Religious Organizations and Social welfare: Key Issues in the United States

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ABSTRACT: *The paper deals with these questions: What is the role of religious organizations in charitable activities? What are the advantages and disadvantages of religious groups entering partnerships in the legal and political culture of the United States, including its commitment to religious pluralism?; and Are there, in the American experience, helpful comparisons or parallels for other nations and cultures? The author then briefly introduces the case of "Charitable Choice". This experiment is currently underway in the United States, testing and shaping the relationship between religious organizations and the government.*

Introduction

In cultures throughout the modern world, a crucial element of civil society consists of providing assistance and resources to those who stand in need. It may be food and shelter for those suffering from poverty or displaced by conflicts or natural disaster. It may be medical care to prevent or treat disease. It may be education to provide training for employment or even the basic tools of literacy and numeracy that are increasingly essential to making one's way in the world. It may be assistance to overcome drug addiction, or to prepare for re-entry into society after a period of incarceration as punishment for a crime. These activities are needed in every nation, ranging from the most affluent to the newly developing.

Some of this work is done directly by governmental agencies using public funds and employees, as governments assume increasing responsibility for the well being of their citizens. Such activities are often considered under the general label of "welfare." Some is done by non-governmental persons and organizations, with little

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or no compensation expected from the recipients, using philanthropic donations. It then is often referred to as "charity."

In the United States this critical work is increasingly carried out through partnerships between government and nonprofit organizations (NPOs). Whether at the federal, state, or local level, governments often enter into contracts with NPOs.[1] The government supplies funds and oversees their use. The NPOs do the actual work. They conduct outreach to find those who qualify for assistance of various kinds, supply the people to do the work, and actually administer the programs. In situations such as these, NPOs become crucial providers of social services.

What is the role of religious organizations in these activities? Like other NPOs, they are formally organized under state law.[2] Many of them have deep institutional commitments to serving the less fortunate and are continuously involved, independent of government, in charitable activities.[3] Some, but not all, wish to become partners with government as social service providers. What are the advantages and disadvantages of religious groups entering such partnerships in the legal and political culture of the United States, including its commitment to religious pluralism? Are there, in the American experience, helpful comparisons or parallels for other nations and cultures?

This paper briefly describes an experiment currently underway in the United States that is testing and shaping the relationship between religious organizations and the government. It is commonly known as "Charitable Choice." Its goal is to invite overtly religious groups to partner with the government in the delivery of social services under conditions that allow the groups to retain, and act in, their religious character, while preventing the imposition of religious belief or practice on the recipients of those services. Charitable Choice is controversial. In many respects, the debate surrounding it is peculiar to the circumstances of the United States. But it may also illuminate analogous issues in very different cultures.

Two Perspectives

Understanding the legal position of religious groups engaged in charitable activities is aided by viewing them from two, distinct perspectives. I refer to them here as the *religious exercise perspective* and the *social service NPO perspective*. Each of these perspectives represents a way of thinking about a category of activities important to

civil society. Each is heavily shaped by American law and culture. They cannot be transferred intact to another social and legal setting. Yet they may offer insights into comparable situations elsewhere.

The Religious Exercise Perspective

The *religious exercise perspective* views churches, synagogues, mosques, and other houses of worship as fundamentally devoted to inviting their members, and others, to learn God's will and follow it through worship and participation in religious celebrations. Individuals do, of course, engage in religious exercise unconnected with any religious group, but the norm in most cultures is that like-minded individuals come together to engage in communal worship under the auspices of a religious organization. The activities of these organizations will certainly be spiritually focused; they may also include performing good works (charity) in the broader communities in which they are found.

