question of law or of fact which it may involve, or for other reasons, the Commissioners may consider more fit to be adjudicated on by the court."

Frequent reorganisation in education, the National Health Service and local government perturbs donors when institutions they intend to benefit cease to exist in the form in which they intended to benefit them. It is not a statutory consideration, but it is a matter of public concern, that potential benefactors may be deterred from generosity by that type of consideration or by foreseeing the authorised use, by trustees short of cash, of property meant as a permanent endowment, for purposes other than those for which the gift of the property was intended.

The Charity Law and Practice Review

EXPORTING CIVIL SOCIETY: CONFESSIONS OF A "FOREIGN LEGAL EXPERT"[1]

E Blake Bromley[2]

Introduction

My first direct involvement in the work to create a legal infrastructure for the third sector[3] in Eastern Europe was in the summer of 1989 in Moscow. I participated as part of an international delegation of foundation experts in a symposium sponsored jointly by the Rockefeller Brothers Fund of New York and the Foundation for Social Innovations of Moscow. In the next two years I made five trips to Hungary, Poland and Czechoslovakia, participating in various seminars and conferences on the third sector and meeting with national organisations interested in law reform which would create a more enabling environment for the third sector. I became directly involved

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1 This was presented at NCVO International Charity Law Conference, London, 16th-17th September 1994.

2 E Blake Bromley, Douglas Symes & Brissenden, 2100-505 Burrard Street, Vancouver,
British Columbia, Canada.
Tel: (+604) 683 6911 Fax: (+604) 669 1337.

3 The debate as to whether the sector should be called the charitable, non-profit, independent, non-governmental or voluntary sector is interminable. I have arbitrarily decided to use the term "third sector".

in legal drafting work in June 1991 when I spent a week in Moscow as a "foreign legal expert"[4] consulting with the Committee on Freedom of Conscience, Religion, Mercy and Charity of the Supreme Soviet of the Russian Soviet Federated Socialist Republic. Together with Andrew Phillips of London and Bruce Hopkins of Washington DC I spent the week before Boris Yeltsin's election as President in the White House meeting with the committee responsible for bringing a draft law of charities to the Parliament. Since then I have returned once a year to Moscow and remained in touch with those directly involved and had additional meetings with them in Canada, USA and Europe. Prior to my work with the Russian Parliament I spent a week in January 1990 in Beijing with the drafting committee of the Law on Social Organisations in the Peoples' Republic of China. This work was sponsored by the Ford Foundation which later sponsored a week long visit by members of the committee to Vancouver and Ottawa to see charities in action and meet regulatory officials. I have visited China several times since them. It has been interesting to contrast the radically different attitude to foreign experts in China and how China has managed the introduction of foreign legal concepts into its society.

There is no better exercise to teach a "foreign legal expert" how little he really knows about the law of charity than to attempt to explain the common law concept to sceptical Communist bureaucrats trained in the civil code in a completely alien culture in a foreign language. Repeated assignments have convinced me that we need more anthropologists, sociologists and historians in the process and fewer lawyers. Being born in China, having spent years in Southeast Asia as a child and adult, having started my undergraduate degree at the University of Singapore and completed a degree in modern China studies, I have some understanding of the political and social environment in China. Unfortunately, I have no similar knowledge or experience in Eastern Europe. When the expert knows only the law of his own country and not the history and culture of the host country, the temptation is to listen less and talk louder to prove that one is indeed the "expert".

If one does indeed genuinely listen to the representatives of the host country, in addition to teaching an expert some humility, the missionary impetus to zealously preach the English common law as the one true way to charity heaven gives way to an evolutionary syncretism influenced by different legal and social traditions. One realises that restricting the discussion and the law to what the common law recognises as charitable eliminates much of the third sector as it historically, presently and effectively operates in the indigenous culture. If a village organisation, clan association, co-operative endeavour or civic body does not neatly fit into some classification defined in Baltimore, it is excluded from the sector. There is no doubt in my mind that if the legal infrastructure in these countries is to reflect indigenous reality, then the law must sanction much more than is allowed by the English common law.

Having travelled repeatedly to common law jurisdictions such as England, Hong Kong, India, Australia and New Zealand as well as civil code jurisdictions throughout Europe, Asia and South America, I believe the future of the law of charity will be determined by civilian[5] traditions and concepts rather than the common law. This is a matter of geographic and political reality rather than preference. With the United

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4 I have used the term "foreign legal expert" as that is the description given to me and other consultants in the materials accompanying the draft law of charity presented to the Russian Parliament in 1993.

