MCGOVERN v ATTORNEY-GENERAL

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Introduction

The modern starting point of the rule against a charitable object comprising a political purpose is *Bowman v Secular Society Limited*.[2] This case concerned a testamentary bequest by Bowman to the Secular Society Ltd (which was not a charity).[3] In finding the bequest valid the House of Lords emphasised that the Society was able to receive and dispose of the property absolutely. The circumstances in which the Society would not have been able to do so were if it had received the property as a result of duress or undue influence or if it had been taken by the Society under a trust.[4] Lord Parker put forward the view that if the property had been a trust it would have been void as neither a trust for persons nor a trust for a valid charitable purpose. Using as authority the earlier case of *De Themmines v De Bonneval*[5] Lord Parker found the objects of the Society to be political in nature and asserted that 'Equity has always refused to recognize such objects as charitable' for the reason that 'the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit'.[6] In *De Themmines* an attempt to create a trust with the purpose of 'printing and promoting the circulation of a treatise written in French and Latin which inculcated the doctrine of the absolute and inalienable supremacy of the Pope in ecclesiastical matters' was held to be void as contrary to the policy of the law and void as an activity amounting to a superstitious use. To have enforced the trust would have involved promoting a purpose for which a change in the law would be necessary.

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2 *Bowman v Secular Society Limited* [1917] AC 406 (HL).

3 The purposes of the Secular Society Limited were 'to promote ... the principle that human conduct should be based upon natural knowledge, and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action', ibid.

4 *Bowman* (n 2) 440 (Lord Parker).

5 (1828) 5 Russ 288, 38 ER 1035.

6 *Bowman* (n 2) 442 (Lord Parker).

However, although enforcing the *De Themmines* trust would have involved a change in the law, the court's refusal to enforce the trust is not authority for the principle that changes in the law are prohibited. By extrapolating too broad a principle from the narrow circumstances of *De Themmines*, Lord Parker's obiter rationale on political purposes and charitable objects in *Bowman* is a poor foundation from which a general rule has grown.[7]

That general rule was confirmed by the House of the Lords in *National Anti-Vivisection Society v Inland Revenue Commissioners*,[8] and whilst Lords Wright, Simonds and Normand were cognisant of the paucity of authority, they did not feel its absence. In this case a purpose of total abolition of vivisection was rejected as a valid charitable object. This was because the public benefit afforded to the community on the basis of advances in public health outweighed any public benefit afforded to public morals through the protection of animals and, secondly, because the main purpose of the Society could only be achieved by a change in the law which amounted to promotion of legislation and so was a political object under the *Bowman* approach. In reaching this decision Lord Wright explained the dicta of Lord Parker in *Bowman* by using the arguments that law cannot stultify itself, law is right as it stands and courts should not usurp the functions of the legislature.[9]

Against this backdrop stands the High Court decision in *McGovern v Attorney-General*.[10] Whilst *McGovern v Attorney-General* did not establish the rule preventing political purposes becoming charitable objects, it is argued in this article that it is nonetheless a key case because it significantly enlarged application of the rule. In particular, Mr Justice Slade provided the first systematic evaluation of what would amount to a political purpose, expanding the notion of 'political' through a non-exhaustive test. It is argued in this article that the approach in *McGovern* failed to hold a boundary around the rule against political purposes and permitted extension of the rule without heed to the propriety of doing so. The result has been a closing down of jurisprudential development of charity law in this field.

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7 Lord Parker expressly noted that the trust was not void or illegal yet used as authority a case which involved illegal activity from which he extrapolated a general rule about all 'political' activity, including legal activity. Lord Parker did not consider the argument in *Re Foveaux* [1895] 2 Ch 501 (Ch), 503 (Chitty J) that the court 'stands neutral' on issues of political controversy.

8 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) (*NAVS*) Lord Porter dissenting. In so doing the House of Lords overruled *Foveaux* (ibid). The House of Lords' decision is discussed in detail by Jonathan Garton in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) ch 18.

9 *NAVS* (n 8) 50.

10 *McGovern v AG* [1982] Ch 321 (Ch).

The *McGovern* Case

Amnesty International, formed in the early 1960s, was the inspiration of Peter Benenson, a British lawyer who had developed an interest in securing amnesty for political and religious prisoners of conscience.[11] Abuse of human rights and political imprisonment was increasingly prominent in this Cold War period, as was growth of social action in light of public disillusionment with political regimes.[12] Supported by Benenson's peers and other volunteers and working independently of governments, states, political parties or interest groups, Amnesty International soon developed a presence on the international non-governmental organisation scene. By 1964 it had been granted consultative status of the United Nations and a clutch of awards followed in the 1970s including the Nobel Peace Prize (1977) and the United Nations Human Rights Prize (1978).[13] By the early 1980s Amnesty International's membership had increased to a quarter of a million members across 150 countries.[14] With membership growth came expansion in Amnesty International's aims, launching an appeal for universal amnesty of all prisoners of conscience to which was added campaigns against the death penalty, apartheid and inhuman treatment on the basis of a person's sexuality.[15]

In 1977 Amnesty International (British Section) set up a separate Amnesty International Trust for which it sought charitable status.[16] Clause 2 of the constitution of the Amnesty International Trust laid down the Trust's six purposes:[17]

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11 Peter Beneson set out his views in an article in the *Observer* 28 May 1961 reproduced in Egon Larsen, *A Flame In Barbed Wire: The Story of Amnesty International* (Frederick Muller Limited 1978) Illustration 2. For an examination of the history of Amnesty International and the motivations of its founder see Tom Buchanan, '"The Truth Will Set You Free": The Making of Amnesty International' (2002) 37(4) Journal of Contemporary History 575.

12 Public disillusionment has been cited as a reason why Amnesty International grew so rapidly in the 1960s, see Martin Walker, 'The good cause that grew into a multinational force' *The Guardian* (London, 19 March 1981) 17.

13 Amnesty International, 'The History of Amnesty International' <http://www.amnesty.org/en/history> accessed 1 May 2013.

14 ibid.

15 ibid.

16 Other aspects of Amnesty International's operations had already been successfully separated off for charitable status, such as its Prisoners of Conscience Appeal Fund, see Charity Commission, *Report of the Charity Commissioners for England and Wales for the year 1978* (HMSO 1979) para 65. Amnesty International Trust's counsel explained that the Trust deed was a 'pilot trust' to test whether the objects were charitable, see *McGovern* (n 10) 330.

17 *McGovern* (n 10) 329-330.

2A. The relief of needy persons within any of the following categories: (i) prisoners of conscience, (ii) persons who have recently been prisoners of conscience, (iii) persons who would in the opinion of the trustees be likely to become prisoners of conscience if they returned to their country of ordinary residence, (iv) relatives or dependants of the foregoing persons by the provision of appropriate charitable (and in particular financial educational or rehabilitational) assistance.

