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DEFINING THE NONPROFIT SECTOR:

GERMANY

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PREFACE

This is one in a series of Working Papers produced by the Johns Hopkins Comparative Nonprofit Sector Project, a collaborative effort by scholars in over twenty countries to understand the scope, structure, and role of the nonprofit sector using a common framework and approach.

The Working Papers provide a vehicle for the initial dissemination of the work of the Project to an international audience of scholars, practitioners and policy analysts interested in the social and economic role played by nonprofit organizations in different countries, and in the comparative analysis of these important, but often neglected, institutions.

Working Papers are intermediary products, and they are released in the interest of timely distribution of Project results to stimulate scholarly discussion, and to inform policy debates. A full list of these papers is provided on the inside of the back cover.

The production of these Working Papers owes much to the devoted efforts of our project staff, in particular Regina Rippetoe, as the program manager, and Wendell Phipps, the project's secretary. We also want to express our deep gratitude to our colleagues on this project, to the International Advisory Committee that is helping to guide our work, and to the many sponsors of the project listed at the end of this paper.

The views and opinions expressed in these papers are those of the authors and do not necessarily represent the views or opinions of The Johns Hopkins University, its Institute for Policy Studies, any of its officers or supporters, or the series' editors.

We are delighted to be able to make the early results of this project available in this form and welcome comments and inquiries either about this paper or the project as a whole.

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DEFINING THE NONPROFIT SECTOR: GERMANY

Introduction¹

This paper offers a conceptual analysis of the nonprofit sector in Germany in the context of the major characteristics of German society.² Definitions and concepts about the institutions located in the area between the state agency and the market firm reflect distinct national histories, styles of organizing and institutional cultures. Such conceptualizations are closely tied to the ways and means societies develop to define and provide public goods and social services, to resolve political conflicts, and to coordinate opposing interests. In the following we intend to examine these factors in the way they relate to the nonprofit sector in Germany.

In Germany, the area between market and state is not commonly understood as a single institutional sector. Likewise, the nonprofit sector is not seen as one entity, neither in everyday language, nor in legal, economic or political discourse. Several general terms are used to refer to organizations located between state agencies and market firms: *Vereine* and *Verbände* (associations), *gemeinnützige Organisationen* (public benefit organizations), with the important subset of the "free welfare associations," *gemeinwirtschaftliche Unternehmen* (communal economic corporations) and *Organisationen ohne Erwerbszweck* (organizations with no commercial character). The adjectives (*freiwillig*, *gemeinnützig*, *gemeinwirtschaftlich*) or modifiers (*ohne Erwerbszweck*) can then be used to describe the sectors or systems (*Wesen*): *Vereins- und Verbandswesen* (associational system), *Gemeinnützigkeitwesen* (public benefit system), *Gemeinwirtschaftswesen* (communal economy), and *Nicht-Erwerbssektor* (non-commercial sector).³

Like in other countries, the different legal, tax, national accounting, social science and "street" usages produce a complex terminology. Each term focuses on a particular subset of nonprofits, and significant overlaps exist among the organizations included and excluded. But there are also important differences which reflect specific historical developments and how they, in turn, shaped the nonprofit sector. We will sketch these historical developments and describe how they influence both the nonprofit sector itself and they ways the sector is conceptualized and defined. These factors are closely related to different principles which emerged in the complex course of the last two centuries of German history:

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² Although the legal, economic and political system of the Federal Republic of Germany now includes the former German Democratic Republic, we will focus on West Germany in this chapter. This is at least partly justified by the fact that the West German institutional setting has been formally transferred to East Germany as of October 3, 1990, although significant differences continue to exist in legal and administrative aspects.

³ In addition, three terms are used in the social science literature which have usages that are similar to those in other countries: *intermediäre Organisationen* or intermediary organizations (see Bauer 1990), *Dritter Sektor* or third sector (Anheier and Seibel 1990), and finally, *Nicht-Regierungsorganisationen* or nongovernmental organizations.

- the principle of self-administration or self-governance, originating from the 19th century conflict between state and citizens, allowed parts of the nonprofit sector to emerge and develop in an autocratic society, where the freedom of association had only partially been granted;
- the principle of subsidiarity, originally related to secular-religious frictions and fully developed after World War II, assigns priority to nonprofit over public provision of social services; this created a set of six nonprofit conglomerates ranking among the largest nonprofit organizations worldwide; and
- the principle of Gemeinwirtschaft (communal economics), based on the search for an alternative to both capitalism and socialism, led to the cooperative movement and the establishment of mutual associations in the banking and housing industries.

To varying degrees the three principles shaped the various parts of the nonprofit sector, each institutionally linked, and oriented to, a specific sector of society.

Why Tocqueville's Problem Did Not Apply to Germany

The evolution and political economy of Germany's nonprofit sector may best be understood by way of comparison with two classic examples of the political role of intermediary institutions, the French and the American, as they appear in Alexis de Tocqueville's influential analysis "Democracy in America" (1835/40). His analysis of American associations was meant as a critique of France's post-revolutionary political order and society. Long before the revolution of 1789 took place, France had been a centralized nation-state, and it was the very centralization of the state which had facilitated the revolution's effectiveness. The *ancien regime* was replaced by a new ruling class while using the existing centralized state structure as a tool for rebuilding the country's political system and societal order. In accordance with the strict individualistic, anti-corporatist ideology of the Revolution, the *Loi le Chapelier* (1791) stipulated that no "intermediary associations" were allowed to exist between the individual as citizen and the state.

Individualism provided the basis of America's "Voluntary Spirit," too (O'Connell, 1983; see also Herbert Hoover's "American Individualism" [1922]). But unlike the French case, American society was quasi-stateless and pragmatically oriented toward the maintenance of individual mobility and free choice that combined with a general mistrust of central state power. Accordingly, voluntarism and associational life evolved as an appropriate compromise of individualism and political collectivity. Whereas the French State had been conquered by a revolutionary regime which saw associations as premodern elements of the feudal and clerical order, the State in the United States emerged only gradually (Bensel, 1990; Skowronek, 1983), while local community and associational life remained the focus of a democratic identity.

In both countries, *either* state *or* associational structures formed the basis of political progress and initial democratic identity. In this respect, the German case is fundamentally different. Politically, Germany's history of the 18th and 19th centuries is one of compromises between a "self-modernizing" feudal order on the one hand and the emergent bourgeoisie on the other. Germany did not witness an anti-feudal revolution, nor the building of the nation-state. Its 300 kingdoms, dukedoms and baronies remained religiously and politically divided, with the Protestant Kingdom of Prussia and the Catholic Empire of Austria as two dominant and autocratic powers.

When first elements of a bourgeois culture in the sense of civil society evolved in the 18th century in the field of literature, newspaper publishing, music societies and educational associations (Habermas, 1962:217; Nipperdey, 1976), government and state administration, however, continued to remain under the exclusive control of the aristocracy. The new middle class, or *Bürgertum*, did not come to share political responsibilities, and remained outside the political arena.

In contrast to other European countries, the latent tension between the aristocratic and autocratic state on the one hand, and the emergent middle class, its political aspirations and associations, never lead to ultimate rupture, despite serious conflicts during the 19th century. Although the early associational initiatives in the 18th century were anti-status quo -- since their explicit purpose was to assemble people regardless of rank within the feudal order -- early cooperation between the state and associations soon developed. This was particularly the case when the interest of the feudal state and bourgeois coincided, e.g., in the areas of education, free trade and economic development (Nipperdey, 1976). Especially in Prussia, where the state became the main engine of modernization, an increasingly stable and more widely applied pattern of cooperation provided the seed for what was to become a major aspect of the nonprofit sector in Germany. The German nonprofit sector did not develop in antithesis to the state, but in interaction with it. This pattern led to the development of characteristic types of organizations that are located and understood in German society in ways different from what is implied in de Tocqueville's dichotomy of state-centered versus association-centered society -- a dichotomy that does not apply to the German situation.

The Emergence of the Principle of Self-Governance

With respect to the modernization of state and economy, Prussia's defeat by France in 1806 brought a wave of unprecedented reforms to government, state administration and state-society relationship.⁴ Prussia's ten-year-old civil code was stripped of almost all corporatist elements to allow for free trade, free choice of profession and personal mobility (Koselleck, 1967). Trade and business associations were officially recognized as representative institutions and the state's official interlocutors (Hendler, 1984). In 1809, the cities were exempted from the feudal system and obtained the status of self-governing authorities with a limited form of citizen participation.

