by the Comunidade Solidária Council declared that:

“The third sector included a diversity of organizations: NGOs, foundations, institutes, community associations, cultural associations, philanthropic institutions, etc. ... by definition they are voluntarily constituted by groups of citizens in Civil Society, legally private and without profit. They are autonomous with respect to the state and independent from political parties and organizations of corporate character, **and have public ends**” (emphasis in original) (Conselho da Comunidade Solidaria, 1997a:8)\(^7\)

Since the third sector only included, by this definition, organizations with public ends, organizations that were considered “corporatist” or representing class interests – labor unions and business organizations – were automatically excluded from the debates, along with those seen to be representing only part of society – e.g. political parties. This composition was never questioned by those who were invited to participate.

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\(^6\) The Comunidade Solidária program is headed by the nation’s First Lady, Ruth Cardoso and is formed by the Federal Ministers, selected representatives of NGOs, and a number of musical and sports celebrities.

\(^7\) This distinction resembles the one used by the World Bank (1997) between “public benefit organizations” and “mutual benefit organizations”.
An analysis of the list of problems cited and of the Base Document suggests that there were six general problems of concern to the participants with respect to the existing legislation governing non-profit organizations.

1. The existing legislation benefited only a minority of NGOs. As a whole, non-profits were treated almost exactly the same as private companies, except of course, in that they were not required to pay taxes on income, since they did not, by definition, generate profit from the revenues they acquired. The only organizations applicable for special treatment were those that were able to navigate enormous bureaucratic and sometimes political obstacles to obtain a Certificate of Public Utility which is given at the discretion of the President of the Republic. This Certificate exempts organizations from social security and other labor related payments, allows the organizations to receive federal funding and allows them to receive tax deductible donations. Another beneficial certificate provided for by the existing legislation is for officially recognized Philanthropic Institutions, which provides most of the same benefits as the Public Utility Certificate but also exempts organizations from import tariffs. Only organizations working in the areas of education and social assistance can apply for this certificate. In practice both of these beneficial titles are available to only a small minority of non-profit organizations.

2. Excessive bureaucracy. Even if they did not apply for the above certificates, each non-profit was required to sign up with a long list of official registries. Like businesses, non-profits must be registered as legal entities with the Civil Register (Cartório de Registro Civil das Pessoas Jurídicas), must be listed with the General Register of Tax Contributers (Cadastro Geral de Contribuintes, CGC) in order to emit invoices, and must be registered with the Treasury Secretariats of both the state and municipality in which they are located. Some of these steps entailed particularly onerous demands, such as the need to hire a lawyer to register the organization in the Civil Register. Since most of these registries required the documents to be obtained each time the certificate was renewed, and since they worked on different schedules, NGOs often found themselves immersed year round in the effort to produce the legally required paperwork, a task that was extremely time consuming for organizations with limited administrative staff. For those seeking Public Utility status, the bureaucratic requirements were so complicated as to prohibitive for many smaller organizations.

3. “Inappropriateness” of the existing forms of transferring government resources to non-profits. The respondents emphatically criticized the existing mechanisms for transferring resources between the state and the third sector. The legislation provided for two mechanisms. “Contracts”, the conventional mode through which the government transferred resources to private companies. Principally used to purchase equipment and services and to pay for public works, government contracts must result from competitive biddings (licitações) for any payment over a relatively small sum. The law governing licitações was recently revised, creating much stricter rules and ensuring that the lowest bidder always receive the contract.
For many NGO representatives, this tightly controlled (and relatively transparent) form of transferring public funds to the private sector was not appropriate for the non-profits, who did not have the extra resources to take part in numerous bidding competitions. In addition, the nature of the work carried out by non-profits, generally involving creative public policy design rather than simply carrying out easily definable routine tasks or supplying generic goods. Often, defining the activities to be carried out (the terms of reference) is very specific to each organization and is part and parcel of the work non-profits engage in—but according to the law, the private organization that defines the terms of reference can not participate in the licitação for carrying out the work itself.

