LAW REFORM AND THE REGULATION OF CHARITIES: SOME COMPARATIVE THOUGHTS

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The papers presented in this volume of the Charity Law & Practice Review, originally presented at the International Charity Law Symposium at the Charity Law & Policy Unit, University of Liverpool, on 11 April 2014, represent the best of the new comparative scholarship on charity law and regulation. Along with the wide geographic diversity and richness of the countries and regions covered, core questions and issues emerge. In this brief contribution, we seek to engage with some of those core issues and common concerns for charity law, regulation, and reform.

As the papers in this Symposium attest, in recent years there has been an increasing focus on the need for law reform in the charity and wider nonprofit sectors. With an unfortunately less visible profile than other areas of law, charity law reform has often been overlooked or placed on a back burner, with the result that other fields of law with greater perceived needs for reform have taken priority. When charity law reform is finally achieved it can be misconstrued as the completion of a long awaited reform process, rather than simply a milestone along the way. In a number of the jurisdictions highlighted in the papers for this Symposium, for example, reform is the outcome of extensive lobbying for change and represents a culmination of activity over a lengthy period of time. But the reality is that rather than an end-point, reform is often just the beginning of a much longer process of delivering change. Despite high expectations upon it, reform does not always bring the certainty or put into effect the desired changes that

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reformers hoped it would. As the papers in this Symposium show, law reform often raises new questions on implementation and interpretation or resurrects old ones. Law reform can also have broader, sometimes unforeseen, consequences that might also need to be addressed.

Issues around implementation can be seen in a number of contexts. At one end of the scale there can be delay or failure to implement charity law reforms and, at the other, implementation that is short-lived or which takes time to settle in. As Oonagh Breen highlights, in Ireland the legislative reform set out in the Charities Act 2009 has yet to be implemented some five years post enactment, and twelve years post commitment of the Irish Government to the creation of a new statutory framework for charities within its jurisdiction.[1] Failure to implement law reform is evident elsewhere. In England and Wales, for example, the public fundraising provisions in Part 3 of the Charities Act 1993 have never been implemented, and the new corporate form, the charitable incorporated organisation, first recommended in 2001 and enacted in the Charities Act 2006 only came into (partial[2]) effect last year. In Australia a long awaited regulator for the sector, the Australian Charities and Not-for-profits Commission (ACNC) was established through legislation in 2012,[3] but as Fiona Martin explains,[4] the implementation of this significant reform is threatened to be overtaken by political events as a result of a change in the Federal Government.[5] In New Zealand too, due to inadequacies of public funds the newly created sector specific regulator, the Charities Commission, was disestablished after a short period of operation with its core functions drawn into New Zealand's Department of Internal Affairs.[6]

As these latter examples show, even where implementation occurs it may not subsist or it may not be able to find its feet in quick order. Taking time to develop a regulatory approach and culture was certainly true of the implementation of the Office of the Scottish Regulator, as it will be true of the new Charities Regulatory

1 O Breen, 'Long Day's Journey: The Charities Act 2009 and Recent Developments in Irish Charity Law' (2014-15) 17 CL&PR 91.

2 The provisions which enable an existing charitable company to convert to the new form are not yet in force.

3 Australian Charities and Not-for-profits Commission Act 2012, in force from 2013.

4 F Martin, 'Developments in Australian Charity Law: One Step Forward and Two Steps Backward' (2014-15) 17 CL&PR 23.

5 An Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 is currently under debate.

6 The New Zealand Charities Commission was established under the Charities Act 2005 and disestablished under the Charities Amendment Act (No 2) 2012.