⁴ For reasons of shortness and clarity, we use the Prussian example as the paradigmatic case. While other parts of Germany show significant deviations from the course of Prussian history in the 19th century, Prussia became the dominant political actor in the formation of the German nation state.

The political effect of granting limited civil rights was to mitigate the underlying conflict between the aristocratic state and the *Bürgertum* (bourgeoisie). The economic effect was the liberalization of trade and commerce, which provided the basis for much improvement in subsequent economic development. The institutional effect, however, was the construction of "state-free" organizations for both economic purposes and political integration, such as the chambers of trade and commerce as well as "free" professional associations.

The principle of self-government, enacted in the chambers of commerce, professional associations and the new municipal constitutions, created a far-reaching pattern of institutional learning. The licensing by the state and the transfer of considerable autonomy to some associations occurred while the full freedom of associations continued to be banned. Therefore, the historical experience was that the state would grant limited freedom to citizens while maintaining control over its institutional and political dynamics.

A new period of state-society relationship began with the Vienna Congress in 1815 and the upcoming era of the "restoration." What was to be restored was the Old Regime in the once French-occupied Europe. Napoleonic occupation, though the result of national imperialism, had disseminated some crucial elements of an anti-feudal social and political order, such as the *code civil* which treated everyone as an equal citizen. It had also substantially shattered the political role of the Catholic Church and reduced the role of the church as an important landowner. Moreover, the war of 1813 had mobilized the common man and, accordingly, had strengthened the people's political self-confidence.

The Vienna Congress, however, and the Karlsbad Decisions of 1819 in particular, brought a conservative backlash against any kind of political liberalism. The effect was a newly emerging conflict between the state and the politicized citizenry and their associations. The Prussian General Order of 1816 declared *Vereine* (associations) as "useless" and banned them as a potential source of political unrest and upheaval. From 1815 to 1848, the right of association was a central claim of political liberalism in Germany, and became a synonym of democratic constitutionalism (Müller, 1965; Dann, 1976). This idealization of political associations was still intensified after the year 1848 -- with characteristic consequences for the political embeddedness of Germany's future intermediary (nonprofit) sector.

In Germany as well as in all the other European countries, the revolution of 1848 ultimately failed, though it led to the first national parliament. What followed, however, was another conservative political backlash and, again, associations were subject to authoritarian persecution. The repeated failure to seize state power led to a new idealization of associational life as the "true" locus of politics. In the face of political suppression, associations became a surrogate for democracy which had not been achieved within the political realm of the state-order itself. With the political suppression being slowly relaxed, the association became a broadly accepted institutional type of local everyday-life in sports, culture, folklore and, last but not least, quasi-politics (Wurzbacher, 1971).

The revival of associational life since 1848 was a basis for a common political culture of the bourgeois middle-class and the emerging workers movement. The latter grew from associational initiatives of journeymen and young workers aiming for risk protection in shops and improvement of education (Grebing, 1970:40-47). In everyday life, associations for sports and singing formed a common cultural sphere for workers and middle-class. Thus, even without the full right of associations granted to the citizens, associations as an institutional form had been fully developed and culturally acknowledged *within* an autocratic society when Germany became a nation-state in 1871.

Parallel to the latent political conflict line between the autocratic state and the middle class, a new conflict developed, this time between the state (and the still ruling aristocracy) and the workers movement. From 1878 to 1890 the Social-Democratic Party and its related associations were banned from political life. Yet once more, this conflict was mitigated through modernization of governmental policy and political integration: beginning in 1883 and throughout the rest of the century, state legislation on health insurance, accidents and invalidity, and pension funds were passed. The deliberate purpose of the policy was to integrate the workers into the new nation-state, and thereby weaken the social-democratic movement, which was considered to be the most important challenge to political order and stability. While Germany's civic-associational culture remained underdeveloped in political terms, its social security legislation itself was one of the most advanced worldwide.

Still more important, however, was the institutional form under which the legislation was administered, which until today has remained the model of collective risk protection in Germany. Again, self-government became the institutional mechanism to achieve two objectives at the same time: to maintain political control through a system of quasi-public service administration, and to integrate parts of the populations that might otherwise pose a threat to political legitimacy and stability. Social insurance corporations were independent bodies with boards of directors composed by representatives of the employers and the employees. Nonetheless, the self-administration was and still is subject to close state supervision and control. It is a repeated pattern of *loose coupling* between the state and quasi-independent agencies, a kind of state-controlled autonomy within a triangular setting: two sides with more or less antagonistic interests, plus the state as the neutral intermediary (Lehmbruch, 1982). This was to become the classic model of *neo-corporatism* as a pattern of German politics in general and of government-nonprofit relationships in particular (Seibel, 1990).

The Emergence of the Principle of Subsidiarity

After 1871, a significant conflict developed primarily between (Protestant) Prussia and the Catholic Church. The conflict was not as threatening to the political order as the one between the conservative elite and the social-democratic workers' movement since it didn't exist in the Catholic parts of the country. Nevertheless, the tension between state and church, and the ultimate compromise, laid the ground for the gradual development of the principle of subsidiarity, which after

World War II became an important aspect for much of the government-nonprofit relation in Germany (Anheier, 1992).

One reason for mistrust of the Prussian state was the intensified political Catholicism, and the founding of the Catholic political party, "*Zentrum*" (Center) in 1871. This meant a challenge for (Protestant) Prussia which had only recently gained political dominance in Germany by defeating (Catholic) Austria in the War of 1866. As the social democrats would later, the Catholic Church and related groups became subject to restrictive or even suppressive measures. All Catholic schools came under state control in Prussia in 1872, in addition to the general administration of the Church (1873), and all state subsidies to the Catholic Church were suspended in 1875.

Though the open conflict with the autocratic state was settled during the 1880s, it remained a traumatic experience for the Catholic Church. An appropriate ideological response came late; but when it came, it was especially influential. The Pope's encyclical "*Quadragesimo anno*" (1931) insisted on the priority of individual compassion and solidarity instead of state-organized assistance and public welfare programs. It argued that the state's role in this matter ought to be only a "subsidiary" one (Nell-Breuning, 1976). The principle of subsidiarity of public welfare became the most influential ideological counterweight to state-centered ideas of welfare provision.

A Catholic principle by origin, subsidiarity became a synonym for any sort of institutional alternative to the state as provider of social welfare. In the German context, subsidiarity also implied an alternative to a *public* welfare state, which continued to be propagated by the Social-Democratic Party. In (West-) Germany, the complicated conflicts between state and church, and between catholicism and social democracy in the field of social welfare were legally settled only in 1961 by the German Supreme Court (see below). This settlement endorsed the constitutionality of the *Bundessozialhilfegesetz* (Federal Social Assistance Act) and related legislation which stipulated the general subsidiarity of public action in favor of the free welfare associations (see below) in the provision of social services (Rincken, 1971).⁵

The ideological success of the principle of "subsidiarity" also led to another compromise in terms of institutional effects. Ultimately, the German welfare state is not a state affair at all. Not only are the huge administrative bodies of social insurance (health, pension funds, accidents) subject to self-government -- which makes them largely independent from direct governmental control and influence -- but so are most of the social services provided through the free welfare associations. The latter, however, though independent in terms of governance, are dependent on public subsidies to considerable degrees (Seibel, 1990; Anheier, 1992).

⁵ Significantly enough, it was the Social-Democratic government of the state of Hessen which filed suit against the Federal Social Assistance Act and its stipulation of "subsidiarity" with the Constitutional Court (see below).

The Emergence of the Principle of *Gemeinwirtschaft*

The principle of self-government, the idealization of associational life, combined with the vision of a socialist organization of the economy gave birth to a set of institutions that influenced the notion of the German nonprofit sector for several decades until the mid-1980s: the principle of *Gemeinwirtschaft*, or communal economy. The principle implies non-market, non-competitive production of commodities and delivery of services (cf. Thiemeyer, 1970). The principle rested on the vision of a non-capitalist order of economic production which was less radical than Karl Marx's since it required neither revolution nor working class domination. The principle of *Gemeinwirtschaft* became important in the cooperative and workers' movement, and favored an economic system in which actors attempt to maximize common as well as private returns. This communal, socialist tradition is most clearly expressed by the term *Gemeinwirtschaft* itself, which bears some affinity with Toennies' (1935) notion of *Gemeinschaft* (community). It can thus be understood as a form of communal, though not necessarily local, economy, and as a third way between "free market capitalism" and "bureaucratic socialism." Moreover, it revitalized rural traditions of self-help among independent producers, i.e., the *Raiffeisen Cooperatives* for small-scale farmers, or cooperative banks for small-scale businesses in urban areas.

