

Ostromian Logic Applied to Civil Society Organizations and the Rules That Shape Them

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This chapter applies the Institutional Analysis and Development (IAD) Framework, conceived by Nobel Laureate Elinor Ostrom in 1990, to the institutional arrangements that structure and organize the operating environments for civil society organizations (CSOs). We begin by defining what is meant by “civil society” and “CSOs,” highlighting their essential attributes, followed by a discussion of the importance of the legal and regulatory frameworks that underlie the existence and operation of CSOs. We then briefly review Garrett Hardin’s “Tragedy of the Commons” thesis before discussing the role that CSOs can play in preventing such “tragedies” from emerging in the first place. After presenting the types of rules that inform every IAD action situation and applying them to the existing research on CSOs, we conclude by reconceptualizing CSO regulatory regimes through the lens of Ostrom’s IAD framework and analysis.

DEFINING CIVIL SOCIETY & CSOS

“Civil society,” considered the “invisible subcontinent on the landscape of contemporary society,”¹ is an amorphous term defined in a dizzying number of ways by a multitude of organizations, scholars, lawyers, and civil society practitioners.² It is used to refer to individual activists, broad social movements, non-governmental organizations, religious organizations, cultural and sports clubs, philanthropic foundations, political parties, the media, and community groups. We define CSOs as nongovernmental, voluntarily formed, organizational entities that exist for purposes other than political control, economic profit, or crime.³ This definition situates CSOs as entities within civil society but differentiates them from other actors such as amorphous social movements, political parties, or terrorist groups. CSOs, under our definition, include both formal organizations that have officially registered with the state, and therefore receive certain tax privileges and are held to certain legal obligations, as well as informal groups of individuals who have no formal relationship with, or recognition by, the state. CSOs include established transnational organizations with well-known names, multi-million-dollar budgets,

¹ L. M. Salamon & H. K. Anheier, “The Civil Society Sector,” *Society*, 34, 2 (1997), 60–65, 60–61.

² A. C. Vakil, “Confronting the Classification Problem: Toward a Taxonomy of NGOs,” *World Development*, 25, 12 (1997), 2057–2070; J. N. Brass et al., “NGOs and International Development: A Review of Thirty-five Years of Scholarship,” *World Development*, 112 (2018), 136–149.

³ J. Wolff & A. E. Poppe, *From Closing Space to Contested Spaces: Re-assessing Current Conflicts over International Civil Society Support* (Frankfurt, 2015); N. Ferguson, *The Great Degeneration: How Institutions Decay and Economies Die* (London: Penguin Books, 2012), 15–16.

and satellite offices spread throughout the globe, such as the International Committee of the Red Cross, the Open Society Foundations, and Doctors Without Borders. But they also include neighborhood book clubs, local gardening groups, and other “amateurs without borders,”⁴ or no-name groups consisting of a few individuals working on shoestring budgets with the help of volunteers to advance their particular agenda. CSOs include “do-good” organizations, such as Human Rights Watch, Amnesty International, Save the Children, and the Girls Scouts, as well as organizations with what many would consider malicious agendas, such as the Ku Klux Klan, the Alt-Right, and the United Aryan Front.⁵ Perhaps the only thing that unites this exceedingly diverse array of organizations is, at least according to our definition, what they are not: *nongovernmental* and *not-for-profit*.⁶

Conventional approaches lead us to believe that all CSOs are non-exclusive, open to all, and non-discriminatory in their distribution of goods and services. But this does not accurately reflect reality, which is more nuanced and complicated than that kind of dichotomous thinking. CSOs vary considerably, with many having exclusive or status-based membership requirements and others being open to a broader, albeit still defined, swath of the population. The current literature on CSOs does not lend itself to this type of nuanced conceptualization of CSOs. However, the Ostromian paradigm, which has never been applied to CSOs, usefully provides a framework to differentiate among the multitude of CSOs that exist. More specifically, Ostromian logic allows us to differentiate goods, in this case CSOs, according to their varying levels of excludability and subtractability. Excludability refers to the ability to restrict which individuals can use and enjoy a particular good,⁷ while subtractability is the extent to which an individual’s use of a collectively shared good subtracts from the availability of that good for consumption by others.⁸

Combinations of excludability and subtractability, according to Ostrom and her colleagues, produce four well-known types of goods: public, private, toll, and common pool.⁹ Public and toll goods have characteristically low subtractability: one person’s use of the good doesn’t reduce or limit another’s enjoyment of that good. Private goods and common-pool resources (CPRs), on the other hand, have high subtractability: one individual’s use of the good takes away from others’ enjoyment and use of that good. Toll goods (such as country clubs) and private goods (like consumer products) are easily excludable. In contrast, CPRs (like forests and water basins) and public goods (like community parks) are generally nonexcludable and accessible to all.

⁴ A. Schnable, *Amateurs Without Borders: The Aspirations and Limits of Global Compassion* (Oakland: University of California Press, 2021).

⁵ S. Chambers & J. Kopstein, “Bad Civil Society,” *Political Theory*, 29, 6 (2001), 837–865, 842. state that “vibrant and well-organized civil society . . . gave birth to and nurtured the Nazi movement.”

⁶ A. Klotz, “Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences,” *European Journal of International Relations*, 8, 1 (2002), 49–76; T. Risse-Kappen, *Bringing Transnational Relations Back In: Non-state Actors, Domestic Structures, and International Institutions* (Cambridge: Cambridge University Press, 1995), 3.