Authority in Ireland.[7] This is apparent also in other reforms in England and Wales including both the implementation of the Charity Tribunal, created under the Charities Act 2006 with an intention of offering a much needed lower-cost route of appeal from decisions of the Charity Commission but which has resulted in a number of high cost cases;[8] and the implementation of an opt-in self-regulatory scheme for fundraising which remains subject to a reserve power for Parliament to intervene if it does not become more widespread and operationally effective.[9]

Interpretation is another area in which law reform creates new challenges. In those jurisdictions where there has been a recent overhaul of charity frameworks and operating legislation, the evident tension around the definition of charity in pre-Act debates has been borne out in practice post-reform. In England and Wales, for example, the Charity Commission's guidance interpreting the new public benefit requirement in the context of an apparent repeal of the presumption of public benefit in the Charities Act 2006[10] was subject to a (partly) successful legal challenge.[11] The exact nature and meaning of the public benefit requirement in English and Welsh law had been the subject of intense debate in Parliament pre-Act and confusion was evident post-Act in the way in which existing case law was to be interpreted in light of legislative provisions which were, at best, a legal and political fudge. The focus of the legal challenge was around interpretation of public benefit for fee-charging schools, but that has not been the only issue of application that the public benefit test has raised.[12] Nor was England and Wales the only jurisdiction to face difficulties in interpreting public benefit. In Australia, for example, the definition of public benefit has been an issue in the context of

7 The Office of the Scottish Charity Regulator was established by the Charities and Trustee Investment (Scotland) Act 2005. The Irish Charities Regulatory Authority was established under the Charities Act 2009 but is awaiting commencement.

8 Such as *The Independent Schools Council v The Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2012] Ch 214.

9 Charities Act 2006, s 69.

10 Charities Act 2006, s 3, now Charities Act 2011, s 4.

11 *The Independent Schools Council v The Charity Commission for England and Wales* (n 8) discussed in P Luxton, 'Opening Pandora's Box: The Upper Tribunal's Decision on Public Benefit and Independent Schools' (2012-13) 15 CL&PR 27.

12 See for example Charity Commission, *Application for Registration of the Preston Down Trust,* Decision of the Commission (3 January 2014).

religious charities,[13] as it is anticipated by Breen to be so in Ireland.[14] In a different setting, Evelyn Brody's article on the United States law, dealing with constructs such as change of charitable purpose which are often dependent on context, highlights the difficulty of interpretation when circumstances change but the law does not.[15]

That charity law reform has not been an end-point in achieving legal change is also evident through the fact that it gives rise to broader consequences and new challenges that might not have been foreseen or intended by the law reformers, but which may still need to be addressed. One such unintended consequence highlighted in the papers for this Symposium is increased scrutiny on sector organisations and the response of organisations to that scrutiny. As Adam Parachin argues, in Canada an attempt to provide incentives for philanthropy for first-time donors through introduction of a first-time donor's super credit tax concession (FTDC) in 2013 potentially has the (unintended) consequence of subjecting charitable organisations to increased scrutiny and, through that, greater regulatory intervention.[16] Such scrutiny opens the sector up to broader questions about organisational transparency and governance yet to be addressed in Canadian law but which were not apparently within the intent of the tax concession.

In terms of a sector response to law reform, it is understandable that due to nature, size, scale and diversity, charities and the wider nonprofit sectors will rarely speak with one voice, particularly on matters of vision, role and purpose. As a result, despite reform in the charity field often being long awaited, it is not assured that there will be an automatic buy-in to that reform by organisations or sector representative bodies. In Australia, for example, where transparency is being tackled by the newly created sector regulator, the ACNC, Martin highlights the polarisation of views and resistance of religious and financial service organisations with regard to the need for and consequences of this increased scrutiny.[17] A lack of buying-in to reform is also evident in England and Wales where the introduction of self-regulation of fundraising has had a low adoption rate, thereby leaving

13 We are grateful to Matthew Harding for raising this point in discussion at the Symposium, and see P Ridge, 'Religious Charitable Status and Public Benefit in Australia' (2011) 35 Melbourne University Law Review 1071.

14 See Breen (n 1).

15 E Brody, 'Simultaneous Contrasts in the US Law and Regulation of Charities' (2014-15) 17 CL&PR 113.

16 A Parachin, 'Tax Reform in Canada: Are Enhanced and Targeted Donation Incentives Harmful for the Charitable Sector?' (2014-15) 17 CL&PR 47.

17 See Martin (n 4).

outside the regulation those very organisations at which the regulation was aimed.[18] As these examples show, the drive and desire for reform cannot ever be a guarantee of its success.