In practice, however, *Gemeinwirtschaft* was the ideological justification for the growing property of the unions and the Social-Democratic Party, and as a symbol for the vision of a non-capitalist future. The term gained much currency after World War II, particularly in public housing where excess demand existed until the mid 1970s. The decline of the communal economy set in at about that time, and by the mid-1980s, many organizations had closed (following several scandals of corruption and mismanagement) or changed to commercial firms, like banks and insurance companies.

The Principles in Action

Before the three principles came to exert their full influence on what had begun to emerge as the German nonprofit sector, the Nazi period (1933-1945) resulted in significant discontinuities in the country's institutional setup and political economy. The Nazi-policy of "*Gleichschaltung*," the organizational levelling, streamlining and incorporation of all major aspects into the political party machine, brought much of the nonprofit sector under party-control. Other parts were brutally suppressed. For example, the free welfare associations were first regrouped under a single (Nazi-controlled) umbrella organizations, and soon, with the exception of the Red Cross, reorganized as the National-Socialist People's Welfare (NSV) (Bauer, 1990; Sachße and Tennstedt, 1992:110-150).

The post WWII era saw a pacified Germany in domestic terms, too. Many previous conflicts, while never resolved or settled, no longer mattered: regional and religious differences, as well as separatist tendencies became much less manifest, and no regional party has been represented in the Federal parliament since 1957. The weakened and displaced agrarian groups were incorporated into the Christian Parties, which in turn made attempts to avoid confessional politics. It was only in post-

WWII Germany that the three principles, which emerged between 1870 and 1929, came to full fruition:

- the principle of subsidiarity became the corner stone of German social policy and the general principle to govern public-private relationships in a great variety of areas, most prominently in the case of the free welfare associations;
- the principle of self-administration became an important ingredient of labor and industrial policy through the establishment of business and professional associations, the formation of many public law institutions in cultural, educational, health and social service fields, and the institutionalization of the social market economy; wherein unions and employers' associations enjoy quasi-statutory power in a system of "tariff autonomy" in setting and enforcing wage policies and disputes; and
- the principle of communal economy was influential in the period of reconstruction in the 1950s and 1960s, and gradually declined until much of the industry was moved into the commercial sector by law in the 1980s.

The associational system maintained its largely apolitical character until the mid-1970s, and the nonprofit sector became a cornerstone of political stability. The aristocratic agrarian elite in the East had disappeared; the new party system managed to incorporate virtually all social groups and strata within a democratic system. More importantly, however, the party system acted as a mediator between the state and the organized interests of society. Unlike the Weimar Republic, all significant interest groups were able to find political representation in the democratic party system.

The loose alliances that emerged among the interest groups under the new system were a precondition for the establishment of paragonovernmental coordination to influence public policy, for instance in industrial relations and social security. This neo-corporatist style of policy-making, which seeks to establish consensus prior to parliamentary decisions, bypasses the constitutional order and weakens the power of parliament. However, it relieves government from the "costs" of coordination as well as from the need to establish legitimacy for particular policies. Since the mid-1970s, neo-corporatism has provided the political "elasticity" needed to support welfare measures during economic crisis.

This pattern is even true for the so-called New Social Movements which emerged in the context of the economic crisis of the 1970s (Windhoff-Héritier, 1982). These movements -- formed by environmentalists, feminists, and grassroots promoters -- were ideologically ambivalent at first because they did not fit into the left-right scheme of traditional politics. On a different level, however, they corresponded to a general trend to relieve government from increased demands, which in turn made the new social movements legitimate partners both in economic and ideologic terms within the grass-root philosophy of neo-liberalism. This trend meant a considerable containment of the dramatically expanding West German welfare state.

Moreover, the new social movements are influenced by the very same institutional and ideological traditions of the German nonprofit sector in general. On one hand, the political myth of a state-free associationalism as the locus of "true" democracy -- or *Basisdemokratie* (basic democracy) -- was revitalized. On the other hand, through a new political party, the *Grüne* (Greens), parts of the movement became loosely linked to the "regular" party system. Other self-help groups that emerged as part of the new social movements became associated with one of the several large welfare associations (see below).

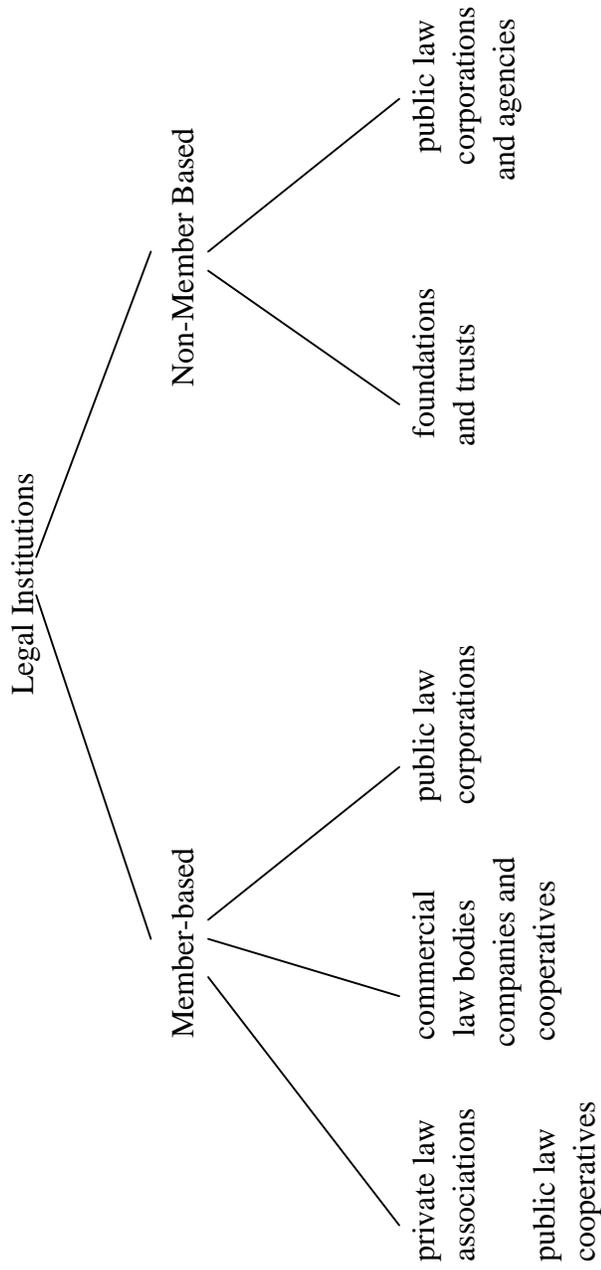
According to Vilmar and Runge (1986), the estimated 35,000 self-help groups in the mid-1980s fall into six main fields of activity: unemployment, training, and employee-managed enterprises (40%); handicapped and health problems (28.7%); homeless, homosexuals, ethnic minorities, and delinquency (15.4%); the disadvantaged (11.9%); leisure, education and culture (2.9%); and neighborhood initiatives (1.3%). Thus, self-help groups contributed primarily to ease employment and health-related problems.

Major Types of Organizations in the Nonprofit Sector

Figure 1 offers a schematic representation of the principal types of organizations in the nonprofit sector. These types are the building blocks for the major systems that may either form conceptual equivalents or components to what we below will define as the German nonprofit sector: associations, public benefit organizations, communal economy, and organizations with no commercial character.