5 The original meaning of "civilian" is a practitioner of civil law and this paper will use the term in that way.

Kingdom being the only common law jurisdiction in Europe, and even its Charity Commissioners only having jurisdiction in England and Wales, the common law will not prevail in the struggle for "harmonisation" in a united Europe. Any success in resisting "harmonisation" in legal concepts
will be overcome by the overwhelming need to harmonise fiscal policy and tax privileges throughout the European Union.

The United States has in practice, if not in theory, moved its law of charity out of the common law and into the nether world of administrative regulations and rulings. I think it unlikely that Canada, Australia and New Zealand can withstand the preponderance of jurisprudence which will come from the predominantly civil code countries in Europe, Asia, Africa and South America. While they may ignore civilian jurisprudence in the same way they now ignore cases out of the United States and India, the difference is that in the future they will no longer be part of the mainstream of the legal concept of charity if they do so.

It is my belief that we are living in the last days of the common law of charity which is the product of homogeneous societies with common religiously based values. The common law is an inductive legal system which develops legal principles from the bottom up, based on the pragmatic analysis of concrete fact patterns. It is, in my opinion, an inductive legal system building upon the precedents of past decisions that is a superior method of translating the existing customs and culture of a society into a legal pathway reflecting indigenous reality. The common law, however, is poorly equipped to deal with a modern world in which not only are the religious values underpinning the law cast aside, but the law itself is no longer sacrosanct. If the law of charity is to be based upon contemporary and changing public policy rather than eternal principles, then the common law restriction on political purposes becomes a restriction on freedom of expression. It is increasingly untenable to ban charities from having political purposes which will change the law to enhance and modernise public policy when the presumptions that the common law stems from "God's Law" and that statute law is correct, have been removed. The first presumption is already dead and the second increasingly irrational as the number of constitutional, human rights and charter of rights and freedom challenges to overturn statutes increase.

The law of the future will be the product of diverse, pluralistic societies with no single source of values. Constitutional and human rights will be its legal basis rather than any religious values. A deductive legal system, such as the civil code, which begins with top-down noble philosophic proclamations outlining where the legal pathway should be, seems better suited to promoting constitutional and human rights. The starting point for this secular pluralistic concept of the public good which will increasingly be shaped by fiscal reality must necessarily be legislated. The challenge is to devise modern legal principles and an effective legal infrastructure to guide to evolution and development.[6]

My concerns about the process of exporting existing models or even creating a new international model law for the third sector began by recognising the gulf which exists between the civil code and the common law. Too often our dialogue with civilians does not go beyond preaching the merits of common law trust and the virtue of the law of charity. While that does not necessarily make it an exercise in legal

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6 See the author's paper "Quest for Convergence: Musings from the Middle of the Maze," presented at the NCVO International Charity Law Conference in London, 16th-17th September 1994.

imperialism, it is not very pragmatic or helpful if the host country's legal system does not contain the legal concept of the trust. The objective is to create a legal infrastructure which will enable indigenous social organisations to operate with greater legal authority and protection as well as tax privileges in their own country. This requires one to work within the parameters of the existing legal system and to create a law which is the servant of the indigenous social and cultural movements rather than a law which redefines the sector according to international criteria.

The law of charity requires fundamental change in all countries. No one country has a system so perfect that it merits exporting without modification. Too many countries are struggling with the same questions in completely different social, economic and legal environments in a radically changing world to allow us to simply watch it evolve in the common law tradition. We must draw upon the tried and proven in our past national experience; but must be prepared to take risks and incorporate lessons from other countries and cultures. If there is to be a move towards an international standard in the law of charity it will require statutory change rather than simply the development of case law and will require the common law to import concepts from the civil code as well as export concepts to it.

Charity, Mutual Benefit, Public Utility and Civil Society

One of the primary difficulties involved in drafting laws for the third sector is to define it. Before achieving a definition, we must overcome a myriad of descriptive terms for the sector which all have different nuances that are quite legitimate in the their local context but become confusing and contradictory when applied internationally. The international problems become much more complicated because of the problems involved in translating terms. And yet the words used in different countries tell us much about that country's image of itself, its priorities and its sector. The US describes itself as "non-profit sector" because of the dominance of the for-profit private sector. Others, wanting to stress independence from the government, use the term "independent sector". In Europe, where the government is the dominant force in society, it is much more common to use the term "non-government". Those, as in England, who give priority to voluntarism use the term "voluntary sector". None of these terms is without failings and the search for the correct term continues. Bangladesh has expended considerable effort to redefine the sector's primary operators as "private voluntary development organizations".