B. Attempting to secure the release of prisoners of conscience.

C. Procuring the abolition of torture or inhuman or degrading treatment or punishment.

D. The undertaking promotion and commission of research into the maintenance and observance of human rights.

E. The dissemination of the results of such research by (a) the preparation and publication of the results of such research, (b) the institution and maintenance of a library accessible to the public for the study of matters connected with the objects of this trust and of the results of research already conducted into such matters, (c) the production and distribution of documentary films showing the results of such research.

F. The doing of all such other things as shall further the charitable purposes set out above.

The Charity Commissioners rejected an initial application by Amnesty International Trust for registration as a charity on the basis that its objects in clause 2 were not exclusively charitable.[18] On appeal to the High Court counsel for the Inland Revenue conceded that clause 2A on its own would be charitable under the relief of poverty head of *Pemsel*,[19] but argued that the remainder of the clause included political rather than charitable objects. Counsel for Amnesty International submitted that the purposes of the Trust in clause 2 amounted to the relief of human suffering and distress, a thread of purposes which ran through the

18 Charity Commission (n 16) paras 65-72. The Charity Commissioners rejected an analogy for clause 2B to 'relief of prisoners and redemption of captives' in the Preamble to the Charitable Uses Act 1601, and an analogy to 'prevention of cruelty to animals' for clause 2C. Applying *Re Strakosch Decd* [1949] 1 Ch 529 (CA) the Commissioners noted that in any event clauses 2B, 2C and 2D could not be confined to charitable purposes but 'might well be attempted by political pressure or propaganda or by trying to inculcate an attitude of mind'.

19 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL). This point had been earlier accepted by the Charity Commissioners (n 16) para 67. See also Sir John Mummery's article in this issue of CL&PR.

Preamble to the Charitable Uses Act 1601, albeit recognising that such a thread was not explicit in Lord Macnaghten's fourfold classification of charitable objects in *Pemsel*.[20] Mr Justice Slade, sitting in the Chancery Division of the High Court, was prepared to accept that the relief of human suffering and distress could be a valid charitable object. Nonetheless, he rejected Amnesty International Trust's appeal, noting that despite Amnesty International Trust's general aims it did not follow that all 'good compassionate purposes' would be charitable *per se,* nor satisfy the public benefit requirement.[21] Applying the rule against political purposes as set out in *National Anti-Vivisection Society v Inland Revenue Commissioners*[22] Slade J found Amnesty International Trust's objects in clause 2B and 2C to be political purposes and the objects of the trust as a whole not exclusively charitable.[23] In so doing Slade J took the opportunity to set out a general classification of political purposes which has been applied in subsequent case law in the charity law field in England and Wales and beyond.[24]

Key Elements of Slade J's Decision

Construing a political purpose

A key feature of Slade J's judgment was how he addressed the question of the ambit and scope of the term 'political' and the fact that he drew for it a broad meaning. Prior to *McGovern* the precise elements of what constituted a political purpose or political activity had not been systematically considered by the courts. Because Lord Parker set out in *Bowman*[25] that trusts for political purposes had always been held invalid it was perhaps too late at that juncture to seek to pin

20 ibid 583.

21 *McGovern* (n 10) 329, 333.

22 *NAVS* (n 8). In so doing the House of Lords overruled *Foveaux* (n 7). The House of Lords decision is discussed in detail by Jonathan Garton in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) ch 18.

23 Clause 2A was accepted by all parties as charitable. Slade J expressed the view that he would have been prepared to accept clauses 2D and 2E as charitable if they had stood on their own. The political purposes in clauses 2B and 2C, however, were fatal to the objects overall, *McGovern* (n 10) 348, 352, 353.

24 See for example case law in Canada and New Zealand: *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999) 169 DLR (14th) 34; *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340, 352-355; *Re Collier (Dec'd)* [1998] 1 NZLR 81, 88-91; *Re Greenpeace New Zealand Inc* [2012] NZCA 533 (but cf *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688, 695-696). Australia stands apart in this context, see *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 85 ALJR 154 briefly noted at the end of this article.

25 *Bowman* (n 2) 442.

down the constituent elements of a political object, and it was unnecessary in the context of that case to do so. More surprisingly the point was not considered in any meaningful way by the majority of the House of Lords in *National Anti-Vivisection Society v Inland Revenue Commissioners* beyond Lord Simonds' observation that Lord Parker's dicta in *Bowman* had not narrowly confined as political only those objects which sought to change the law on a controversial issue.[26]

Nonetheless, drawing upon the approaches of the House of Lords in *Bowman*[27] and *National Anti-Vivisection Society*[28] Slade J drew up a non-exhaustive fivefold classification, setting out that the following purposes would be political and not charitable:[29]

> Trusts for political purposes…include (*inter alia*) trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

Taking the second arm of Slade J's classification first, this had been the primary focus of the pre-*McGovern* case law. Slade J concluded that both *Bowman* and *National Anti-Vivisection Society* established that it would be political to seek to procure a change to the existing laws of the United Kingdom.[30] This category is uncontroversial if one accepts the foundation of the rule in the pre-*McGovern* case law, a rule which had been applied in cases post-*Bowman*.[31] In setting out this category Slade J followed the traditional reasoning that firstly, the court would not

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26 *NAVS* (n 8) 62-63.

27 *Bowman* (n 2) 442.

28 *NAVS* (n 8).

29 *McGovern* (n 10) 340.

30 There is some confusion in this context since in his judgement Slade J sometimes refers to laws of the United Kingdom and sometimes to those of England and Wales.

31 See for example *The Commissioners of Inland Revenue v The Temperance Council of The Christian Churches of England and Wales* (1926) 10 Tax Cases 748 (HC), albeit Lord Parker's dicta in *Bowman* was not cited in the judgment and clear authority was not provided for the principle that a political purpose cannot be a charitable purpose. The later case of *Re Hood* [1931] 1 Ch 240 (CA) distinguished *The Temperance Council* on the basis that in *Hood* 'minimising and extinguishing drink traffic' was secondary to the main purpose of promoting Christian principles in regard to temperance, see 249 (Lord Hanworth MR), 252 (Lawrence LJ).

have the means to ascertain if such a change would be in the public benefit, and, secondly, where the court did have the means so to determine public benefit (as the House of Lords were able in the *National Anti-Vivisection* case), it could not do so because it would then be usurping the role of the legislature.[32] Rather, the court had to accept that the law was right as it stands. In drawing this latter point Slade J used for support the decision of the House of Lords in *Duport Steels Ltd v Sirs*[33] which had emphasised the importance of separation of powers in maintaining public confidence in judicial impartiality. In so doing, however, Slade J failed to limit the dicta of the House in that case which had been concerned with judicial impartiality in statutory interpretation.

