



*The International Journal  
of Not-for-Profit Law*

**Volume 11, Number 1  
November 2008**

A Quarterly Publication of

The International Center for Not-for-Profit Law  
1126 16th Street, NW, Suite 400  
Washington, DC 20036  
(202) 452-8600  
[www.icnl.org](http://www.icnl.org)

*Publisher*

International Center for Not-for-Profit Law  
1126 16th Street, NW, Suite 400  
Washington, DC 20036  
(202) 452-8600  
[www.icnl.org](http://www.icnl.org)

Editor: Stephen Bates

Senior Editor: Douglas Rutzen

Contributing Editor: Stephan Klingelhofer

Production Editor: Ivan Gan

*The International Journal of Not-for-Profit Law*, ISSN 1556-5157, is a forum for the discussion of civil society, philanthropy, nongovernmental organizations, and the law, published quarterly by the International Center for Not-for-Profit Law, [www.icnl.org](http://www.icnl.org). Based in Washington, D.C., the International Center for Not-for-Profit Law promotes an enabling environment for civil society and public participation around the world. Views expressed here do not necessarily reflect those of the International Center for Not-for-Profit Law, its affiliates, or its funders.

Except where otherwise noted, all contents copyright 2008 by the International Center for Not-for-Profit Law.

# *The International Journal of Not-for-Profit Law*

Volume 11, Number 1  
November 2008

*Letter from the Editor* ..... 4

## **EUROPE**

*A Comparative Overview of Public Benefit Status in Europe*  
David Moore, Katerina Hadzi-Miceva, and Nilda Bullain ..... 5

*Defining “Charity” and “Charitable Purposes”  
in the United Kingdom*  
Nuzhat Malik ..... 36

*Charities and Restrictions on Political Activities:  
Developments by the Charity Commission for England and Wales  
in Determining the Regulatory Barriers*  
Alison Dunn ..... 51

*Financial Reporting in European NPOs:  
Is Now the Time for a Common Framework?*  
Claudio Travaglini ..... 67

*Why Is the European Foundation Statute Needed?*  
Gerry Salole ..... 75

## **ARTICLE**

*The Development of NGO Support Organizations:  
The Early Years of the Australian Council for Overseas Aid*  
Patrick Kilby ..... 84

## ***Letter from the Editor***

This issue of the *International Journal of Not-for-Profit Law* features a special section on Europe. First, **David Moore**, **Katerina Hadzi-Miceva**, and **Nilda Bullain** analyze and compare public benefit status in various European countries. Next, **Nuzhat Malik** discusses the evolution and current state of the United Kingdom's legal definitions of "charity" and "charitable purposes." **Alison Dunn** considers NGO law in the United Kingdom from another angle, by assessing the restrictions on political activities imposed by the Charity Commission for England and Wales. **Claudio Travaglini** finds common ground in financial reporting requirements in the United Kingdom, Spain, and Italy and speculates on the possibility of a common framework across the European Community. Finally, **Gerry Salole** explains the importance and ideal operation of a European Foundation Statute.

We also feature an article by **Patrick Kilby** on organizations that provide support to NGOs, in particular the Australian Council for Overseas Aid.

For this wide range of perspectives on civil society, we are, as always, grateful to our authors.

Stephen Bates

Editor

*International Journal of Not-for-Profit Law*

[sbates@icnl.org](mailto:sbates@icnl.org)

## *Europe*

# **A Comparative Overview of Public Benefit Status in Europe**

**David Moore, Katerina Hadzi-Miceva, and Nilda Bullain\***

## **I. INTRODUCTION**

The legal framework for civil society organizations (CSOs)<sup>1</sup> typically permits organizations to be created in different forms to pursue any legitimate aim, including both private benefit and public benefit aims. In most countries, however, the state does not want to extend benefits to all CSOs indiscriminately; instead, the state typically extends benefits to a subset of these organizations, based on their purposes and activities. In return it requires a higher level of governance and accountability for these organizations. By providing benefits, the state seeks to promote certain designated activities, usually related to the common good. CSOs pursuing such activities are given many different labels, including “charities” and “public benefit organizations.” Moreover, in some countries, there may be no explicit status defined in the law, but certain purposes and activities are nonetheless linked to state benefits (tax benefits, state grants etc.). In this article, we use the term “public benefit” to refer to this special status – however described in the national context – and the term “public benefit organization” (or PBO) to refer to organizations legally recognized as having this status.