Given the nature of law reform as an ongoing process in terms of implementation, interpretation and consequences it is important for it to be kept on the agenda even after desired change has been achieved. Too often a political programme moves on post-reform and resultant problems are left unresolved. A novel feature of the recent charity law reform in England and Wales was provision within the Charities Act 2006 for a five-year review of the effect and impact of the legislation's provisions (the resultant Hodgson Review).[19] One key attribute of that Review was less the recommendations it made (important though some of them were), and more the fact that it built into the reform process an ongoing period of reflection. This has served to keep the question of developing charity law reform in England and Wales on the political agenda and has resulted in referral of charity law matters to the Law Commission for further consideration.[20]

The papers in this Symposium are also revealing about the processes of reform. Two key aspects of this theme are evident: firstly the arbitrariness of the political and economic climate and secondly the role within that climate played by internal and external drivers for reform. In England and Wales, and separately in Scotland, favourable policy climates in the late 1990s caused by a change of political administration took momentum for sector reform from a push within the respective sectors.[21] The rolling back of the state, the move to a mixed economy of welfare provision, a drive by the sector and a new government with a clear agenda for change (with a focus on partnerships) all combined to create an enabling environment conducive to reform. The policy climate stemming from

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18 The potential of future reform on trustee remuneration is also prompting divisive views from within the charity sector. See Lord Hodgson, *Trusted and Independent: Giving charity back to charities: Review of the Charities Act 2006* (The Stationery Office, 2012); V Mair, 'Sector leaders criticise Lord Hodgson's proposals on paying trustees, *Civil Society*, 17 July 2012; Cabinet Office, *Interim Charities Act review response from the Minister for Civil Society* (Cabinet Office, 2012).

19 Charities Act 2006, s 73(2), Lord Hodgson (n 18).

20 The Law Commission's 11th programme of law reform includes a range of micro technical charity law issues drawn from Hodgson Review, Appendix A (n 18). For the Law Commission's terms of reference see http://lawcommission.justice.gov.uk/areas/charity-law.htm. See also E Cooke and D Robinson, 'The Law Commission's Charity Law Project' (2014-15) 17 CL&PR 65.

21 Deakin Commission, *Meeting the Challenge of Change: Voluntary Action into the 21st Century. Report of the Commission on the Future of the Voluntary Sector* (NCVO, 1996), Kemp Commission, *Head and Heart: The Report of the Commission on the Future of the Voluntary Sector in Scotland* (SCVO, 1997).

that period and which culminated in the Charities and Trustee Investment (Scotland) Act 2005 and the Charities Act 2006 in England and Wales would have been unthinkable under the previous political administration which demonstrated a continuing lack of impetus for reform.

In Ireland too, we see an example of how expediencies create the priorities for reform and the way in which external and internal drivers join to impel reform forward. As Breen explains, it was a combination of a prevailing external driver through the UN Security Council and the Financial Action Task Force responding to an unprecedented act of terrorism as a world event which created the policy imperative for reform. But it took drivers closer to home arising out of accountability and transparency scandals within the Irish charity sector that prompted the more immediate imperative to get action on implementation.[22] Other internal drivers may demonstrate less of a need to reform the sector and represent more of a sop to the sector. Parachin's article on Canada, for example, shows evidence of an attempt to encourage and maintain sector goodwill by introducing tax reforms which 'keep faith' with the sector in light of expectations that had been built up for more extensive form.[23] Looked at in this light the tax reforms are more than just concessions for first-time donors.

Of course, arbitrariness in the policy climate can work both ways and events which trigger reform of the law can also trigger its repeal. As evident in Australia, that policy arbitrariness is not currently enabling reform but is in danger of dismantling it as a result of a change of ideology towards the charity and wider nonprofit sector brought about by a new political administration.[24] Similarly, economic austerity measures in New Zealand led to the closure of its Charities Commission as a separate regulatory body, whilst in Ireland they resulted in withdrawal of the initial funding for its proposed sector regulator, the Charities Regulatory Authority. In England and Wales austerity measures led to a one third reduction of its Charity Commission's budget in real terms without a corresponding reduction in its remit. This caused a significant loss of staff in the Commission alongside the need for a strategic review of how it operated. Subsequent reviews of the Charity Commission have focused on its inability to oversee the charity sector and properly exercise its power, without addressing the lack of resourcing.[25] The effect of lack