In the first arm of his classification, Slade J identified the inclusion of those objects which are party political as 'within the spirit, if not the letter'[34] of Lord Parker in *Bowman*. It is notable that Slade J did not expressly broaden out this category to include objects in furtherance of a political cause, where such a cause was not expressly party political. Prior to *McGovern* cases had existed which could be said to fall into a broader category of supporting a political cause such as *Re Tetley*[35] concerning a gift for 'patriotic purposes' and *Re Strakosch*[36] which comprised a bequest 'to strengthen the bonds of unity between the Union of South Africa and the Mother country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South African community'. In the latter case Lord Greene MR interpreted appeasement of racial feeling as a cause and non-charitable in the same manner as Viscount Haldane interpreted patriotism in *Tetley*.[37] In both the purposes taken as a whole were considered too vague to be limited to an exclusively charitable object. On a point of construction these cases were not strictly ones in which there was a political purpose, but rather involved a failure to clearly confine a purpose to a charitable object with the result that there was potential for the objects to include non-charitable elements. Post *McGovern,* and following *Tetley* and *Strakosch,* this arm of Slade J's classification has been interpreted to include objects which further the interests of a political party or cause.[38]

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32 *McGovern* (n 10) 334, 336-337.

33 [1980] 1 WLR 142 (HL).

34 *McGovern* (n 10) 337.

35 [1924] AC 262 (HL).

36 *Strakosch* (n 18).

37 *Tetley* (n 35) 267.

38 See for example *Wolf Trust*, Decision of the Charity Commissioners for England and Wales (30 January 2003) (promotion of conservation and welfare of wildlife including wolves).

Other cases with an explicit party political focus did exist prior to *McGovern*. Citing *Bonar Law Memorial Trust v Inland Revenue Commissioners*[39] and *Re Hopkinson, decd*[40] Slade J expounded the view that the court was in just as much of a bind in the context of purposes which supported a political party as it was with purposes seeking to change legislation (which often did not have a party political focus). This was because party political views, by their nature, are controversial and as a result it is difficult to determine if they are for the benefit of the public. Slade J also provided the rationale that judicial neutrality could be compromised by encroaching on the functions of the legislature, so too endangering public confidence in the impartiality of the judiciary. This was because the court, by accepting charitable status for an organisation supportive of a political party, would be seen to be giving approval to the organisation and thereby endorsement or legitimacy to the political tenets to which the organisation ascribes. Of course, this argument ignores the fact that neither the Charity Commission nor the court is seen as compromising their neutrality in other circumstances, such as where they accept as valid charities with controversial non-political objects such as those in the fields of religion, health or the environment, or other objects with which some members of the public might disagree or be in serious doubt. Accepting as charitable an organisation on the basis that it has an object which satisfies an established legal test should not call into question the neutrality of the court. Slade J's approach also fails to take into account the fact that judicial even-handedness could result from accepting as charitable cases in furtherance all recognised political parties (as it already does in other fields where charities with opposing objects have been accepted).[41] Were it to do so, such an approach across a range of party political policies would not compromise judicial neutrality or explicitly demonstrate judicial endorsement of the tenets of the organisations in question. A more persuasive argument that Slade J could have used would have been that to accept organisations which support party political policies is contrary to public policy, particularly where the party political views are unpalatable to society, such

39 *Bonar Law* (1933) 49 The Times Law Reports 220 (HC) (organisation set up with a number of objects which included commemorating the Conservative politician Bonar Law and educating, *inter alia*, on political principles).

40 *Hopkinson* [1949] 1 All ER 346 (HC) (to educate along the lines of the Labour Party's memorandum).

41 Compare the Conservative Party principles cases (*Re Jones* (1929) 45 TLR 259 (HC) (a bequest 'to the Primrose league of the Conservative cause'); *Re Scowcroft* [1898] 2 Ch 638 (HC) (a village club and reading-room 'to be maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing'); *Bonar Law* (n 39)); the Labour Party Principles cases (*Hopkinson* ibid; *Re Bushnell* [1975] 1 WLR 1596 (HC) (bequest 'for the advancement and propagation of the teaching of socialised medicine')); and the Liberal Party principles cases (*Re H J Ogden* [1933] Ch 678 (HC), albeit in this case it was unnecessary to consider whether the promotion of Liberal principles could be a valid charitable object as an outright gift had been provided to one party).

as where the party is considered extremist or which proposes political tenets contrary to the state, albeit those cases could nonetheless be dealt with on the basis of existing laws rather than in setting out a separate political purpose rule in charity law.[42]

Slade J broke new ground in the third arm of his fivefold classification, determining as political those purposes which sought to change the law of a foreign country. There was no previous authority for this proposition, a point recognised by Slade J. Whereas some cases prior to *McGovern* had included this purpose as a subsidiary object, no other case had considered it as a primary purpose of an organisation seeking charitable status.[43] It is, of course, arguable that if one accepts as per Lord Parker in *Bowman*[44] that to change the law in this country is a political purpose then it is within the spirit of Lord Parker's reasoning to accept that attempts to change the law in another country would be political also. But in so doing one faces the obstacle of the rationale for not allowing this political purpose to be a charitable purpose. Slade J accepted that the traditional reasoning used in *Bowman* and *National Anti-Vivisection Society,* such as the public benefit argument, was weaker where the organisation's purpose was to change the law of a foreign county, and that the rationale of the law being taken to be correct as it stands simply could not apply.[45] In terms of the public benefit argument Lord Evershed MR considered, obiter, in *Camille and Henry Dreyfus Foundations Inc v Inland Revenue Commissioners*[46] that the requisite public was the public of the United Kingdom. In the context of this third arm of Slade J's classification assessment of benefit of a change in the law of a foreign country to the public of the United Kingdom is one which a court could feasibly undertake, with the consequence that this would remove the public benefit rationale as an obstacle to accepting as charitable a purpose which sought to change the law of another country. However, going beyond Lord Evershed in *Camille and Henry Dreyfus* Slade J took the view that the public of a foreign country could not be ignored in cases where a change of the law of that country was sought. In so doing Slade J

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42 Such as under the Public Order Acts, Crime and Disorder Act 1998, Racial and Religious Hatred Act 2006, Criminal Justice and Immigration Act 2008 and the raft of UK terrorism legislation.

43 Consider, for example, *Habershon v Vardon* (1851) 4 De G & SM 467, 64 ER 916 (restoration of Jews to Jerusalem); *Strakosch* (n 18) (strengthening the bonds of unity between South Africa and England); *The Commonwealth Magistrates Association; Report of the Charity Commissioners for England and Wales 1975* (1975-76 HC 463) 63-64 (promotion of the independence of the judiciary and educational purposes found charitable notwithstanding that the purpose could potentially include an ancillary object of an attempt to change the law in Commonwealth countries).

44 *Bowman* (n 2) 442.

45 *McGovern* (n 10) 338.