⁷ V. Ostrom & E. Ostrom, “Public Goods and Public Choices,” in M. D. McGinnis (ed.), *Polycentricity and Local Public Economies: Readings from the Workshop in Political Theory and Policy Analysis* (Originally printed in *In Alternatives for Delivering Public Services. Toward Improved Performance*, ed. E. S. Savas. Boulder, CO: Westview Press, 7–49 edition., Ann Arbor: University of Michigan Press, 1977 [1999]), 76–77; E. Ostrom, *Understanding Institutional Diversity* (Princeton: Princeton University Press, 2005), 23.

⁸ M. D. McGinnis, “An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework,” *Policy Studies Journal*, 39, 1 (2011), 169–183, 174; Ostrom, *Understanding Institutional Diversity*, 23.

⁹ E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

While Ostromian logic is useful for classifying specific types of CSOs, none of its categories captures the experiential good that many individuals enjoy simply by participating in CSOs. For this, we develop a new concept, which we refer to simply as an *associational good*. Individuals use and enjoy “associational goods” when they voluntarily assemble, in the absence of profit-motivations or governmental coercion, to engage in a shared activity, cause, or agenda. Examples of associational goods, which are in part tangible and in part intangible, and which are rooted in practices and behaviors rather than discrete resources or physical property, include: celebrating a shared faith, enjoying shared activities, joining a professional society or association, protesting against social injustice, and advocating for a particular policy proposal. For most CSOs, the associational good they offer has low subtractability, and enjoyment by one generally does not subtract from the enjoyment of another. Excludability, by contrast, can and does vary.

Using Ostromian logic, we can differentiate CSOs according to who can participate in them. Some CSOs are like public goods or CPRs because it is difficult to exclude individuals from associating with them. Animal welfare societies, human rights groups, religious congregations, and museums all have a limited ability or interest in restricting which individuals can and cannot participate in them. Of course, excludability is not a discrete category but rather a continuum. Museums may suggest a “recommended donation” or require a purchased ticket, but they cannot easily exclude who chooses to purchase a ticket; the same with religious groups and many advocacy organizations, which are motivated to have as many congregants or participants as possible but who implicitly exclude those who don’t believe in their cause. Like goods, CSOs can be differentiated on the basis of how easily and to what extent they exclude certain groups; CSOs vary wildly on this front. CSOs with high levels of excludability are exclusive associations, which typically use a variety of means to exclude individuals from associating, including membership dues (e.g., private clubs and fraternal societies), educational degrees (e.g., the American Bar Association), aptitude tests (e.g., MENSA), or public service (e.g., Veterans of Foreign Wars).

We can further differentiate CSOs based on what they produce and for whom (Figure 15.1). We begin with inclusive CSOs that have little ability to restrict access to which individuals receive their services, which we refer to as *Public Goods CSOs* (“PG CSOs”). This kind of CSO is open to an expansive portion of the population and produces goods or offers services with low subtractability, or goods and services that, when consumed or utilized, do not exclude from the enjoyment or use by others. Examples of PG CSOs include legal clinics that collect and publish free online repositories of legal information, environmental organizations that voluntarily build rain gardens in parks, and democracy-promoting groups that host voter education booths at farmers markets. The services and goods produced by PG CSOs are offered freely to all without exclusion.

Common Pool Resources CSOs (CPR CSOs) organize staff, volunteers, and resources to produce nonexcludable, but subtractable goods, such as meals or health services. They share all but one key element with PG CSOs: these organizations produce goods or offer services that are in limited supply. When one individual consumes the good they offer or accepts their services, that consumption subtracts from the use of that good or service by others. CPR CSOs include food banks that offer a limited number of meals each week, battered women shelters that offer safe housing on a first come, first serve basis, and clinics that voluntarily provide free medical screenings until their supplies run out.

CSOs that produce goods and services that are excludable but non-subtractable can be categorized as *Toll Goods CSOs* (TG CSOs). This kind of CSO can easily limit access to their goods or services through membership requirements, such as employment status, education level, membership dues, or residency in a particular neighborhood. Once a member, however,

	Low Subtractability	High Subtractability
Excludable	<p><u>Toll Goods CSOs</u></p> <ul style="list-style-type: none"> • Subtractability (low), excludability (high) • Exclusive associational good: easy to exclude voluntary participation—e.g., membership. • CSOs produce low-subtractability goods enjoyed jointly. Goods enjoyed jointly by members—e.g., labor bargaining, job training, club amenities. 	<p><u>Private Goods CSOs</u></p> <ul style="list-style-type: none"> • Subtractability (high), excludability (high) • Exclusive associational good: easy to exclude voluntary participation—e.g., selection criteria. • CSOs produce high-subtractability goods enjoyed privately. Goods are finite and rivalrous—e.g., grants, emergency funds. Access conditional on selection criteria or group membership.
Nonexcludable	<p><u>Public Goods CSOs</u></p> <ul style="list-style-type: none"> • Subtractability (low), excludability (low) • Inclusive associational good: difficult to exclude individuals who wish to participate with the CSO. • CSOs produce low-subtractability goods enjoyed jointly without exclusion—e.g., democracy promotion, mosquito abatement, claims-making advocacy. 	<p><u>Common-pool Resources CSOs</u></p> <ul style="list-style-type: none"> • Subtractability (high), excludability (low) • Inclusive associational good: difficult to exclude individuals who wish to participate with the CSO. • CSOs produce high-subtractability goods enjoyed privately without exclusion. Finite and rivalrous goods provided to those in need—e.g., food kitchens, safe housing, affordable medical services.