As we can see in Figure 1, the German legal system distinguishes between member-based and nonmember-based institutions. Among member-based forms, we separate private law associations (like a sports club) and public law cooperatives (a local savings and loan association) from commercial-law bodies, businesses and cooperatives (partnerships, limited liability companies, stock corporations), from public law corporations like some professional and business associations (notary chambers, chambers of commerce), and from some religious organizations. On the other side, among the nonmember-based forms, we separate foundations and trusts as endowed institutions from public law corporations as operating agencies such as universities, schools, public insurance funds, the Federal Post, and most radio and television stations. It is important to keep in mind that the notion of a nonprofit organization cuts across all the different types of legal institutions that German associational and corporate law treats as separate. Thus, the nonprofit sector includes organizations that vary greatly in terms of legal personality (public versus private), taxation (commercial versus noncommercial), or financial structure (stock corporations versus tax-financed institutions versus endowments).

Figure 1. Major Types of Legal Institutions



Associations and the Associational System (*Vereins- und Verbandswesen*)

The associational system includes a great variety of organizational forms ranging from village improvement associations, singing clubs and amateur theaters, and sports clubs to professional and business associations and foundations. In general, the term excludes organized religion, cooperatives, and political parties. However, it generally includes political and civic organizations and local voters' groups, as well as compulsory economic associations like chambers of commerce and craft unions.

"*Verein*" (associations) has several meanings in the German context.⁶ It implies sociability, and refers generally to any social group outside family, business and public administration. "*Verband*" is similar to "*Verein*," but tends to be used more in reference to formal, means-oriented associations that combine common or mutual interests, like a business association. Other terms used are *Vereinigung*, which is similar to *Verband* and refers primarily to mutual interest associations among businesses in the same branch of the economy; and *Gesellschaft*, which is often used to refer to scholarly associations and learned societies. Finally, association in the terms of *Innung* or *Kammer* (chamber) tends to refer to modernized version of guilds among local businesses and professions, often with compulsory membership.

Participation in society via associational membership and volunteering has long been identified as a major ingredient of social integration. The number of registered voluntary associations is estimated to range around 286,000 for 1990,⁷ which, relative to population size, is considerably less than in other countries of comparable economic development, such as the United States (1.4 million) or France (500,000-700,000). A recent poll (Commission of the European Communities, 1987) shows that somewhat less than half (45%) of the German adult population are members of associations, compared to 43.9% in France. Combined with the number of associations, this suggests that German associations tend to be, on average, larger than their French counterparts. Membership in a political association or party is at 4.6% for the German adult population, which is slightly higher than the percentage for France (3.1%), but lower than in Great Britain (6.4%). Similarly, German membership rates in human rights organizations are the lowest in Northern Europe, and are, at 3.1%, below the European average of 6.3% for environmental organizations. Certainly, such survey data may be affected by problems of cross-national validity; however, the data seem to give some support to the thesis of the continued relative underdeveloped state of political civil society in Germany when measured in individual membership in typical civic associations.

⁶ In its contemporary meaning, the term is a creation of the 19th century (Hartwig 1990). Several major bodies of law, from the Prussian Land Law of the late 18th century, to the Civil Code of 1900, and the various laws on commercial associations like the stock corporation or the limited liability company, established uniform definitions for associations, corporations, societies, or cooperatives that were previously often used interchangeably. The imprecision and overlap in definition is an indication of the early (and -- in comparison with common law countries -- late) development of various forms of private associations.

⁷ This number is based on figures compiled by Klaus Neuhoff; personal correspondence, January 1993.

In addition, "association" is a legal term, based on the right of association granted in ' 9 of the Basic Law (Constitution), "All Germans have the right to found associations and societies," and the law of associations, grounded in the German Civil Code of 1900 (Bürgerliches Gesetzbuch [BGB], ' ' 20-79). An association is based on a contract among natural personalities. The contract may stipulate any objective (' 305 BGB), provided it does not violate existing legal (' 134 BGB) or moral and ethical provisions (' 138 BGB). Associations may be *eingetragener Verein* (registered associations) or *nicht eingetragener Verein* (not registered associations). The registered association becomes a legal personality endowed with its own legal rights. To achieve legal personality, an association must be registered in the *Vereinsregister* (Association Registry) maintained locally at the about 800 *Amtsgerichte* (local county courts). To register, an association must pursue a noncommercial (*ideal*) objective, and have at least seven members, a charter and a *Vorstand* (Board). A registered association can be recognized by the acronym "e.V." which many associations attach to their name, e.g., the German Alp Association, e.V. A nonregistered association possesses no legal personality; it is legally represented by the Board, and members are personally liable.

At this point, it is important to recall the distinction between two principal types of nonprofit organizations: *Vereine* (private law associations) and *Körperschaften* (public law corporations). As a civil law country, Germany is based on the fundamental distinction between private law, regulating the rights and responsibilities among individuals and private legal personalities, and public law (e.g., administrative, fiscal and ecclesiastical law), dealing with the relations between individuals and the state, public agencies, and public law corporations. The central point is that the state is regarded as a legal actor *sui generis*, relatively independent of the political party in power, and in possession of its own legal subjectivity that requires laws and regulations qualitatively different from those addressing private individuals. Moreover, the distinction between public and private law equates the state with the public good, and puts the burden of proof of public utility on private law associations only.

By definition, public law corporations are set up for public benefit, and their charter may include an explicit reference to serve a public good or common goal. For example, many municipalities established *Sparkassen* (savings and loan associations) in the form of public law corporations charged to provide financial services to local populations not covered by the commercial banks. In order to make sure that the local savings and loans associations may not diverge from their objective to serve low income groups, a *Gemeinwohlsklausel* ("common good clause") was explicitly written into their charter.

The actual legal status of nonprofit organizations varies. The BGB differentiates between ideal associations (those with no primary business interest) and commercial associations. The law classifies associations according to their underlying *raison d'etre*, and not according to their profit motive. The basic point is that primarily commercial objectives are usually restricted from assuming associational status, and they must use either a noncorporate form (e.g., private partnerships) or chose a corporate status envisioned in the Commercial Code, such as limited liability companies or

stock corporations. Thus we have a situation whereby nonprofit organizations may be associations or corporations in legal terms, whereas commercial forprofits may not.

Other Legal Forms

While associations are the most important organizational type in the German nonprofit sector, other legal forms are the *Gesellschaft mit beschränkter Haftung* (Limited Liability Company), *Stiftung* (Foundation) and *Genossenschaft* (Cooperative).

Limited Liability Companies are common in the nonprofit hospital industry. They are also used for some quasi-commercial nonprofits (Hansmann, 1980) such as workshops employing handicapped people (Arnold, 1990). Overall, the limited liability company is the form of choice for the great majority of forprofit corporations in Germany. Relatively easy to found with minimal capital requirements and limited public oversight, it is also a useful legal form for nonprofit organizations that need relatively large capital investments.

Foundations are treated separately in the Civil Code ('80-88), and are defined not as associations but in terms of their endowment. Actual foundation law is a matter of *Länder* legislation (see Neuhoff, 1978). Because of secularization and the development of a state-centered welfare system, church-related foundations had already lost their crucial function for charity in the 19th century. In addition, two periods of hyper inflation (1923 and late 1940s) wiped out the liquid assets of many foundations. The majority of foundations existing today were created after World War II. A German peculiarity are the "Political Foundations" which form the legal roof for the educational and international activities of political parties. With the exception of the social democratic Friedrich-Ebert-Foundation (created in 1925), they are a product of post-WW II, and largely financed by public funds.

Cooperatives play an important role in some segments of the (West) German economy -- mainly farming, housing, banking, and insurance -- but they lost their not-for-profit attitude to a large extent. Initially considered as an alternative to a capitalist economy (Oppenheimer, 1896), cooperatives as nonprofit organizations persisted only in public housing. Cooperatives in the farming and banking industries, however, changed largely into businesses.

The Public Benefit Status

Whereas the legal status of associations was at the center stage in the emergence of civil society within the context of an autocratic political system, the issue of public benefit is closely linked to the social question of the 19th and early 20th centuries (Ladour, 1985). The definition of what constitutes public benefit is essentially defined by provisions in various tax laws.

Gemeinnützigkeit, or "public benefit status," is today foremost a fiscal term. Its definition and application serve to differentiate the tax-exempt from those liable to various forms of taxation.

Tax-exemption on the basis of *Gemeinnützigkeit*, i.e., whether or not an association meets the criteria of public benefit, is generally regulated in ' '51-68 of the German Fiscal Code (*Abgabenordnung* or AO).⁸

The promotion of the following objectives are covered by the definition of *Gemeinnützigkeit*:

- public well-being in material, spiritual and moral spheres;
- charitable and benevolent activities to support persons in need and unable to care for themselves;
- church-related activities including the construction, maintenance and administration of churches and church property, religious instruction, religious services, and training of the clergy.