46 [1954] Ch 672, 684. See also Robert Meakin's article in this issue of CL&PR.

effectively reinstated the public benefit objection by arguing that considering the benefit of an effect of a change of the law on the public in a foreign country would be beyond the ability of a court in England and Wales.[47] Whilst this restores the public benefit rationale it does not remove its weaknesses. For example, as Nobles has pointed out, for laws at the extremes of commonly acceptable behaviour and international law (such as torture) it should not be difficult for a court to see that a legislative change would be in the interests of the public irrespective of whosoever or howsoever that public is construed.[48]

To strengthen his argument for this third classification Slade J added to it the rationale that there could be a public policy risk in charities campaigning overseas for changes in the laws in other jurisdictions, specifically in terms of a risk to the relationship between the United Kingdom and governments of other countries.[49] Such a risk could not be assessed by the court because it would be a political risk rather than a legal one (and indeed would need to be kept under review during the lifetime of the organisation given the shifting sands upon which political incumbencies stand). Whilst public policy arguments are often speculative, this one is also neither strong nor particularly defensible. It is not used, for example, as a reason to prevent charities working overseas for other purposes such as aid or education where the risk that they are seen as disturbing or interfering in the internal policies or politics of another country is equally prevalent. Neither does it take into account the fact that this risk, if it is present, exists whether or not an organisation has charitable status. It applies equally to any non-charitable organisation which chooses to campaign in or about another country's legal regime. Crucially, a point that this rationale ignores (and which distinguishes it from the other rationales such as judicial neutrality or public benefit) is that it is the activity of campaigning that creates the public policy risk and not the granting of charitable status by the Charity Commission or the court.

The fourth and fifth arms of the political purpose classification set out by Slade J, comprising any attempt to procure the reversal of government policy or administrative decisions of governmental authorities in this country or in another country, are similarly weak in terms of authority.[50] The categories rest upon an

47 *McGovern* (n 10) 338.

48 Richard Nobles, 'Politics, Public Benefit and Charity' (1982) 45 MLR 704.

49 *McGovern* (n 10) 338-339.

50 *McGovern* (n 10) 339-40. Slade J used the same public benefit and separation of powers arguments alongside the inability of a court to control a trust where the trust related to another jurisdiction. His example was the dilemma faced by a court where it had to consider public benefit in a jurisdiction which applied Islamic law, the court being unable to consider public benefit in that context 'and it would not be appropriate that it should attempt to do so'.

obiter statement by Lord Normand in *National Anti-Vivisection Society* where he mooted that the principle from *Bowman* in regard to legislative change would also apply to 'change by means of government administration'.[51] Putting aside its obiter status, even if one accepts that Lord Normand's point regarding a change in law effected by government authorities is within the spirit of the House of Lords' decision in *National Anti-Vivisection Society* concerning legislative change, it is still not authority for the much broader construction placed upon it by Slade J in *McGovern*. Moreover, Slade J's focus upon purposes seeking to reverse government policy as well as decisions by governmental bodies brings into the rule a wide spectrum of considerations, from matters which are unambiguously governmental policies to peripheral aspects of decision-making that connect to a matter under ministerial control but which are secondary to the actual administrative decision of the governmental authority. This makes this category not only extensive but also amorphous at the boundaries. To take an example, one current government policy is to ensure that hazardous waste is properly disposed of. The implementation of that government policy may be devolved to a government agency, such agency having the chief role of determining the location of hazardous waste sites. In reaching its decision on site location the governmental authority has to weigh up the scientific evidence of the best geological sites alongside, inter alia, the socio-economic, environmental and health evidence and political questions of impact upon local communities. The validity of the scientific evidence, environmental impact, community concerns and how the evidence should be best interpreted are relevant factors in this evaluative decision-making process. In this light, it becomes apparent that opening up the definition of political purpose to the policy field brings with it a wide range of matters that are not the actual administrative policy decision but which nonetheless lead into or form part of the decision-making of governmental authorities.

Finally, for the fifth of Slade J's categories of political purposes it should be noted that Lord Normand's statement, if it applies at all, was made only in the context of governmental authorities in this country. The only apparent justification for broadening that out to government authorities in other countries is parity of approach with the third arm of Slade J's classification which, as already noted, had no basis in law prior to *McGovern*.

Central to these fourth and fifth arms of Slade J's classification were the particular objects of the Amnesty International Trust in clause 2 of its constitution. Clause 2B was found by Slade J to fall within the fifth arm of his test as an object which sought to procure the reversal of decisions of governments and governmental

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51 *NAVS* (n 8) 77. Application can be seen in *Baldry v Feintuck* [1972] 2 All ER 81(HC) where Sussex University students' union's attempt to fund a campaign against a government policy of ending free school milk was deemed a political purpose and outwith the scope of the Union's constitution.

bodies in other countries.[52] As a category that stands without authority prior to *McGovern*, this begs the question of role the facts played in pushing the boundaries of Slade J's classification. This was arguably a defining moment for the future development of the law in this field, given that the fourth and fifth categories of political purposes established in *McGovern* have been subsequently interpreted at their broadest level.[53]

The impact of *McGovern* in construing a political purpose should not be underestimated. Slade J's fivefold classification was the first systematic attempt to give meaning to political purposes. As already noted, it was an expansive reading of the previous case law. Lord Wright sitting in the House of Lords in *National Anti-Vivisection Society*[54] considered as political merely attempts to influence the legislature to change the law in favour of the views or purpose of an organisation. Lord Simonds did not conceive of the term any more broadly than Lord Wright, but was compelled, along with Lord Normand, to state that he was not of the opinion that the word political was intended by Lord Parker in *Bowman* to be narrow or limited to merely acute controversial subjects.[55] That limitation upon Lord Parker's dicta had been put forward by Lord Greene MR, dissenting, in the Court of Appeal in *National Anti-Vivisection Society*,[56] and was similarly proffered by Lord Porter, also dissenting, in the House of Lords.[57] Such a narrow interpretation of Lord Parker is not represented in *McGovern*. Indeed by contrast Slade J pointed to Lord Simonds' obiter observation that Lord Parker had not envisaged the term political in a narrow sense.[58] As a result Slade J took the opportunity to entrench the political purpose rules and significantly extend the concept of a political purpose not just beyond controversial issues, but towards questions of law, policy and policy decision-making of governments and governmental authorities in any jurisdiction.

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52 *McGovern* (n 10) 347. On the facts the finding that clause 2B was a political purpose and not a charitable object was sufficient to decide the case. Slade J nonetheless went on to discuss, obiter, the effect of clauses 2C, D and E. He determined clause 2C to be a political purpose to procure changes in the laws of this country and of a foreign country (352), and that clauses 2D and E had they existed on their own would have been charitable as valid objects of research under the advancement of education (353).

53 See for example Charity Commission, *Campaigning and political activities by charities – some questions and answers* (Charity Commission 2007) para 7, discussed further below.

54 *NAVS* (n 8) 51-52.

55 *NAVS* (n 8) 62.

