

BOOK REVIEW

Matthew Harding*

The Public-Private Nature of Charity Law

by Kathryn Chan

Published by Hart Publishing, Oxford, 2016

ISBN: 978-1-78225-848-3. Hardback £60

Not that long ago, if you went looking for serious scholarship on charity law, you would find rather little apart from a handful of venerable textbooks, Michael Chesterman's lucid and original *Charity, Trusts and Social Welfare*, and a mountain of economic analysis spelling out the 'three failures' view of the not-for-profit sector. Now, the pickings are much richer; in recent years several monographs have been published examining charity law from different disciplinary perspectives, along with numerous journal articles including in the *Charity Law & Practice Review*. Scholarly understanding of and engagement with charity law is expanding at an exciting pace; it is a good time to be an academic charity lawyer.

Kathryn Chan's book, *The Public-Private Nature of Charity Law*, is an important new contribution to this dynamic scene. Chan, from the University of Victoria in Canada, seeks to understand charity law in light of the 'public/private' divide that is usually thought to characterise legal systems. By reflecting on charity law with the 'public/private' divide in view, Chan hopes to illuminate charity law in conceptually useful ways, provide a basis on which to compare developments in charity law across time and between jurisdictions, and lay the groundwork for normative arguments about how charity law ought to look. She succeeds in achieving all three aims, and she does much else besides. Her book shows deep and detailed learning in relation to arcane and neglected aspects of charity law (such as its procedural dimension), as well as cutting edge developments (such as law reforms enabling social enterprise vehicles). But at the same time, Chan has a clarity and largeness of view that compels the reader to confront some of the big questions of public policy that have surrounded charity law from the beginning and that remain with us today.

* Matthew Harding, Melbourne Law School, University Of Melbourne.
Email: m.harding@unimelb.edu.au

Chan sets out to defend four claims in the book. The first is that the charity law tradition developed historically in Chancery was a public-private ‘hybrid’ that achieved a fine balance between the autonomy of property-holders and the public interest in the use and management of assets dedicated to charity. The second claim is that recent legal and policy developments in different jurisdictions have altered this balance in various ways. Chan’s third claim is that such developments have delivered two discernible types of charity regulation: ‘civil’, and ‘tax-based’; in ‘civil’ regimes the value of autonomy is balanced with the public interest in the use and management of charity assets; in ‘tax-based’ regimes autonomy is balanced with the public interest in preservation of the revenue. Finally, Chan claims that the trend in both ‘civil’ and ‘tax-based’ regimes has been to give more weight to public values than to the value of autonomy; in this way, Chan argues, charity law is increasingly ‘public-leaning’.

In Chapter 1 of the book, Chan explains what she means when she refers to the ‘public/private’ divide: she opts for a straightforward account according to which ‘public’ law is concerned with the pursuit of collective projects while ‘private’ law is concerned with the pursuit of individual projects (see pp 18-23). She also defends her choice of theoretical frame, for reasons including that categories of ‘public’ and ‘private’ are usually thought to be fundamental to taxonomical thinking about law (see pp 10-11). I had one worry about this defence. If, as Chan argues in the book, charity law is properly characterised as a ‘hybrid’ against the backdrop of a taxonomy organised around categories of ‘public’ and ‘private’ (see p 7), then perhaps this tells us something about the limitations of the taxonomy, and perhaps it would be better to approach charity law from a different starting point. Chan could presumably address this concern by arguing that if charity law is theoretically interesting because of its hybridity – and it seems that it is (see the discussion at pp 8-9) – then there may be value in stipulating a provisional public/private distinction in light of which charity law’s hybridity may be described, even if ultimately charity law shows that a public/private distinction is limited as a methodological tool.

But I do not want to dwell on methodological quibbles because there is much in this book that deserves to be highlighted. For example, in Chapter 3, Chan examines the public benefit requirement of charity law. In various ways – including through the objectivity of its inquiries into questions of benefit and detriment, the ‘personal nexus’ constraint articulated in *Oppenheim v Tobacco Securities Trust Co Ltd*,¹ and its demand that charitable purposes include the poor in some minimal way – the public benefit requirement reflects public values. On the other hand, however, ‘charity founders and trustees retain substantial autonomy to define what type of benefit their charity will provide and who will

¹ [1951] AC 297 (HL).

receive that benefit' (p 62). Thus, Chan identifies the public benefit requirement as an element in charity law's hybridity. Chan then examines recent developments in relation to the public benefit requirement in England and Wales, arguing that the 'public/private' balance in the requirement has shifted noticeably towards the 'public' side. She provides rigorous and compelling discussion of the Catholic Care litigation (*Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*²), in which public law equality norms were imposed on an adoption agency that refused to offer services to same sex couples, and the regulatory activities of the Charity Commission in the lead-up to the Independent Schools Council case (*R (on the application of the Independent Schools Council) v Charity Commission for England and Wales*³), in which charity law was moulded to fit public policy goals relating to the distribution of educational opportunity. Chan's analysis deepens our understanding of these developments, and offers us the tools to think productively about other developments as well, such as the Charity Commission's handling of the recent controversial Preston Down Trust case (*Charity Commission for England and Wales, Preston Down Trust*⁴).