The practice of distinguishing PBOs from those that are established for private interest and facilitating their activities is deeply rooted in European society. Codification of the common law system dates back to 1601 and the English Statute of Charitable Uses, whose purpose was to enumerate charitable causes and to eliminate abuse. Over time, the notion of public benefit was expanded beyond the relief of poverty to include caring for the sick, training of apprentices, building of bridges, maintaining roads and other related purposes. In the civil law tradition, foundations – which were dedicated to a public benefit purpose – existed in Europe in the fifth century BC. Today, most civil law countries extend tax preferences to both foundations and associations, contingent upon public benefit purposes.

---

\* David Moore is Program Director of the European Center for Not-for-Profit Law (ECNL), where Katerina Hadzi-Miceva is Legal Advisor and Nilda Bullain is Executive Director. The first version of this article was prepared and published in 2005 by ECNL, the National Foundation for Civil Society Development in cooperation with the Academy for Institutional Development with the support of the United States Agency for International Cooperation/Croatia. The first version of this article was also published by the International Center for Not-for-Profit Law (ICNL) in 2005 in “Selected Procedures for Granting Charitable, Public Benefit, and Tax-Exempt Status Around the World” with the support of United States Agency for International Development, Save the Children, and the Institute of Urban Economics, Moscow. The current revised and updated version of the article is prepared by ECNL for the Macedonian Center for International Cooperation (MCIC).

<sup>1</sup> The term CSO in this article will refer to associations, foundations and non-profit companies. The article will also refer to other entities country specific laws give them the right to obtain PBO status.

This article seeks to present an overview of European practices for regulating organizations with public benefit status.<sup>2</sup> In analyzing the status, we will focus on the (1) characteristics and rationale, (2) regulatory approaches; (3) criteria; (4) decision-making authority; (5) procedures and conditions for certification/registration; (6) state benefits; and (7) obligations of PBOs, supervision and accountability issues.

## II. CONCEPT AND RATIONALE

In most continental European countries, recognizing a certain organization to be of “public benefit” indicates that the organization has obtained a “**status**” and not that it has been registered as a separate legal form. Public benefit status is granted after the organization has been registered as a legal entity (most commonly in the form of an association or a foundation).<sup>3</sup> If the public benefit organization ceases to fulfill the conditions for having this status, it would lose the status and the benefits associated with it, but it could still continue to operate.<sup>4</sup> Public benefit status is generally considered to be **voluntary**. Having public benefit status might be required to obtain certain benefits, but its existence in the legal framework generally does not inhibit the right of individuals to establish an organization for private purposes and does not prevent an organization to operate without having such status, even if it is established for public benefit purposes.<sup>5</sup>

The approach to public benefit is different in the United Kingdom, in that all organizations with exclusively public benefit purposes are considered “charities.”<sup>6</sup> In England and Wales, those charities with income above 5,000 British pounds are required to register with the Charity Commission for England and Wales (with some small exceptions). Those with income below 5,000 British pounds may voluntarily choose to register. In Scotland they are registered with the Office of the Scottish Charity Regulator. Charities based in Northern Ireland do not, and indeed cannot, register; they need to apply to the Inland Revenue to obtain a charitable status for tax purposes.

---

<sup>2</sup> All laws in this cited in this article can be found in ICNL’s online library: [www.icnl.org](http://www.icnl.org)

<sup>3</sup> Depending on the legal framework, an organization can apply for public benefit status at the same time when it submits the documents for registration as a legal entity, and it will obtain the status once registration is approved. Or it can apply at any time after registration, as long as it fulfills the criteria prescribed by law.

<sup>4</sup> The laws, however, establish rules about transformation and dissolution of property to ensure that the public money that the public benefit organizations have received do not get channeled to private interests, after the organization loses its status.

<sup>5</sup> A Draft Order is under discussion in Northern Ireland, which aims to define charities and establish a Charity Commission, and a Charity Tribunal.  
[http://www.dsdni.gov.uk/index/voluntary\\_and\\_community/charities\\_advice.htm](http://www.dsdni.gov.uk/index/voluntary_and_community/charities_advice.htm)

<sup>6</sup> Charities can be unincorporated or incorporated. Unincorporated charities are not recognized as bodies by the law, and as such cannot own land or investments, employ people or enter contracts in their own name. These tasks are undertaken on their behalf by the trustees, who are also personally liable for all the charity’s debts. Unincorporated charities include membership associations and trusts (“trusts” are an arrangement whereby money or property is owned and managed by several physical or legal persons, for the benefit of the public). Incorporated charities are recognized as legal bodies, and as such can own land and enter into contracts. Typically, there is also limited liability for trustees (“directors”) in the event of dissolution. Incorporated charities include charitable companies and the newly created Charitable Incorporated Organizations  
<http://www.charitycommission.gov.uk/registration/charcio.asp>.