56 [1946] KB 185, 207 (CA).

57 *NAVS* (n 8) 54-55.

58 *McGovern* (n 10) 336.

Moreover, in setting out his fivefold classification of political purposes Mr Justice Slade made it clear that his was not an exhaustive classification.[59] Given the nature of the rule and a desire for flexibility in the law this is not a surprising outcome. One legacy of *McGovern* is that in extending Lord Parker's and *National Anti-Vivisection Society's* conception of a 'political purpose' and in failing to put clear boundaries around the concept Slade J opened the door for political purposes to be more expansively interpreted by the courts. That opportunity has been taken readily in subsequent case law. Peter Gibson J in *Re Koeppler's Will Trusts*,[60] for example, noted the non-exhaustive nature of Slade J's classification and added two further purposes as being within the spirit of Lord Parker in *Bowman* and outside the ability of the court to determine public benefit. His categories were 'trusts to oppose a particular change in the law or a change in a particular law'[61] and 'trusts aimed at securing better international relations, including co-operation in a particular part of the world'.[62]

A similar extension has taken place for the fourth and fifth arms of the classification in the context of government policy, which has been developed beyond Slade J's focus upon *reversal* to a far more nebulous conception of matters connected to such policy. Partly this enlargement is as a result of the spectrum of policy based purposes created between government policy and decisions of governmental authorities. In *R v Radio Authority, ex parte Bull,*[63] for example, McCullough J drew upon Slade J's classification of 'political' in *McGovern* and expanded it:[64]

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59 *McGovern* (n 10) 340.

60 [1984] 1 Ch 243 (HC). In this case Sir Heinrich Koeppler left part of his estate to the warden and chair of Wilton Park, an institution that Koeppler had founded for the 'benefit at their discretion of the said institution as long as Wilton Park remains a British contribution to the formation of an informed international public opinion and to the promotion of greater co-operation in Europe and the West in general'. In case Wilton Park had ceased to exist as an institution by the date of the testator's death, there was gift over in default to Magdalen College Oxford 'for the assistance of undergraduates or post-graduates (but not for established scholars) who have left their own country for political, racial or religious reasons'.

61 Citing as an example *Hopkinson* (n 40) 350.

62 *Koeppler* (n 60) 260-261 (Peter Gibson J). Although the Court of Appeal reversed the decision of Peter Gibson J on the facts of the case, it did not comment on his additional categories of political purposes: *Re Koeppler's Will Trusts* [1986] Ch 423 (CA).

63 [1995] 4 All ER 481. In *VGT v Switzerland* (2002) 34 EHRR 4 the European Court of Human Rights construed as falling within the meaning of 'political' any matter which was controversial and an issue of debate.

64 ibid 500. The court also endorsed dicta from Lord Diplock in *Tzu-Tsai Cheng* v *Governor of Pentonville Prison* [1973] AC 931, 945 (HL) that 'politics are about government. "Political" as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its

> Once the matter has become the subject of government policy, or once the need for legislation about it is advocated, particularly if the matter has become contentious, then, as it seems to me, it is open…to treat it as 'political'.

Bull was not a decision concerning a charity or application of the *McGovern* rule within charity law,[65] but nonetheless it demonstrates the extensiveness of Slade J's approach and the extent to which concepts can be enlarged in the absence of clear boundaries. The problem is that where a term becomes extended by incremental developments in individual cases the desirability of so doing tends to be left out of consideration. Indeed, Slade J did not address desirability in setting forth his classification of political purposes in *McGovern*, nor has it been considered in subsequent case law. As evidenced in the use of the classification in *Bull,* Slade J's conception of the term 'political' in charity law was simply transplanted into another field without any meaningful examination of context or the propriety of doing so.

The consequences for charitable purposes of 'concept creep' are evident in the ways in which these arms of Slade J's classification have been interpreted, particularly by the Charity Commission in its guidance to charities on this rule. For the second element of the fourth and fifth arms, for example, there has been a movement away from Slade J's focus upon 'particular decisions'[66] of governmental authorities to the authority per se. This is evident from the Charity Commission's initial guidance to charities on political campaigning post *McGovern* which stated that charities should avoid 'bringing pressure to bear on a government to procure *a change in* policies or administrative practices',[67] which would appear to cover policy development in addition to policy reversal. Latterly the Charity Commission has placed a spotlight upon the body that is the object of the campaign at the expense of the action of seeking to change a decision that body has made.[68] As argued elsewhere this misses two crucial nuances.[69] Slade J's fivefold

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policy'. For discussion see Alison Dunn, 'Charity Law – A Political Scandal?' [1996] Web Journal of Current Legal Issues <http://webjcli.ncl.ac.uk/1996/issue2/dunn2.html> accessed 1 May 2013.

65 The case concerned construction of the term 'political' in the context of Broadcasting Act 1990, s 92(2)(a) and was the result of a challenge made by Amnesty International (British Section) following the Radio Authority's decision to ban Amnesty's radio advertisements.

66 *McGovern* (n 10) 340.

67 Charity Commission, *Report of the Charity Commissioners for England and Wales for the year 1981* (HMSO 1982) para 54 (emphasis added).

68 Charity Commission (n 53) 7.

69 Alison Dunn, 'Hippocratic Oath or Gordian Knot? The Politicisation of Health Care Trustees and their Role in Campaigning' (2007) 18 King's Law Journal 481, 492-493.

classification makes a direct link between governmental policy and the objects of the organisation in respect of that policy. The mere fact that the body which is the object of the organisation's activities is a governmental authority (or more broadly a public body) is insufficient on its own. Moreover, it is not any or every decision of the governmental authority that will bring a purpose within this rule. Rather it is those decisions which are administrative (in a governmental sense) or which pertain to governmental policy (albeit, as recognised above, this creates its own broad range).

Slade J's fivefold classification also throws up some novel difficulties of application. Dicta in earlier cases had considered that a purpose which sought to uphold or maintain the existing law could be a charitable purpose,[70] and this has been taken forward post *McGovern*,[71] with the proviso that if the object is enforcement of the law that must be of the law as it stands and not anything broader.[72] The rationale against the courts being able to uphold as charitable a purpose which seeks to change the law has little troubled the courts in cases where the purpose is to uphold the current law through its enforcement. The argument would hold that if law is taken to be correct as it stands the court is able to judge the public benefit of enforcing the current law and it does not endanger its judicial neutrality to do so (that is, if one accepts the view that Acts of Parliament once passed are autonomous entities rather than political instruments). But by comparative extension with Slade J's classification of political purposes, what of the position where a purpose seeks to uphold or maintain a government policy or decision of a governmental body? A distinction could be made where a particular government policy is a direct derivative of a party political policy (such as the

Conservative's Big Society policy pursued as current coalition government policy) so bringing it within the first arm of Slade J's classification. But, what of those policies formed by a government or its agencies which are distinct from an express party political agenda, such as those which are derivative of European Union or

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70 See for example *Hopkinson* (n 40) 346, 350 (Vaisey J); *Re Vallance* (1876) Seton's Judgements, Vol 2 (7th edn) 1304 (the promotion of prosecutions for animal cruelty). Other examples of dicta that uphold the current law as charitable can be found, including Lord Normand in *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380, 391 (HL) (preservation of public order) and referred to in *McGovern*.

