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THE RATIONALE FOR CHARITY LAW

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Introduction

This article is based on a lecture delivered at the International Conference on Charity Law held at Royal Holloway and Bedford New College on 16th-17th September 1994. The approach to the subject is based on the author's professional experience of reading (and drafting) the governing instruments of charities and advising their trustees, and (latterly) of the real life experience of being a trustee or advisory body member of a number of charities. It is regarded solely from the point of view of the law of England and Wales.

A "Rationale"

One of the more encouraging features of the common law system is what might be called its "forgivingness". Whatever theory is currently in fashion may easily be amended or replaced as soon as an inconsistent decision appears. Theories can be helpful in making sense of the existing law, for the benefit of students or practitioners, but are not necessarily either descriptive of the present or (unless they are actually adopted by the courts) prescriptive for the future.

Charity law contains an abundance of case law which illustrates this in colourful ways. For example, the theory that animal charities are charitable only because of the moral lesson they present to human beings provides a humanitarian justification for fulfilling the old lady's wish to give all her money to a cats' home. In reality, such an old lady is probably more concerned about the physical welfare of the cats than about a more grandiose scheme of improving human morality.

It is further submitted that *Re Grove-Grady* [1929] 1 Ch 557, in which the provision of a nature reserve was held non-charitable, would be decided otherwise today. Instead of looking solely for a moral lesson to mankind a modern judge would be more likely to take account of the ecological and other scientific benefits from nature conservation.

In other words, the Victorians' emphasis on direct benefits to mankind is already being overtaken by other ways of regarding the same kinds of purposes. Indeed, it is suggested that a good deal of the law relating to charitable status is primarily instinctive, the rationalisation being secondary. It is in the instinctive reaction that

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this or that purpose should be treated as charitable, and thereby favoured, that the true rationale for charity law is to be discerned.

Instinct

At one level, it can be said that there is a natural instinct at work: the maternal instinct, which is of course not confined to mothers, leads people to wish to care for the weak, the sick and the old, so that they do so without prompting. Virtue being its own reward, there is a sense of satisfaction to be gained by most people from performing this simple duty to their fellows, and there is reason to think that it plays a vital role in holding together not only families but larger communities and indeed national communities and the "world community".

This subject has recently been the subject of close examination in David Selbourne's recent book *The Principle of Duty* (Sinclair-Stevenson, 1994), in which the author traces the signs of alienation and disintegration to be seen in society to the emphasis from the 19th century onwards on individuals' human and civic rights against the rest of society (what he terms "dutiless rights") in contrast to the other side of the equation, their civic duty.

Virgil, in the "Georgics" or, today, a scientist such as Desmond Morris, would doubtless refer to such behaviour as "altruistic", and draw comparisons with the seemingly altruistic behaviour of social insects such as ants and bees. Comparisons with the higher animals, rather than with insects, however, are more apt to provide a realistic sense of charity as a natural impulse.

Religion

Without positing acceptance of any particular scheme of religious belief or allegiance, it is clear that religion has a cohesive effect on its own communities, and that obligations towards others are of central importance, even in a theocentric community such as a monastery. The 6th century Rule of St Benedict (which recently came under judicial scrutiny since it was incorporated by reference into a charitable trust deed: *Gunning v Buckfast Abbey Trustees* (1994) *The Times*, 9th June) is regularly used as a guide to organisational arrangement in commercial as well as monastic settings.

Charity as a concept, though made famous throughout western civilization by St Paul's sublime passage in I Corinthians ch 13, actually predates Christianity. In the Jewish religion there are two concepts which encapsulate the human activity which is summed up in the neighbour principle: **gemilut chasadim** and **tsedakah**.

Gemilut chasadim, literally the performance of acts of kindness, includes providing hospitality for strangers, visiting the sick, comforting the bereaved, providing dowries for needy brides and giving a proper burial to the dead. It is a universal obligation of which observant Jews remind themselves daily. There are echoes of this concept in the Sermon on the Mount and in the Preamble to the Charitable Uses Act 1601. Perhaps the nearest example of a type of organisation which observes gemilut chasadim is a voluntary organisation working directly with beneficiaries, such as a league of friends of a hospital.

Tsedakah, which literally means "justice", is the obligation of the rich to give to the poor, not (like the notorious Lady Bountiful) de haut en bas but in a spirit of equality, and with a view to righting an unfairness: "If your brother becomes poor, and cannot maintain himself with you, you shall maintain him ... that your brother may live beside you" (Leviticus ch 25 v 35). The concept is exemplified by grant-making trusts. As explained in *The Jewish People: their History and Religion* by David J Goldberg and John D Rayner (Viking, 1987), tsedakah is not merely an obligation to give, but to give in a considering way, for the benefit of the recipient rather than the glory of the donor. Giving in the right spirit, however, is beneficial to the soul, and linked with prayer and repentance in the liturgy for the Day of Atonement.

