

BOOK REVIEW

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CHARITY LAW AND SOCIAL INCLUSION

by

Kerry O'Halloran

Published by Routledge, London, 2007.

ISBN10: 0-415-34723-8 (paperback); 437 pages. Price: £ 25.

This important and effective book² is written with a very simple aim – looking into the “legal framework regulating the philanthropic environment [so as to] facilitate a more effective contribution of charitable resources for the alleviation of poverty and the encouragement of social inclusion.” The author wants “existing obstructions” to be removed in order to accomplish this goal, and he takes a comparative perspective to show ways in which a variety of common law jurisdictions have addressed (well or not so well) the issues he raises. Dr. O'Halloran is Adjunct Professor at the Centre of Philanthropy and Nonprofit Studies at Queensland University of Technology in Australia. He addresses the issues at a time when the countries he has studied have recently completed or are in the process of charity law reform efforts.

The book is divided into four parts. The first of these examines the core concepts of charity and fundamental dilemmas of charity and the law, including the “gift relationship.” The second looks at the 400 year old common law legacy of charity law, which still today makes a significant contribution to the definitions of charity in the six jurisdictions studied. The third develops a framework for the jurisdiction specific analysis and the book's conclusions both according to international human

¹ Professor of Law, Catholic University of America, Washington D.C. This review first appeared in International Journal of Civil Society Law, Volume V Issue III, July 2007 and is reprinted here with the kind permission of the author.

² The author of this review must disclose at the outset that she is engaged with the book's author and Professor Myles McGregor-Lowndes of the Centre of Philanthropy and Nonprofit Studies, Queensland University of Technology, in preparing a companion volume entitled “Charity Law and Social Policy”.

rights norms and the legal benchmarks of an appropriate system of charity law. The final chapter sets out conclusions, focusing on the principal areas of “sensitivity in the relationship between the charity law framework and social inclusion.”

What are some of the key issues examined?

1. The extent to which it is useful/necessary to have “an independent forum for adjusting the law” like the Charity Commission for England and Wales and the new Charities Commission in New Zealand.³ Dr. O’Halloran clearly feels rather strongly that this is a good way to develop the law, and in another forum this reviewer has agreed.⁴ On the other hand, it should be noted that the tendency has been for the Internal Revenue Service (IRS) in the United States and the Canada Revenue Agency (CRA) to address various aspects of poverty alleviation and community development in public pronouncements indicating that such activities are charitable. These are, of course, statutory interpretations of revenue laws, but they have necessarily addressed important areas of social inclusion.

Of course, one of the principal constraints faced by the charitable sector in countries without a single entity that determines charitable status is the overlapping of jurisdictional regimes – in both Canada and the United States, for example, charities can register as corporate entities at the state or provincial level, while needing to apply for tax exempt status at the national level (and in some states in the US). There are also laws regulating fund-raising, which differ from local jurisdiction to local jurisdiction. Further, as Dr. O’Halloran notes, the fact that the Charity Commission can itself apply *cy-pres* to charities is enormously useful and avoids the delays and expense occasioned by requiring court supervision of such changes.

In addition, it is clear that the role of the Charity Commission in broadening the definition of “public benefit” is a salutary one. Both Dr. O’Halloran and Prof. McGregor-Lowndes, who wrote the chapter on Australia, have deplored the revenue agency focused regulation of the sector in so many of the common law countries.

³ One is also proposed for Northern Ireland.

⁴ See Robert Kushen, Leon E. Irish & Karla W. Simon, “Guidelines for Laws affecting Civic Organizations” §3.2 B.

2. The extent to which charities can address causes rather than effects of poverty.

Historically, this has been a problem, given that charity as defined in the Preamble to the 1601 Statute of Charitable Uses was principally aimed at effects. Dr. O'Halloran points out, however, that as times have changed so has this focus on effects. One can see it, for example, in the health field and in overseas aid – in both these areas charities aiming to alleviate disease and attend to development rather than mere disaster relief have been given charity status.

3. Whether limiting the definition of the “public” to exclude clan-based groups has the effect of placing unnecessary limits on the charitable nature of trusts for the benefit of indigenous peoples. Dr. O'Halloran points to the differences between the rule in New Zealand, which contrasts rather sharply with the CRA policy, to wit:

“An organization cannot qualify for registration with purposes established to assist Aboriginal Peoples of Canada if it further restricts its beneficiaries to a limited class of persons, also known as a ‘class within a class.’ For example, limiting beneficiaries to a particular nation that excludes members of other nations does not meet the necessary element of public benefit.”

Obviously such limitations can be a serious problem in the case of indigenous peoples, and this is troubling matter – it is clear that many of the members of such groups need to have charitable assets focused on their inclusion in the larger polity.