71 For example, on the basis of *Re Vallance* ibid, the Charity Commissioners were prepared to accept as charitable trusts which seek to promote compliance with the law (stopping short of seeking to enforce the law) by analogy, see *Public Concern at Work* Decisions of the Commissioners, Vol 2, April 1994, pages 5-10. In *Re Jenkins's Will Trusts* [1966] Ch 249 (HC) it was also accepted, obiter, that it might be charitable to have an organisation which supports enforcement of current law.

72 *Hanchett-Stamford v AG* [2008] EWHC 330 (Ch), [2009] Ch 173, [18] (Lewison J).

United Nations obligations? The extension of the notion of political policy means that upholding government policy through enforcement could fall within the *McGovern* classification as political, even though it may also fall within the spirit of those cases prepared to allow enforcement of the current law. The ultimate result is that making such distinctions presents difficulties in sustaining a cogent rationale for the broader political purpose rule.

Understanding and distinguishing primary purposes and subsidiary activities

A second key element of Slade J's judgment was his consideration of the distinction between primary charitable purposes and the means by which those purposes are carried out. Pre-*McGovern* case law had allowed for the fact that subsidiary political activity did not prevent an organisation having a primary charitable purpose, but that case law had not clearly considered the relationship or the dividing line between the two.[73] In *McGovern* Slade J distinguished between an act which was no more than a means to achieve an end, and an act that was integrally connected to the end purpose such that it formed part of the purpose or was an 'independent additional object' in its own right. He stated:[74]

> The distinction is thus one between (a) those non-charitable activities authorised by the trust instrument which are merely subsidiary or incidental to a charitable purpose, and (b) those non-charitable activities so authorised which in themselves form part of the trust purpose. In the latter but not the former case, the reference to non-charitable activities will deprive the trust of its charitable status.

It was Slade J's view that the Amnesty International Trust stood as an example of the latter. This is evident through the way in which Slade J distinguished *Jackson v Phillips,*[75] a decision of the Supreme Court of Massachusetts to which he was referred. In *Jackson* a bequest 'for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means, as, in their judgment, will create a public sentiment that will put an end to negro slavery in this country' was accepted as a valid charitable purpose. In that case Gray J

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73 The point was accepted, for example by Lord Normand in *NAVS* (n 8) 77 when he agreed with Lord Greene MR in the Court of Appeal that *Bowman* (n 2) did not apply 'when the legislation is merely ancillary to the attainment of what is ex hypothesi a good charitable object'. See also 61 (Lord Simonds); *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611 (CA) (Society set up for a broad range of objects, including 'watching and advising on legislation affecting the agricultural industry', political aspect considered merely subsidiary); *Hood* (n 31) where extinguishing drink traffic was simply a means to achieve the primary purpose of the spread of Christian principles and which was not 'an independent additional' non-charitable purpose.

74 *McGovern* (n 10) 341 commenting on *Hood* (n 31).

75 (1867) 96 Mass (14 Allen) 539.

emphasised that any attempt to act in a manner which was prohibited by law, which could 'excite servile insurrections' or which amounted to political agitation to change the law could not constitute a valid charitable purpose.[76] However, an attempt to create a public sentiment through 'moral influence and voluntary manumission' in favour of a purpose would be acceptable.[77] Moreover, insofar as the bequest left some discretion to the trustees in carrying out the purpose, that discretion should be exercised in a lawful manner using lawful means.

Slade J was of the opinion that the approach taken by Gray J in *Jackson v Phillips*[78] with regard to cultivating an attitude of mind could not be adopted in relation to the case before him. This was due to the differing foci in the two cases on how the purpose should be achieved. The creation of sentiment apparent in *Jackson* was with regard to the public to persuade slave owners to release their slaves. By contrast, in the context of clause 2B of its constitution the Amnesty International Trust sought the purpose of securing the release of prisoners of conscience not by the creation of a public sentiment as envisaged in *Jackson*, but rather through an attempt to exert 'moral pressure or persuasion' against government or governmental authorities responsible for imprisonment.[79] Thus clause 2B stood as an example of an act that was integrally connected to the end purpose such that it formed part of the purpose, that is, the means and the ends could not be separated. As a result, because of its political nature Slade J applied the dicta of Lord Parker from *Bowman v Secular Society Ltd*,[80] that the court would have difficulty in determining on the evidence whether the purpose had public benefit.

This has led to a more thoughtful approach in the case law to determining when creation of public sentiment is a valid charitable purpose. The limited cases prior to *McGovern* on matters similar to those raised by *Jackson*, such as *Anglo-Swedish Society v Commissioners of Inland Revenue*[81] and *Buxton v Public Trustee,*[82] had

76 ibid 565, 568.

77 ibid.

78 Or similarly the approach taken by Dillon J in *Re South Place Ethical Society* [1980] 1 WLR 1565 (HC).

79 *McGovern* (n 10) 346-347.

80 *Bowman* (n 2) 442.

81 (1931) 16 TC 34 (HC) (bequest to a society which sought to promote 'better knowledge and esteem between the English and Swedish peoples', held not exclusively charitable).

82 (1962) 41 Tax Cases 235 (HC) 242 (Plowman J) ('To promote and aid the improvement of international relations and intercourse to aid the improvement of international relations … [by a number of means including] (a) Educating or informing public opinion by the methods (among others) of periodical magazines and papers, books and pamphlets, lectures, prizes, scholarships and research work.). *Buxton* was cited in argument in *McGovern* but was not discussed in the judgment.

struggled to see the public benefit in promoting an 'an attitude of mind'[83] per se. Post *McGovern*, climate of opinion cases such as *Re Koeppler's Will Trusts,*[84] *Attorney-General v Ross*[85] and *Southwood v Attorney-General*[86] have more clearly delineated the difference between creating public awareness through a full discussion of views on an issue, which would be acceptable, and the presentation of one-sided information in order to influence public opinion, which would not.[87]

Contributing to Slade J's decision on the facts in regards to the means and ends of Amnesty International Trust's purposes was what he called the 'factual matrix' from which the approach of the Amnesty International Trust could be discerned.[88] In determining the means that the Trust proposed to take to meet its purposes Slade J was not prepared to take a benign interpretation of the types of activities which the trustees could undertake. This was because an Amnesty International Handbook laid out various means the organisation would pursue, including putting pressure upon foreign governments through letters and trade embargoes.[89] In drawing upon these extrinsic sources,[90] Slade J noted that because of the close links between Amnesty International and Amnesty International Trust, the constitution of Amnesty International and the content of the Amnesty International

Handbook formed part of the 'factual matrix' of the Amnesty International Trust's trust deed.[91] Through triangulating those sources it was evident to Slade J that the political means therein were integral to the purposes set out in clause 2 of Amnesty International Trust's purposes.