22 See Breen (n 1).

23 See Parachin (n 16).

24 See Martin (n 4).

25 House of Commons Public Administration Select Committee, *The Role of the Charity Commission and 'public benefit': Post-legislative Scrutiny of the Charities Act 2006*, Third Report of Session 2013-14, Vol 1, HC 76 (6 June 2013); National Audit Office, *The Regulatory Effectiveness of the Charity Commission*, HC 813, Session 2013-14 (4

of resourcing is evident too in Brody's discussion of the sorry tale of the US Internal Revenue Service and the re-purposing of use of § 501(c)(4) status for organisations as a driver for change.[26] As these examples reveal, if there is an element of randomness and uncertainty about whether reform will actually occur, there is equally an element of randomness and uncertainty about whether reform will actually stay the course.

But the success or otherwise of law reform is not just about timing, resourcing or the resident political administration. There is a significant role to be played by the sector itself. A theme evident from the papers in this Symposium is the importance of having advocates for reform, be they within or without the sector, and a workable (preferably stable) relationship between the sector and government.[27] There has been a strong sector, with well-placed sector representatives through umbrella bodies with a clear vision, alongside a (relatively) stable relationship with government in England and Wales to push for reform (or object to it), and keep reform on the political agenda. There is an even stronger sector in Scotland, a product of the size of the nation and the concentration of organisations close to the seat of power in Edinburgh. In Ireland, Breen highlights the way in which the sector has come to the fore to fill the void left by the Irish Government's failure to commence transparency provisions in legislation.[28] In Australia the sector has been more disparate and diverse and, in the early years of reform, certainly less cohesive.[29] It will be interesting to see how the sector there coalesces (or not) around the consultations on the future of the ACNC and to compare that response to the response of the charity sector in England and Wales in defending the Charity Commission in the face of extensive criticisms from the Public Administration Select Committee, Public Accounts Committee and the National Audit Office.[30]

December 2013); House of Commons Committee of Public Accounts, *The Charity Commission*, 42nd Report of Session 2013-14, HC 792 (5 February 2014).

26 See Brody (n 15).

27 A point also evident in K O'Halloran et al, 'Charity law reforms: overview of progress since 2001' in M McGregor-Lowndes and K O'Halloran (eds) *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 41.

28 See Breen (n 1).

29 For example, K O'Halloran et al (n 27) 41 make the point that in the period leading up to reform in Australia the charity sector 'is still being "invented" in Australia'.

30 House of Commons Public Administration Select Committee (n 26); National Audit Office (n 26), House of Commons Committee of Public Accounts (n 26). See also, D Morris, 'Recent Developments in Charity Taxation in the United Kingdom: The Law Gives and The Law Takes Away' in M Harding, A O'Connell and M Stewart (eds), *Not-for Profit Law. Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 264, where she notes how the sector in England and Wales united in 2012 in the face of a threat to its tax reliefs.

Alongside a strong sector and a workable state/sector relationship, the papers from this Symposium highlight a further theme in the process of law reform, which is the importance of the existing legal framework either as an enabler or as a barrier to change. Two issues arise in this context. First, in some jurisdictions, particularly federated systems like those in the US, Canada and Australia, the legal landscape is complex. The existing legal frameworks can involve multiple regulators, none of which are solely regulating charitable or nonprofit sector organisations and may misunderstand how the sector operates or ignore it when devising regulatory standards or requirements. Martin's article on Australia, for example, points to 95 government bodies in six states and two territories administering 170 different laws affecting nonprofit organisations.[31] Such multiplicity of regulation and regulatory bodies is evident in other jurisdictions too, with Ireland demonstrating that this is not just the preserve of federated systems.[32] Alongside this fragmented regulatory framework sit different operating definitions of charity for different purposes, such as in the US where there are separate definitions for fundraising and taxation with different underlying policies which operate to determine the breadth or narrowness of the definition.[33] As Brody's article examining the sightless intersection and bifurcation between corporate law and trust law in the US also shows, one consequence of this is bipolar; that is, the creation of an overlap in regulation in some areas at the same time as the creation of regulatory gaps in others.[34] Achieving successful reform is inevitably difficult where there is this type of regulatory disjointedness, duplication and deficiency.