Source: Adapted from V. Ostrom and E. Ostrom 1977 [1999] (p. 12) and E. Ostrom 2005 (p. 24)

FIGURE 15.1 Conceptualizing CSOs using an Ostromian Framework¹⁰

all members have exclusive and generally equal access to the goods or services offered by the CSO. Examples of *TG* CSOs include trade unions that negotiate better conditions for their workers, professional associations that conduct membership trainings, and organizations serving economically marginalized groups.

Private Goods CSOs, by contrast, produce organizational outputs that are excludable and subtractable. Funding intermediaries and foundations are one example. Although these CSOs may have a public or charitable mission, they provide grants to specific recipients. Village savings and loan associations are additional examples. These small, self-governed groups collectively save their money so members can access small loans and emergency insurance. Both examples feature limited financial resources that are highly subtractable. We conceptualize private goods CSOs as private and self-governed groups that exist for purposes other than political control or economic profit and produce goods that are both easily excludable and highly subtractable.

Ostrom’s pioneering research allows us to conceptualize CSOs in a more nuanced, complex way, and in a way that better reflects reality. It’s critical that we understand CSOs as the enormously complex and varied array of organizations that they comprise, and resist encapsulating them all in the same altruistic, black and white ways. The typology introduced above can help to break down this conventional and overly simplistic way of understanding CSOs and, more specifically, assist civil society scholars and practitioners to better understand the various ways that CSOs operate and serve their communities.

THE TRAGEDY OF THE COMMONS APPLIED TO CSOS

It was not until the efforts of a team of determined researchers at the Workshop in Political Theory and Policy Analysis at Indiana University, led by Vincent and Elinor Ostrom, that

¹⁰ Figure adapted from Ostrom & Ostrom, “Public Goods and Public Choices,” 12; Ostrom, *Understanding Institutional Diversity*, 24. This figure shows the familiar typology of goods with categories for excludability (y-axis) and subtractability (x-axis). Associational goods discussed in terms of who can participate in the CSO. Four CSO types discussed in terms of the goods and services CSOs produce and for whom.

scholars began to understand that there was a third way to avert the tragedy of the commons. Others in this volume, such as William Blomquist, Andrew P. Follet, Brigham Daniels, and Taylor Petersen, have reviewed the particulars of Hardin's seven-page essay from 1968, "the Tragedy of the Commons," so it will not be reviewed here.¹¹ Elinor Ostrom, whose empirical work on this question led to her becoming the first female noble laureate in economics, closely analyzed hundreds of real-life commons' cases, such as high mountain meadows and forests in Switzerland and Japan, irrigation communities in Spain and the Philippines, fisheries in Turkey, Sri Lanka, and Nova Scotia, and groundwater management systems in California.¹² This bottom-up, evidence-based, globally comparative approach defined and shaped Elinor Ostrom's groundbreaking work, which is outlined in her book, *Governing the Commons*.¹³ In this book, Ostrom empirically confirms that a "third way" to solving commons dilemmas is possible, even if not guaranteed. At the heart of the solution are local voluntary associations of individuals who, in the absence of private ownership or governmental oversight, successfully create, oversee, and enforce their governance regimes and prevent the degradation or over-use of their shared resources. This conclusion – that under the right conditions, which Ostrom carefully defines, self-governance is a viable alternative to government regulation or privatization – was revolutionary for its implications for the widely cited and believed "tragedy of the commons" thesis.

Elinor Ostrom emphasized the value of civil society in her research, even if she didn't use that precise term.¹⁴ She understood civil society to be the domain of society organized through voluntary association, which is what teaches us the art and science of self-governance and what builds, according to Vincent Ostrom (her husband), "political capacity."¹⁵ While CSOs are not always virtuous in their aims or means,¹⁶ research from contexts as diverse as Kenya, Haiti, Peru, and North Korea provide examples of the many valuable and indeed essential roles that CSOs play in societies throughout the globe.¹⁷ Overall, without CSOs, the skills, organizational infrastructure, and motivation necessary for self-governance can quickly vanish.

¹¹ G. Hardin, "The Tragedy of the Commons," *Science*, 162, 3859 (1968), 1243-1248.

¹² E. Ostrom et al., *Rules, Games, and Common-Pool Resources* (Ann Arbor: University of Michigan Press, 1994); E. Ostrom et al., "CPR Coding Manual," Bloomington: Indiana University, Workshop in Political Theory and Policy Analysis. (1989).

¹³ Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*.

¹⁴ "Tocqueville" is the name given to space of highest honor in the Vincent and Elinor Ostrom Workshop in Political Theory and Policy Analysis. The Ostroms' numerous honors and awards adorn the walls of The Tocqueville Room in which large, artisan wooden tables stage public discussions and facilitate intellectual debate. Moreover, the Ostroms founded and funded the Tocqueville Fund for the Study of Human Institutions.

¹⁵ V. Ostrom, *The Intellectual Crisis in American Public Administration* 3rd edition, (Tuscaloosa: University of Alabama Press, 1973 [2008]), 149.