While it is frustrating not to know what best to call the third sector, maybe we are better to accept and learn from this diversity rather than continue the search for a universal term. I use the term "third sector" simply because of its neutrality on the above issues and my unwillingness to expend more time and energy on nomenclature which is primarily of interest only to researchers and academics. Rather, I will attempt to identify four dominant forces or missions of the sector as accepted by the common law, namely: charity, mutual benefit, public utility and civil society. Balancing these simultaneously complementary and conflicting forces is one of the greatest challenges facing the law, as well as tax authorities.

Charity is the provision of succour to the needy which is found in every society and culture. It is frequently inextricably entwined with the predominant religious traditions of a homogeneous society and the personal values of an individual. The law of charity is also a reasonably accurate reflection of society's attitude to the poor

in any given age. Prior to *Pemsel*[7] the common law required the recipients of any kind of charity, whether the benefit be material, medical, educational or religious, to be poor in order for the courts to recognise a gift as charity. Legal theorists find religion to be an anomaly to the legal concept of charity and it is periodically excluded by statutory intervention. The person in the street, however, has difficulty understanding how it is possible to exclude religion from charity and it always finds its way back into the law.

Charity is a universal expression of public welfare. It is where the law of charity begins and has the most universal acceptance. It involves a lot of voluntary gratuitous actions by altruistic citizens. In the common law, it evolved from a religious impulse or imperative in medieval feudal England to a more secular and scientific drive to eradicate the causes of poverty during the Protestant Reformation. Religious motivations gave way to *noblesse oblige*; and after the industrial revolution the state began to take over the responsibility for the social safety net funded by tax dollars. In spite of all these drastic changes, charity continues to be the heart and soul of the sector and its most universal common denominator.

Mutual benefit is the recognition that not all those who are poor and in need of succour and compassion are strangers. Mutual benefit is the banding together of citizens to provide self-help and relief to members of the group in times of need. The law of charity has rejected mutual benefit and friendly societies in all their forms because of the provision of a benefit to members rather than to strangers. Voluntary associations, trade unions and professional associations have all been held not to be a broad enough section of the community to meet the "public benefit" standard. In a world where government cutbacks of social service increasingly require citizens to band together to provide their own services, it is likely that benevolence will be brought back into the third sector. The amount of tax-paid assistance which is displayed by self-help initiatives suggests that the government must give fiscal benefits to encourage this trend.

It is also ironic, if not perverse, that while the law has excluded mutual benefit to the poor in the realm of basic human need and financial security, mutual benefit to the rich in the area of enhancing quality of life is widespread. Sometimes a group of parents applying for charitable registration of a pre-school are subjected to a requirement of low incomes and registration is denied. However, there is never a denial of music academics, art organisations and private schools which will receive almost 100% of their tax deductible donations from parents and grandparents of children currently enrolled. These parents would never qualify as having low incomes. These are self-help mutual benefit organisations of far less pressing social significance but do not restrict their benefits to members.

Public utility is the primarily secular provision, from private funds, of facilities and services of benefit to the public. It is inextricably entwined with the constantly changing national consensus and individual ideology as to what services and facilities should be provided by the state. Europeans define public utility as being much broader than common law charity. I suspect the difference is less a matter of definition than a matter of ideology as to what the role of the state should be in funding public utilities. The common law of charity is a reasonably accurate reflection of society's attitude to the role of public versus private funding in any age, although the attitude may be shaped by the current economy as much as by ideology.

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7 *The Commissioners for the Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) [hereinafter *Pemsel*].

Public utility is a predominantly civilian expression of public or community good. It aspires to build a civic society as much as a civil society.

Civil society is the primarily political view of the third sector as a force to change society by enabling the individual and collective to address social problems. Its preference is to increase the rights of citizens rather than simply to expand the provision of services and facilities with private money. It is interested in "entitlement" and "empowerment" rather than voluntary charity. Its objectives are pluralism and diversity rather than homogeneity. Its *modus operandi* is "advocacy" to create the legal infrastructure which will guarantee the rights and entitlements sought. This is essentially political action although it should be carried out in a non-partisan way.

Civil society is a term which has achieved such widespread usage so fast that it is difficult to identify the significant differences in its use in different parts of the world. In Eastern Europe its "creed" often includes the ideology of promoting free market capitalism and US style democracy. It is as much a crusade as a social service. Time will tell the impact on the third sector of having the energy and objectives of its driving forces being directed to advocacy rather than service delivery.