The following types of activities are mentioned as exemplars of *Gemeinnützigkeit* in Article 52 (2) of the AO:

- support of science and research, education and instruction, art and culture, religion, international understanding and exchange, development aid, environmental protection, historical preservation, and local customs;
- support of youth welfare, the elderly, public health, welfare, and sport;
- the general support of a democratic state and community; and
- the support of animal husbandry, plant cultivation and gardening (all noncommercial), traditional customs, veterans' affairs, amateur radios, model aero-planes clubs, and dog shows.

This list is meant to be non-exclusive, and its exemplary character notwithstanding, reveals a great deal of arbitrariness, particularly in the last point. According to the AO (' '55-68) (see Bundesministerium der Finanzen, 1988), public service activities designated as *gemeinnützig* must be:

⁸ Similar provisions for tax privileges in the case of *Gemeinnützigkeit* are found in special tax laws. They all relate to the AO as the basic legal reference for the definition of tax-exempt status. Examples are ' 5(1) Nr. 9 corporate income tax law, ' 3(6) trade tax law, ' 3(1) Nr. 12 property tax law, ' 3(1) Nr. 2b real estate tax law, ' 13(1) Nr. 16b inheritance tax law, ' 7(1) Nr. 1 capital transfer tax law, and the provisions of ' 4 of the turnover tax law.

- *selfless* in the sense of altruism, whereby members of the organization are neither allowed to receive profits nor other profit-like compensations. This strict nondistribution constraint excludes many mutual membership associations, as well as business and professional associations. It also implies that the cost behavior of nonprofits must be "reasonable" in terms of salaries and fringe benefits.
- *exclusive* in the sense that the organization pursues only purposes defined as *gemeinnützig* in the AO. If an organization carries out other activities, it may lose the nonprofit tax status altogether. In practice, the organization may declare some of its activities as *gemeinnützig* and others as "commercial." This has the effect that those activities which are classified as *gemeinnützig* receive preferential tax treatment, whereas commercial activities may be subject to taxation.
- *direct* in the sense that the charitable purpose has to be served by the organization itself rather than through third parties. This provision contains many exceptions which basically relate to inter-organizational structures (peak associations), financing (transfers to developing countries) and special institutions (foundations), whereby a third party may provide services on behalf of a tax-exempt organization.

The tax regulations on donations and deductions follow essentially the same logic. According to § 10(b) of the income tax law, only donations to legal personalities under public law (e.g., municipal administration churches), and organizations with *Gemeinnützigkeits*-Status can be deducted from taxable income.

To achieve the status of *Gemeinnützigkeit*, an organization must have formal status, e.g., a registered or unregistered association, foundation, limited liability company, cooperative, or even stock corporation. The application is submitted to the local tax authority which also decides on the matter. To qualify for tax-exemption, the activities of the organization must meet the requirements stipulated in relevant tax provisions. Special regulations apply to housing associations. The nonprofit status is examined by the local tax authorities every three years. The usually light public oversight involves a routine inspection, and rarely a full audit. Nonprofits found in violation of the tax-exempt provision of the relevant tax laws may lose their nonprofit status.

Gemeinwirtschaft (Communal Economy)

As mentioned earlier, the term has become less important in recent years, and many organizations in the communal economy have changed to commercial enterprises. Communal economy refers to that part of the economy which is guided by the principle of maximizing the public good rather than private returns only (Himmelmann, 1985; Eichhorn and Münch, 1983). Often, *Gemeinwirtschaft* is contrasted to *Erwerbswirtschaft*, the commercial (but not necessarily for-profit) sector. The term communal economy does not imply that organizations disown the profit motive; the profit objective is subordinated to other goals like public and social welfare or economic

equity considerations. The principle of *Gemeinwirtschaft* states that the chief objective of business is to improve social and economic conditions and not to maximize profits.

Several types of organizations are regarded as typical for the communal economy: public enterprises and utilities, self-help groups, cooperatives, union related corporations and banks, housing societies, foundations, and charities. The term excludes political parties and organizations, business and professional associations, and organized religion. Note that an employers' association would not fall under the definition of *Gemeinwirtschaft*, whereas workers' unions may be included.

A Statistical Term: Organization Without Commercial Motive

This term comes in some ways close to "nonprofit organization" but shows several substantial differences. In addition to organizations serving charitable purposes and membership associations, this term includes churches, political parties, unions, some types of foundations, employers and business associations as well as public law economic and professional associations such as chambers of commerce, physicians, pharmacists or notaries. It excludes commercial-law cooperatives, nonprofit housing associations, public utilities and related public corporations, and mutual organizations.

The term is widely used in official statistical accounts. Unlike most other systems of national accounts, the German System of Economic Activity, the national equivalent of the Standard Classification of Industries, used to identify (until 1992) nonprofit organizations as a separate sector in economic and labor-related statistics (see Statistisches Bundesamt, 1987).

The German system of national accounts defines nonprofit organizations as "associations and institutions which either provide public goods and serve the common weal, or meet the specified interests of their members or other groups. These organizations are not primarily active for economic gains; they meet their expenses largely through membership contributions, public subsidies and, in the case of the churches, through taxes, and only to a lesser extent through production income, usually in the form sales and services" (Statistisches Bundesamt, 1979).

The State and the Nonprofit Sector

Historically, the institutional features of the nonprofit sector resulted from conflicts between the state and its political challengers such as the workers' movement or the churches. What persisted is, accordingly, a peculiar organizational pattern of political compromise, with state-licensed and state-controlled independence as its major characteristics. In this section, we will focus on how the state and the nonprofit sector relate to each other in two areas that are most indicative of this relationship: the principle of subsidiarity and the free welfare associations, and the principle of self-governance and the role of public law corporations in particular.

Subsidiarity

The church-state relationship in Germany is highly complex in historical and political terms. Although the Basic Law does not recognize a State Church, ecclesiastical law is constitutionally equivalent to public administrative law. Thus, churches are established not under civil but under public law, and form corporations of public law. This legal privilege applies only to the member churches of the Council of Protestant Churches in Germany (41.5% of the West German population), the Roman Catholic Church (43.3% of the population) and the Jewish congregations. Other religious communities, in particular the numerous "free religious associations" and the close to 2 million Moslems, would form civil law organizations, if they decided to incorporate.

Because of its public law status, church property is not taxed. Since public benefit status is a private law category, the classification of churches as public law entities means that the Protestant and Catholic Church as such are tax-exempt by definition, yet they become *gemeinnützig* only through the application of ' ' 52-68 AO. In other words, while public law status implies tax-exemption, it does not necessarily connote with *Gemeinnützigkeit*, which enables organizations to receive tax-deductible donations. As legal personalities under public law, the churches can set up civil law associations and foundations which can then apply for preferential tax treatment provided their activities meet the criteria of ' 52(1). This criteria states that only organizations pursuing charitable, religious, public good-related objectives can be *gemeinnützig*.

The churches maintain their own tax administration, and are in the constitutional position to collect "church tax," a portion of income tax which is levied by the state through employee payroll deductions and transferred to the churches. The church tax provides churches with a stable, inflation-proof income. The church tax is only voluntary in the sense that tax payers can "opt out" by denouncing their church membership. Leaving the Protestant or Catholic Church is more than the cancellation of membership in a voluntary association. It is an official legal act like a change in marital status, to be recorded both in civil and church registries.

The implications of the church tax system and the special status of the churches become clear if considered in the context of the principle of subsidiarity. While the Basic Law does not explicitly mention the principle of subsidiarity, legislation and judiciary derive it from several Basic Law articles, in particular ' 20 ("The Federal Republic is a democratic and social federal state"), and passages granting religious freedom and administrative autonomy to the churches (' 140 of the Basic Law).

Between 1950 and 1975 the principle of subsidiarity was introduced in three significant bodies of legislation which pertain to the role of private nonprofit providers in the field of social services and welfare. These are the Social Code, the Federal Social Assistance Act, and the Youth Welfare Act. Legislation establishes the "overall responsibility" of the public sector for the provision of social services and assistance, and successively implements the principle of subsidiarity as a protected, state-supported system of private service and assistance delivery (see Anheier, 1992).