Secondly in relation to an enabling legal framework, the papers in this Symposium show the importance of having accessible mechanisms by which the law can be challenged and so open to change. One of the common criticisms of charity law across the common law world has been the paucity of case law. Since case law is one of the principal mechanisms through which common law systems evolve it is of primary importance that routes to challenge are open and accessible. This includes having sufficient reporting on decision-making, which is not always the case in some jurisdictions.[35] Without access to decisions of regulatory authorities it is very difficult to challenge interpretation of the law or the application of it. Beyond sufficiency of information there also needs to be a sufficiency of routes for challenge open to organisations which may have limited resources to bring a case.

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31 See Martin (n 4) citing National Roundtable of Nonprofit Organisations (2007).

32 A further example is the case of the Cup Trust in England and Wales. See National Audit Office, *The Charity Commission: The Cup Trust*, HC 814, Session 2013/14 (4 December 2013).

33 Evident in the US context, see Brody (n 15).

34 ibid.

35 Such as in Ireland, see O Breen, 'Ireland: Pemsel Plus' in McGregor-Lowndes and O'Halloran (n 27) ch 3.

In England and Wales (and separately in Scotland[36]) a Charity Tribunal was created through the legal framework reforms in response to this very issue with the explicit purpose of being a reasonable-cost route of appeal (although it has not necessarily operated that way in practice) and the Law Commission is taking forward discussions of how that Tribunal might be opened up further.[37]

The papers in this Symposium also reveal the difficulty of accomplishing workable law reform when there are competing agendas and purposes informing or driving the reform process. In the context of the provision of tax concessions in Canada for example, Parachin's article raises directly the question of what regulation is, or should be seeking to achieve in relation to the purposes for tax liabilities and tax concessions and whether increased scrutiny is appropriate in these circumstances.[38] Indeed, the papers as a whole lead to a raft of other questions: Can reform be achieved which effectively accommodates principles of the operating legal system, such as the concepts of flexibility and discretion in common law jurisdictions, into a legislative framework which inherently has more rigidity in its definition of terms? How should the needs of donors and beneficiaries be accommodated alongside the needs of organisations and alongside the policy of encouraging philanthropy? Can regulatory trends towards efficiency and standardisation of regulation be accommodated at the same time as respecting the diversity of the sector? How can red tape and regulatory burdens be reduced as part of a de-regulatory agenda without compromising the public's trust and confidence?

Should anything be done about organisations that exist under the regulatory radar? One example of the tension evident in reform where there are competing agendas is the current proposal in England and Wales to increase the ability of charities to undertake social investment through different financial vehicles, but without creating difficulties for existing requirements for reporting and accounting or use of permanent endowment, or endangering the current safeguards against private benefit.[39] Similarly in the US context, Brody highlights the need for law to evolve by not binding fiduciaries with restrictions that preserve a rule but which allow a

36 The Scottish appeals mechanism is through the Scottish Charity Appeals Panel which hears appeals from decisions of the Office of the Scottish Regulator.

37 Proposed in Strategy Unit Report, 'Private Action, Public Benefit' (Cabinet Office, 2002). For the Law Commission's terms of reference in charity law see http://lawcommission.justice.gov.uk/areas/charity-law.htm

38 See Parachin (n 16).

39 See E Cooke, Law Commission, *Social Investment by Charities*, Consultation Paper No 216 (2014). See also Cooke and Robinson (n 20).

charity to stagnate overall, setting priorities of current need against historical purpose.[40]

