# DEFINITION OF CHARITY: A MODEST PROPOSAL FOR A BIT OF DIVORCE

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A few years ago, as an enquiring layman, I thought it might be interesting to set about reading everything that had ever appeared in the *Law Quarterly Review* or the *Modern Law Review* about charities. I was not disappointed, but I fear that, whatever it may have done for my background knowledge, the experience has left only two things firmly stuck in memory. One is a naughty little quotation, the source of which I have lost: "Charity law - that's not something they can be terribly proud of in Lincoln's Inn." The other is more substantial, the following passage from an article that Geoffrey Cross wrote in 1956 (72 LQR 187 at 205):

> "So long as the two questions, the validity of the trust and the exemption of its income from tax, are linked together in an unnatural union the tendency which the House of Lords has shown of late to limit the scope of charity is, if I may respectfully say so, fully justified. But if one puts aside all question of fiscal privilege and considers simply in what circumstances the law ought to allow a trust to effectuate a purpose, as opposed to a trust to benefit private individuals, to be created at all, a more generous approach might be justified. The only important privileges - other than fiscal privileges - enjoyed by charitable trusts are freedom from the rules against perpetuity and uncertainty .... All that need be required of a trust to earn these privileges is, I suggest, that it should be a "public" trust and not a trust for private individuals and that it should be calculated to confer an appreciable benefit of some sort on the public."[2]

I do not propose in the present context to follow Geoffrey Cross into the subsidiary question how it is to be settled whether a particular trust is "public" or "private". He continues:

> "Again, once fiscal privilege is out of the way, it would seem unnecessary to limit the public benefit to be required of a charitable trust to benefit of any particular type. Lord Macnaghten's words `a purpose beneficial to the community' could be taken at their face value and not limited to purposes analogous to those contained in the

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[2] The writer is grateful to Sweet & Maxwell, publishers of the *Law Quarterly Review* for permission to reproduce these two passages.

> preamble to the Statute of Elizabeth or to any new edition of it. Any appreciable public benefit should suffice. Finally, if all that was required of a trust to make it a charitable trust was that it was a public trust, as opposed to a private trust, and that it appeared on the evidence to be likely to confer an appreciable benefit of some sort on the public, a solution could readily be found to the difficulties at present caused by trusts for indefinite purposes. Any trust expressed to be for public, benevolent, philanthropic or other similar indefinite purposes, whether or not coupled disjunctively with charitable purposes, and whether or not confined to a particular locality, could be construed as a gift for charitable purposes."

The "unnatural union" of charitable status and fiscal benefit has attracted criticism time and time again from the fiscal point of view, especially as the fiscal privileges have so greatly increased. Criticism from the viewpoint of charity lawyers has been less frequent; yet I doubt whether any of us would deny that the fiscal link has acted as a brake on the development of charity law. Both camps might agree that the tail has wagged the dog, differing only in their identification of dog and tail.

Suppose the link broken, we can well imagine the advantage that the fiscal powers would take of their new freedom; but that too is a by-way down which I do not propose to go. My concern is with the corresponding freedom that might be enjoyed on charity law's side of the fence. A more generous extension of charitable status would no longer of itself impose any necessary cost on the tax-payer. All it would do would be to reduce the tyranny of the rule against perpetuities (i.e., against perpetual duration) and enable more uncertainty to be cured. I find it hard to suppose that either change would result in significant damage. Once again I refuse to go down the by-way of asking whether the rule against perpetual duration ever did any real good or prevented any real harm, or of asking what horrors occur in jurisdictions where the rule is unknown.

The change would make it possible to tidy up the intolerable messiness of the Romilly-Macnaghten fourth head of charity, which at present has to be defined as such purposes as:

1 are beneficial to the community;

2 are not included under the other three heads;

3 have been or may hereafter be found charitable by the courts in their inscrutable wisdom.

It would instead become possible to define the fourth head as such purposes, not falling under any of the other three heads, as may confer an appreciable benefit on the public. The courts would still have a modest degree of discretion (in assessing appreciableness), but would exercise it within a rational frame. Perhaps all that game of inspecting the Sibylline book of 1601 could be ended.

We might even find ourselves able, if it were so desired, to stop talking about charity and to talk instead about trusts for public purposes, or something of that kind. The law of England might move a little further towards that of Scotland - always a desirable move - and our arrangements would perhaps present a more rational, less arbitrary appearance to visitors from the European mainland.

The White Paper *Charities: A Framework for the Future*, Cm694, may be quoted

against the proposal. At para 2.15 it says "Defining `charitable purposes' as `purposes beneficial to the community' would have the merit of simplicity but would also be open to major objections. Such a definition would allow the courts to admit to charitable status virtually any organisation which was not obviously for private benefit or profit. A definition on these simple lines would greatly expand the ambit of charity in ways which might be far from desirable." The loss to the public revenues having *ex hypothesi* been cleared aside, I feel entitled to ask: In precisely what ways? And why undesirable? More work for the Charity Commissioners, perhaps; but need that terrify us?

The difficulties in the way are perhaps different in character. Is the proposed reform too simple, too rational for this not very rational world - something too good to happen?

Yet, one wonders. Might the wind from the mainland blow us in that direction? There seem no real risk that harmonising pressure might be brought to bear on charity law generally. The realm of *fiscalité* is another matter. The movers and shakers of the voluntary sector in Europe are already urging that fiscal privilege should be harmonised, but are not at all interested in harmonising the law about the underlying structures. They would like to establish the proposition that it is discrimination contrary to the Treaty if a Member State treats its indigenous Non-Governmental Organisations (NGOs) (or donors to them) better than those that have their siège in other Member States. Out of that may come in the fullness of time some pressure to harmonise not only fiscal privileges but also the rules about what NGOs should enjoy them. Such pressure may be expected to bear on fiscal law rather than on charity law itself, and we might - just might - find it easier to deal with if we could disentangle the two systems.