This is the theme of St Paul's message to the effect that without "charity" in the spiritual sense it is profitless to the donor to give, however lavishly, to the poor. In medieval times, with the very real fears which were felt by those whose Catholic faith was underpinned by somewhat fiercesome notions of eternal punishment, and with the rise in the doctrine of Purgatory and the accompanying urgency in saying prayers for the souls of the departed, the obligation to give to charity by will was generally recognised as providing a last opportunity of safeguarding future promotion prospects.

Hence arose the cy-près principle, by which the charitable intention (and thus the testator's soul) would be preserved even though the chosen means were not available.

Legal Obligation

At the junction of law and morality, which are at their best supportive of each other and thus of society, there is a vital difference. Morality at its highest exhorts the individual to positive, beneficial behaviour; law, since it has to be enforced or is useless, can only prohibit negative, harmful behaviour. Thus, as Lord Atkin said in the famous passage in *Donoghue v Stevenson* [1932] AC 562:

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question `Who is my neighbour?' receives a restricted reply."

In relation to charitable activity, a negative rule such as the rule which forms the basis of the tort of negligence is not enough. The law needs to do something more to lend support to the positive obligation to do good towards one's neighbour.

Public Policy

It is submitted that charity law would never have developed into the sophisticated system which now obtains in England and Wales were it not for an additional public policy objective: the desirability of encouraging citizens to undertake - voluntarily - financial and other obligations towards the rest of society.

The fact that, in the time of Elizabeth I, people were encouraged to provide funds for road and bridge-building, the maintenance of prisons and to provide help to others in the payment of specific taxes - all purposes enumerated in the Preamble to the 1601 Statute - demonstrates that the concept of charity had already progressed beyond the religious obligations directed towards other individuals, which lie at its root, and had taken its place in the framework and organisation of society. If not undertaken

voluntarily, those additional obligations would tend to fall upon the parish and have to be paid for by imposing taxes on the less than willing.

It would seem that the objective, public policy element in the legal recognition of charitable purposes (in contrast to their subjective, spiritual source) led to "benefit to the public" being treated as an essential ingredient of charity. This feature of charitable status was formulated relatively late, and did not fit in with the already well-established concept that the relief of poverty was charitable per se: i.e., without the need for the beneficiaries to constitute a section of the public, which has remained: see *Dingle v Turner* [1972] AC 601.

In a Utopian world it would doubtless be an attractive idea for the Government to be able to direct all charitable spending in order to make the most economical (or "efficient") use of it. In reality, however, to rely on voluntary giving (whether of time or money) is not enough. This is accepted by Selbourne as a general principle which leads to the need for universal taxation, a fact of life which cannot be entirely disregarded in a discussion of charitable status.

If the individual donor cannot be certain that his offerings will be used for the purpose he intends, the springs of generosity will naturally tend to dry up. This will be the case either if the donor does not have a choice as to the purposes he will support or if the donor cannot be sure that those administering the gift will carry out his directions, even after he is gone.

A successful policy must therefore encourage the charitable impulse, and harness it no more tightly than is necessary for it to flourish independently.

Trust Concept

It is fortunate for charity law in this jurisdiction that it developed alongside the "trust" concept, under which the person in control of property holds it on behalf of someone else rather than himself: what Churches, in fundraising mode, familiarly call "stewardship", but which again has an ancient Jewish origin exemplified by the rule that ownership of land is legally impossible: *Yours, Lord: a Handbook of Christian Stewardship*" by Michael Wright (Mowbray, 1992). It may be noted that in Scotland, where the trust concept did not develop until later, there are many fewer old-established charities.

Thus the common law, for good psychological and public policy reasons, supports charitable gifts by enforcing them when no other purpose trust would be enforced; by permitting them to endure indefinitely, when other trusts would be subject to the rule against perpetual duration; and by changing them when they become unworkable.

Apart from this enabling activity, the law provides a regulatory framework, originally consisting of the Courts but now, on a day to day basis, of the Charity Commissioners, and gives the Commissioners comprehensive powers to advise, register, supervise and investigate and correct abuse.

Further, there are the generous tax and rate reliefs which are viewed by many, including the present Government, as an essential incentive to charitable giving and thus a vital feature of the charity scene.

Anomalies

One of the strengths of our system is that it allows new purposes to be recognised as charitable from time to time. Thus, in the absence of prescriptive legislation, the Courts, and the Charity Commissioners themselves, have been able, in recent years, to recognise as charitable such beneficial purposes as the protection of "battered" women, the promotion of racial harmony, the commemoration of a prominent leader, the exchange of political ideas and the provision of mediation services.