¹⁶ Chambers & Kopstein, "Bad Civil Society"; C. C. Gibson et al., *The Samaritan's Dilemma: The Political Economy of Development Aid* (Oxford: Oxford University Press, 2005); T. T. Schwartz, *Travesty in Haiti: A True Account of Christian Missions, Orphanages, Fraud, Food Aid and Drug Trafficking* BookSurge Publishing, 2008); D. Moyo, *Dead Aid: Why Aid is Not Working and How there is a Better Way for Africa* (New York: Farrar, Straus and Giroux, 2009); N. Banks et al., "NGOs, States, and Donors Revisited: Still Too Close for Comfort?," *World Development*, 66 (2015), 707-718; M. Edwards & D. Hulme, "Too Close for Comfort? The Impact of Official Aid on Non-governmental Organizations," *World Development*, 24, 6 (1996), 961-974; E. S. Clemens, "The Constitution of Citizens: Political Theories of Nonprofit Organizations," in W. W. Powell & R. Steinberg (eds.), *The Nonprofit Sector: A Research Handbook* (2nd edition., New Haven: Yale University Press, 2006), 207-220; D. H. Smith, "Impact of Voluntary Sector on Society," in D. H. Smith (ed.), *Voluntary Action Research* (Lexington, MA: Lexington Books, 1973).

¹⁷ W. Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Nairobi, Kenya: SAREAT, 1999); J. Nelson-Nuñez, "Substitution or Facilitation: Service-Delivery NGOs and Political Engagement in the Peruvian Amazon," *Comparative Political Studies*, 52, 3 (2019), 445-477; J. N. Brass, *Allies or Adversaries? NGOs and the State in Africa* (Cambridge: Cambridge University Press, 2016); A. J. DeMattee, "Was it Worth It? The Effects of ODA, NGOs, and Time on Local Politics in the Haitian State," in S. Haeffele et al. (eds.), *Informing Public Policy: Analyzing Contemporary US and International Policy Issues through the Lens of Market*

APPLYING AN OSTROMIAN LENS TO CSO RESEARCH

Civil society is critical to certain fundamental sociopolitical outcomes, including the emergence, ongoing existence, and robustness of democracy.¹⁸ But civil society is only able to contribute to these outcomes under certain conditions, which are often dictated by their relationship with the state. Scholars have identified a variety of frameworks that describe the state-civil society relationship.¹⁹ The rules contained in a nation's laws, public policies, and regulations are influential, and at times decisive, in determining the nature of the state-CSO relationship. A recent systematic review of over 3,000 peer-reviewed articles shows that for over 35 years, scholars have studied the legal institutions that regulate state-CSO relations.²⁰ Yet, the existing CSO literature continues to lack a coherent or nuanced theory for explaining the differences between the variety of CSO rules seen throughout the globe, the implications of these different rules on CSOs, and more generally, the ways in which a nation's legal regime shapes the ability of CSOs to emerge, operate and flourish.

Interdependence theory, first articulated by civil society expert Lester Salamon in the 1980s, acknowledges the important synergies between the government and CSOs. It predicts that the legal and regulatory regime is what, in large part, determines state-civil society relations. This theory can, in part, help to explain the frequent rule changes impacting CSOs that we've seen across the globe, particularly over the past two decades. However, this theory assumes a well-meaning state and a virtuous nonprofit sector, which limits its application to legal provisions that grant additional autonomy and opportunities for collaboration with CSOs. The adversarial state-CSO relationship, and rules that limit (rather than enhance) CSOs' independence, are blind spots for this otherwise illuminating theory.

A nascent area of research, which casts doubt on the interdependence theory, examines the widespread use of the law as a tool of state repression and control over civil society actors.²¹ Practitioners and scholars call this global trend the "closing" or "shrinking" space phenomenon, which refers to the attempt by governments to constrain the spaces where civil society can

Process Economics (Lanham: Rowman & Littlefield International, 2019), 141–169; S. Snyder, "American Religious NGOs in North Korea: A Paradoxical Relationship," *Ethics & International Affairs*, 21, 4 (2007), 423–430.

¹⁸ A. de Tocqueville, *Democracy in America* English edition, (Indianapolis: Liberty Fund, 1840); R. D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993); F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995); P. D. Aligica, *Public Entrepreneurship, Citizenship, and Self-Governance* (Cambridge: Cambridge University Press, 2018); T. Skocpol & M. P. Fiorina (eds.), *Civic Engagement in American Democracy* (Washington, D.C.: Brookings Institution Press and Russell Sage Foundation, 1999); Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*; Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*; J. J. Linz & A. C. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996).

¹⁹ M. Bratton, "The Politics of Government-NGO Relations in Africa," *World Development*, 17, 4 (1989), 569–587; M. C. Cammett & L. M. MacLean, "The Political Consequences of Non-state Social Welfare: An Analytical Framework," in L. M. MacLean & M. C. Cammett (eds.), *The Politics of Non-state Social Welfare* (Ithaca, NY: Cornell University Press, 2014), 31–56; A. Najam, "The Four C's of Government Third Sector-Government Relations," *Nonprofit Management and Leadership*, 10, 4 (2000), 375–396; D. R. Young, "Alternative Models of Government-Nonprofit Sector Relations: Theoretical and International Perspectives," *Nonprofit and Voluntary Sector Quarterly*, 29, 1 (2000), 49–172.