Because of these limitations, most often the Brazilian government has used another mechanism for transferring funds to non-profits, the convênio, a mechanism which was originally designed to govern resource transfers between different government agencies. The legislation governing convênios, however, has its own problems. In particular, government money transferred through convênios cannot be used to pay salaries or rent, which are presumed to be covered by the receiving agency’s budget. In sum, the contract mechanism was created for transfers between state and private firms while the convênio was created for transfers between different government agencies. Neither was appropriate for transfers between the state and non-profits.

4. Lack of transparency in government-third sector relations. This problem appeared on two fronts. First, obtaining the beneficial certificate of Public Utility depends largely on the administrative discretion of the public agency charged with evaluating each organization. Ultimately, many organizations were able to obtain the certificate even though they were not effectively non-profit organizations, such as many health insurance companies. Second, the NGOs complained that there were no formal selection criteria governing which organizations benefited from convênios with government agencies. Each agency was free to make convênios with the organizations it saw fit.

5. Tax and Labor Costs. The respondents complained of the enormous difficulties in gaining the right to receive tax deductible donations. Even those organizations that had obtained the required certificate of Public Utility suffered losses after recent legislation that reduced the amount that businesses and private individuals could deduct. Respondents also complained about the rigid labor laws which allow for little flexibility in hiring and firing and require employers to pay enormous amounts to social security and other federal workers’ funds. Even having volunteers was difficult since the law prohibited unpaid labor. Many of these problems are faced by all legal Brazilian businesses, but non-profits faced particularly complicated problems since often the additional costs involved in, for example, firing an ineffective worker, could not be covered by previously defined project budgets. In addition, some international funders do not allow their projects to cover tax payments.

6. Lack of public accountability and transparency of non-profits more generally (with or without government funding). Respondents noted that non-profits have a bad reputation in Brazil, spoiled by occasional media coverage of
organizations working as covers for illicit activities, tax evasion, diversion of public
money, or for-profit activities. Though most noted that the vast majority of NGOs
are indeed “legitimate”, a large portion of “honest” NGOs could use some help
improving their financial accounting capacity. Respondents also argued that some
system should exist to publicize information about the workings of organizations
that claim to have “public” objectives, such as a public accreditation system that
identified organizations that have good financial and administrative practices.
Respondents also complained about a lack of systematic information on non-profits
more generally, including basic data on how many exist in each field and what
kinds of activities they carry out.

**Elaborating “Practical” Solutions**

These above cited issues were the starting point in a year long process of
negotiations in which dozens of NGOs participated at some point or another, but
which were dominated by a small number of NGO representatives who had the
energy and interest to participate more intensely. After the October 1997 general
meeting in which the above problems were discussed, a Working Group was
created to develop more detailed proposals.

A first sub-group worked on initial versions of legislation that would create a
broader definition of “publicly oriented non-profits”, and defining a special kind of
contract between government and those organizations. This group was
coordinated by the Comunidade Solidária representatives and by the Casa Civil
(Ministry of Internal Affairs) and included representatives of the Ministries of
Administration and State Reform, of Health, Social Security, Treasury, Planning
and Budgeting and of the National Council of Social Assistance. Three NGO
representatives participated, including a network of institutes and foundations
(GIFE – Grupo de Institutos, Fundações e Empresas), a nationwide network of
environmental and development NGOs (Forum de ONGs de Meio Ambiente e
Desenvolvimento Sustentável) and a social NGO located in Brasília (Fundação
Grupo Esquel Brasil). Another nationwide NGO network, ABONG (Associação
Brasileira de Organizações Não Governamentais) was assigned to the group but
did not participate intensely. Over the months, these participants worked mainly by
telephone and email to develop the proposals, meeting several times. The resulting
proposals were circulated to the remaining “interlocutors” at the end of the April of
1998.