International Focus on the Third Sector

The third sector has come into fashion and sparked a great deal of inquiry on a global basis. Government bureaucrats are seeking the magic legal formula which will unlock a whole new source of private money to fund social programmes. The third sector itself is divided between those primarily seeking more private money and those advocating the "privatisation" of statutory services with the money continuing to come from the state. Economic pressures on national treasuries the world over are forcing governments to re-assess the role of the third sector and their relationship with it. This trend is found in the citadels of capitalism as much as in the former bastions of communism. It is particularly interesting to observe this process in Western Europe and Canada where generous state support for the social welfare safety net, health, education and even cultural activities is being curtailed by economic necessity without a corresponding shift in the formal statements of government policy. What is new in this trend is the extent to which the pressure to "create" the third sector is coming from governments rather than the sector itself.

The US has embraced this accelerated trend to have the third sector be the primary deliverer of social services with ideological fervour as yet another example of how anything or anyone is better than government. One is sometimes left wondering whether the third sector is less important for its tradition of voluntarism and charity than for its present economic opportunity to provide government funded services for a fee. Eastern Europe embraces the trend both because of economic necessity and as a brave new step in adopting the market economy leading to the cornucopia of free enterprise. Western Europe knows that things must change; but it is suspicious of having private non-governmental interests shaping and delivering social policy and services. These suspicions are in part fed by overt ideological claims of the US non-profit sector that it is inherently superior to government as a service provider. Although motivations vary, all countries are examining how to find more private money for the third sector to fund services previously provided by governments.

What is fascinating is the extent to which the debate about the role and importance of the third sector is itself redefining the sector. The sector describes itself in terms

of independence from government and voluntarism, but is being significantly reshaped by the quest for government money to provide "state" or "statutory" services on a paid basis rather than as volunteers. Cost-benefit and economic arguments replace compassion and altruism as the rationale for having the third sector deliver services. Tax and fiscal issues dominate the agenda as governments consider which privileges to extend to charities. The law of charity, however, still refuses to acknowledge that tax benefits are an important part of the criteria by which the sector is defined.

It is regrettable that this debate has been substantially limited to a tug-of-war between governments looking for private charity so they can reduce their social obligations and sector organisations trying to get government funds to fund their institutional activities. Each side is attempting to define its position based upon the recent past with a view to the near future. The world is changing far too drastically for that to be a useful exercise. A universal bankruptcy of all levels of government is coinciding with an unparalleled intergenerational transfer of private wealth. It is necessary to seize this historical opportunity to fundamentally and radically rethink the relationship. The law is much easier to reform in times of crisis and during a dysfunctional period in the economy such as when the *Statute of Elizabeth*[8] was enacted in 1601 than during stable prosperous times. There is more to be learned by looking back to the emphasis on creating employment and funding infrastructure in the Preamble of the *Statute of Elizabeth* than by looking back to the last twenty years when there was fantastic economic growth and rich governments.

The majority of the action in the international development of the third sector today is taking place in Eastern Europe. Much of the comparative study of the law governing charity in search of a universal model is concentrated in the common law world with the United States' wealth of endowed foundations and generous tax incentives to donors being the holy grail. The primary model being promoted is the US model, although there is considerable attention being paid to the model of the Charity Commissioners for England and Wales. Nothing has made it more clear that there is not a single model which works in all countries than the attempt to export the US model to Eastern Europe.

Developing third sector laws has taken on increased urgency from the US perspective because "creating" a third sector in the image of the US model is believed to be necessary to build the pluralism essential to a civil society. In the former communist states third sector laws are proclaimed as necessary to construct and support the "institutions of democracy" which will create a new civil society. USAID is in the process of making multi-million dollar grants to promote and support the third sector in Russia and Eastern Europe by creating the legal infrastructure. This effort has become not so subtly intertwined with the ideological drive to establish a free market economy.

While I am in favour of democracy and a civil society, I am opposed to imposing an overt ideological agenda upon the process of nurturing the third sector in Eastern Europe. It strikes me as being intellectually dishonest to proclaim that every nation and culture has some inherent charitable tradition which needs to be given expression and protection in the law and then impose an ideology of pluralism and democracy designed in Washington DC. I believe that the primary objective should be to enable

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8 *An Acte to Redress the Misemployment of Landes, Goodes and Stockes of Money heretofore Given to Charitable Uses*, 1601 (43 Eliz 1) C 4.

and protect citizens as they come together to address their common problems in ways developed by drawing upon the traditional wisdom and values of their society. It is contradictory to the objective of drawing out and learning from indigenous values and experience to be simultaneously imposing a foreign ideology. That is a different agenda which will only succeed if taken up voluntarily by the indigenous people.