²⁰ Brass et al., "A Review of Thirty-five Years of NGO Scholarship."

²¹ T. Carothers, "The Backlash Against Democracy Promotion," *Foreign Affairs*, 85, 2 (2006), 55–68; C. Gershman & M. Allen, "The Assault on Democracy Assistance," *Journal of Democracy*, 17, 2 (2006), 36–51; D. Christensen & J. M. Weinstein, "Defunding Dissent: Restrictions on Aid to NGOs," *Journal of Democracy*, 24, 2 (2013), 77–91; C. Swiney, "The Counter-Associational Revolution: The Rise, Spread & Contagion of Restrictive Civil Society Laws in the World's Strongest Democratic States," *Fordham International Law Journal*, 43, 2 (2019), 399–456.

operate freely and autonomously from government control. Unlike the interdependence theory, the closing space theory assumes an adversarial state-CSO relationship and tends to depict the government as the “bad” actor and CSOs as the “good” one. It is, therefore, silent on amicable state-CSO relationships, creating its own set of blind spots.

Neither interdependence theory nor the closing space literature comprehensively explains how and why governments use laws to regulate CSOs and shape different state-CSO relationships. The history, complexity, and dynamism of state-CSO relationships call us to reevaluate existing theories and, perhaps, develop new ones. New theories must consider the nuanced nature of the CSO sector, the goods or services they offer, and the communities or groups they serve (or exclude). In the following section, we attempt to offer a new way to conceive of state-CSO relations, one that is more inclusive, flexible, and agnostic concerning the intentions of the actors involved. This new conceptual framework builds on the Ostromian Institutional Analysis and Development Framework (the IAD Framework) and the new way of conceptualizing CSOs articulated above.

RULES AFFECTING THE IAD ACTION SITUATION

The “action situation” is the centerpiece of the IAD Framework, which explains how self-governance can lead to successful outcomes in the absence of governmental or private sector involvement. The “action situation” represents the arena in which actors interact to produce outcomes.²² Many interactions occur within a single action situation, including the exchange of goods and services, problem-solving and dispute resolution, the domination of one actor over others, and moments of discord.²³ Table 15.1 revisits the seven types of rules that define the IAD action situation. The left column summarizes these several rule types and provides page numbers to Ostrom’s authoritative explanations of each (left column). The right column shows applied examples of exogenous legal rules that affect CSO action situations.

CSOs engage in many “action situations” throughout their existence. One of the earliest is the decision to remain as an informal association or apply for formal registration with the state. The decision to register produces links to another action situation because the registration process generally requires interacting with government actors. The rules of the registration process vary, but the process typically leads to one of two outcomes: a favorable decision that allows the CSO to enjoy the privileges that accompany the legal form or a rejection that the CSO can either accept or appeal. CSO action situations are not limited to interactions with the government. CSOs routinely interact with donors, volunteers, beneficiaries, members, organizational leaders, and other CSOs. These interactions showcase different actors engaging in collective decision-making, problem-solving, and dispute resolutions. Each exchange is a unique CSO “action situation,” and the only shared characteristic is that exogenous rules affect them. Even then, however, CSOs that are different legal types may be subject to a different set of exogenous rules.

CSO REGULATORY REGIMES

Governments use laws to overtly and explicitly communicate the exogenous legal rules that regulate CSOs. We refer to these legal frameworks as *CSO Regulatory Regimes*, which are defined as the various restrictive and permissive legal provisions that constrain and/or incentivize CSOs’ existence

²² McGinnis, “Introduction to IAD,” 173; E. Ostrom, “Beyond Markets and States: Polycentric Governance of Complex Economic Systems,” *The American Economic Review*, 100, 3 (2010), 641–672, 64.

²³ Ostrom, *Understanding Institutional Diversity*, 14.

TABLE 15.1 Rules affecting CSOs' action situations²⁴

Type and function of rule	Type and function of CSO rule
1. <i>Position Rules</i> (p. 190): specify the required positions, how they are filled and replaced, and how many actors can hold each one.	<ul style="list-style-type: none"> Applied Examples: government must <i>create</i> an agency to regulate and monitor CSOs; informal associations <i>must</i> meet clear legal definition to incorporate as an official CSO legal form.
2. <i>Boundary Rules</i> (p. 190; 194-200): how actors are assigned to or leave positions and how one situation links to other situations.	<ul style="list-style-type: none"> Applied Examples: CSOs <i>must</i> have a minimum number of members and/or possess a certain amount of capital before registering; CSOs <i>may</i> appeal regulatory actions to an independent court.
3. <i>Choice Rules</i> (p. 200; 301): specify the duties and actions required of each position.	<ul style="list-style-type: none"> Applied Examples: CSOs <i>must</i> apply for registration with the government; regulator <i>must</i> be overseen by a board of civil society representatives and government officials.
4. <i>Aggregation Rules</i> (p. 202): specify how decisions are made, such as majority or unanimity rules.	<ul style="list-style-type: none"> Applied Examples: CSOs <i>forbidden to</i> appeal a registration denial or deregistration order (nonsymmetric aggregation rule); members <i>must</i> agree on a governing document, commonly known as bylaws, for CSO self-management (symmetric aggregation rule).
5. <i>Information Rules</i> (p. 206): authorize channels of information flow among participants, and obligations, permissions, or prohibition to communicate.	<ul style="list-style-type: none"> Applied Examples: agency <i>may</i> publish certain information about a CSO or seize a CSO's documents without reasonable cause; the agency <i>must</i> have reasonable cause and follow explicit rules when investigating CSOs or conducting inspections of CSO property or premises.
6. <i>Payoff Rules</i> (p. 207): assigns external rewards or sanctions to particular actions.	<ul style="list-style-type: none"> Applied Examples: CSOs <i>must</i> surrender certain organizational assets to the government or its agent upon project completion; taxpayers <i>may</i> take a tax deduction for supporting specific CSOs according to their legal type.
7. <i>Scope Rules</i> (p. 208): specify the outcomes that could be affected.	<ul style="list-style-type: none"> Applied Examples: the government <i>may</i> make new rules regulating CSOs on certain matters; CSOs <i>may</i> adopt standards for self-regulation through umbrella associations.