That view of religious organizations is reflected in the First Amendment to the United States Constitution which secures a special place for worship activities in civil society. The First Amendment states, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These "religion clauses" encompass two distinct concepts: (1) Congress shall not "establish" a religion, that is, officially sponsor or promote it; and (2) Congress shall not impede or interfere with the "free exercise" of religion. By judicial interpretation of the Constitution by the United States Supreme Court, the religion clauses now apply to state and local governments, as well as to the U.S. Congress.[4]

The 16 words in the religion clauses of the First Amendment are the basis of an enormous body of judicial interpretation by the United States Supreme Court. I can provide only the briefest comment on some of that material here. For the purpose of understanding the religious exercise perspective, it is traditional to speak of the First Amendment as requiring a "separation of church and state." Such a description is oversimplified, of course. Total separation is impossible. For example, houses of worship exist as legal entities under state law regulating matters of organization and the exercise of legal powers.[5] They are sometimes involved in disputes requiring resolution by the courts.[6] If a building owned by a religious group catches fire, one expects the municipal fire department to respond.

But the First Amendment limits the degree to which a government may intrude on the internal operations of a religious body.[7] For example, houses of worship are exempt from federal taxes and thus from both the financial burden and the official scrutiny that accompanies a tax obligation. Some other charitable NPOs enjoy the same privilege, but religious organizations are not required even to make application for favorable tax treatment; they are automatically entitled to it.[8]

The religious exercise perspective is firmly embedded in the constitutional culture of the United States. Houses of worship and the government keep a respectful distance from one another. They avoid a relationship producing anything that looks like an official church that might exert control over government policy, thus imposing their messages on those who disagree with them. Maintaining a distance also keeps religious groups from being corrupted or unduly influenced by the government. When a government provides financial or other support, it simultaneously gains leverage and control over the recipient. To avoid such effects, the First Amendment aims to keep the government from intruding into the sphere of worship, providing religious groups with a protected space within which they can freely pursue their religious goals.

The Social Service NPO Perspective

The *social service NPO perspective* focuses on a particular subset of charitable NPOs.[9] By definition, charitable NPOs devote themselves to activities intended to benefit society. Their primary focus is not on the well-being of their own members, but on the social goals and purposes that prompted them to organize. Thus, any income they receive or revenue they produce is devoted to the specific causes for which they exist and is not distributed to shareholders or members.

Some charitable NPOs actively seek to provide social services to members of the public, usually those in need. They are involved in such things as assisting the homeless, providing support for those addicted to drugs, supplying housing for the mentally ill, and making available emergency food assistance.

In contrast to houses of worship, as viewed through the lens of the religious exercise perspective, the private organizations operating under the social service NPO perspective are very much involved with the government. For example, like other NPOs, they are subject to various kinds of governmental regulation, such as

legislation enacted at the state level governing the formation of trusts and corporations (the juridical forms used by most NPOs), the duties of officers and directors, etc.[10] At the federal level, regulation comes primarily through the tax laws. Charitable NPOs are exempted from most U.S. taxes,[11] and in many cases those who donate to them enjoy tax benefits as well.[12] Unlike houses of worship, however, they must apply for their tax exemption and annually account for themselves to the government in order to retain it.[13] The tax regime is an indirect, though highly effective, form of official government control. Access to the exemptions and other tax benefits are economically crucial to many charitable NPOs, so they have a great incentive to qualify for these benefits by adhering to the tax-based regulations on which they depend.

Many NPOs that provide social services have a further connection with the government arising from their active partnerships with official agencies. By accepting government grants or contracts, they enter binding agreements to perform specific tasks, and they are subject to the oversight of the agencies that control over the manner in which those resources are used.

Viewing Religious Organizations From Within the Two Perspectives

The relationships of government to non-governmental organizations operating within the two perspectives just described are quite different. In the former, houses of worship function largely autonomously. By contrast, social service NPOs, especially those who partner with the government in carrying out their missions, are quite thoroughly involved with official regulation.

So what happens when a fundamentally religious organization wishes to become involved as a social service provider in partnership with the government? Can the requirements of the two perspectives be accommodated? Or must the organization abandon the world of religious exercise, with its culture of autonomy and separation, and join the world of the social service NPO, with its extensive government oversight and control?

