

# THE CHARITY EXPERIENCE: CASES, COURTS AND COUNSEL

Sir John Mummery<sup>\*</sup>

### Theme

When a charity is involved in a dispute it usually takes legal advice. Sometimes it takes proceedings. Sometimes proceedings are taken against it. If necessary, the charity instructs counsel to represent it in the court that will hear and decide the case.

This paper is about the contribution of cases, courts and counsel to charity law. It started as a talk given at the Charity Law & Policy Unit of Liverpool University with particular reference to cases in which I had taken part. I will set the scene with some observations on charity generally in the context of the main elements of charity law. The discussion then turns to the cases. Most of them are reported as matters of public record, the rest are traces in my memory. The cases show how the courts, with the help of counsel, decide what, as a matter of law, is a 'charitable' purpose. They also show how the courts decide disputes about setting up and running charities.

### Charity: Background to Law

Charity has a number of sources: religious convictions, social ideals and Utopian dreams are some of them. Charity overall is an amazing tapestry of the contradictions of altruism and self-interest that are present in human nature and on display in the cases.

Changes in the politics of government, the policies of legislation and the health of the economy also impinge on the fortune and fate of charity, the disputes that occur and the proceedings that go to court. In favourable conditions rising living

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<sup>\*</sup> Retired Lord Justice of Appeal. This article is based on a Public Lecture, given in November 2013 at the Charity Law & Policy Unit, University of Liverpool.

standards and increasing wealth stimulate individual and community aspirations. Ambition for self-advancement is coupled with concern for the welfare of others and for the well-being of society as a whole.

In unfavourable conditions charities face many challenges. The recent recession is one of them. Just when the need for funds and volunteers escalates, support begins to dry up. Government aid and grants are cut. The level of private funding falls off. A recent report based on research by the Joseph Rowntree Foundation<sup>1</sup> reveals the scale of the current problems of poverty in this country. It considers possible solutions, all against a depressing backdrop of mounting pressures on the financial and human resources of voluntary agencies, as well as of central and local government.

This may be as good a time as any to talk about how the law works for the charity sector when disputes occur and end up in court. I will begin with examples of two areas in which a charity may find itself involved in legal proceedings.

The first example is a dispute about an important provision of taxation law. All charities recognised by law are entitled to tax exemptions. The tax breaks encourage the creation of charities and affect the level of donations. Some of the cases in court are disputes about the availability of the exemptions. The law insists that the purposes promoted must be exclusively charitable in the legal sense of the promotion of recognised charitable purposes for the public benefit.

The exemptions have been criticised both for their limitations and for their generosity. Any exemption from tax increases the burden on those who pay tax. The critics say that in the case of religious charities and in the case of independent fee-paying schools currently treated as charities, the exemptions benefit members of society without evidence of that need for assistance that would justify a financial subsidy from other taxpayers. What justification is there for giving tax exemptions across the whole spread of charity? Should the tax law be changed to confine the exemptions to charities that address more pressing problems of poverty? Why do the courts continue to deny charitable status and therefore tax breaks to campaigning for the needs of the poor?

Any attempt to draw a line between different kinds of charities, some tax exempt and others not, is bound to meet with strong opposition from many quarters. The attempt would also have to overcome the practical difficulties of devising workable definitions affecting multiple legal arrangements with no certainty that the plight of

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<sup>1</sup> Joseph Rowntree Foundation, *Poverty in the UK: Can it be eradicated?* (Joseph Rowntree Foundation 2013).

the poor would be alleviated by removal of the long-standing exemption enjoyed by many other charities.

The next area of dispute is in the regulation of charities and in accountability to their supporters and to the taxpaying public. Regulatory measures are essential to maintain public confidence in the propriety and effectiveness of the activities that enjoy the privileges of charitable status. Proceedings may be taken against charities for non-compliance.

In a sceptical tone a recent commentator asked 'Do we still need the Charity Commission?' His article discussed the shrinking role of the Commission and the impact of budget cuts on its ability to perform its functions as regulator.

Tax breaks and the Charity Commission are just two areas of dispute that involve charity and its institutions in court cases.

Some changes in the law, such as curtailing tax exemptions and reform of the statutory machinery of regulation, can only be made by legislation. The changes might have a better chance of success if more public and professional interest was taken in actively improving the workings of charities and the law.

Many people are broadly sympathetic to charity as a compassionate way of treating one another. In a world of shifting political, economic and social values that are liable to disappoint the expectations of the public, compassion has constant appeal.