The danger in the legal drafting process is that we begin to believe that creating something by words in a statute means that it exists and operates in the real world. One is reminded of the US writing the Japanese constitution after World War II. A constitution was enacted which "created" a democracy. The democracy, however, did not reflect Japan. Elections were held for decades which on the surface complied with the American words in the statutes; but in reality these elections merely ritualised the decisions taken in a Japanese way about who should govern. Having the same ruling party for 38 years suggests that democracy has not flourished in Japan. Now that party has been defeated and a more genuine democracy is taking hold, the government seems to be in crisis. In the same way, any study of the freedoms guaranteed in the constitutions of communist countries serve to warn us of the dangers of believing that creating a right in law necessarily creates a right in practice.

If we would confine ourselves to priorities of the sector we would provide and guarantee freedom of expression rather than democratic rights. Freedom of expression should properly be entrenched in the constitution for all persons rather than merely in laws relating specifically to the third sector. It is particularly important for the third sector, however, as it is certain that the open exposure of social problems will not be welcomed by repressive governments because such exposure is not welcomed by democratic governments.

The importance of laws enabling the third sector is to give individuals who have the right of free expression the additional right to act collectively. Therefore, citizens must also be given the right to incorporate or otherwise have the full legal power to act collectively as a juridical person to accomplish their third sector purposes. It is far more useful to give indigenous citizens the tools of democracy, being free expression and the right of collective association, than to give them the institutions and organs of government which the West recognises as democratic.

With freedom of expression and the collective right to become an active juridical person, indigenous organisations can determine how best to give legal expression to the third sector and begin to promote, enhance and entrench their rights. Freed from the stigma and suspicions which follow from being marked with a foreign ideology, they can pioneer their own path to some form of democracy and pluralism, if that is their priority. It is, I submit, counter-productive to attempt to strengthen the legal infrastructure of the third sector to give international ideologies primacy over national culture. This is particularly true in countries which have anti-democratic and anti-pluralistic traditions. It is doubtful that Moses could have developed a charitable tradition in Pharaoh's Egypt if he had begun by claiming this was fundamentally about democracy and pluralism. There are pragmatic as well as policy reasons for restricting the agenda to providing an enabling environment for the third sector.

It is particularly regrettable that this ideological agenda is combined with foreign government financing. It is a major blow to the credibility of the vaunted independence of the third sector from government that it should rely on government money for this work. It is also a significant contradiction to claim that one of the great features of the third sector is its prohibition on having political purposes and

then to give the entire sector an ideological agenda to build democracy, pluralism and a market economy.

Democracy and Pluralism and the History of the Law of Charity

It has been my exposure to repeated proclamations about the primacy of democracy and pluralism that forced me to remind people that the law of charity in England did not evolve in an age of democracy or pluralism. The legal history of the law of charity is one of the sorriest examples of religious discrimination one can find. The only religion recognised and authorised by the law of charity in its formative years during the sixteenth century was the present religion of the reigning monarch. When King Henry VIII wanted to appropriate the funds held in chantry[9] endowments, he had legislation enacted[10] which proclaimed chantries a "superstitious" use and made them unlawful. The result of being unlawful was that they were void and no longer charitable because they supported false religious purposes.[11] It took many successive pieces of legislation to force the law of charity to recognise non-conformist Protestants, Roman Catholics, Jews and then "Mohammedans" as being lawful and therefore being charitable.[12]

In fact one can make an historical case that the world's predominant charitable systems have grown not in pluralistic environments or democracies but in quasi-theocracies where "law" was man's expression of God's Law. Charity was essentially a religious concept which was compelled by God's Law even if voluntary under the state's laws. Charity was as important for the eternal benefit of the donor as for the temporal benefit of the recipient. The religious compulsion was very strong because it was the dominant influence in a non-pluralistic society. The courts could give legal expression to charitable values precisely because they were the commonly shared values of a homogeneous society. The English common law of charity is indisputedly rooted in the Christian traditions and values of English society. Similarly, the Jewish charitable tradition has no roots in pluralism or democracy. The same is true of the Islamic charitable tradition which gave legal expression to the wakf[13] several centuries before the common law trust. There was also a complete absence of pluralism and democracy in the environments in which the less religious but still charitable traditions evolved in China, Japan and other parts of Asia.

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9 Charities were endowments for saying masses for the dead.

10 1531 (23 Hen 8) c 10.

11 *De Themmines v De Bonneval* (1828) 5 Russ 287.

12 A more comprehensive historic outline of the legislation defining lawful religions can be found in the author's article "Contemporary Philanthropy" - Is the Legal Concept of Charity Any Longer Adequate?" in DWM Waters, ed, *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993).