The underlying rationale for introducing public benefit status is usually **to promote public benefit activities**. Governments recognize that PBOs serve more effectively the needs of local communities and society as a whole. By addressing social needs they complement or supplement obligations of the state or provide services that are under-supplied. They often identify and respond to social needs more quickly than governments and are capable of delivering services more efficiently and directly. In addition, in the provision of their services, PBOs may raise private funds, which complement and save state money and mobilize larger community support.<sup>7</sup>

In addition, states across Europe have adopted this status to:

- **Encourage flow of private resources to CSOs** through creating incentives for private giving to PBOs – e.g. corporate and individual donations (Hungary), percentage mechanism (Poland).
- **Facilitate a state-CSO relationship** in provision of social services. In Poland, PBOs are eligible to bid on tenders for social services on equal footing with the government's own agencies. The Hungarian Act on PBOs introduced two tiers of public benefit status: basic and prominent. Organizations can obtain the status of "prominent public benefit organization" if they undertake state or local government responsibilities, usually by having a contract with a state body.
- **Strengthen relationship between CSOs and public**. With the introduction of the PBO Law in Poland, it was expected that creating a pool of more transparent and more accountable NGOs would help improve the generally poor image of the sector and increase trust in civil society organizations.

Through introducing public benefit status, governments generally want **to ensure that tax benefits granted to NGOs are related to purposes and activities which are of benefit for the public and the society**. In theory, therefore, the status is considered as an issue of fiscal regulation. States generally introduce this status as a response to the question: who should be eligible for state benefits and under what requirements; how can we assure that funds from the local private donors are channeled for purposes of public benefit? Consequently they link fiscal (tax) benefits to publicly beneficial activities or organizations with public benefit status. For example, in Croatia, tax benefits are only available for donations to organizations pursuing the types of activities listed in the tax laws, while in Hungary tax benefits for donors are linked to organizations which have obtained a PBO status. Further, the tax laws will either grant exclusive benefits to such activities and organizations or give them the right to greater benefits than those of organizations that have not received the status. In Poland PBOs are exempt from corporate income tax (as well as real estate tax, civil actions tax, stamp duty, and court fees) on all income devoted to the public benefit objectives listed in the law,<sup>8</sup> while in Hungary PBOs have a right to a higher-threshold exemption on income from economic activities.

---

<sup>7</sup> "A Supportive Financing Framework for Social Economy Organizations," by Katerina Hadzi-Miceva, 2007 © ECNL and OECD

<sup>8</sup> <http://www.usig.org/countryinfo/poland.asp#exemption>

In the past few years, some countries have also linked **other types of state support**, which can come in the form of grants, subsidies, payments for providing certain services, and percentage designations, to public benefit activities or public benefit status. Thus, if the organization wants to apply for and receive state grants or be eligible for other types of benefits, it might need to have obtained such status (e.g., only PBOs in Poland can receive designations through the 1% law<sup>9</sup>). Even if the state does not require organizations to have public benefit status, they might draft the criteria in a law or tender in a way that the criteria closely correspond to the public benefit criteria. For example, the Hungarian Law on 1% mechanism does not require organizations to have obtained public benefit status; however, the criteria for such status are closely linked to those in the PBO law.

Furthermore, public benefit status contributes towards enhanced **accountability and better governance** of PBOs. In exchange for the benefits granted by the state, PBOs are generally subjected to more stringent supervision to ensure that they are using their assets for the public good. They are also required to adhere to more specific rules of governance and accountability.

### **III. REGULATORY CONTEXT**

Public benefit status can be conferred on CSOs explicitly by including provisions in framework legislation (e.g., basic law that governs associations and foundations), in separate laws concerning public benefit status, or in tax laws. In some countries, various activities and criteria concerning public benefit can be found in different laws.

#### *1. Regulation of a “Public Benefit Status”*

##### Public Benefit Status in Framework Laws

CSO framework legislation specifically defines public benefit status in Bosnia, Bulgaria, and other countries. This approach makes most sense when there is one law that governs both the associations and the foundations and the public benefit status extends to these legal forms. These laws generally address a full range of regulatory issues relating to public benefit status, including the definition of public benefit status, the criteria for obtaining it, and the obligations it imposes. In these situations, it is important that the reform of tax laws which introduce benefits for PBOs is adopted parallel to introducing this status. Otherwise, if such status does not entail any financial benefits the organizations may have no incentive to obtain it. In Bulgaria, for example, two years elapsed between the introduction of the public benefit concept (through a new CSO law) and the provision of some benefits for PBOs (through revisions to the tax law).