Taken together, the papers in this Symposium seem to show the weakening, in some cases even the collapse, of regulatory structures. There are examples of that in the Internal Revenue Service situation in the United States (with the interposition of politics), the political responses to new nonprofit regulatory structures in Australia, and issues with the Charity Commission in England and Wales. But there is a danger in over-interpreting the situation in some high-profile Western countries to be taken as representing a wider weakening or collapse of regulatory structures for nonprofit organisations across the world. There is a somewhat countervailing picture elsewhere, where policy changes that impact the nonprofit or charitable sector have not disempowered, weakened or collapsed regulatory structures, but may have further empowered regulation. In India, for example, the new 'comply or explain' corporate giving requirements (a mandate for certain companies to at least consider and act on corporate giving), have given new surveillance and oversight powers to the Ministry of Corporate Affairs, joining a panoply of other regulatory actors in the charitable sector.[41] In China, regulatory reforms are allowing thousands of formerly unregistered nonprofits - many small and community-based - to legalize at the local level. Sometimes such regulatory reforms are taken as a weakness for regulatory authorities, but in at least this Chinese case the legalization of thousands of smaller nonprofits moves them into the realm of regulation, out of the shadows, and brings the possibility of giving new power and new work to local civil affairs and other regulators.[42] In Canada, as Parachin indicates, new tax measures of the kind he describes provide new life for regulators, rather than weakening them.

The papers also bring us to the relationship between regulation and self-regulation. These complex relationships show up in many countries, including several of the ones profiled in this Symposium. In her talk, Elizabeth Cooke noted, for England and Wales, the impact of de-regulation on the charitable sector.[43] This can be a significant trigger for self-regulation. The government seeks to intervene less in the economy and in the provision of social welfare, encouraging the sector, and

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40 See Brody (n 15).

41 For a detailed discussion of the new Indian requirements, see S Agarwal et al, 'What is CSR' in *Accountable* 107 (Mar-Apr 2013), at:

http://www.accountaid.net/Periodicals/AccountAble/107%20-%20What%20is%20CSR.pdf

42 On the Chinese situation, see e.g. M Sidel, 'The Shifting Balance of Philanthropic Policies and Regulations in China' in J Ryan et al (eds) *Philanthropy for Health in China* (Indiana University Press, 2014) 40.

43 See, for example, the Red Tape Task Force, *Unshackling Good Neighbours* (Cabinet Office, 2011).

donors, to take more responsibility for social welfare. Crucial to that shift from public to nonprofit occurring is the need for a rise in public confidence in the charity and nonprofit sector, and a strengthening of sectoral autonomy. As government seeks to do less, it wants the social sector to do more - a dynamic we understand from the UK to the US to China. And strengthening self-regulation is important to increasing public confidence, accountability, and autonomy in the sector.

This is as much the case in China as it is elsewhere, despite the rather clear differences between countries. In China the state seeks to maintain control over the nonprofit sector, and particularly over those parts of the sector that focus on advocacy. Yet the government, intent on the transition from state-led social welfare to nonprofit-led social welfare, needs a stronger sector too, at least for those organisations that carry out social services, the government's preferred role for the sector. So, on the one hand, there is control, especially on advocacy. On the other, there is more autonomy; a stronger sector, more self-regulation, more transparency, more accountability for the sector as it takes on the social welfare and services provision role that the government appreciates and, through social contracting, begins to fund.

This duality brings to light the often overlooked need for a much wider debate on the role and purpose of law reform in the charity and larger nonprofit sectors, taking into account the role for both state regulation and self-regulation. The papers in this Symposium have shown that when legal change occurs the resulting provisions and the debate around them frequently focus upon micro-level issues. This is not to undermine those reforms, which all have importance in their own right. They may well be controversial in nature (such as the test for public benefit or the role of a sector specific regulator), or be significant to retention of the public trust in organisations (such as transparency in fundraising or the operation of public collections). But there are wider issues that must also be addressed, and often are not, as charity law moves forward in a legal world very different from the one in which it was fashioned. Should the role of voluntariness in a modern charity sector be retained? How far should the legal framework adapt to the fact that many private law based charities and organisations in the wider nonprofit sectors are more likely to be operating in a public law arena? To what extent should control of and enforcement of regulation be in the hands of the nonprofit sector? These wider and more difficult questions are all pertinent to the evolution of charity regulation, but are more often sidestepped even by those who welcome such a debate.[44] Law reform will be far more likely to be piecemeal, and poorer for it, if that wider debate remains left behind.

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44 Lord Hodgson (n 18), and see discussion in A Dunn, 'Lord Hodgson's Charities Act review' (2013) 4(1) Voluntary Sector Review 127, 134-136.