Greater interest by legislators, lawyers and legal scholars in the charity sector would enhance the quality and scope of debate. In contrast to the general law, which helps to clear up the mess created by past havoc (deliberate or careless acts of wrongdoing, broken promises and abuses of trust and power), charity law is about realising ideals for a better future. It is about people's efforts, individually and collectively, to make life better for everyone and especially for innocent victims of natural disasters, personal misfortunes and human vulnerabilities.

Objections are made by critics to the mixed motives for charity. Certainly, there is a dark side. Charities are occasionally used as a cover for illegal activities, as a distraction in the giddy circularity of artificial tax avoidance schemes, or for personal gain by seekers of social status and celebrity and by others who use charity to divert attention from activities that are far from philanthropic. Doubts are also cast on the concrete benefits of some forms of charity, and on the efficiency of charitable organisations in general.

Despite the abuses and the doubts, charity has an underlying strength. It recognises the depth of human dependency. Deprivation and ignorance, illness

and personal misfortune, the vulnerabilities of childhood and old age are all around us. The worthwhile aim of charity law is to encourage and facilitate private benevolence in tackling those needs for the public good. Only the deluded believe in their self-sufficiency and choose to ignore the point and the possibilities of improving the quality of the lives of individuals and communities by the giving and receiving of practical help.

English law does not confine charity to improving conditions for the disadvantaged sections of the public. It covers purposes that ‘benefit’ the ‘public’ in the widest sense of enhancing the quality of life for the whole community. As well as alleviating poverty, charity embraces purposes that advance education, religion and other community benefits. The purposes may benefit, either directly or indirectly, the better-off as well as the less well-off. That is not in itself an impediment to charitable status.

The legal disputes sometimes focus on what purposes are ‘educational’, or ‘religious’, or are ‘beneficial’ to the community and whether the required element of ‘public’ benefit is present in the purposes promoted. Those issues present problems at the cutting edge of the law and make a refreshing change from the heavy involvement of the courts in purely factual disputes arising from acts of greed, dishonesty and selfishness.

The history of charity shows how political, social and economic changes have taken place over the centuries. The continuity of the charity idea, underpinned by the stability and flexibility of the law, has resulted in many major achievements of voluntary action for the overall good of humanity.

For practising lawyers and scholars charity law has a professional appeal in the high content of case law. Periodic legislation updates the regulatory aspects, but, at its core, charity law is stored in centuries of concrete cases. In a pragmatic fashion reasoned judicial precedents continue to develop the scope of charity law.

You do not have to be a charity lawyer to have a good general idea of what charities are, what they do and how they do it. There is hardly a person in the land who has not, at some time, had either direct or indirect contact with charities. They are rarely out of the news. On the international scene there has been the massive international aid effort by both governments and aid agencies for the victims of the terrifying typhoon in the Philippines. On a more local level a less than snappy newspaper headline stated ‘North Sea cod still “off the Menu” despite rise in stocks’.<sup>2</sup> It was based on a report made by the charitable Marine Conservation Society, but challenged by the industry body, Seafish.

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2 *The Guardian* 13 November 2013.

The lawyer is concerned with a question that is less newsworthy: what *exactly* is charity? As usual, lawyers seem to be asking for too much. In its widest sense the charity idea is not capable of the exact definition that the lawyer's question demands. It is nothing less than acting on belief in common humanity and doing something about it by donating money, time and effort to better the conditions of life, especially for those who are more vulnerable than the majority. The ideals, attitudes and ways of doing it are in a constant state of change. Throughout history charity has faced up to the imperfections of the world in the never-ending fight against poverty and ignorance.

The democratic sides of charity should be mentioned. Civic freedom includes opportunities for every citizen to initiate or join in the initiatives of others for improving the lives of others as well as of themselves. They include tackling problems of social injustice that are not dealt with, or not adequately dealt with, by the state through its institutions. The democratic state recognises this and takes measures to encourage private philanthropic enterprise. Charity often attempts to fill gaps in the social justice measures of the state.

Charity differs from politics in public life and from the workplace in the daily lives of individuals. Charity encourages people to think about other people as an end and not using them as a means to power or profit. In general, charity is not about imposing anything on any one. It should be voluntary, practical, individual and local.

As is often attributed to Winston Churchill: 'we make a living by what we get but we make a life by what we give'.

### **Charity Law: The Main Elements**

So what counts as charity in the eyes of the law? Rules are required for legal recognition and regulation. Decisions have to be made about what forms of charity to encourage, the best way of ordering the activities of charity in the practice and pursuit of it, the detailed nuts and bolts of how charities can be created, how they should be managed and to whom they should be accountable.

While many people appreciate the value of charity or certain aspects of it, there is less understanding of the necessary part that the law has to play in getting the best out of charity for those who need it. The law insists on definitions, preferably in clear, simple and precise terms. Charity law is an astounding mix of very general definitions, principles and concepts along with quite technical legal rules, which for non-lawyers, even sometimes for lawyers, seem to produce surprising results.