In ' 2, the *Sozialgesetzbuch* (Social Code) introduces the primacy of individual help and care over any form of private or public social assistance and service provision. In ' 3 the Social code mandates public-private cooperation in providing assistance and services:

"In cooperating with nonprofit-making, voluntary establishments and organizations, the (public) social assistance institutions seek to ensure that their activities and those of the (nonprofit and voluntary) establishments and organizations effectively complement one another for the benefit for those receiving assistance."⁹

The general concept of cooperation is further specified in the Social Assistance Act, a comprehensive piece of legislation on the public and private provision of welfare and social services:

"2. In the implementation of this Act, the (public) bodies responsible for social assistance shall collaborate with the public law churches and religious communities and with the free welfare associations, acknowledging in so doing their independence in the targeting and execution of their functions" (from ' 10(2)).

Within the context of cooperation and independence, ' 10(3) requires the public sector to provide financial and other support to the free welfare associations:

"3. . . . The (public) social assistance bodies shall support the Free Welfare Associations appropriately in their activities in the field of social assistance."

The principle by which cases of individual assistance are allocated between public assistance organizations and the free welfare associations is established in ' 10(4):

"4. If assistance in individual cases is ensured by Free Welfare Associations, the (public) social assistance bodies shall refrain from implementing their own measures; this does not apply to the provision of cash benefits."

While this section establishes the primacy of private delivery of social assistance over public assistance, irrespective of the mandate for public support, ' 93 of the Federal Social Assistance Act provides additional protection for the Free Welfare Associations by virtually limiting and restricting the number and type of service providers at local levels (similarly, ' 5 of the Youth Welfare Act):

"1. The (public) social assistance bodies shall seek to ensure that establishments appropriate to the provision of social assistance are sufficiently available. They may

⁹ The translation of ' 2 and the following legal passages in this section are, in part, adopted from Deutscher Verein, 1986.

not create their own new establishments if suitable establishments of the free welfare associations . . . are available, or can be extended or provided."

The principle of subsidiarity is more than a formula for public subvention; it is primarily an organizational principle for the division of labor between the public and the private sector (Anheier, 1992). As mentioned earlier, it has been politically controversial. In the 1960s, the social democratic government of the state of *Hessen* challenged the constitutionality of the Youth Welfare Act.

The legal case against the principle rested on four charges. First, the law establishes privileges for the free welfare associations that amount to an embargo of public organizations in the field of social service delivery and assistance at the local level. Second, the law introduces a hierarchy among assistance and service providers whereby public organizations are devalued and put into a position of "second choice." Third, the principle of subsidiarity, based on Catholic moral philosophy and theology, stems from the idea of natural law and of a pre-state social order which cannot serve as a guiding principle for legislation affecting all citizens. Fourth, the privileges accorded to the free welfare associations, in particular their quasi-monopoly once established in a local area, lead to a restriction in the number of choices available to individuals seeking help.

In a controversial 1967 ruling, the Federal Supreme Court (Bundesverfassungsgericht, 1968) rejected the charges and argued that, primarily, the translation of subsidiarity into a ranked system of providers does not imply a depreciation of public organizations. The Supreme Court emphasized the role of the public sector in the "overall responsibility" for provision of services at the local level. Secondly, the language in which subsidiarity is described in the law does not imply any theological or natural law principle; it is primarily a principle dealing with the division of labor between the public sector and the free welfare associations. Thirdly, neither the public nor the private nonprofit sector would be able to provide social services and assistance to all citizens, neither financially nor organizationally. This necessitates the cooperation and joint efforts that had characterized the relationship between sectors since the creation of the Federal Republic. The intent of the Youth Welfare Act and similar legislation was to formalize and enhance such cooperation. Lastly, the right of choice of a suitable and personal form of assistance (' 3 of the Social Assistance Act) co-exists with the right to assist and the freedom of association for the free welfare associations in accordance with their own beliefs and convictions.

We can anticipate that the free welfare associations occupy an important position in social welfare and services in Germany (Goll, 1991). They run 68,466 institutions in the area of health care, youth and family services, as well as services for the handicapped, elderly, and the poor (Bundesarbeitsgemeinschaft, 1990). They provide 70% of all family services, 60% of all services for the elderly, 40% of all hospital beds, and 90% of all employment for the handicapped. The free welfare associations employ 548,420 full-time and 202,706 part-time staff. The number of volunteers is estimated at 1.5 million, with a self-reported average number of 15.8 volunteer hours per month (Spiegelhalter, 1990). To put the combined size and economic weight of the free welfare

into perspective, it is useful to consider that CARITAS alone employs more people than the industrial conglomerate Siemens, one of the largest employers in the Federal Republic. Together, the free welfare associations employ three times as many people as the Federal Post Office.

The free welfare associations present a special and perhaps unique case both in the field of social service delivery and in the area of interest mediation. Most welfare associations are closely linked to a religious or political belief. As interest associations, they aggregate the interests of the social group they represent vis á vis the state. As instruments of government policy, they participate in the formulation, financing and implementation of public programs and activities. Thus, their role is inherently ambiguous (see Bauer and Dießenbacher, 1984).

Legal stipulations based on the principle of subsidiarity tend to protect the nonprofit organizations from both for-profit and public sector competition. In this case, the principle of subsidiarity lead to quasi-monopolistic supply structures. In terms of law and taxation, the public law status of the Catholic and the Protestant churches and the church tax system provide those parts of the nonprofit sector linked to the churches with a stable source of income, making church-related nonprofit organizations less dependent on the state in general, and on competitive grants, consumer fees and charges in particular. Because the principle of subsidiarity is deeply imprinted in Germany's constitution and laws, it allows organizations access to sources of funds largely independent of the current political situation.

Self-Governance

As we have seen above, the principle of self-administration or self-governance originated from the 19th century conflict between state and citizens. It allowed parts of the nonprofit sector to emerge and develop in an autocratic society, where the freedom of association had only partially been granted. In the course of the last century, and particularly since 1949, the principle has become incorporated in numerous aspects of economic and social life, and is a dominant force in the field of research, higher education, and the arts.

Many of these aspects relate to labor and industrial policy within the general framework of the social market economy. First, unions and employers' associations enjoy far-reaching autonomy in the area of collective bargaining over wages as well as working and social conditions. These negotiations are legally protected from any government interference, and the results are binding for all employers and employees in a particular branch, independent of actual union membership and representation in firms. Nonmembers, however, are not bound to adhere to the agreements reached at collective bargaining.

The de facto system of unitary labor unions (only one union per industry) under the umbrella of the Federation of the German Trade Unions, finds its counterpart in the employers' associations. Therefore, each employers' association tends to deal with only one union, which reduces industrial conflicts and contributes to stable labor-management relations. In addition, the system of co-

determination requires labor representation as well as participation in the management of all larger enterprises.

Whereas the employers' associations deal with collective bargaining and social policy, the several thousand business associations organized under the Federation of German Industries deal with economic policy and are active lobbyists in matters relating to trade, and industrial and business affairs. Both the employers' associations and the business associations are registered associations under private law. The chambers of commerce and industry, however, are public law corporations with comprehensive and compulsory membership, are responsible for the interests of the local and regional business community in general, and carry out some regulatory and governance functions. The organization of economic interests is a special feature of the German system. The business community, represented in a triple system of interest associations, and the unions, organizationally in a relatively strong and somewhat protected position, are responsible for a wide array of social and economic policies independent of the state.

Other areas show different manifestations of the principle of self-government. Broadcasting is one area that for long seemed indicative of both the continued mistrust of the German state vis á vis uncoordinated and unregulated political and market forces, as well as of the protective or caretaker role the state tends to assume for the public at large. The example of broadcasting is also useful to highlight some of the reasons that lead to the creation of public law corporations. Until recently, when private forprofit broadcasting corporations entered the television and radio market, the right to broadcast rested exclusively with nine regional and one national corporations. As nonprofit, public-law corporations, they were created by treaty among the various *Länder* and, by choosing public law status, they ensured that the corporation could remain relatively independent from disproportionate influence by any particular *Land*, as well as from any special private or political interests.