The group members decided, largely for the sake of pragmatism, to focus on
two of the specific issues. First, they would create a new official definition of
“publicly oriented non-profits” that would distinguish non-profits with broad “public”
ojectives from a variety of other associations – such as choral societies,
cooperatives and soccer teams -- that sought to benefit only their specific
memberships. The objective would to be to create a public certificate that would be
applicable to a much broader group of organizations than the current “Public Utility”
and “Philanthropic Institution” certificates. They would also seek to insure that the
process of obtaining the certificate was more transparent and less bureaucratic than the existing procedures.

In the second place, they would focus on creating a new mechanism for transferring government resources to such “publicly oriented non-profits” that would be more appropriate for the type of work these organizations engage in than either the “contract” or the convênio. The objective would be to achieve a sort of middle ground between the two, not requiring the open public bidding of the contract, but still creating mechanisms of accountability and transparency so as to avoid that only those organizations that had “connections” in government would have access. At the same time, the new mechanism would seek to be much more flexible in terms of what kinds of spending it allowed for than either of the existing mechanisms, so as to promote the kinds of innovative, creative activities in which non-profits engage.

While these proposals were being elaborated by the first sub-group, a second sub-group was assigned to work on proposals for changing tax and labor laws and for making donations to non-profits tax deductible. Ultimately, however, these issues were determined to be “too controversial”. On the one hand, there were serious constitutional obstacles in creating special labor laws for non-profits. On the other hand, there was emphatic opposition within the government to changes in tax laws, especially from the Federal Revenue Agency (Receita Federal). Even among NGOs there was opposition to the proposals to give non-profit tax and social security exemptions, since many of the NGOs saw this as countering the workers rights the redistributive capacity of government that they fought for. Most (but not all) NGOs supported the idea that donations could be tax-deductible. But this idea also brought on stark opposition from sectors government concerned with tax intake and budgeting.

Alternative suggestions, such as the creation of a government fund for supporting NGOs were discussed, but ultimately, were not included in the proposed legislation. The NGOs that followed the process agreed to postpone discussions of labor and tax laws in favor of focussing on issues that were easier to address in legal terms (since they would not require changes in the Constitution) and would not bring on strong opposition from powerful sectors of the government. The Comunidade Solidária representatives promised to pursue these issues further in the future.8

With respect to the two issues that became the focus of discussions – the new certificate for publicly oriented non-profits and the new type of contract – an initial debate had to do with whether the new legislation should seek to replace the variety of existing certificates and registers or whether it should simply create a new type of official certification that would function parallel to existing mechanisms. The Working Group participants ultimately argued in favor of the second hypothesis, based on the experience of similar legislation in the United States,

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8 Some of the other issues brought up by the “interlocutors” were partially resolved during the negotiation period by the approval of new legislation in Congress. For example, a new law passed legalizing voluntary labor while another one outlawed the concession of Public Utility to health care plans and private hospitals and schools.
where in the sixties a new law governing non-profits was enacted that did not replace the existing legislation, but added to it. In the long run, the older certification processes became obsolete as non-profits found it more beneficial to adhere to the newer rules and thus gain access to government funding that was not available to organizations that had followed the older rules. The hope was that in the Brazilian case, the fact that only organizations certified under the new legislation would be allowed to receive federal resources under the new rules would lead most organizations that had previous benefited from the earlier laws to “migrate to the new legislation”. In the meantime, not eliminating the older certificates would avoid provoking the opposition of powerful non-profits that benefited from them.