Unsurprisingly, the law itself and its practitioners do not enjoy a benevolent image. The impression is of one of taking rather than giving. But, like it or not, law and lawyers are necessary in the charity sector. For most of the time charities get on with their day-to-day activities perfectly well without coming into direct contact or conflict with the law. Ultimately, however, law is necessary to underpin charity and its institutions and the way things are done by providing for what cannot be done and what has to be done.

Of course, the law is imperfect and sometimes deserves the bad write-up it gets. Like everything else, it is criticised. Like everything else, it is capable of improvement. Critics create the impression that it hinders rather than helps charity. In fact, law is as basic to the work of charity as it is to, for example, the maintenance of public order and the dispensing of civil justice for private wrongs.

Problems start with definitions. Once anything is defined by law, there is room for disagreement and dispute about the width of the definition, or its accuracy, or its usefulness and where to draw the line.

If there is a dispute, someone has to decide it: someone neutral and impartial, such as a judicial person or body. For example, if there is a dispute about liability to pay tax or entitlement to exemption from it, the charity cannot decide it nor can Her Majesty's Revenue & Customs (HMRC). There has to be an independent impartial adjudicator, a judge sitting in a court or tribunal.

The law not only lays down rules about the purposes that can be promoted as charitable - it also covers the way to set up a charity, the benefits it will enjoy, the way it is run and to whom it is accountable, and what controls there are to make sure that its funds are used for the purposes for which they were given and are held.

What sort of things go wrong and finish up in court?

A state body, such as HMRC, may question whether an organisation is a charity at all when an application is made to register a body as a charity, or when a claim is made for exemption from tax. A local authority may raise a similar query, if a claim is made by a body for relief from local rates.

Gifts to charity sometimes go wrong. The beneficiaries under a will may challenge a gift for stated purposes on the ground that the purposes are not valid as exclusively charitable. A will may simply contain a gift for a purpose without naming the body or beneficiary to take. If the stated purposes are not exclusively charitable, that gift will fail and the money will fall into the gift of residue in the will or, if there is no residuary gift will pass on a partial intestacy. On the other

hand, a gift simply to 'charity' or to a charitable purpose is valid, as charity is in itself recognised as a valid legal entity. The gift does not fail for uncertainty as to the particular way in which it can be achieved. A charitable scheme can be directed by the court dealing with the details of how the gift is to be used.

A gift to 'good causes' would not be a valid charitable gift, as it would include causes that are not legally charitable. Some causes are good, but not legally charitable. For example, a gift in a will to campaign to change a particular law might be a good cause, but not be charitable, because campaigning for a political change is not recognised as charitable in law. In that case the persons entitled to the residue of the estate under the will would be entitled on the failure of the non-charitable purpose gift.

In other instances there are disputes between different charities as to which of them is entitled to the fund, for example, a gift to 'Cancer Research.' Several bodies are engaged in cancer research. Which one was intended to receive the legacy? In the absence of agreement, the court would have to decide.

Things also go wrong in the administration of charities. The complaint may be that the charity is not being properly run: that funds raised for one purpose are being used for a different purpose, such as another charity, or for something that is not charitable at all.

Problems can occur when a charity runs out of money, or runs out of the work it was set up to do, as when its purposes become impossible or impracticable.

Things do not often go seriously wrong. Most charities run smoothly and effectively most of the time without going to court or getting taken to court. They solve most of their problems without becoming a precedent and without the need for the services of counsel or the courts.

All this may seem obvious, but too often the obvious is unsaid or overlooked. It is a wise precaution to re-state the obvious about what the law is, so as to remind ourselves of the importance of having: good laws; an independent, impartial and effective system for the administration of justice; good access to that system; and the benefit of competent and affordable legal representation and advice.

## **Cases Discussed**

These generalities can be brought to life in a sample of cases that went to court and were argued by counsel. What sort of cases are they and what are they about? Why is money donated to charity spent on cases and counsel?

The legislative list of recognised charitable purposes is a start. They add little, except more words, to the four heads of charity under which the courts had, with occasional clarifying judgments, notably *Pemsel's Case*<sup>3</sup> in 1891, operated for 400 years: the relief of poverty, the advancement of education, religion and other purposes beneficial to the community. The statutory list arranges the heads of charity as follows:<sup>4</sup>

- the prevention or relief of poverty;
- the advancement of education;
- the advancement of religion;
- the advancement of health or the saving of lives;
- the advancement of citizenship or community development;
- the advancement of the arts, culture, heritage or science;
- the advancement of amateur sports;
- the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or social disadvantage; and,
- the advancement of animal welfare.