13 The "wakf" is the legal process in the Islamic tradition by which a person creates an endowment for purposes pleasing to God. Endowments by non-Muslims are only valid if they are intended for a purpose which is not incompatible with Islam. The wakf therefore also has an anti-pluralistic tradition. See H A R Gibb & G H Kramers, eds (on behalf of Royal Netherlands Academy), *Shorter Encyclopedia of Islam*, H A R (Leiden: E J Brill, 1974) at 624.

There is an interesting irony in the fact that those engaged in promoting the importance of the charitable tradition always list the English common law, Judaic traditions and the Islamic wakf as their prime examples. Almost never do they cite the cradle of democracy, Greece, as an example of the model third sector. In fact, however, Greece had pluralistic and secular foundations almost two millennia before the common law charitable trust.

If the history of the law of charity in England from a pluralism perspective is a sorry one, it is just as bad when one analyses the democratic environment in which it grew. While the monarchs of Tudor[14] England did operate with a Parliament the forces behind the legislation of the *Statute of Elizabeth* were certainly not democratic. There is a disturbing degree to which the social legislation, in which the origins of the law of charity lie, was not rooted in altruism but in preserving social order. In his masterful historical study entitled *Philanthropy in England 1480-1660* Professor W K Jordan says:

> "It may safely be said that the steady concern of the Tudors with the problem of poverty flowed from the almost obsessive preoccupation of these great rulers with the question of public order."[15]

The *Statute of Elizabeth* was the culmination of a chain of legislation which began with laws[16] ordering the arrest of vagabonds and whipping them until bloody before returning them to their home[17] and progressed to the notorious Elizabethan "Poor Laws". My objective in citing some of the harsher realities of the history of the law of charity is not to discredit it. Rather it is to counter some of the revisionism which is rampant in some politically correct schools of civil society theory. Eastern Europe has had enough of its own revisionist history without being subjected to revisionism from the West. The expectations placed upon the third sector's ability to address social problems are already so excessive that it is wrong not to add a footnote or two about problems the sector has had in the West.

Problems in Exporting the US Model

The challenge of developing a legal framework for the third sector in Eastern Europe is daunting enough without adding the democracy and pluralism agenda. It seems that every tenet and presumption upon which the third sector is based in the West is not presently available there. Donations for active support of charitable activities presumes disposable income; but in Eastern Europe such income is almost non-existent. Promoting voluntarism as the solution ignores the financial reality of citizens who are struggling for bare survival. It also forgets that "volunteer" was a codeword for compulsory unpaid labour for the state during the communist years.

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[14] The reign of the Tudors began with King Henry VII in 1485 and continued until the death of Queen Elizabeth I in 1603. Henry VII reigned from 1485 to 1509 followed by Henry VIII from 1509 to 1547. He was succeeded by his children Edward VI (1547-1553), Mary (1553-1558) and Elizabeth I (1558-1603).

[15] W K Jordan, *Philanthropy in England* (London: George Allen & Unwin, 1959) at 77 [hereinafter "Jordan"].

[16] 39 Elizabeth I, c 4 (continued as 43 Elizabeth I, c 9).

[17] Jordan, supra, note 13, at 95.

Suggesting foundations presumes an accumulation of private capital which, if it does exist, is usually in the hands of hated corrupt "profiteers" of the harsh new market economy. Foundations also bring to mind the state funded foundations from the Communist era controlled by the *nomenclatura* who are now desperately trying to project an image of independence from the state.

The common law has a very strict theoretical prohibition against political purposes for the third sector and outside of the US allows only very limited proscribed political activity. In a communist or otherwise non-democratic country almost any activity undertaken by the third sector is, by their definition, political. The history of social activism in the 1980s and changes since 1989 provide objective evidence of this reality. During my visit to Moscow in 1989 as part of an international delegation to discuss foundation law, it was fascinating to witness *nomenclatura* from state-funded "authorised" foundations attack groups representing the victims of the Chernobyl nuclear disaster as being political. Claiming that their endowments made them independent from the state and denying any political taint applied to them, these state-funded foundations argued that activist foundations such as the Chernobyl group should not be considered part of the third sector because they were "political".

The *nomenclatura* considered other participants even more political. Environmentalists at the meetings made eloquent pleas to prevent the extermination of life in Lake Bakal due to pollution. They were followed by even more moving protestations by national groups in the Baltic Republics stating that the extermination of fish was of little consequence compared to the extermination of a people's culture by an occupying military force. Subsequent developments have established that much of the political leadership for the new independent governments of the Baltic Republics came from third sector organisations which during the communist occupation proclaimed themselves "cultural foundations". It is my opinion that a vibrant third sector will result in citizens demanding more open and responsive forms of government. It is doubtful to my mind, however, that this process is assisted by making democracy, as understood by a particular foreign ideology, a stated objective of building the third sector.