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83 *Anglo-Swedish Society* (n 81) 38 (Rowlatt J).

84 [1986] Ch 423 (CA).

85 [1985] 3 All ER 334 (HC) 343-344 (Scott J) cf *Webb v O'Doherty* (1991) 3 Admin LR 731 (HC) (Hoffmann J).

86 [2000] EWCA Civ 204, The Times 18 July 2000 (Project of Demilitarisation to propose alternative strategies to achieve disarmament).

87 See *Webb* (n 85) (Hoffmann J), *Hanchett-Stamford* (n 72) [17] (Lewison J).

88 *McGovern* (n 10) 349.

89 *McGovern* (n 10) 347, 349.

90 Where there is ambiguity in the terms of an organisation's objects inquiry can be made into the activities of the organisation to determine the meaning of the objects (*Incorporated Council of Law Reporting for England and Wales v AG* [1972] Ch 73 (CA) 91 (Sachs LJ)). This occurred in *McGovern* in the context of determining the precise scope of the word 'punishment' in clause 2. Extrinsic evidence will not be admitted where it relates only to the motive of a donor or founder, see eg *Strakosch* (n 18).

91 *McGovern* (n 10) 349.

In reaching this conclusion, Slade J dismissed the argument that the means Amnesty International Trust would pursue were no more than ancillary to a valid charitable purpose.[92] Nevertheless, he was prepared to accept, as cases before him, that an organisation could pursue non-charitable activities as subsidiary or incidental to a valid charitable purpose, such as political campaigning, advocacy, bringing actions for judicial review. Although noting that this 'distinction is perhaps easier to state than to apply in practice',[93] Slade J was clear that a court must separate out purposes from the means used to achieve them and also from any consequences that arise from the purposes being carried out. In so doing, Slade J laid out two propositions: first that if the primary object of an organisation was political it could not qualify as a charity and, second, that an organisation with a primary charitable purpose did not cease to be so simply because the means used to achieve or the consequences which arose from the purpose were non-charitable.[94] As a result he concluded that:[95]

> Trust purposes of an otherwise charitable nature do not lose it merely because, as an incidental consequence of the trustees' activities, there may enure to private individuals benefits of a non-charitable nature',[96] and 'the mere fact that the trustees may have incidental powers to employ political means for their furtherance will not deprive them of their charitable status.

Thus, *McGovern* opens up degrees of difference and creates a nuanced boundary between purposes which are properly conceived of as charitable objects, non-charitable purposes which are incidental to charitable objects and non-charitable activities which further charitable objects. To take an example combining the

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92 *McGovern* (n 10) 351. For example, for clause 2C of the Amnesty International Trust ('securing the abolition of torture or inhumane or degrading treatment or punishment'), Slade J was not prepared to accept that construction of the wording was limited. Since punishment could involve both corporal and capital punishment then it was not outside the bounds of the clause for the trustees to seek change in the law of this country or foreign countries on issues such as the death penalty. Slade J accepted the argument of counsel that in some states torture and inhumane and degrading treatment are not sanctioned by law but carried out by executive authorities without legal consent but that still meant that whilst the purpose would not involve an attempt to change the law via legislation, it would nevertheless involve the exertion of pressure upon government or governmental authorities in foreign countries to abolish the practice. For these reasons, clause 2C was a political purpose.

93 *McGovern* (n 10) 341. See also *Bushnell* (n 41) 1604 (Goulding J).

94 Drawing upon *NAVS* (n 8), *Hood* (n 31), *Bushnell* (n 41) and *Incorporated Council of Law Reporting* (n 90).

95 *McGovern* (n 10) 343.

96 *McGovern* (n 10) 340-341, citing *Incorporated Council of Law Reporting* (n 90) where the benefits to the legal profession of being supplied with the 'tools of their trade' did not render the publishing of law reports non-charitable.

primary/subsidiary rule and Slade J's treatment of *Jackson*: an organisation with the charitable purpose of reducing the incidence of liver disease in England and Wales might attempt to persuade the public to desist from the practice of drinking and so create a climate of sentiment against alcohol. Similarly such an organisation might warn the public of the health consequences of consuming alcohol.[97] Subject to the point made above against putting forward only one or limited views,[98] both approaches would be acceptable because the means (persuasion of the public) are incidental to the end (reducing the incidence of liver disease) which is an acceptable charitable purpose under advancement of health or the saving of lives.[99] An attempt by the organisation to persuade the public to persuade other individuals to desist from imbibing alcoholic spirits in order to achieve the purpose of reducing the incidence of liver disease would also be acceptable. So too, an attempt to persuade the public to persuade companies or institutions to desist from certain practices (such as persuasion of supermarkets to desist in selling cheap alcohol) in order to achieve the organisation's charitable purpose. Similarly any direct attempt by the organisation to persuade companies or institutions to desist from certain practices (such as direct persuasion of supermarkets to desist in selling cheap alcohol) in order to achieve the purpose of reducing the incidence of liver disease would also be acceptable. An attempt by the organisation to persuade the public to put pressure on government or governmental authorities (thus informing the public of a political issue), or any direct attempt to persuade a government or governmental authority to change a practice (such as prohibiting or otherwise restricting the manner or means by which alcohol may be produced or sold) in order to achieve the purpose of reducing the incidence of liver disease would still be acceptable if it was a subsidiary activity of the organisation in furtherance of its charitable purposes. However, if in any of these examples (and particularly in the latter two) the activity of persuasion becomes the end in itself then such means fall to be construed as integral to the purpose (as they did in *McGovern*) with the result that the organisation would not be constituted for exclusively charitable purposes.

Distinguishing between a political purpose as an end in itself and political activities which are no more than a means to achieve an acceptable charitable purpose have, to some extent, ameliorated the effect of the general rule as set out in *Bowman* and

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97 One can read the decision of the Privy Council in *Tribune Press, Lahore (Trustees) v Income Tax Commissioner, Punjab, Lahore* [1939] 3 All ER 469 in this light. In this case a trust to maintain a press and newspaper successfully sought charitable trust exemption from income tax. It had been contended unsuccessfully by the respondent that because the newspaper contained political propaganda and reform advocacy the trust could not be charitable. In this trust a climate of opinion through education is created via the means of the newspaper.