That list is in addition to any purposes recognised as charitable under existing charity law. Charity also includes purposes that may be regarded as analogous to, or within the spirit of, any of those in the list.

In order to qualify as charitable the listed purposes must also be shown to be for the 'public benefit.'<sup>5</sup> That can give rise to difficult questions of where to draw the line when compiling a balance sheet of what is beneficial about the purposes and what is public, as distinct from private, about the beneficial effects claimed for them.

It is not simply a matter of the numbers of people who may benefit. Some purposes would benefit large numbers of individuals, such as the education of the children of employees of a multi-national company, and yet not be charitable

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<sup>3</sup> *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL).

<sup>4</sup> Charities Act 2011, s 3.

<sup>5</sup> *ibid*, s 2(1)(b).



because the personal connection between employer and the employees would prevent the purposes from being ‘public.’ Others, like traditional alms houses, would benefit only a small section of the local public and yet be charitable.

There are self-evident disqualifying factors, as well as lack of benefit or lack of a public aspect of the benefit. Obviously out of the charity frame are organisations established solely for self-help or for the making of profits to distribute to members.

By taking a guided tour through some of the cases I aim to cover a range of topics and to illustrate by concrete example the general points and in that way bring the working of charity law into closer focus.

It is rather like pushing a quart into a pint pot. This is not an A to Z of the subject. I will reduce the cases to their essence because, at the end of the day, that is all that one really remembers or needs to know in practice.

### ***Inland Revenue Commissioners v McMullen***<sup>6</sup>

The purpose of the Football Association Youth Trust in this case was to promote the playing of football by providing facilities to enable pupils at schools and universities to play football and other games or sports. The facilities were not necessarily at an educational establishment nor was the playing of football part of an institutional curriculum. Is that a charitable purpose? The case is notable for the sharp differences of judicial opinion in answering that question. The disagreement mainly turned on the way in which the wording of the Trust Deed was interpreted. The Charity Commission registered the Trust as charitable. The Inland Revenue disagreed. They appealed to the High Court. That is where I came in as counsel to the Attorney-General in Charity Matters, a position I held from 1977 to 1981.

The High Court allowed the appeal.<sup>7</sup> Walton J said that it could not possibly be charitable, as it was a trust to encourage the playing of sport. It was not for public recreation, like a public open space, nor for the education of the young, as there was no necessary correlation between the playing of sport and the education of pupils at an educational establishment or as part of a curriculum. Nor was it beneficial to the community within the spirit of the fourth head of the traditional classification.

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<sup>6</sup> [1981] AC 1 (HL).

<sup>7</sup> [1978] 1 WLR 664 (Ch).

The Trust's appeal to the Court of Appeal failed.<sup>8</sup> The majority agreed with the judge that it was not educational: it was for games, which were not part of a curriculum at a place of education. The third Lord Justice (Bridge LJ) dissented, confessing that he had no experience of this field of law, but it seemed to him that it was for the benefit of pupils in education and that was enough to make it educational and charitable.

The Trust appealed, again with the support of the Attorney-General, this time to the House of Lords,<sup>9</sup> where it was heard by an Appellate Committee of five, Lord Hailsham presiding with gusto over three days of legal argument. The appeal was allowed unanimously.

The case is notable for three points. First, when interpreting legal documents prepared for setting up a public trust, the court should, if possible, give them a meaning that is benign i.e. one that would support valid charity, not one that would defeat it: interpret according to the spirit rather than strictly according to the letter.

Secondly, the purpose of the Trust contributed to the total education of the young, who were of school age and were undergoing education. The educational process was not confined to formal instruction at particular educational establishments, or in a school curriculum, any more than it was confined to a class room.

Thirdly, the House took care to make it clear that they were not deciding that playing sport or games was in itself educational, or beneficial to the community, or for public recreation. It was not necessary to decide those difficult questions. They would be left over for another case in which they would have to be decided.

### ***McGovern v Attorney-General***<sup>10</sup>

In this case there was a sharp difference of expert opinion. The Charity Commission refused to register the trusts of Amnesty International, as they were not exclusively charitable. Some of the purposes were charitable. Some were not. Amnesty International appealed. It was opposed by the Inland Revenue. The appeal was dismissed by Slade J. His brilliant judgment is humbling to anyone who attempts to write a judgment in a charity case.

The purpose of relief of the needy prisoners of conscience and their families was charitable, but not the purposes aimed at changing government policy and securing

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<sup>8</sup> [1979] 1WLR 130 (CA).

<sup>9</sup> [1981] AC 1 (HL).