Another common law tenet of the operation of the third sector is that it prohibits business activities that are other than incidental and ancillary to the organisation's charitable purposes and, in the US, applies an unrelated business income tax to them. While restricting business is a seldom challenged doctrine in the West, there are few other realistic sources for funding the third sector in Eastern Europe. The problem posed is not so much one of unfair competition because of tax exemptions; but that tax exemptions offered to enterprise activities attract for-profit businesses which seek foundation status solely for tax reasons. In countries where the new market economies have resulted in shocking levels of corruption and criminal control there is a great danger in attracting those operators into the third sector. In the West there is a high level of respect and trust in the integrity of the third sector both among the public and the government. This respect was earned over decades of hard work and cannot be presumed to exist without being earned. Overly generous tax exemptions to business activities make it more difficult to increase the level of public trust necessary for the sector to flourish in the long run, while providing the necessary funds to survive in the short run.

It is not only the issues of public trust and the fear of corruption which makes the matter of tax incentives problematic. The third sector in Eastern Europe is desperate to receive generous tax incentives for charitable donations to encourage funding. Promoting charitable giving on the basis of tax incentives is to send the message to

citizens who are only learning about charities and personal income tax, that donors give to receive a personal financial benefit. Realising that we are not in an ideal world where people give readily out of pure altruism it is still useful to be cautious about the contradictory message as to motivations sent to societies just entering the market economy. At a more pragmatic level one must balance that risk against the significant evidence that the new entrepreneurs are not filing tax returns. Consequently, they are not going to invite taxation of their entire income in the hope of obtaining a tax deduction on only a tiny portion of that income given to charity.

There is a very real danger that the greatest threat posed by adopting generous tax incentives is the unrealistic expectations in Eastern Europe that this is the "open sesame" which will immediately result in US level funding flooding in from the private sector. The fact that this is not true is just an additional level of disillusionment with the free market economy which could be very harmful to the third sector getting on its feet.

When one considers the huge gulf between the social, economic and political realities which gave rise to the US model and the comparable realities of current societies in Eastern Europe, it is difficult to see a common law model taking root unless there is radical adjustment to accommodate and incorporate indigenous customs, cultures and codes. The difficulty in the current international export and creation of third sector laws as a means of creating civil society is that the process is dominated by foreign experts on the sector "as it should be" in a utopian politically correct world. These experts are predominantly lawyers who are not unduly sensitive to indigenous values and idiosyncrasies. Lip service is paid to giving consideration to local mores, customs and even political considerations. This usually translates into searching for something local that looks familiar to a foreigner rather than a genuine attempt to craft a legal infrastructure which reflects domestic charity or third sector practices. There is tremendous pressure on the foreign expert to produce a law that will impress his or her professional colleagues and funders back home. The result is lawyers attempting to create a civil society based on foreign legal and tax experience instead of the law being created as a servant and protector of the indigenous society. It is important to bring into the process more sociologists, anthropologists and historians who are equipped to understand and interpret the local society into the process.

This is not to criticise the US or any other particular system. It is to argue that the genius of the US system is that it reflects US society, culture and values. Analysing tax and regulatory differences between the US and Canada should not be done in isolation of an analysis of the differences in their respective societies. The Canadian system works to the extent that it reflects Canadian realities and aspirations. Eastern Europe needs to be encouraged to look beyond importing any model. It must learn from the experience of the third sector in other legal regimes; but create its own unique blend of the ideal and the pragmatic.

Role of the Courts

In my opinion the most important ingredient of building and protecting the legal infrastructure of the third sector in the West is free and independent courts.[18] These are missing in Eastern Europe at present and much more attention must be given to encouraging and enhancing the courts. In England the ecclesiastical courts and then the courts of equity gave legal expression to indigenous charitable activities and protection to the charitable endowments. The evolution of the law of charity is a wonderful example of a legal system being created as a response to and the servant of, rather than the architect of, indigenous values. This evolution came primarily through the courts and not the legislature. This ability of the common law courts to advance the law through precedent is fundamental to the law adapting to indigenous realities. Civilian legal systems must foster this to the extent possible.