98 See *Southwood* (n 86).

99 See Charities Act 2011, s 3(1)(d).

National Anti-Vivisection Society. Indeed, *McGovern* is important both in making clear this opportunity and in not shutting it down as a possibility. Nonetheless, understanding the exact distinction between primary and subsidiary or incidental purposes and acceptable political means (or activities) to achieve charitable purposes has troubled trustees, the Charity Commission and charity sector representatives since *McGovern*.[100] Partly this is a result of a tendency to misconstrue Slade J's use of the term 'incidental powers'[101] and partly it is due to the fact that, in practice, the distinctions do not admit of precise division and have to be considered substantively as questions of degree. The difficulty of making such a judgment call has not only led many charity trustees to shy away from undertaking even permissible political activities in furtherance of a valid charitable purpose, but it has also contributed to the enduring myth that charities and politics have to remain absolutely distinct.

Concluding Thoughts

The case of *McGovern v Attorney-General* is often considered as a key case in charity law because of the systematic way in which Slade J set out a classification of political purposes and the clarity that classification subsequently gave to the boundaries of the law in this field. By contrast, Slade J's decision in *McGovern* can be interpreted as a key case not for reasons of utility or clarification, but because of the limiting affect it has had upon the jurisprudential development of charity law in England and Wales. As noted at the time, *McGovern* served to create a 'formula' by which courts have been able to subsequently sidestep the question of political purposes.[102] Simply applying Slade J's classification enables cases on political purposes to be dismissed without consideration or evidence and, as Weiss pointed out, any distinction between a test of public benefit and a political purpose per se is consequently erased.[103] As a result, the case entrenched the rule against political purposes by unquestionably accepting the differing rationales for the rules and adding to them. The case also enlarged the rule by extending the pre-*McGovern* categories of political purposes, and this was done without

100 For example it has been described as 'a minefield of confusion, obstruction and outdated interpretations of the law', see 'Report of the Advisory Group on Campaigning and the Voluntary Sector' (Advisory Group 2007) at:

http://www.bateswells.co.uk/Files/News/CampaigningReport.doc accessed 1 May 2013.

101 It is the powers of the trustees that Slade J identified as being incidental (ie they are not the main purpose of the trust). Slade J was not saying that in operation the powers have to be incidental to other activities as trustees ie Slade J was not commenting on the use to which the powers are put (ie the activities themselves must be merely incidental).

102 Nobles (n 48) 707.

103 Friedl Weiss, 'Quot Homines Tot Sententiae or Universal Human Rights: A propos McGovern v The Attorney-General' (1983) 46(4) MLR 385, 389.

consideration of the propriety or consequences of doing so. These limitations on the shape and development of charity law at a practical level extend also to the cogency of its jurisprudential base. One effect of allowing courts to sidestep the practical question of political purposes is that *McGovern* also closes down any scope for judicial probing of the *Bowman* or *National Anti-Vivisection Society* rationales, save where a case were to reach the Supreme Court (unlikely though that appears). The irony is that the Law Lords' concern in *National Anti-Vivisection Society* with ensuring that the law does not stultify itself (in a narrow sense)[104] is exactly the broader consequence of the *McGovern* decision at a jurisprudential level.

At the same time as restricting the development of the law on political purposes *McGovern* also effectively opened up the ability of charities to pursue political activities. Slade J did this by prominently setting out the primary/subsidiary purpose distinction and by separating political means from charitable ends. This second, facilitating effect has become even more important in light of the extension of Slade J's non-exhaustive classification of political purposes post *McGovern*. But this second effect of Slade J's judgment can also be viewed in a different light. An alternative interpretation is that while the primary/subsidiary rule has resonance at a practical level, it also has a subjugating effect by serving to reinforce the broader prohibition on political purposes. This is because while ever charities are permitted some level of political activities the push for them to be able to contribute at a wider political level through use of political purposes will not flourish. Indeed, alongside the traditional judicial rationales, the fact that charities can use political means in any event is used as a reason why there is no need to alter the current *Bowman* and *National Anti-Vivisection Society* rules. Thus the longer term effect of McGovern has been to doubly restrict the development of charity law in this field.

An answer to the question of what the consequences would have been to the development of jurisprudence in this field had Slade J been bolder in *McGovern* is emerging in Australia. In 2010 a majority decision of the Australian High Court in *Aid/Watch Incorporated v Commissioner of Taxation*[105] allowed an appeal from the Federal Court, finding that an organisation with the purpose of generating

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104 The point was actually made by Amherst D Tyssen, *The Law of Charitable Bequests* (Sweet & Maxwell 1888) 176 and cited in NAVS (n 8) 62 (Lord Simonds) and 50 (Lord Wright).

105 *Aid/Watch* (n 24) (Heydon and Kieffel JJ dissenting); *Federal Commissioner of Taxation v Aid/Watch Incorporated* (2009) 178 FCR 423. For discussion see Kerry O'Halloran and Myles McGregor-Lowndes, 'Charity Law, Advocacy and the Aid/Watch Decision: Compatibility of Charitable Purposes and Political objects – the View from Australia' (2010-11) 13 CL&PR 1; Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation' (2011) 35 Melb ULR 353.

debate on the effectiveness of Australian and multi-national aid as to the best means of poor relief was a charity. In so doing the court rejected both the political purpose doctrine under *Bowman* and the doctrine's 'scope indicated in England by *McGovern*' as having no applicability in Australia.[106] This decision is not as extensive as might first appear. It is limited in so far as it does not accept as charitable all political objects. Rather it permits evidence to be considered by a court on the charitable nature of a political object, such as encouraging public debate on a political issue as seen on the facts of the case.

A key point of distinction between the Australian and English and Welsh context is the Australian Constitution which, in the words of the majority in *Aid/Watch,* specifically sets out '"agitation" for legislative and political change'.[107] One effect of this constitution is to create channels of dialogue between electors and legislators on matters of government and politics. As a result the traditional public benefit argument is no longer an obstacle for a court when faced with a purpose which seeks to create debate about a change in the law as Aid/Watch sought to do.[108] This constitutional point was significant in the context of the *Aid/Watch* decision, and it is subsequently significant as a point of distinction limiting the usefulness of *Aid/Watch* for other shores. However, other jurisdictions, including England and Wales, will lose out on an opportunity to re-evaluate its charity law jurisprudence and put it on a firmer footing if *Aid/Watch* is dismissed on those grounds alone.[109]

106 *Aid/Watch* (n 24) [48].

107 *Aid/Watch* (n 24) [45], referring to *Royal North Shore Hospital of Sydney v AG* (1938) 60 CLR 396 and the concerns of Dixon J, 426.

108 *Aid/Watch* (n 24) [45]. The extent to which *Aid/Watch* applies more broadly is unclear.

109 In New Zealand re-evaluation of the political purpose doctrine in light of the *Aid/Watch* decision was left open for consideration by a higher court in *Re Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC), but rejected by the Court of Appeal *Greenpeace* (n 24) [63]. This case is currently on appeal to New Zealand's Supreme Court. The Supreme Court hearing of *Greenpeace of New Zealand Inc v Charities Board* (SC 97/2012) was held on 1st August 2013, judgment awaited.