Until the late 1990s, the answer was that religious organizations desiring to engage in social service activities in partnership with government agencies were, to a substantial degree, required to exit the realm of the religious exercise perspective and join the ranks of social service NPOs. The fundamental reason was the Supreme

Court's interpretation of the Establishment Clause ("Congress shall make no law respecting an establishment of Religion") and the general constitutional culture it generated. For a number of years, the Supreme Court had been relatively strict about prohibiting public money or resources from flowing into private religious organizations. Many of the cases involved attempts by state legislatures to provide funds or other assistance to private, sectarian schools. A number of such attempts were rebuffed by the Court which voiced concern that doing so would promote religion and entangle the government in religious affairs.[14] One important phrase the Court used to describe private organizations that could not receive public funds or resources was "pervasively sectarian."[15]

Obviously, a church, mosque, synagogue, or temple is, by definition, "pervasively sectarian." Religious organizations intent on entering social services partnerships with government agencies addressed the problem by forming distinct legal entities for the purpose of carrying out their charitable missions. Prominent examples are Catholic Charities and Lutheran Social Services, which are tax exempt, charitable NPOs in their own right. Those NPOs, while retaining an orientation and philosophy sympathetic to their religious communities, were secularized - i.e., separated from the direct control and religious practices of the churches after which they are named - to a degree that avoided the "pervasively sectarian" label and qualified them for government grants and contracts.

Not all members of the religious community were satisfied with this state of affairs. Some were concerned about the degree to which religiously oriented NPOs were being regulated and secularized as a result of their compliance with the rules accompanying government grants. In 1996 the Congress enacted, and the President signed, legislation that had the capacity dramatically to change the character of the social service NPO perspective. It has become known as "Charitable Choice."

The Rise of Charitable Choice

The original Charitable Choice legislation appeared as part of a much broader welfare reform bill.[16] Its promoters explain that it is based on three principles: (1) The government may not discriminate on the basis of religion in determining whether a non-governmental social service provider is eligible to deliver social services. Instead, the focus should be on the provider's ability to perform the intended service mission. (2) The government may not interfere with the religious

autonomy of social service providers. Thus, for example, they cannot be required to remove religious symbols from their office walls, and they are entitled to prefer members of their own religious communities when hiring staff, even though federal law would normally forbid religious discrimination in hiring by those receiving federal funds. (3) Beneficiaries of the programs who object to receiving services from a religious organization may require the government to provide equivalent services from another social service provider. Moreover, a religiously sponsored provider may not discriminate against beneficiaries on the basis of their religion or their refusal to participate in religious practices.[17]

The Charitable Choice legislation ran directly counter to what had been an important element of the Supreme Court's Establishment Clause jurisprudence, that government funds could not be given to a "pervasively sectarian" organization. But that jurisprudence had been undergoing an important shift in emphasis. Over the past decade or so, the Court's Establishment Clause decisions have been characterized by competing theories, none of which has yet gained a comfortable dominance. One theme that has shown some staying power, however, is that the government may benefit religious groups if it does so evenhandedly. It cannot favor religion generally or one religious group over another.[18] But it may provide significant assistance if a religious group is part of a larger community of beneficiaries.[19] The Supreme Court has not ruled specifically on Charitable Choice programs. But under its current approach to the Establishment Clause, there is a reasonable chance that it will decide that the government may provide funds to even "pervasively sectarian" organizations that are otherwise qualified to provide social services.

Having Charitable Choice legislation in place did not guarantee that it would be implemented. A great deal depended on action by the relevant officials in the individual states that receive grants of federal funds to be administered locally for social service programs. If state officials did not pursue the opportunities it created, and if it were not promoted at the federal level, Charitable Choice would not have a great impact. As it turned out, during the 1990s only a small number of states aggressively implemented Charitable Choice principles, and the federal government failed to encourage other states to do so.[20]