<sup>10</sup> *McGovern v Att-Gen* [1982] Ch 321 (Ch).

the passing of legislation, even though the subject was the abolition of torture and of inhuman and degrading punishments. That was a 'political' purpose. It was, of course, lawful, but not recognised as legally charitable, however good it would be to reform the law in that way. It was not constitutionally possible or desirable for an independent, non-political judiciary to become involved in assessing the public benefits to be secured by law reform.

I would make three points on the importance of *McGovern*. First, it is the leading case on the non-charitable nature of political purposes, such as campaigning targeted at specific changes in the law. They are matters for parliament, not for the judiciary.

Secondly, it recognised that a research purpose, for example, into human rights or, as in the case of *Besterman*<sup>11</sup> (also Slade J), into history in the form of the works of Voltaire and for the dissemination of the results in the form of communicable knowledge, was legally charitable, as long as it was not subsidiary to a political purpose. It was held to be subsidiary in that case.

Thirdly, it pointed the way to the sensible practice of keeping separate parts of an umbrella organisation some of whose purposes were charitable and others were not. If they were separated, there would at least be the prospect of having some trusts that were exclusively charitable and therefore valid.

### ***Inland Revenue Commissioners v White*<sup>12</sup>**

There was a difference of view in this case. The trusts of the Clerkenwell Green Association for Craftsmen were for the preserving and promotion of crafts and craftsmanship for the benefit of the public. The Association successfully appealed to the High Court from the refusal of the Charity Commission to register in the face of opposition from the Inland Revenue.

I would make two points. First, the purposes were held charitable under the fourth head of purposes beneficial to the community. Secondly, they were charitable, even though the promotion of the purposes incidentally benefited individual craftsmen practising their crafts.

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11 *Re Besterman's Will Trusts* (unreported), 21 January 1980, Slade J.

12 [1980] TC 651.

***Re South Place Ethical Society***<sup>13</sup>

The trusts of the Society were for the study and dissemination of ethical principles and the cultivation of a rational religious sentiment. The Society was originally a Unitarian body, but later boasted members who were against all forms of religion. In a dispute about liability to pay rates on premises at Conway Hall in Holborn, the Society claimed charitable status and rate relief.

Dillon J held that the trusts were not for the advancement of religion, because the society was non-theistic: no God, no worship, no prayer, no religion. But the trusts were for the advancement of education and they were beneficial to the community, having the requisite degree of public benefit in relation to beliefs in the values of truth, beauty and love and moral improvement. They were not just for the benefit of their members who professed no religion. It was for the improvement of a useful branch of human knowledge, which was disseminated at meetings to which the public were admitted and in discussions.

I would make these points. First, there are limits to what can be recognised by law as a religion, though more recent decisions in a different context appear to modify the limits so that worship may no longer be a requirement for a purpose to be recognised as religious.

Secondly, the scope of education that can benefit the public is very wide indeed. What matters is public access to the results of research and public discussion. Even if restrictions were placed at some future date on the advancement of religion as a charitable purpose, it would in many cases be possible to achieve charitable status under the heads of advancement of education or other purposes beneficial to the community.

***Heritage Trusts***

Oliver J held that a heritage trust for the preservation of Chiddingstone Castle in Kent was charitable.<sup>14</sup> The National Trust was unwilling to accept a gift of this country house, which was not in the same class as other historic properties held by it.

Historic house charitable trusts and gardens have increased to such an extent over the last 50 years that some of the country's most important heritage properties are not in the National Trust or English Heritage, but are individual charities to

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<sup>13</sup> [1980] 1 WLR 1565 (Ch).

<sup>14</sup> Unreported.

preserve the properties and make them accessible to the public: Chatsworth, Blenheim, Arundel Castle, Wilton House and so on. That has been achieved without dispersing the contents or totally severing historic family connections with the properties.

***Liverpool and District Hospital for Diseases of the Heart v Attorney-General*<sup>15</sup>**

The purposes of the Liverpool Hospital were agreed to be charitable. They were for medical treatment of heart disease and research purposes, as stated in the memorandum of the company limited by guarantee, which ran the hospital until it was transferred to the National Health Service. When the company went into liquidation, there was a dispute about what should happen to its assets. Were they to be used for other charitable purposes or were they to be transferred to the members of the company?

Slade J decided that the company was not a trustee holding the assets on charitable trusts. He went on to rule, however, that the members were excluded by contract from claiming the assets for themselves. He directed that the assets were to be applied by a charitable scheme for other related charitable purposes.

I would make these points. First, the case is an example of how a charity may be organised and operated through legal structures other than the traditional trust for example, as an incorporated company, or an unincorporated association, or (now) a new kind of charitable incorporated organisation with legal personality.