The courts not only contributed to the evolution of the charitable sector but to its protection. Protection of charitable interests and protection of the freedom of expression in the pursuit of lawful charitable purposes were part of the heritage of the *Statute of Elizabeth*. It is to the courts that the poor and socially excluded turn when endowments for charitable purposes are abused. The courts appropriated to themselves an inherent jurisdiction in investigating any matter involving charity and became champions of the poor by enforcing charitable trusts. Initially this was expressed primarily in situations where property rather than rights were involved, but gradually it evolved to encourage and protect advocates speaking out for justice and compassion.

It is freedom of expression and not tax privileges which must be fostered and given protection in legal systems if the third sector is to be nurtured and prosper. It is the individual's freedom of expression and corresponding collective right of a group to have the legal right to free association which will lead to a civil society. The laws creating an enabling environment for the third sector must first guarantee the right of free expression and the ability of citizens to associate and incorporate as a matter of right before worrying about the privileges of tax exemption and deductions. Independent courts are necessary to enforce these rights.

If the focus of the law is on the right of indigenous organisations to freely associate and incorporate then they will have been given the necessary tools to develop the sector. As the nature of the organisations which incorporate becomes clear, it will be possible to give a truly indigenous definition of the third sector. It is highly improbable that the sector will conform to parameters preconceived in Baltimore or Brussels; but it will have some hope of succeeding and growing without the taint of being a foreign creation. Very difficult decisions will have to be taken with regard to the nature and extent of tax privileges extended to help the sector flourish in any country. An even greater challenge will be to devise systems of granting and monitoring tax privileges without unduly reducing the independence of the sector from the state. Again, the role of the courts will be crucial.

Another important issue for independent courts is to determine the extent to which political activities of third sector organisations will be allowed. It is arguable that the common law restricts the freedom of speech of charities by limiting their ability to engage in direct political activities. This is another issue which must be determined

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[18] In a year when we have witnessed democracy established in South Africa it is important to recognise the extent to which the blacks' struggle for full legal rights in their society was assisted by independent common law courts supporting the rule of law and enforcing the legal rights available to the blacks even under apartheid.

in the context of the political, social and cultural environment of any country. Individual third sector organisations should have the right to decline tax privileges in favour of the unrestricted right of free speech on political issues if they so decide.

Conclusion

The primary objective in drafting laws for the third sector should be to create a legal regime which allows incorporation with full legal capacity and powers for socially beneficial purposes as a matter of right immediately upon compliance with the minimum amount of formalities as to the contents of the constituting documents. The allowable purposes which qualify for incorporation as a matter of right should be much broader than the common law's charitable purposes. If the law is restricted to charitable purposes as understood by the common law then only organisations which meet criteria established outside the country in a foreign legal system qualify to use the law for incorporation. Such a law is not available to groups whose purposes and *modus operandi* are not charitable and fails to extend its rights and protections to them.

The reason that a third sector organisation must be allowed to have far broader purposes is that many of the purposes which citizens may want to accomplish in exercising their right of freedom of expression and freedom of association will not be exclusively charitable. They must not be denied their right to obtain juridical person status for the legal expression of their socially beneficial purposes because of the narrow and often outdated legal definition of charitable purposes in the common law. It is necessary for anthropologists, sociologists and historians to become actively involved in the process so that the law is not circumscribed and shackled by foreign legal expertise and agendas for the third sector. The law must be liberated from lawyers so that it can be free to reflect and serve the indigenous third sector.

The impulses and sentiments which drive the third sector have existed in all cultures centuries before the first, second and third sectors existed. Given that historical perspective, it is more important to create a law that reflects the sector rather than to attempt to create the sector through drafting a law. Only a law which draws upon and responds to the indigenous society will survive and stand the test of time. Recent experience in post-communist societies has demonstrated that the sector finds ways to survive and expand in countries which have not enacted sophisticated enabling legislation. Foreign legal experts can provide valuable expertise on a consultative basis but must resist the temptation provided by the temporary instability of post-communist societies to export a foreign political and ideological agenda when asked only for technical legal advice.

I have been asked why I continue to work as a "foreign legal expert" if I have the misgivings expressed in this paper. The answer is that I believe there is value in having a person (even if he is a lawyer) involved who can point out some of the problems entailed in importing a law from a different culture and legal system. My function has increasingly been to point out the reasons why an imported model is not the "open sesame" solution to enabling and enhancing a viable third sector. At the early stages of consulting on the law for the third sector it is often difficult to convince the host nation that not all answers are to be found abroad. A "foreign legal expert" can sometimes do this more effectively than the local prophet who is without honour in his own land. Once the host nation is committed to developing local solutions drawing upon indigenous traditions, there is real value in testing local concepts against international experience. We live in a global village. Drawing upon

comparative law expertise both avoids re-inventing the wheel and contributes to a more truly international third sector.