The proposal that resulted from the discussion carefully defined the type of organization that could be considered what was ultimately labeled as an Organização da Sociedade Civil de Interesse Público (Civil Society Organization of Public Interest, OSCIP), created a new type of contract, called the Termo de Parceria (Term of Partnership) and instituted a number of mechanisms to monitor how state resources were used by the OSCIPs. The law allowed those organizations that currently have certificates of Public Utility and Philanthropic Institutions to also become OSCIPs, though after two years, they would have to opt for one or another status. But unlike those previous certificates, a much broader range of organizations could become OSCIP. The applicable fields included: social work; culture; historical and artistic preservation; free education; free health; food security; environmental protection and sustainable development; the promotion of voluntary work; economic and social development; poverty alleviation; non-profit experiments in new systems of income generation and credit provision; promoting established rights and constructing new rights; free legal assistance; promoting ethics, peace, citizenship, and human rights along with other universal values; research; developing alternative technologies; and producing and developing scientific information and knowledge. The proposed law excluded, on the other hand, commercial organizations, labor unions and other class organizations, religious institutions, political parties, groups whose activities benefit only their members, health plans, private schools and hospitals that charge for their services, cooperatives and public foundations. The wording of each of these terms were the subject of intensive debate and discussion.

One of the objectives of the legislation was to make it relatively easy to obtain the certificate, requiring only the presentation of a few documents and the organization’s bylaws, which would have to include statements showing that the organization fit into one of the above categories. The bylaws would also have to show that the organization followed “principles of legality, impersonal administration, morality, public-ness (publicidade), thrift (economicidade) and efficiency”. The bylaws would also have to mention the existence of transparent administrative practices, a fiscal council, adherence to the official “Brazilian Accounting Norms”, and the regular publication of a report on activities and finances of the institution, including proof that social security and other similar payments were in order. To receive certification, the organizations would not have to prove that they actually complied with these conditions in practice, but the
intentions to do so would have to be stated in the bylaws. If the bylaws were in accordance with these obligations, a technical office in the Ministry of Justice would supply the certificate, with little bureaucracy involved. According to the law, the only three reasons for rejection could be given by the Ministry: that the organization did not fit into any of the fields of activity covered by the law, that the bylaws not contain the necessary statements, or that the required paperwork was not completed.

The Termo de Parceria made the use of public funds much more flexible than the convênio mechanism, while not requiring the government to hold licitações. There were much fewer limitations to how public resources could be spent. Institutions could, for example use government funds to pay for payroll and other institutional costs. Rather than strictly control spending, as did the convênios or require open bidding competitions, as did the traditional contract, the proposed legislation included a number of alternative mechanisms to insure that public funds were used responsibly.

The law determined that a specific work plan be included in the Termo de Parceria, in addition to a list of expected results. The Termos de Parceria would also have to define a set objective criteria for evaluating those results and would have to include detailed budgets. Besides, the law required regular reporting on achieved results and financial accounting. Evaluation Commissions created by the funding agency would approve the contract and monitor its implementation. Depending on the area of action, existing government advisory boards or councils would also be consulted about the contracts and would be partially responsible for monitoring results. External audits would be required for projects involving large amounts of money and in the case of the inappropriate use of public funds, the directors of the organizations would be held accountable and provisions were included that punished them harshly. More generally, all OSCIPs would be required to make public the Termos de Parcerias signed; information about the organizations finances would have to be publicly available; specific accounting procedures would have to be followed; and if the organization should lose its qualification, any patrimony acquired with public funds would have to be transferred to another OSCIP.

The proposal was sent to the House of Federal Deputies in July of 1998. Over the course of the following months, some of the details of the law were discussed and a new version, with a number of specific changes was presented to the full house for vote. On March 3, 1999, the proposal was unanimously approved by the House and then approved a few days later by the Senate. It was signed into law by the President on the 23rd of March. In June of the same year, a presidential decree regulated the law, giving clearer definition to the activities covered by the law and specifying procedures involved in signing, implementing and monitoring the Termos de Parceria.

The negotiations between Comunidade Solidária and the NGOs and in congress, the legislation generated a great deal of consensus. This unanimity attests to the pragmatic attitude of those negotiating the proposal, who, effectively, decided to avoid contentious issues and insure that no group was directly harmed
by the legislation. Since the law did not eliminate existing certificates from which many of the most powerful non-profits benefited, there was general support for the law within the non-profit sector. Since the law did not touch the tax or social security system, the government sectors that would have vetoed changes affecting the federal budget were also satisfied.