Secondly, whichever legal machinery is used, the court invokes traditional trust principles when deciding what is to happen to the assets. The directors or governors of the hospital occupied a fiduciary position as regards the disposition of the assets. That duty could be enforced by the court to ensure that the assets continued to be available for charity.

***Re Atkinson's Will Trusts*<sup>16</sup>**

A gift in a will for 'worthy causes' failed on the ground that not all 'worthy' causes are legally charitable. They exceed the bounds of charity and therefore the purposes of the gift were not exclusively charitable and failed for uncertainty.

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<sup>15</sup> [1981] Ch 193 (Ch).

<sup>16</sup> [1978] 1 WLR 586 (Ch).

### ***Exclusive Brethren***<sup>17</sup>

This case, which came before Walton J, is of interest as an instance of proceedings by the Attorney-General in an attempt to remove a charity from the register on the ground that its activities were not for the public benefit.

There had been an inquiry into the activities of the Exclusive Brethren. The report was followed by legal challenges to its fairness. The application for removal from the Register of charities, which was not pursued, shows what evidential problems may be encountered in an application for de-registration on lack of public benefit grounds.

### ***Charity Breakdown***

*Attorney-General v Schonfeld*<sup>18</sup> is an instance of what can happen when governance of a charity breaks down. The reported decision is only one in a series of applications to the court in a legal marathon arising from the alleged mismanagement of voluntary aided secondary schools. On the application of the Attorney-General, the court appointed a receiver and manager of the charity's schools to run them pending resolution of disputes about the trusts and possible removal of trustees.

More recently the Court of Appeal had to deal with a governance problem in the organisation of the religious community at Little Gidding (commemorated by TS Eliot in one of *The Four Quartets* of that name).<sup>19</sup> The Charity Commission appointed a receiver on the grounds of perceived irregularities in the running of its affairs. Ultimately financial difficulties ended the activities of the charity.

On the impracticability of charitable purposes, one of the most memorable cases concerned a leper hospital in the Greek island of Chios, which ran out of patients needing treatment for leprosy.<sup>20</sup> The main question was whether the funds should be used to treat leprosy in another part of the world or should remain in Chios to treat other medical conditions. Chios won the day. The case is one of the simpler examples of the *cy-près* doctrine.

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17 *Holmes v Att-Gen*, *The Times*, 12 February 1981.

18 [1980] 1 WLR 1182 (Ch).

19 *Weth v Att-Gen* (No 1) [2001] EWCA Civ 263.

20 Unreported.

## **Miscellaneous**

Many other kinds of legal proceedings come before the courts: applications for family provision out of a deceased's estate; applications for the variation of trusts; applications for the winding up of charities; and so on. I recall the case of a failure to insure the regimental silver which was held on a charitable trust. The silver was stolen. There was a claim for breach of trust in failing to insure. The claim was settled.

## **Developments**

Other developments that have assisted the work of the courts in dispute resolution: the good work done by the Charity Law Association; the books and numerous articles published on aspects of charity law; the 2006 Act and later legislation; the discussions, consultations and debates which preceded them; the continuing work of the Charity Commission; and, the work of the First-tier Tribunal (Charity) and the Upper Tribunal.

## **Courts**

Courts are independent and impartial agents of justice in sorting out disputes when things go legally wrong. Their function is to make reasoned findings about what has happened and binding decisions about what should be done.

If the facts are disputed, the court has to read and listen to the evidence, hear it tested and decide what the facts are. It is necessary to provide evidence to prove disputed facts on the balance of probabilities.

If, for example, there is a dispute about whether a purpose is for the public benefit it is advisable to produce evidence of the benefits which probably flow from the promotion of the purpose and evidence about the section of the public that will receive that benefit. This may not be a demanding exercise if the purpose is generally recognised as having intrinsic value. There may be difficulties in using methods of cost/benefit analysis to measure the benefits of doing some things, but the law does not limit proof of benefit to any particular method.

This aspect of charities is crucial, as the only acceptable justification for recognising purpose trusts is that they benefit not individuals, but the general public or a section of the general public. It is the public benefit element that also justifies the tax exemption. All exemptions have to be objectively justified since every exemption adds to the tax bills of those who are not exempt.

If the interpretations and application of the law are disputed the court has to decide what the law is and how it should be applied. The decisions of the courts can be appealed, but, subject to that, they are final.

For many years the decisions were made in the High Court, the Court of Appeal and the House of Lords (now replaced by the Supreme Court of the United Kingdom.) To those courts have been added the First-tier Tribunal (Charity) and the Upper Tribunal, which hears appeals from the Tribunal. Very few cases reach the Court of Appeal or the Supreme Court.