During the presidential campaign of 2000, however, both leading candidates—Republican George W. Bush and Democrat Al Gore—promised in their campaigns to make faith-based initiatives an important part of the government's efforts to fight

poverty and provide social services.[21] Following his election, President Bush proposed legislation that would expand Charitable Choice into many other federal programs.[22] The Charitable Choice concept, which had attracted relatively little attention when first included in the 1996 welfare reform legislation, now became a topic of heated debate. The proposed legislation was not adopted by Congress. The Bush administration actively promoted the Charitable Choice concept from within the executive branch of government, however, using a variety of methods, including executive orders directing the federal bureaucracy to adopt its principles.[23] Those efforts have been both effective and divisive: effective because the amount of federal money awarded to religious service providers has increased significantly over the past several years;[24] divisive because opponents of Charitable Choice criticized it publicly and have sought occasion to challenge it in the courts.[25]

The Two Perspectives in Conflict

The Charitable Choice experiment is still evolving in American society. Apart from the constitutional questions it raises, which will probably be resolved by the Supreme Court at some point, it poses this fundamental policy question about the role of religion in civil society: Is there a place for overtly and actively religious organizations to provide important social services to the public, not on their own account, using their own resources, but as partners of the government, using public money? Stated in terms of the two perspectives described in this paper, can such organizations retain the autonomy and independence of the religious exercise perspective as full participants in the social services NPO perspective, thus overriding many of the regulatory constraints of the latter? American society has yet to answer this question, which is cultural and political as much as legal.

The argument in favor of Charitable Choice has two major elements. The first focuses on the underlying purpose of social service activities. If the purpose is to assist those in need, and if religious organizations have the motivation and energy to do precisely that, then why not let them put some of the government's resources to work to accomplish the goals that government sets for itself? The argument is largely an instrumental one: this partnership has the capacity to get the work done.[26]

The second element focuses on the place of religious organizations in civil society. Charitable Choice proponents argue that the government discriminates against religious organizations when it excludes them from the opportunity to partner

with the government in providing social services, or when it insists that they do so only through separate, highly regulated entities that must mask or discard their essential religious character.[27] Why, they ask, should overtly religious organizations not have the same opportunities as any other social service NPOs to deliver essential assistance to those in need? Excluding them sends an implicit but powerful message: religion may have its place in the private, spiritual life of citizens, but it is not a valid tool for addressing some of society's most difficult, practical problems such as drug addiction, domestic violence, lack of skills to seek and retain employment, and preparation to reenter society after a term of imprisonment.

Critics see things quite differently. They perceive three serious risks. One is that they do not trust the legislative guarantees intended to ensure that the recipients of social services are not pressed to participate in religious exercise as a condition of receiving assistance. Beneficiaries of these programs, they say, will be among the most vulnerable to such pressure, lacking the experience, skills, and bargaining power to resist subtle, or even overt, attempts at indoctrination.[28]

Second, by providing funds to overtly religious organizations, the government inexorably advances religion. Even with accounting and other safeguards designed to ensure that public funds are not diverted to sectarian purposes, the receipt of major government grants builds a social services NPO in all its dimensions.[29] When the NPO is committed to a specific religious view and is permitted to prefer its own adherents in its hiring, the underlying religion is unavoidably promoted.[30]

Third, Charitable Choice is likely to alter the character of the religious organizations themselves.[31] Even under the relaxed regulations applicable to them under the Charitable Choice legislation, they know where the money comes from and will have an incentive to do what it takes to get it. Might a house of worship that has come to enjoy, and depend upon, a stream of government funds for its social service mission be less likely to challenge or criticize government policy that it finds morally objectionable? The prophetic voice of warning from the religious community has a time honored place in American culture. Religious organizations are vital and energetic precisely because they are autonomous. They can, and must, take care of themselves. Some, including members of the religious communities themselves, fear that Charitable Choice may undermine these traits.[32]

Broader Lessons from the Charitable Choice Debate

The debate over Charitable Choice in the United States reflects both a fundamental disagreement at the level of principle and a clash of perspectives at the level of practice. The argument in principle – whether rejecting it constitutes discrimination *against* religion, or promoting it constitutes discrimination *in favor* of religion – reflects a longstanding constitutional debate about the meaning of the First Amendment's religion clauses.[33] Leaving the United States Constitution aside and considering the matter as one of social policy, this disagreement speaks directly to the basic question of what role a society expects religion to play in its social fabric. The practical question is essentially whether religious organizations can be effective means of carrying out government's social welfare goals while simultaneously respecting the liberty of recipients and preserving their own autonomy and authenticity.