It is somewhat surprising that some sectors within the state, such as public employees opposed to efforts to transfer government responsibilities to the private sector, did not voice a stronger opposition to the law. Indeed, during the congressional negotiations, the largest left-wing party in Brazil, the Partido dos Trabalhadores (PT), one of the main constituencies of which are the public employees unions, initially came out against the law. The PT viewed the proposed legislation as part of a general “neoliberal” effort to reduce the sphere of state activity. It also questioned the circumvention of strict rules for licitações, which were seen as important controls against favoritism and clientelism. While the proposal was being negotiated in congress, however, the party reversed its position, largely because many NGOs with strong ties to the left supported the proposal and because it was satisfied with the alternative mechanisms of insuring transparency and accountability required by the legislation.

III. An Initial Evaluation and an Agenda for Research.

In general, it is too early to make a definitive (or even an initial) evaluation of the legislation, since to date, no Termo de Parceria has been signed at any level of government. This suggests that a first concern for evaluation is whether or not the law will “take off” at all. At the moment, very few non-profits have actually been accredited as OSCIPS. According to the Ministry of Justice, by February of this year, 148 organizations had sought accreditation but only fourteen had actually received the certificate. The vast majority (106) were rejected because they had not sufficiently completed the paperwork required. Another group included thirty-eight organizations that were rejected because their bylaws did not contain the statements about the objectives of the organization that fit into the list of acceptable activities or about the decision-making and conflict resolution methods required by the law. Only four failed to fit into the list of activities considered to be “public”.

This may mean that one of the main objectives of the law, to make accreditation less bureaucratic and more accessible to organizations lacking in strong administration capacities, has not been achieved, at least at first glance, although most would agree that the rules are simpler than those for obtaining Public Utility certificates. If only large, well organized NGOs with previous institutional funding that allows for contracting administrative personnel are able to pass through the bureaucracy of accreditation, a basic objective of the project will have been missed. The first fourteen accredited OSCIPs seem disparate in terms of size and sphere of activity, ranging from a large food security NGO to an association of inventors. This suggests that the thematic spectrum of groups
practically benefited by the new law will indeed be large. An analysis of why most organizations have difficulty completing the paperwork will therefore be crucial for understanding the potential of the legislation and what actions could be made to streamline the accreditation process.

If the law does indeed lead to a substantial growth in transfers of state resources to civic associations, we would suggest that a deeper reflection into impact of the legislation return to the two perspectives on civil society cited at the beginning of this paper.

The new legislation will be an interesting opportunity to test some of the assumptions of the state reform perspective. If substantial numbers of “publicly oriented” NGOs begin to enter into partnerships with the state, are the results indeed more effective, more innovative, more appropriate, and more cost-effective social policy? As noted earlier, some critics of the state-reform view suggest that dramatic changes in how government bureaucracies function would be necessary for such transfers to be effective. Does the kind of spending flexibility and results-based management required by the law give government better capacity to take advantage of the “hidden potential” of NGOs?

Other critics have questioned whether such NGOs have as much hidden potential as they touted. NGOs are fragmented and particularistic, not necessarily cost effective or administratively competent. Will the experience of transferring funds to them through the OSCIP law prove these critics wrong? Can state agencies organize resource transfer in ways that insure that a coherent social-policy program is carried out? Will the OSCIP law, in the end, stimulate the creation of NGOs that can fill the gaps, so that a wide range of publics and needs are addressed? How does the tradeoff between innovativeness and coherent policy-making work out in different state agencies and at different levels of government? Do NGOs actually reduce costs, or do they lack economies of scale that are necessary for carrying out certain types of activities? What groups in society benefit from the flexible creativity of NGO activities and what groups are left aside?

It will also be important to explore the new mechanisms of transparency and accountability included in the law. Do they sufficiently insure that transfers to NGOs are not governed by patronage? Is the end result more efficient, streamlined social policy, or does the law simply become a new route to favoritism and uncontrolled public spending?