By law, the broadcasting corporations are required to remain politically neutral. Consequently, the composition of the governing bodies of these corporations has assumed high levels of complexity due to the meticulous attempt to arrive at a balanced representation for major interest groups. For example, the Television Board of the Second German Television (ZDF), a nonprofit organization under public law, includes sixty-six members: one representative from each of the *Länder* party to the Treaty to be delegated by the state government; three delegates from the Federal Government; twelve representatives from political parties in proportion to their number of seats in parliament; two representatives each from the Catholic and Protestant Churches; one from the Central Council of Jews; three from the trade unions; two from the Federation of Employers' Associations; one from the Central Committee of German Agriculture; one from the Central Association of Crafts and Trades; two from the Federation of Newspaper Publishers; two from the Journalists' Association; one from the four largest free welfare associations each; one from the Conference of Cities, the Conference of Counties, and the Conference of Communities each; one from the German Sports' Federation; one from the Federation of Expellees; ten from the fields of

education, science and the arts; one representative of the free professions; and one each from fields of family services, youth services and women's issues.

The composition of the Television Board highlights a style of organization and a way of interest regulation typical of many aspects of Germany's institutional landscape: conflict management of potential sources of contention by the accommodation of special interests. In many ways the systems led to an over-representation of political parties, since many delegates tend to be party members at the same time.

Defining the Nonprofit Sector

In this section we provide an evaluation of how well the structural/operational definition (Salamon and Anheier, 1992) fits the German situation. According to this definition, the nonprofit sector is a collection of organizations that are formal, private, not-profit-distributing, self-governing, and voluntary. Like in other countries, the different legal and tax-based, economic, functional as well as street definitions of nonprofit organizations produce a complex and confusing terminology: unincorporated and incorporated associations, public benefit associations, public law corporations, public and private law foundations, limited liability companies, cooperatives, communal economy corporations, and non-commercial organizations. Each term focusses on a particular subset of nonprofits, and significant overlaps among organizations included or excluded exist.

As we have seen, the different legal forms available to nonprofit organizations do not add to a distinct sector. For example, registered associations may or may not be nonprofit or charitable; public law organizations vary from government agencies to largely independent institutions like public television stations, the Bavarian Red Cross Society, the Jewish Welfare Agency, and even the Roman Catholic and Protestant Churches; and public utility organizations include mutual benefit societies, even political parties, and exclude the churches.

Thus legal definitions have limited utility in describing the full scope of the German nonprofit sector. Moreover, the common understanding of the German nonprofit sector does not follow this legal structure. The parts of the nonprofit sector regulated by the principle of subsidiarity are usually referred to as "welfare associations." In fact, the "free welfare associations" are themselves made up of numerous establishments with different legal status: for example, the Protestant *Diakonie*, an umbrella for thousands of separate legal entities, consists of registered associations (43.2%), foundations (23.4%), public law foundations and corporations (29.4%), limited liability companies (5%), and other legal forms (Thermann, 1979). Members of the *Paritätischer Wohlfahrtsverband* include 88.6% registered associations and 5.5% limited liability companies, with public law corporations and foundations making up the remaining 5.9% (Bockhacker, 1985).

The parts of the German nonprofit sector close to the principle of self-administration include civil law associations, public law corporations and foundations. These vary in the extent which they

are independent from government. Consequently, they include organizations that are an operational arm of some federal or state ministry, as well as chambers of commerce and industry, radio and television stations, and institutions of higher education. Not all, however, qualify as nonprofit organizations under the structural/operational definition. These include the public radio and television corporations and the German Association for Technical Corporation.

As we will see below, the great virtue of the structural/operational definition as applied to the German situation is that it pulls together the several overlapping subunits that national concepts treat separately. The structural/operational definition ties together the organizations regulated by these different bodies of law and commonly attributed to different sets of institutions.

Formal. The criterion "formal" applies to Germany: the definition includes nonregistered associations and informal groups, which are not fully captured by legal definitions. One example is the citizen initiatives. Most of such groups were ad hoc, informal associations of individuals who shared common concerns that they did not find appropriately addressed by local authorities or political parties. The issues were varied, and ranged from waste disposal to traffic regulation and child day care. The initiatives were basically local and small, with only 4% having more than 1,000 members (Kodolitsch, 1975). They added a local element to the centralized associational landscape of Germany's civil society. Beginning in the mid 1970s, they tended to form extended regional and national networks, which later benefitted the creation of the Green Party (the first environmentalist party worldwide) as well as the peace movement of the 1980s.

Private. The distinction between public and private law has become blurred ever since forms of public-private partnerships and cooperative arrangements emerged in the field of social security and services. The principle of subsidiarity has contributed to the increasing complexity of the public-private borderline, as have the numerous private and public law associations created by public agencies to take on auxiliary administrative and service tasks. As some authors have remarked, the choice of public or private associational form seems often a matter of political and other circumstances rather than a strict application of legal principles (Ladeur, 1985; Schuppert, 1981). For example, in matters involving both federal and state governments, the private nonprofit form is a more practical, and therefore less costly, solution than establishing joint public law corporations, which, according to legal form, would be the logical choice.

Thus, it may seem inappropriate to employ a strict distinction between public and private law categories in defining the nonprofit sector in Germany. It may be useful to extend the notion of "private" to include also "self-governing public law organization." This, however, would appear to open a Pandora's box: universities, public broadcasting stations, and many other public law organizations would qualify as nonprofit. Are we willing to grant nonprofit status to the University of Eichstätt, which is an independent Catholic university and legally a Church foundation, but not to the (secular) University of Cologne, which sees itself as an independent, learned corporation? Both are established as public law bodies, one by the Catholic Church, the other by a regional government. Should the public TV stations be regarded as private nonprofit organizations, despite

the fact that they collect revenue from a "captive" audience through a "fee collection agency" endowed with quasi-regulatory power to enforce compliance?

As we have seen, "public" does not necessarily mean "state" in Germany, and "private" may neither imply "non-state" nor "nonpublic." It is one of the consequences of the distinction between civil law and public law that the private versus public distinction ends up being not very useful for our purposes. The governance of an organization (primarily private and relatively independent versus state-appointed and governmental) may be better in constructing the dividing line needed to separate public from private nonprofits than the legal status of both the organization itself (public law, private law) and its founder (individual, parliament, by decree or other legal instrument). In this case the virtue of the structural/operational definition is that the combination of two criteria, i.e., private and self-governing (see below), will allow for a refined treatment of borderline cases. Other such cases, however, will have to be examined on their own merit.

Self-Governing. Much of the history of associations in the 19th century is a history of the allocation of social, political and economic spheres into either private or public realms, and therefore, private and public law status. Well into the first part of the century, the law says little about *Gemeinnützigkeit* (public usefulness), but much about public oversight and political restrictions to associational freedom. The 19th century set a pattern whereby the legislature has tended to opt for public law status whenever the state saw a special need to protect its own rights and sovereignty vis a vis private interests (as in the case of the churches), felt the necessity to balance public and private needs (like the creation of public law broadcasting corporations or the public railroad network), or when the general public good character of institutions could be separated from individual motivations (such as in universities). However, contrary to the abstract legal principles that underlie the public - private law distinction, legal reality had always been mediated by political opportunism and practicality, and the dividing lines have become more fluid in the course of recent decades.

The for-profit versus nonprofit status of associations was much less a contested issue, when compared to the degree of public control. The issue of self-governance poses problems whenever the private-public character of a nonprofit organization is unclear. In addition to the typical cases mentioned in the discussion of private-public distinctions above, the issue of self-governance becomes less focussed in the relationship between political parties and nonprofit organizations located in their ideological vicinity.

Non-profit-distributing. In the German case, the monetary equivalent of economic activities directly linked to the charitable purpose of the organization is exempt from certain forms of taxation, but not necessarily from all. Nor are all of the organization's activities exempt: beyond a certain threshold, any "commercial activity" not directly related to charitable purpose is subject to taxation. The tax law divides nonprofits into: the charitable segment inclusive of related business income; the commercial segment; and the financial segment of endowments, assets and liabilities. It then applies different tax liability and tax exemption regimes to each. Thus, in some ways, non-profit

versus for-profit status is less of a dichotomy than it would appear. Similar to the various forms of 501(c) exempt categories, the nonprofit/for-profit difference is closer to an ordinal ranking than a strict dichotomy. In addition, for small associations below a certain threshold of annual turn-over (DM 60,000), the nonprofit constraint does not apply -- they are not required to file and tax authorities do not examine their balance sheets. They are nonprofits by default. In toto, however, it should be possible to draw a relatively clean boundary for nonprofit organizations.