Do these issues have any relevance to other societies with very different legal and cultural traditions - societies, including those of southeast Asia, that wish simultaneously to respect religious freedom and to provide for the social welfare of their citizens? A discussion of the social service activities of religious groups in southeast Asia is beyond the scope of this paper.

Conclusion

Mutual cooperation between the government and the religious sector – the former relaxing regulatory burdens, the latter acting transparently and in good faith – can promote the current trend in which religious organizations provide important social services independent of government. The day may come when religious organizations' confidence in their place in society and their capacity to promote public social welfare are sufficient that partnership between them and the government, analogous to the American Charitable Choice experiment.

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[1]. *See, e.g.*, STEVEN V. MONSMA, WHEN SACRED AND SECULAR MIX 4 (1996) ("[n]onprofit organizations as a whole receive approximately 31 percent of their income from government sources"); *id.*, at 64-66 (study finding that, for example, 90 percent of non-profit child service agencies receive public money, and 37 percent of those form 80 to 100 percent of their total

budget from public money). *See also*, Barbara Peat & Dan L. Costley, *Effective Contracting of Social Services*, 12 NONPROFIT MANAGEMENT AND LEADERSHIP 55, 55 ("approximately half of all public social service dollars are spent purchasing services").

[2]. *See* note 10, *infra.*

[3]. *See* LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 153-154 (1999) (reporting on the substantial contributions in money and volunteer time provided by religious congregations to support non-religious charitable activities and needy individuals).

[4]. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment concept of "liberty" protected from state action includes the First Amendment right to free exercise of religion; Everson v. Bd. Of Education, 330 U.S. 1, 15 (1947) (holding that the Fourteenth Amendment prohibits state establishment of religion).

[5]. Some states have enacted statutes dealing specifically with the formation of religious organizations. *E.g.*, N.Y. Religious Corporation Law §§ 4-455; N.J. Stat. §§ 16:2-1 - 16:19-9. Others apply more generic legislation. *E.g.*, 805 ILC § 110 (Illinois).

[6]. *E.g.*, Jones v. Wolf, 443 U.S. 595 (1979) (dispute over control of church property between competing factions of a Protestant congregation).

[7]. *See, e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708 (1976) (First Amendment precludes courts from inquiring into matters of religious law or polity).

[8]. 26 U.S.C § 508(c)(1)(A). To preserve their tax benefits, of course, houses of worship must operate within the guidelines set out in the Internal Revenue Code. For example, when religious organizations engage in activities that are more commercial than charitable in nature, they may find their tax exempt status challenged on that basis, see, e.g., Presbyterian and Reformed Publishing Co. v. Commissioner, 743 F.2d 148 (3d Cir. 1984) (reversing Tax Court's revocation of tax exemption from religiously affiliated publishing house), or the income generated by those activities subject to the "unrelated business income tax." 26 U.S.C. § 511 et seq.

[9]. In the United States, the NPO sector consists of two general categories: (1) charitable organizations such as schools, hospitals, and religious organizations; and (2) non-charitable or mutual benefit organizations, such as labor unions, social clubs, and trade and professional organizations. Broadly speaking, charitable NPOs exist to serve broad public interests, while non-charitable NPOs aim to serve the specific interests of their members.

[10]. *E.g.*, New York Not-for-Profit Corporation Law; 805 ILC § 105 (Illinois).

[11]. 26 U.S.C. § 501(a),(c)(3) (exempting charitable NPOs from federal taxation).

[12]. 26 U.S.C. § 2522(2) (providing tax deduction to donors).

[13]. 26 U.S.C. § 6033(a)(3)(A).

[14]. *E.g.*, Aguilar v. Felton 473 U.S. 402 (1985) (Establishment Clause forbids sending public school teachers and other professionals into religious to provide remedial instruction and other services); Lemon v. Kurtzman, 403 U.S. 602 (1971) (payment by state of salary supplements to teachers of secular subjects in religious schools violates the Establishment Clause).