In Chapter 4, Chan provides a fascinating and important discussion of some of the procedural aspects of charity law. Her focus is on who has standing to seek relief for the 'misadministration of charity property' (p 85). She shows that historically, while private parties did have standing in certain cases (see pp 89-92), and while the Attorney General's enforcement of charitable trusts was largely via relator actions in which private parties played a substantive role (see pp 86-88), the right and power to enforce charitable trusts lay formally and ultimately with the Attorney General, acting on behalf of the Crown. In the legal framework created by the Charities Act 2006, standing is flatly distributed. The Charity Commission itself may seek relief on a range of grounds, as may persons with particular interests in the administration of a charity. Nonetheless, persons with a purely public interest do not have standing under the statutory framework; in this way, that framework differs from the historical picture in which relator actions could be initiated, and the Attorney General could act unprompted on behalf of the Crown, in the public interest. Chan concludes the chapter by suggesting that the modern emphasis on particular interests may signal a reorientation of charity law away from the old idea, reflected in the older procedural framework, that charity is a matter of general concern: 'it suggests that where the property of a hospital or a house of worship is improperly administered, it is the patients and worshippers (rather than individual members of the public) who should be sufficiently interested to bring a claim in their own name' (p 100). Is this one aspect of a broader trend away from understanding charity as a site of public goods in which

2 [2012] UKUT 395 (TCC).

3 [2011] UKUT 421 (TCC); [2012] Ch 214.

4 3 January 2014.

everyone shares, towards a different conception of charity as the provision of private goods that are allocated on publicly-defensible grounds? If so, then it is an aspect of a profound shift that demands further consideration.

Perhaps the closest Chan comes to critique in this book is in Chapter 5, where she examines the current Canadian model of charity regulation. For Chan, Canada is a good example of a 'tax-based' regulatory regime; the chief regulator of charities in Canada is the Charities Directorate of the Canada Revenue Agency. In this way, Canada may be distinguished from jurisdictions like England and Wales, and Australia, where the regulator is an independent statutory body. In Chapter 5, Chan seeks to understand the implications for charity law's 'public/private' hybridity where charity regulation is embedded in a tax administration charged with the preservation of the revenue and answerable to a government Minister. And unsurprisingly she finds that in key ways the axis is skewed considerably towards the 'public' in such a setting. For example, in its guidance documents the Charities Directorate seeks to encourage charities to align their purposes with the policy agenda of the government of the day (see pp 117-119). Chan might have added here a discussion of the position taken by the Charities Directorate on political advocacy by charities, a matter of some controversy in recent years. On the other hand, Chan notes that the rules of standing in relation to misadministration of charity property remain underdeveloped in Canada, thanks to the regulatory structure in that jurisdiction, and this signals a lack of interest in charity as a matter of public concern. In Chan's treatment of the Canadian situation lie the seeds of an argument in favour of a 'civil-based' regulatory regime. But Chan does not go so far as to make that argument; instead, she is content to expose the differences between two such regimes and leave it at that.

In a liberal society, where people value the freedom to dispose of their resources according to their own conceptions of the good, there is presumably only a limited appetite for charity law that is 'public-leaning' in the ways outlined by Chan. In such a society, the trend towards imposing public values and understandings on charity law must meet resistance at some point. In Chapter 7, Chan discusses one possible expression of such resistance: the emergence of social enterprise vehicles which enable public benefit purposes to be combined with profit-making arrangements. Chan shows that the regulation of such vehicles reflects 'private' values more, and in Canada substantially more, than the regulation of charities. To that extent, the advent of social enterprise vehicles might be counted a sort of victory for the autonomy of those who would do good for others unfettered by public goals and values. However, as Chan notes, there is a risk that social enterprise vehicles might, if they become too successful, channel people's energies away from charities to the detriment of the charity sector. A heavily 'public-leaning' charity law, alongside a heavily 'private-leaning' social enterprise regime, might well be sub-optimal compared with charity law's historical hybridity.

There is much in this book that I have not touched on; for example, I have said nothing here about Chan's superb treatment in Chapter 6 of government co-optation of charities via funding arrangements and governance controls. But I hope that I have said enough to show that Chan's book illuminates charity law and regulation in important and insightful ways. And I hope to have suggested that her analysis represents something of a wake-up call to those who value the charity sector. For Chan demonstrates that the success of that sector, both in producing the public benefit that defines it and in constituting a whole mode of social interaction organised around the principle of altruism, has been achieved with the support of a complex and, frankly, improbable legal balancing act. That balancing act has been maintained and refined over hundreds of years. Those who would disturb it do so at their (and our) peril.