A corresponding weakness has been that it is more difficult to take out of the favoured category purposes which have been accepted as charitable for generations. A notable exception is the Commissioners' recent determination that rifle clubs are not charitable: Decisions of the Charity Commissioners (1993) Vol 1 p 4.

As a result of the built-in time lag between general acceptance that a purpose is not necessarily deserving of charitable status and official action (if any) on the matter, and the fact that (for financial reasons) there are very few opportunities to test such questions in the Courts, suggestions are made from time to time that certain charities are not as charitable as others, and should not be treated as generously.

In addition, the recent phenomenon whereby local authorities, traditional supporters of fund-seeking charities, are more likely to offer a binding contract than a straightforward grant, has caused some charities to operate in quite different ways. Very often their activities are led more by the needs and deficiencies of local authorities or other public bodies, which a cynic might say have been deliberately kept short of cash, than specifically by the ideas and initiatives of the charities' members and volunteers.

In their different ways, the suggestions made in the Centris Report and by the Duke of Edinburgh in the Goodman Lecture earlier this year, try to make sense of the differences between charities and the way they operate by putting forward schemes under which they would be treated differently, e.g., for tax purposes. Although those particular suggestions may be new, the general notion that there should be some discrimination between different sorts of charity is not new.

The 12th century Jewish philosopher, Maimonides, for example, identified eight degrees of charity, from giving under pressure, and with reluctance (at the bottom of the scale), to enabling a needy person to help himself by finding him a job or going into partnership with him (at the top).

The fact that an attitude is not new does not mean that it should not be re-examined from time to time. There is reason to consider that it is of vital importance to the health of the charity sector and of charity law that its development should be protected from Government or other "official" interference, since a flourishing and pluralistic charity sector is one of the signs that the essential freedoms of the individual are in good shape. Thus, charitable activity has renewed itself in Russia and Eastern Europe with the demise of their totalitarian regimes. Looking critically at the law of England and Wales, however, it seems that, because of the trust concept, the system concentrates far more on preserving money and property than on protecting people's time and effort.

Voluntary activity

It is often forgotten that the Charity Commissioners exercised jurisdiction in relation solely to endowed and "mixed" charities until the Charities Act 1960 came into force on lst January 1961. Their experience is thus based historically on the kind of charity which generates its own income, does not have to raise funds and need not depend on volunteers other than the trustees themselves.

There has been an enormous growth, since then, in the number of unincorporated charitable associations and charitable companies, and it has been estimated that in this country more than elsewhere, contributions which take the form of the unpaid (or scarcely-paid) time of volunteers would be greater, if properly costed, than financial contributions.

The administrative framework is still based on the model of an endowed charity, however. Thus, there is no-one officially charged with seeing to it that the wishes of volunteers to give their services in support of a particular purpose are observed, and, worse, the somewhat cut-throat "contract culture" takes unfair advantage of the existence of volunteers, thereby undervaluing them.

Despite the relative flexibility of the concept of charity to which reference has already been made, there is no mechanism by which a fundamental shift can be brought about by existing decision-making processes as opposed to primary legislation. In addition to the over-emphasis on money and property, there is a wide area of voluntary activity, whose very existence is a sign of the health of the community but which, because the declared purposes do not comply with charity law as it has evolved, are denied the supervision and assistance which is provided for recognised charities.

If such organisations were in the minority the situation could be accepted as an inevitable feature of a legal meaning of charity which is based on purpose rather than form. It is not a satisfactory situation, however, when such unsupervised bodies are in the majority. The fact that there are so many non-charitable voluntary organisations does not simply imply that people are choosing not to be supervised (and to forego tax and rates relief in consequence). It must mean that more people are choosing to give their time and effort to purposes not accepted as charitable in the legal sense, i.e., that the legal meaning of charity is out of step with the reality of what people regard as worth while and are prepared to give their time to.

This phenomenon may be connected with the fact that such voluntary organisations are based on activity rather than trust funds, are informal and evolutionary rather than formal and static, and appear and disappear relatively rapidly. They tend to arise spontaneously in response to a specific need or enthusiasm, and may not have been devised with the specific notion of charitable status in mind. It may also be the result of increased communication and more leisure for large numbers of people, who do not have a tradition of couching their generosity in legally established ways.

Whatever the underlying reason, it is a defect in the present arrangements that the law does not provide adequately for most voluntary organisations, and it is respectfully submitted that if this anomaly is not addressed it will become very hard to discern any coherent rationale for charity law in practice, and charity law will cease to evolve. If this happens there is a serious danger that our system will become rigid, and vulnerable to being set aside in favour of a more "rational" system based on Civil

Law concepts as European integration advances. If this happens, of course, it may well cease to be alive and to develop.