and operations. As defined, this concept is neutral concerning the degree to which the existing legal and regulatory frameworks in place help or hinder the flourishing of an independence civil society. A CSO regulatory regime affects CSOs' action situations depending on the legal rules they contain and how the government implements and enforces them. The IAD framework identifies seven rule types that externally affect an action situation at any particular time.²⁵

RESTRICTIVE CSO RULES

Though the concerns raised in the "closing space" literature are warranted, this body of work can be unclear regarding how 'restrictions on CSOs,' which include restrictive CSO laws, are

²⁴ The left column contains definitions provided by Ostrom with page numbers identifying relevant sections in *Understanding Institutional Diversity*. Ostrom, "Beyond Markets and States," 652; Ostrom, *Understanding Institutional Diversity*. For other discussions of these rules see Ostrom et al., *Rules, Games, and Common-Pool Resources*, 41-42; McGinnis, "Introduction to IAD," 173-174; D. H. Cole, "Laws, Norms, and the Institutional Analysis and Development Framework," *Journal of Institutional Economics*, 13, 4 (2017), 829-847, 8-10. The right column includes examples of rules that regulate CSOs selected from a review of research studying CSO laws, which uncovered over fifty distinct rules that govern CSO action situations. See A. J. DeMattee, "Toward a Coherent Framework: A Typology and Conceptualization of CSO Regulatory Regimes," *Nonprofit Policy Forum*, 9, 4 (2019), 1-17.

²⁵ Ostrom, *Understanding Institutional Diversity*, 14, 190; Ostrom, "Beyond Markets and States," 652.

defined. A maximalist definition holds that any conceivable new rule (whether embodied in a law, policy or regulation) imposed on CSOs is, by definition, restrictive (irrespective of the contents of the rule). Such a broad definition overlooks the advantages that might accompany certain rules, such as access to tax advantages in exchange for a rule requiring the filing of annual tax returns. What is more, some rules broadly serve the public's collective interest by preventing CSOs from engaging in fraud or criminal misuse of their legal status, rules that apply to all organizational forms. To classify such rules as "restrictive," as certain closing space researchers have done, seems an overuse of that term.²⁶

Restrictive rules, as we define them here, are those that lessen the autonomy of CSOs by imposing restrictions on their ability to form, operate, self-govern, and access resources.²⁷ Restrictive CSO rules reduce the public's trust in CSOs, decrease demand for their goods and services, and ultimately, can shrink the number and diversity of CSOs in a country. The more restrictive the CSO rules, the more control the government has over their emergence, operations, and resources.²⁸ Such legal provisions grant government agencies broad discretion to deny CSO registration or renewal applications²⁹ and empower agencies to interfere with CSOs' internal operations,³⁰ and limit CSOs' access to vital resources, including funding.³¹

PERMISSIVE CSO RULES

The "closing space" phenomenon is a serious matter, but we urge analysts not to forget that permissive legal rules can empower the work and independence of CSOs. Permissive rules, as defined here, are those that *increase* the autonomy of the civil society sector by making it easier for them to form and operate, enlarging their permissible scope of activities, and lessening or

²⁶ A. J. DeMattee, "Covenants, Constitutions, and Distinct Law Types: Investigating Governments' Restrictions on CSOs Using an Institutional Approach," *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations*, 30, 6 (2019), 1229-1255; A. J. DeMattee, "The Institutional Development of CSO Regulatory Regimes in East Africa," *ARNOVA Annual Meeting (November 2019)*. San Diego, CA, 2019. San Diego, CA: 2019. finds different risk factors predict the adoption of different types of restrictive provisions.

²⁷ DeMattee, "Toward a Coherent Framework"; Swiney, "The Counter-Associational Revolution."

²⁸ Wolff & Poppe, *From Closing Space to Contested Spaces*; M. T. Maru, *Legal Frameworks Governing Non-Governmental Organizations in the Horn of Africa* (Kampala, Uganda, 2017); D. Rutzen, "Aid Barriers and the Rise of Philanthropic Protectionism," *International Journal of Not-for-Profit Law*, 17, 1 (2015), 1-42.