[15]. Bowen v. Kendrick, 487 U.S. 589, 593, 616 (1988).

[16]. The legislation is titled the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, codified at 42 U.S.C. § 604(a). Similar provisions were later included in other, welfare

related legislation: the Community Services Block Grant (1998), 42 U.S.C. § 9920, the Children's Health Act (2000), and the Community Renewal Tax Relief Act (2000), 42 U.S.C. § 300x-65 (extending charitable choice to programs run by the Substance Abuse and Mental Health Services Administration), all enacted during the presidency of Bill Clinton.

[17]. Carl H. Esbeck, *Charitable Choice and the Critics*, 57 N.Y.U. ANN. SURV. AM. L. 17, 17-19 (2000).

[18]. For example, the government may not permit public school officials to sponsor a prayer at a school event. Engel v. Vitale, 370 U.S. 421, 424 (1962).

[19]. Thus, a public university does not violate the ban on establishment of religion by paying the printing costs of an explicitly religious student newspaper as part of a broader plan to subsidize the publications of student groups generally. Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 840 (1995).

[20]. AMY E. BLACK, DOUGLAS L KOOPMAN & DAVID K. RYDEN, OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES 62-65 (2004).

[21]. Michele Estrin Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM & MARY BILL RTS.. J. 1103, 1113 (2007).

[22]. *Ibid.*, p. 1114.

[23]. *See ibid.*

[24]. *Ibid.*, p. 1119.

[25]. Although the Supreme Court has ruled on the merits of a constitutional challenge to Charitable Choice legislation, it did recently decide that a group challenging one of the President's initiatives lacked "standing," i.e., that they had not suffered a sufficient detriment to qualify them to bring the action. Hein v. Freedom From Religion Foundation, Inc. ___ U.S. ___, 127 S.Ct. 2553 (2007).

[26]. *See* MONSMA, *supra* note 1, at 192 (describing the religious nature of faith-based groups as providing "a motivating and inspiring force" that is critical to their success); JO RENEE FORMICOLA, MARY C. SEGERS & PAUL WEBER, FAITH-BASED INITIATIVES AND THE BUSH ADMINISTRATION 39 (2003) ("because of the depth of their commitment, if faith-based groups produced even the same civic results as the public sector at a smaller human and financial cost, they should be considered successful").

[27]. *See* Ronald J. Sider & Heidi Rolland Unruh, *No Aid to Religion?*, *in* WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT? 128, p. 132–133 (E.J. Dionne, Jr. & John J. DiIulio, Jr., eds., 2000) ("limiting government funds to allegedly 'secular' programs actually offers preferential treatment to one specific religious worldview"); MONSMA *supra* note 1, p. 113–114 (describing how government funding of only secular public services programs puts religiously based programs at a disadvantage).

[28]. *See* FORMICOLA ET AL., supra note 26, p. 66–67 (on coerced religious exposure or participation); BLACK ET AL., supra note 20, p. 73 (describing controversy over beneficiaries' right to a "secondary opt-out" of the religious parts of a provider's program).

[29]. FORMICOLA ET AL., *supra* note 26, P. 101–102 (describing the practice of "resource shifting" after an NPO receives government funding).

[30]. BLACK ET AL., supra note 20, p. 69–70.

[31]. *See* Melissa Rogers, *The Wrong Way to Do Right: Charitable Choice and Churches*, in WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 61, 66 (Derek Davis & Barry Hankins, eds., 1999) ("the specter of compliance reviews and complaint investigation poses clear threats to church autonomy and church–state separation"); *id*. at 75-77 (describing the effects of dependency on government funding).

[32]. BLACK ET AL., supra note 20, at 72–73 ("There is evidence that religious groups modify their missions in the pursuit of government dollars").

[33]. For the present, the Court's neutrality approach appears likely to be compatible with Charitable Choice. But until the Court rules directly on one or more cases challenging Charitable Choice legislation or practices, the constitutional position will remain uncertain.