##### Public Benefit Status Laws

An alternative approach is to adopt specific, separate “public benefit” legislation, in an effort to regulate the status comprehensively and consistently. This approach is usually adopted in

---

<sup>9</sup> The Percentage Mechanism allows every taxpayer to designate a certain percent of the tax owed to organizations that fulfill the criteria prescribed in the law. So far, the following countries have adopted such laws: Hungary (1% to NGOs and 1% to religious organizations from individuals), Slovakia (2% from companies and individuals), Poland (1% from individuals), Lithuania (2% from individuals) and Romania (2% from individuals).



countries where associations, foundations and other entities, which may obtain this status, are governed by separate laws. Thus having one distinct law on PBO status (vs. regulating it in the separate laws) helps to ensure that it is harmonized and applied consistently in the system. Examples include Hungary, Poland, and Latvia. Hungary adopted public benefit legislation in 1997,<sup>10</sup> Poland enacted a Law on Public Benefit Activities and Volunteerism in 2003, and in 2004 Latvia adopted a Law on Public Benefit Organizations. Similarly to situations when PBO status is regulated in framework laws, these specific laws also regulate all issues relating to the status. In addition, separate PBO laws prescribe more explicitly the benefits that the organizations that acquire this status will gain.

#### Public Benefit Status in Tax Laws

The activities that are of public benefit and therefore deserve specific benefits can be regulated in tax law, which are functional equivalents of the operational provisions of public benefit legislation.

#### Section 6, Act on PBO, Hungary

Preferences due to public benefit organizations, supporters of public benefit organizations and recipients of public benefit services

a) public benefit organization is entitled to:

1. corporate tax exemption with respect to its targeted activity as defined in its founding document,
2. corporate tax preference with respect to its business activity,
3. local tax preference,
4. fee preference,
5. customs preference,
6. other preferences defined by law;

b) recipients of services provided by a public benefit organization as targeted grants are entitled to personal income tax exemption with respect to the granted service;

c) supporters of a public benefit organization are entitled to corporate tax or personal income tax preference with respect to support given to fulfill the purposes of the public benefit organization as defined in the founding document (hereinafter: donation);

d) in case of a durable donation, the supporter described in clause c) is entitled to an extra preference from the second year of the support.

(2) Within the sphere of its targeted activities, a public benefit organization is entitled to employ persons performing civil service.

(3) A public benefit organization is not entitled to these preferences, if it has public debts as defined by the Act on the Order of Taxation.

---

<sup>10</sup> In Hungary, organizations with the same purposes and activities, but different legal forms (e.g., one being an association, the other a foundation) received different tax treatment. One of the main reasons for introducing the PBO status was to remedy this situation.

In many countries, such as Estonia, Germany and the Netherlands, tax legislation lists public benefit activities and defines fiscal privileges for CSOs pursuing those activities. The advantage of this approach is administrative simplicity; since public benefit status is an issue of fiscal regulation, it is natural to regulate public benefit issues through the tax code. The disadvantage is that, in some legal traditions, it is inappropriate to impose operational requirements (such as requirements addressing internal governance and reporting) through the tax law. In addition, legislators can relatively simply (and with a certain freedom for exercising discretion) modify a single provision in a complex tax law, while the same modification to a specific public benefit law would be more conspicuous and subject to the scrutiny of public debate.

## 2. *Regulating Public Benefit Activities in Different Laws*

In some countries, the activities that are of public benefit and therefore deserve specific benefits are regulated through provisions in various laws (e.g., tax laws, government grants laws, humanitarian assistance laws, donations law). However, in these cases the regulation does not amount to a designated “public benefit status”; rather, it addresses various activities and various organizations which are eligible for various benefits.

The *Lithuanian Law on Charity and Support* gives the right to entities enumerated in the law to apply for the so-called “support receivers’ status” if they are engaged in socially useful purposes listed in the law. The benefit of this status is that the organizations become eligible to receive support from individuals and legal entities and allocations through the 2% mechanism. Eligible organizations include not-profit entities established by private persons or the state. However, apart from the requirement that the organizations must be engaged in socially useful purposes, there are no other criteria to receive this status. As a result, in practice, virtually any organization with the legal form prescribed in the law receives this status.