²⁹ S. N. Ndegwa, "NGOs and the State in Kenya," *The Two Faces of Civil Society: NGOs and Politics in Africa* (Kumarian Press Books on International Development; West Hartford, CT: Kumarian Press, 1996), 31-54; P. Kameri-Mbote, *The Operational Environment and Constraints for NGOs in Kenya: Strategies for Good Policy and Practice* (Geneva, Switzerland, 2002); M. Tiwana & N. Belay, *Civil Society: The Clampdown is Real - Global Trends 2009-2010* (Washington, D.C., 2010); M. K. Gugerty, "Shifting Patterns of State Regulation and NGO Self-Regulation in Sub-Saharan Africa," in O. B. Breen et al. (eds.), *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector* (Cambridge: Cambridge University Press, 2017), 69-91.

³⁰ Kameri-Mbote, *Operational Environment and Constraints for NGOs in Kenya*; S. H. Mayhew, "Hegemony, Politics and Ideology: The Role of Legislation in NGO-Government Relations in Asia," *The Journal of Development Studies*, 41, 5 (2005), 727-758; Maru, *Legal Frameworks Governing NGOs*.

³¹ T. Hodenfield & C.-M. Pegus, *Mounting Restrictions on Civil Society: The Gap Between Rhetoric and Reality* (Washington, D.C., 2013); S. Appe & M. Marchesini da Costa, "Waves of Nonprofit Regulation and Self-Regulation in Latin America: Evidence and Trends from Brazil and Ecuador," in O. B. Breen et al. (eds.), *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector* (Cambridge: Cambridge University Press, 2017), 154-175; Christensen & Weinstein, "Defunding Dissent"; M. Sidel, "State Regulation and the Emergence of Self-Regulation in the Chinese and Vietnamese Nonprofit and Philanthropic Sectors," in O. B. Breen et al. (eds.), *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector* (Cambridge: Cambridge University Press, 2017), 92-112; M. Reddy, "Do Good Fences Make Good Neighbours? Neighbourhood Effects of Foreign Funding Restrictions to NGOs," *St Antony's International Review*, 13, 2 (2018), 109-141.

eliminating restrictions on access to funding, both domestic and foreign. Permissive CSO laws strengthen society's trust in civil society, tend to increase the supply and diversity of CSOs, and in general, lead to a more robust and vibrant CSO ecosystem.³²

In practice, permissive rules allow CSOs to self-regulate and keep government oversight at an appropriate minimum. These rules require government agencies to make registration and renewal decisions impartially and efficiently and offer appeals in the event of registration rejections or operational obstacles. Permissive rules restrict the involvement of government actors in CSOs' internal affairs to a bare minimum, and place strict limits and apply the full array of due process standards with respect to the government's ability to investigate, inspect, and prosecute CSOs suspected of criminal wrongdoing.

LEGAL VS. WORKING RULES

As many have identified, rules do not enforce themselves, and rules on the books do not always mirror rules in action.³³ Daniel Cole, working in the Ostromian tradition, has offered a three-part typology to explain this important distinction between what he calls "legal rules" (or *de jure* rules) and "working rules" (or *de facto* rules).³⁴ According to Cole, there are three types of rules: Type 1, which include formal legal rules; Type 2, which include legal rules that interact with social norms to produce different working rules; and Type 3, which include those legal rules that bear no apparent relation with *de facto* rules. Cole's typology adds analytical clarity to the research program we propose herein.

Figure 15.2 depicts the degree to which civil liberties promised in constitutions diverge from the on-the-ground realities in countries around the world. Instead of a perfect relationship between *de jure* and *de facto* civil liberties, the scatterplot shows a distribution with just as many countries outperforming their constitutional freedoms as underperforming them. Many countries enjoy similar levels of *de facto* civil liberties despite enjoying different constitutional protections. New Zealand (NEW, top-left), Finland (FIN, top-middle), and Portugal (POR, top-right), for example, have similarly high levels of *de facto* civil liberties despite differences in *de jure* civil liberties. More interestingly, some cases have similar levels of formal rule protections but experience different working rule realities: North Korea (PRK, bottom-middle), Djibouti (DJI, middle), and Sweden (SWD, top-middle) have a similar *de jure* value ($x \approx 0.4$), but each *de facto* value is different: North Korea underperforms its constitutional liberties ($y \approx 0.0$), Djibouti matches its liberties ($y \approx 0.4$), and Sweden overperforms ($y \approx 1.0$).

Returning to Cole's typology, Djibouti and Portugal portray Type 1, where legal rules resemble working rules. Finland and North Korea represent Type 2, where laws and social norms produce working rules that deviate from legal rules. The result is better for Finland than North Korea. New Zealand, Sweden, and other countries in the off-diagonals exemplify Type 3 working rules that drastically outperform (top-left area) and underperform (bottom-left area) *de jure* legal rules. A key finding to emerge from this illustration is that deviating from legal

³² DeMattee, "Toward a Coherent Framework"; M. Kiai, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association* (United Nations General Assembly, 2012); World Bank, *Handbook on Good Practices for Laws Relating to Non-Governmental Organizations* (Washington, D.C., 1997).

³³ J. R. Commons, *Legal Foundations of Capitalism* (New York: Macmillan, 1924); M. D. McGinnis, "Networks of Adjacent Action Situations in Polycentric Governance," *Policy Studies Journal*, 39, 1 (2011), 45-72; V. Ostrom, "John R. Commons's Foundations for Policy Analysis," *Journal of Economic Issues*, 10, 4 (1976), 839-857; R. Pound, "Law in Books and Law in Action," *American Law Review*, 1 (1910), 12-36.