It is the combination of the public-private, self-governance and non-profit issues which contributes to the complexity of defining the German nonprofit sector. We should recall the distinction between tax-exemption and *Gemeinnützigkeit*. Keeping this in mind, it becomes apparent why a regional water works association and a cultural foundation are, as public law bodies, both tax-exempt but only the latter can achieve the status of *Gemeinnützigkeit*, i.e., receiving tax-deductible donations and exemption from many forms of taxation. While the AO foresees a category for the support of culture, no such stipulations are made for water treatment. Similarly, the churches are tax-exempt, privately-governed public law corporations which are *gemeinnützig* because religious objectives are classified as such in the AO. By implication, the public benefit status of the churches, as granted in the AO, refers only to religious activities, and does not necessarily extent to non-religious objectives, like science or education, even though the latter are classified as *gemeinnützig*. In such cases, religious organizations must set up legally separate branches or institutions. Finally, the tax law recognizes a number of special cases that regulate the *Gemeinnützigkeit*-Status of municipalities, universities or chambers of commerce in the support of certain activities.

Voluntary. It is at the intersection of participation and volunteering that we find additional differences between Germany and other countries: historically, the notion of volunteering carries a different connotation. The equivalent German terms *Ehrenamt* (honorary office) and *ehrenamtliche Tätigkeit* (honorary office activity) emphasize the honorary component, officialdom and public legitimation rather than voluntarism as such (see Müller and Rauschenbach, 1988). The notion of honorary office was popularized in the 19th century in an attempt to reconcile the need for citizen participation and voluntary labor input with the political control felt necessary by the autocratic state. During the Third Reich, honorary office was widely propagated and employed as a means of both political control and infiltration of the Nazi Party into ever more aspects of society. Today, however, the notion of honorary office has been freed of much of its origins, and has moved closer to the concept of voluntarism. Information on volunteering is incomplete; available data suggest a lower rate of volunteering than in other countries, with about 6% of the population volunteering at least once a week, and 42% reported to have volunteered at least once within the last two years (Braun and Röhrig, 1986; Institut für Demoskopie, 1979).

Somewhat different is the notion of voluntarism in the case of membership in the Protestant and Catholic Church. Church membership is quasi-automatic for children of Christian parents, and "opting out" rather than "opting in" is required to exercise the "voluntary" aspect of membership in this regard. A similar case can be made for the church tax, which is levied on the taxable income

of every church member and which is collected by the public tax authorities. Thus, in some cases, voluntary would primarily imply the connotation of non-compulsory.

In summary, the structural/operational definition groups together otherwise separate types of organizations. It does so by de-emphasizing internal, often ill-defined, distinctions, so as to allow us to focus in on aspects of the German nonprofit sector that are both important and difficult to conceptualize and measure, for example the distinction between the private and the public sector. In summary and somewhat simplified: "formal" brings into focus the entire range of formal organizations located between the state agency and the market firm; "private" and "self-governing" retain private-law and independent public-law organizations; "non-profit-distributing" excludes cooperatives, mutual insurance companies, most housing associations, as well as marketing and promotional societies for businesses; and the criterion "voluntary" excludes compulsory public law associations like the chambers of commerce, craft, and industry, and similar organizations for the medical and legal professions.

Conclusion

Historically, the world of associations emerged in a complex process marked by several extreme positions: the anti-associational, individualistic tradition of the French Revolution; the corporatist influences of a late-medial society that were soon used and modified by self-modernizing economic and political elites; the anti-liberal policies and administrative reforms of the autocratic state; the failure of the new middle class to achieve political power; and the increased cultural differentiation of society. These conflicting, and sometimes overlapping, currents shaped a nonprofit sector that is both the terrain and result of the conflict between organized religion, political opposition, and the state over the division of labor and spheres of influence. We argued that Tocqueville's problem, formulated as a dichotomy of either state-centered or association-centered society, does not apply to the German situation.

The early development of the modern German nonprofit sector happened in antithesis to an autocratic state. During much of the 19th century, Catholic and Protestant associations were often seen as challenges to the autocratic state, and found little public support, even though the situation varied significantly across different parts of the country. Similarly, the conflict between the new middle class and the established political order found its expression in demands for a greater freedom of association, and the workers' movement began to create its own associational system, often against the fierce opposition of employers and public authorities alike. However, unlike in other countries, these conflicts did not lead to ruptures and severe discontinuities; rather, within the complicated course of German history, and beginning with Bismarck's social insurance policies, they were channeled into a mode of interaction between the nonprofit sector and the state. This mode emerged as the dominant pattern, ranging historically from more or less subtle forms of coercion, coaptation, and corporatist arrangements, to voluntary cooperation and far-reaching coordination.

We conclude by pointing to some of the implications for the German nonprofit sector today. First, within the legal and programmatic context of subsidiarity, the free welfare organizations are in a complex relationship with the state that goes well beyond monetary transfers (see Goll, 1991, for a recent analysis). There are several points of view regarding free welfare organizations. According to Heinze and Olk (1981), they are a corporatist arrangement whereby the state extends into the area of social services and welfare. Thränhardt (1983) sees free welfare organizations as tools of the churches and other "conservative" political forces to control a vital area of social welfare by creating quasi-monopolies, whereas Spiegelhalter (1990) views them as part of an efficient, responsive and decentralized system in which the advantages of private and public involvement in the field of social services are realized to everybody's benefit.

In terms of policy, as a result of both the principle of subsidiarity and the principle of self-governance, nonprofit organizations tend to be relatively well-integrated into the policy making function of government. In many areas of legislation, public authorities are required to consult nonprofit organizations in matters of economic, social and cultural policy. Moreover, as we have seen above, the state needs the endorsement of the free welfare associations for the establishment of public sector organizations in the field of social welfare and assistance. In this case, the principle of subsidiarity resulted in what others called the neocorporatist system (Heinze and Olk, 1981).

Second, larger interest associations, particularly business associations, are part of a system of "nonplanning" -- a system whereby policy initiatives are "tested" or "rehearsed," often informally, with an emphasis on cooperation and conflict avoidance. Relatively independent of political ideology, all governments since 1949 have operated with a minimum of direct state planning (von Beyme, 1987:188). The unspoken maxim of nonplanning, which leaves many policy initiatives and implementation to nongovernmental agencies and local governments, involves the participation of the numerous mandatory and voluntary associations. In this way, they become incorporated in a political system that demands and encourages cooperation by "controlled delegation" of tasks -- a learned institutional behavior first introduced in the 19th century.

Third, the largely apolitical associational system has shown signs of change, as participation in nontraditional social movements has increased since the 1970s in the form of citizen initiatives. However, true to the organizational environment in which they operate, citizen initiatives began to form peak associations. The most visible of the new peak associations grew from 15 member organizations in 1972 to about 1,000 by the mid-1980s, representing between 300,000 and 500,000 individual members. Thus, while the citizen initiatives introduced new elements into civil society, they nonetheless replicate some of the characteristics of Germany's society and nonprofit sector alike (Katzenstein, 1987): the centralization of decentralized organizations and constituencies through nonprofit institutions.

Politically, the integration of citizen initiatives and self-help groups was provided by a political party which also originated in the late 1970s in the context of the emerging New Social Movements: the "Greens" count the self-help movement as their clientele. Moreover, as a political

party they serve as intermediary between government and this part of the nonprofit sector (cf. Seibel, 1990). In local politics, the "Greens" act as the protector of grass-roots and self-help initiatives. This tripartite relationship between new social movements, political parties and government is a "softer" version of the pattern which generally prevails in the German nonprofit sector. Thus, this arrangement indicates the stability of a deeply enrooted institutional pattern of political integration.

In general terms, the nonprofit sector in Germany, how it developed and how it is conceptualized, is a history of why "state" and "society," "public" and "private" are not a zero sum. It shows that the dichotomy "association-centered" versus "state-centered" societies can be quite misleading. In Germany, the public and the private nonprofit sector developed sometimes in open conflict with each other, but often in a mutually reinforcing manner. In this sense, the structural/operational definition allows for a refined conceptual treatment of the interaction between government, public sector and nonprofit sector.

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