Finally, the apparent contradictions between some of these goals should be the subject of future research. The new legislation seeks to make financial transfers between state and civic associations at the same time more flexible and more accountable. The law sought to make contracts with the government less constrained by bureaucratic requirements by eliminating restrictions on spending and by giving priority to a “results based” rather than the detailed procedural accounting required by the convênio system. But in the name of accountability and transparency, a long list of accounting and reporting measures is required by the law. It is still unclear, whether or not these measures will become new sources of
bureaucratic discretion or of onerous red-tape as receiving NGOs seek to satisfy the demands of a variety of auditors and fiscal commissions.

An interesting aspect of this uncomfortable co-existence of flexibilization and new mechanisms of accountability has to do with the rules governing how government agencies choose which civic associations to sign *Termos de Parceria’s* with. Some of the participants proposed that *Termos de Parceria* should only be made on the basis of an open competitive process (*concurso*) in which a call for proposals would be publicly disseminated and in which the project approved would be made by a committee based on criteria established by the funding agency. This issue was not touched on in the law itself, but was left for subsequent regulation. In the end, the Presidential Decree regulating the legislation stated that the agency “could” use concursos to decide which organizations would receive public funds, apparently thus allowing them to not use them should they see fit. In an interview, Augusto de Franco, the representative of Comunidade Solidária who coordinated the process, declared that he expected concursos to be used more often than not, since they make spending more transparent. But this expectation seems overly optimistic, given the fact that many government agencies supported the bill precisely because of the spending flexibility it would allow.

The second group of theorists of civil society focus on the importance of fostering a strong civil society, for its own sake, which even if working in partnership with government and receiving financial support from it, remains “autonomous”. As noted above, this autonomy seems crucial for insuring that civic associations retain their special character: an alternative space of public deliberation where solidarity and cooperation are the motives for action, rather than self-interest. Should large numbers of civic associations sign *Termos de Parceria* with the government, future research should examine whether or not this process affects the “independent” character of the organizations. As noted earlier, some studies have shown that in the U.S. the greater opportunities to receive state contracts has caused non-profits to change their objectives in favor of those issues of greatest concern to state policy makers. The potential financial stability non-profits gain with the new law might come at a price.

More generally, however, it is still not clear that the law will actually promote the widespread financial stability and expansion of civic associations at all, whether or not such expansion occurs at the expense of autonomy. It is quite possible that only a restricted group of organizations will practically benefit from the law. The new legislation is open to a much broader spectrum of associations than the previous legislation that focussed mainly on health, education and social assistance and that created enormous bureaucratic and political obstacles to obtaining certification. This is certainly an advance. However, it should not be forgotten that the main benefit of gaining credentials as an OSCIP is the possibility of more flexible contracting with the state and in this respect there is no clear guarantee within the law that all potentially certifiable non-profits will actually benefit.

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9 The *concurso* is much looser than the *licitação*, or bidding competition, which is tightly controlled by law and requires the agency to select largely according to price criteria.
benefit. The approved legislation did not include mechanisms of social control of resource transfer to OSCIPs, beyond the stipulation that existing advisory boards, some of which include civil society representatives, be consulted about the contracts. Most of the initial proposals that would have benefited all OSCIPs, such as tax breaks, changes in the labor laws, and government sponsored funds, were excluded from the legislation.

These lacunas reflect the practical limitations faced by the formulators of the legislation, who largely agreed to avoid more complex and controversial issues in favor of getting “something” passed in congress. But at first glance at least, the end results seems to have favored the concerns of the “state reform” perspective over that of the “civil society for its own sake” perspective. Practically the only clear result of the law is that governments will be able to transfer resources to civic organizations in a much more flexible manner than in the past, giving them much more liberty to experiment with policy alternatives. Certainly, some civic associations will benefit from this, but which ones will carry out which activities will depend on the particular goals and interests of each government agency. Meanwhile, important issues, such as insuring that the broad spectrum of NGOs potentially included in the law actually benefit from it are not clearly resolved.
References


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