³⁴ Cole, "Laws, Norms, and the IAD," 11-16.

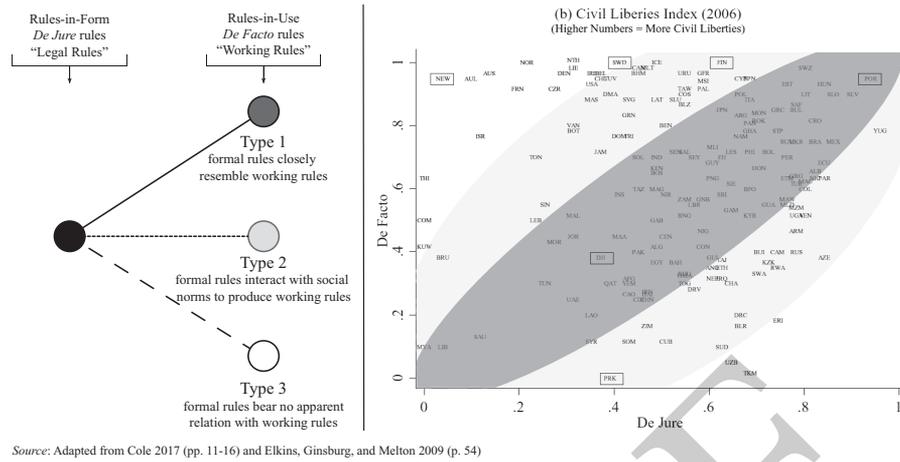


FIGURE 15.2 Cole's working rules, applied to De Jure and De Facto Constitutional Law³⁵

rules is not necessarily detrimental to the on the ground experience of those who would benefit from those rules.

Rarely have “closing space” scholars seriously discussed the difference between legal and working rules. Applying Cole's typology is relevant to the study of CSO regulatory regimes because while scholars have identified the inconsistent, subnational enforcement of rules in countries such as Ethiopia, North Korea, and Russia,³⁶ they have failed to explain such variation. Why and to what degree working rules deviate from legal rules is perhaps the most crucial, yet most understudied question among CSO researchers. Yet, understanding formal laws on their own is not enough. If we are to understand the state-CSO relationship in full, a necessary starting point is to know what rules exist and how the government enforces them.

CONCLUSION

Existing research on CSOs shows a strong correlation between civil society and certain desired sociopolitical outcomes, including a country's development status, level of democratization, and interpersonal trust between citizens and their government. These theories, while illuminating, do not address the influence that CSO legal and regulatory regimes have on state-CSO relations or the environment that enables civil society to achieve such desired outcomes. Simplistic assumptions and narrow scope conditions limit the theoretical arguments offered by civil society and closing-space scholars. On the one hand, civil society scholars assume a well-meaning state and virtuous CSOs, which together pursue complementary and supplementary agendas. Their theories tend to predict the existence of permissive rules but cannot explain the rescission of

³⁵ Figure adapted from *The Endurance of National Constitutions*. The scatterplot illustrates 2006 measures for *de jure* civil liberties in constitutions (x-axis) and *de facto* civil liberties experienced by citizens (y-axis). Higher numbers indicate greater civil liberties. Shaded areas arbitrarily demarcate Cole's working rule types. Type 1 show a strong correlation between *de jure* and *de facto* (dark gray area), Type 2 show a weaker correlation (light gray areas), and Type 3 are in the unshaded areas.

³⁶ S. Toepfer et al., “Subnational Variations in Government-Nonprofit Relations: A Comparative Analysis of Regional Differences within Russia,” *Journal of Comparative Policy Analysis: Research and Practice* (2019), 1–19; A. Cunningham, “Law as Discourse: The Case of Ethiopia,” *International Humanitarian NGOs and State Relations: Politics, Principles and Identity* (Routledge Humanitarian Studies; London: Routledge, 2018); Snyder, “American Religious NGOs in North Korea.”

permissive rules or the passage of restrictive ones. Arguments offered by closing-space scholars, on the other hand, assume power-hungry governments and defenseless CSOs that only pursue adversarial activities. Because closing-space analysts focus solely on restrictive rules, while imposing an extremely broad definition of “restrictive,” their arguments tend to be narrow and undertheorized concerning the passage of permissive rules.

Adopting an Ostromian lens significantly strengthens and clarifies the research program on CSO regulatory regimes. First, Ostrom’s IAD framework is capable of analyzing both permissive and restrictive rules to understand the full variety of action situations. Second, the framework allows us to view CSOs in all their diversity, and to remain agnostic as to their “do-good” status, by categorizing them according to their excludability and subtractability. Third, an appreciation for the important differences between rules-in-form and rules-in-use is built into the IAD framework. Recognizing that incongruencies exist between legal and working rules advances the CSO research agenda by eliminating the overly simplistic assumption of perfect congruence between *de jure* and *de facto* rules. And finally, the IAD framework embraces interdisciplinarity and methodological pluralism, which is essential to understanding something as complex, nuanced, and ever-evolving as state-CSO relations. These characteristics, combined with the framework’s inclusive vernacular, offer a promising new way of conceptualizing the relationship between governments and CSOs, as well as the ways in which the CSO legal and regulatory regimes can shape this critical relationship in both positive and negative ways.

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