4. The extent to which limits on political activities of charities impede their ability to address the needs of the socially marginalized. Dr. O'Halloran suggests that such restrictions exist in all common law jurisdictions, but not in any civil law countries.⁵

⁵ He cites a survey by Perri 6 and Anita Randon entitled “Liberty, Charity and Politics: Non-profit Law and Freedom of Speech”, which was published by Dartmouth in 1995. Subsequent research has shown that it is not atypical of some civil law jurisdictions to limit the political activities of charitable organizations. See the teaching materials developed for the Comparative Civil Society Law course at Peking University Law School, available at http://www.iccsl.org/pubs/Bei_Da_Course_Reader.pdf, page 186, describing the restrictions in Germany and France.

While the latter is not strictly true, the point about the common law countries is generally valid. But there are important distinctions among the common law countries studied. In England and Wales and Ireland, for example, the restrictions are related to the definition of what is a charity and having charitable objects or purposes will preclude registration with the Commission. This is also true in New Zealand, where an organization whose primary purpose is political will not be registered.⁶ A similar result would apply if the purposes were political and an organization sought charity status under the tax laws in Australia, Canada or the United States.

In these latter jurisdictions, the issue is more clearly one of tax policy. In other words, it comes up in the context of whether the tax laws should “subsidize” political activities through an income tax deduction or credit. In general these jurisdictions have decided not to allow such subsidies on the theory that using the tax system to support such organizations does not create a level playing field. Nevertheless, American and Canadian case law have both developed a rule that makes it easy for charities to establish “sister” organizations that do engage in considerable political campaigning or lobbying.⁷ In addition, both jurisdictions have rules about the extent to which lobbying or campaigning⁸ is permissible, which allow most organizations as much latitude as they need.

5. The extent to which the law or public policy encourages public-private partnerships to advance issues of social inclusion. As Dr. O’Halloran suggests, all the common law jurisdictions studied, with the notable exception of the United States, have agreements between the not-for-profit sector and the State outlining a relationship that deals with how these interactions are to take place. In the United States, of course, the overwhelming tendency of government has been to contract out many functions related to poverty relief and social and economic development of marginalized populations, and it is thus questionable whether such an agreement is necessary.

⁶ See Advocacy and the Charities Act, available at http://www.charities.govt.nz/news/news/fact_sheets/advocacy.htm

⁷ The cases are *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S. Ct. 1997 (1993) and *Alliance for Life v. M.N.R.*[1999] 3 F.C. 504.

⁸ There are absolute prohibitions on election or political party related activities, but an extremely interesting United States case outlines a road map for a traditional charity to engage in such activities by forming three related organizations. See *Branch Ministries v. Rossotti*, 211 F. 3d 137 (D.C. Cir. 2000).

6. Ways in which the charity law encourages support for international aid and human rights, and the necessary impact of anti-terrorism measures on such concerns. Although Dr. O'Halloran notes that charity law reviews in the various common law countries began "with much optimism," he concludes that such reform efforts now "show every sign of succumbing to an international security imperative." The balancing of the interests in this regard clearly has not yet concluded, but it is hard to disagree that the current environment does not favor what he calls "more innovative social inclusion strategies" across borders.

There is, however, another significant threat to charities that engage in the international arena and that is that many of them run the risk of becoming agents of the foreign policies of the government bodies that fund them. For those charities that receive all or most of their funding from government aid agencies such as the Department for International Development (DfID – UK), the Australian Agency for International Development (AusAID), or the United States Agency for International Development (USAID) the question of whether they are truly independent or non-governmental is a real one. Combining an environment that favors contracting to private entities with increased government oversight of charitable activities in foreign countries can create an environment in which the innovation referred to in the previous paragraph goes missing.⁹

7. Issues about legal form. Although England and Wales have clung tenaciously to the trust form for charities, the choice of that legal form has largely been abandoned in other jurisdictions, such as Australia, Canada, New Zealand, and the United States, for a variety of historical reasons. In England and Wales and Ireland statutory forms are being or have been created that will make it easier to incorporate a charity. As the accompanying Book Review points out, however, one of the current issues in the United States (resulting from the famous Bishop Estate controversy) is the extent to which large trusts should be allowed to exist without a more corporate form of governance (with a CEO rather than). Clearly allowing flexibility is a good idea, but it must carry with it the notion that any form chosen will have adequate governance by its board and oversight by the appropriate body (Charity Commission or court).

This book is too rich to adequately describe in a review of a few short pages. It needs to be studied, pondered over, and discussed by serious scholars, teachers,

⁹ For an interesting discussion of these and other issues about what influences charity, see Nick Seddon, "Who Cares? How state funding and political activism can change charity" (CIVITAS UK 2007).

and practitioners in this field. As charity law reviews in the various jurisdictions proceed, one can only hope that more lawyers will carefully explore the issues raised – as well as the comparative perspective taken – and seek to convene a forum for a broader and informed discussion.