The names of certain judges are linked to the development of charity law: Lord Macnaghten; Viscount Simonds; Lord Wilberforce; and, Lord Justice Slade all produced path-breaking judgments of the highest quality of judicial craftsmanship combining wisdom and clarity.

## **No Politics**

The denial of charitable status for the promotion of political purposes is often criticised as illogical and as having anomalous consequences. The stance of the courts is not based on the principles of charity law and its notions of public benefit: it is rooted in fundamental constitutional principles. Once that is properly appreciated it can be seen that the courts could not possibly become involved in adjudication of the merits and demerits of political purposes.

The judiciary is impartial and independent of the legislature and the executive. That means that judges are not party political and they do not make laws or unmake laws. They interpret the law as laid down in legislation or handed down in precedent. That means that they decide what the law is by a process of interpretation. They then apply the law to the facts, which they also have a duty to determine in cases of dispute.

In the case of political purposes, such as campaigning for specific changes in the law, which may well be for the public benefit, it is solely a matter for parliament, as the law-making body, to decide whether the law should be changed.

A dispute about whether a political policy, manifesto or campaign for changes in the law is for the public benefit is not properly justiciable by the courts, because the issue cannot be decided without dragging the judiciary into an arena from which it should be excluded or should exclude itself on constitutional grounds. The court would become involved in making controversial assessments about the pros and cons of a particular change in law or policy that are matters for a democratically elected parliament. It would not, for example, be for parliament or



the police to decide whether a defendant is guilty of a crime. That is a matter for the courts. Each body must keep to its separate, special place in the balanced allocation of constitutional responsibilities.

## **No Tax**

Should the tax exemption be available to all charities? That was the central issue in *Pemsel's* case in the early 1890's. The predecessors of HMRC did not challenge the status of the Moravian trust in *Pemsel* as a valid charitable trust. Their argument was that some of the purposes were not 'charitable' within the meaning of the exemptions in the fiscal legislation, as the exemptions only applied to charitable trusts of a certain type, that is, trusts to benefit the needy.

In my view, the majority in the House of Lords were right in law to reject that argument. Although it would be open to parliament to introduce that distinction in new fiscal legislation, there would, as already pointed out, be considerable difficulties in doing so. First, it would be inconsistent with the rationale for the exemption, which is that purposes can only qualify as charitable if they are exclusively for the public benefit. If they are that, why tax some of them, but not others? Distinctions would have to be drawn between different kinds or degrees of benefit.

Secondly, it is doubtful whether, at the end of the day, the Treasury would collect any more tax as a result of such a change. In many cases benefactors would be encouraged to contribute to trusts and companies for purposes that did enjoy the exemption and concentrate on increasing the growth of funds in them.

## **Counsel's Role**

The role of counsel is to give advice on law and to argue cases in litigation. In the charity field a lot of advisory work is done by specialist solicitors in private practice, in the Government Legal Service and in-house lawyers employed by the charities themselves without the need to go to counsel.

Speaking from personal experience I have seen how in practice the interests of charity are served by a small body of barristers who specialise in advocacy and advisory work relating to charity law. Their services are most often called upon when a dispute has broken out or is about to break out.

I became involved as counsel in charity cases 37 years ago when, out of the blue, I was appointed Counsel to the Attorney-General in Charity Matters. In those days

appointments of that kind were like judicial appointments, which were not advertised or held as an open competition. I was invited to accept the position; by what process I have no idea. For the next four years I was in nearly all the charity cases that went to court and many more that did not. I can say without hesitation that the charity cases were the most interesting cases in my whole 24 years at the Bar and my 24 years as a judge. I never again had so many cases that I enjoyed taking a part in.

Why does the Attorney-General need counsel for charity cases? A charity can take its own advice and instruct its own counsel. It usually does. Those bodies in dispute about tax, or rates, or with the beneficiaries under a will containing charitable gifts can also take their own advice and be represented. So what has the Government's Chief Law Officer got to do with it? The Attorney-General is the constitutional protector of 'charity' generally, as distinct from particular charities constituted in the form of a public trust, corporation or unincorporated association. The essential point is that in law charity funds are held for a purpose, not, as in the case of private trusts, such as family trusts and pension schemes, for individuals. Purposes are not persons who are able to bring proceedings to claim the property for charity or to enforce the trust. The Attorney-General does that in the case of charity. He needs counsel to do that work because he has too much else on his plate.

Even where all the parties are properly represented, the counsel for the Attorney-General had an additional role of assisting the court by arguing matters of public interest. In other cases the role is to assist in the settlement of cases, particularly in the field of family provision. They are cases in which a person has cut family dependants out of the will in favour of charitable legacies and a claim is made against the estate under the legislation entitling dependants to make application for reasonable provision to be made which, if allowed, would result in money left to charity going to private individuals. It is commendable to be generous to charity, but justice requires that prior obligations to maintain dependants are performed. In most of the cases a compromise was reached in the charities involved and the Attorney-General agreed to appropriate recognition of the duty of the donor towards family dependants.

## **Parting Thoughts**

Three parting thoughts.

### ***Supporting role***

As the cases demonstrate, courts, cases and counsel perform a supporting role. Charity could not work without a legal framework to supply the legal test of

charitable status, the institutional structures in which to organise and carry out the work, and the courts and other institutions and procedures necessary to monitor and regulate compliance with the law and to hear and decide disputes.

### ***Challenges of change***

The courts have a pivotal role in facing the challenges of change. Charity law, like the rest of the law and most of human life, grows old, becomes out of date and gets into a mess. The underlying policies, as well as the possibilities for technical improvements, need to be regularly reviewed.

It is easier to find fault than to decide what to do for the best. Take the criticism of tax breaks for charities. The critics say that it is anomalous for independent schools, historic houses and obscure religions to benefit from tax breaks denied to the campaigning activities of Amnesty International and the Child Poverty Action Group to improve the conditions of disadvantaged social groups.

Some campaigning has been treated by the courts and the Charity Commission as promoting political purposes, which do not qualify for charitable status. The courts will find it difficult to re-visit this area. Tax exemptions are matters of fiscal policy embedded in legislation, which the courts interpret, but only parliament can change. It is not easy to come up with a satisfactory solution that would be generally acceptable to charities or to the wider community.

However much legislation is passed the development of some areas of charity law, such as the heads of charity, will continue in the courts rather than in parliament. The judicial process is one of reasonable interpretation of the legislation and the application of the basic principles on which it is based. Changing circumstances and combinations of circumstances are bound to influence people's ideas on how to improve the human condition in new ways. The judicial process of working out the concept of charity by analogy from existing cases and recognised purposes is now expressly accepted in the legislation. It is a parliamentary recognition that the issue of what is charitable case by case is a matter for the judicial process. The interpretive decisions of the courts are capable of injecting fresh vitality into this aspect of our national and local life.

The cases show that charity law is a fascinating mix of macro and micro-law: the issues of what is 'education' and what is 'religion', what is 'beneficial' and what is 'a section of the public', as distinct from a fluctuating group of private individuals, are as open-textured as those found in some other parts of the law. Those matters must not be treated in a legalistic and over-technical way. It follows that, in the process of developing the law, the courts aim to make the law as relevant as possible and to do so in a sensible, simple, clear, accessible, consistent, coherent

and systematic way without being over-restrictive. This is not an easy balance to maintain. The more expansive and loose the concepts, the more open they are to differing interpretations, which create uncertainty and makes the law unpredictable. There are bound to be different ways of looking at the words in the trust deed and in the legislation and in ascertaining the intentions behind them. Once made, rulings on interpretation have lasting effects, not always positive and usually difficult to change. The present and the future are often stuck with the past which, with the benefit of hindsight, has some negative, as well as positive, aspects and would now be done differently.

The seemingly chaotic and random nature of case law is to some extent inevitable. The courts can only rule in the context of the cases that are brought before them. This makes it difficult for the courts to update the law in an orderly way. In recent years there have been fewer opportunities, as there have been fewer challenges by the tax authorities to charitable status. There are several reasons for this. I think that in many cases more thought is now given to drafting the trust deed and the objects of charitable companies to ensure that the stated purposes are exclusively charitable under a recognised head of charity.

### ***Future development***

The courts and counsel should do all that can reasonably be done to support the voluntary sector. It is necessary to dispel the misconceptions in some quarters that charities are an ill-assortment of wasteful, inefficient, badly managed, amateurish, vanity projects run by idealistic busy-bodies with bad consciences. Similar criticisms could be made of state enterprise and private business and some of their spectacularly disastrous failures.

The strength of charity is that, with the support of the law, it can facilitate the growth of public action from the ground up. Doing things ‘together’ with and for each other rather than waiting for things to be done from the top-down is healthy for both society and for the well-being of its members.

Participation in charity, particularly in times of political apathy and diminishing respect for public figures and institutions, can make some changes for the better, while conserving the best of what we have.

The combined efforts of individuals over time add to the richness of the experience and fulfilment in life celebrated by the late Seamus Heaney as the *Human Chain*. The ‘human chain’ is not a fetter imposed by the past on the freedom of the present: it is a force that persists by forging strong and rewarding links amongst human beings. It is what enables them to realise ideals, strengthen solidarities and improve understanding of each other, of themselves and of the world. If charity

can help to achieve any those outcomes, it is a good thing deserving the full support of the courts and counsel.