Regulating public benefit activities, which are entitled to state benefits, through various laws can bring to an inconsistent application of the concept. For example, in Croatia different laws refer to activities that are of public benefit (e.g., Law on Humanitarian Assistance, Profit Tax Law, and Personal Income Tax Law). The lists refer only to limited categories of public benefit activities (e.g., education, humanitarian) and fail to include other, equally important activities (e.g., human rights, children rights). Even more, the benefits provided in the tax laws do not embrace all activities which are recognized as of public benefit in the other non-tax laws. In addition, different laws introduce a publicly beneficial status for certain types of organizations (e.g. humanitarian organizations, fire brigades) which lists specific criteria, and benefits that they are entitled to. As a result, the Croatians have concluded that they need to reform the system in order to introduce a coherent policy concerning public benefit status.<sup>11</sup>

---

<sup>11</sup> Ivanovic Mladen, *Legal Framework for the Activity of Public Benefit Organisations in the Republic of Croatia - State of affairs on 31 May 2005*, published by ECNL and National Foundation for Civil Society Development (2005).

#### **IV. CRITERIA FOR RECEIVING PUBLIC BENEFIT STATUS**

The criteria for receiving public benefit status differ among countries and are drafted to reflect the goals of the legislation, the needs of the society and the local circumstances and traditions. Generally the following criteria are considered when granting public benefit status: qualifying activities for public benefit status, eligible organizations, the extent to which PBOs must be organized and operated for public benefit, target beneficiaries, and financial and governance requirements.

##### *1. Qualifying Activities/Purposes*

- Type of purposes considered as publicly beneficial

Generally laws regulating public benefit activities enumerate certain specific purposes deemed to serve the common good. A public benefit activity is therefore defined as any lawful activity that supports or promotes one or more of the purposes enumerated in the law. The list below contains virtually all of the public benefit activities recognized in one or more countries in Europe:

- (a) Amateur athletics;
- (b) Arts;
- (c) Assistance to, or protection of, physically or mentally handicapped people;
- (d) Assistance to refugees;
- (e) Charity;
- (f) Civil or human rights;
- (g) Consumer protection;
- (h) Culture;
- (i) Democracy;
- (j) Ecology or the protection of environment;
- (k) Education, training and enlightenment;
- (l) Elimination of discrimination based on race, ethnicity, religion, or any other legally proscribed form of discrimination;
- (m) Elimination of poverty;
- (n) Health or physical well-being;
- (o) Historical preservation;
- (p) Humanitarian or disaster relief;
- (q) Medical care;
- (r) Protection of children, youth, and disadvantaged individuals;
- (s) Protection or care of injured or vulnerable animals;
- (t) Relieving burdens of government;
- (u) Religion;
- (v) Science;
- (w) Social cohesion;
- (x) Social or economic development;
- (y) Social welfare.

It is important that countries choose public benefit purposes that reflect their needs, values, and traditions. In the Netherlands, for example, the public benefit purposes developed in fiscal jurisprudence include purposes that are ecclesiastical, based on a philosophy of life, charitable, cultural, scientific, and of public utility. German tax law includes public health care, general welfare, environmental protection, education, culture, amateur sports, science, support of persons unable to care for themselves, and churches and religion. In France, the tax law defines public benefit to include, among others, assistance to needy people, scientific or medical research, amateur sports, the arts and artistic heritage, the defense of the natural environment and the defense of French culture. In Hungary, separate public benefit legislation lists 22 different purposes, including health preservation, scientific research, education and culture. Similarly, Polish law lists 24 public benefit activities.

Section 2, Public Benefit Law, Latvia

“A public benefit activity is an activity, which provides a significant benefit to society or a part thereof, especially if it is directed towards charitable activities, protection of civil rights and human rights, development of civil society, education, science, culture and promotion of health and disease prophylaxis, support for sports, environmental protection, provision of assistance in cases of catastrophes and extraordinary situations, and raising the social welfare of society, especially for low-income and socially disadvantaged person groups.”

- Are there limitations to activities that can be pursued?

Many countries exclude certain activities or goals from qualifying as public benefit. Restrictions commonly include political and legislative activities, such as direct lobbying and campaigning for political parties. For example, Hungary prohibits involvement in direct political activities and the provision of financial aid to political parties. Some countries exclude purposes related to sports and religion; others do not.

Section 2, Public Benefit Law, Latvia

“The following deemed not to be public benefit activities:

- 1) activities, which are directed to the support of political organizations (parties) or the election campaign thereof; and
- 2) activities of such a scope as it is directed only to the members or founders of the association and foundation and persons associated with them for the satisfaction of private interests and needs, except activities which promote an association or foundation, which is founded and is engaged in order to protect of the rights and interests of socially disadvantaged person groups and low-income persons and families.”

- Is the list of activities exclusive?

Almost all countries include a “catch-all” category, which simply embraces “other activities” which are deemed to serve the common good. This is an effective way to ensure that enumerated purposes are not interpreted in an overly restrictive manner and that the concept of public benefit remains flexible, keeping pace with changing social circumstances. Public benefit definitions lacking such a “catch-all” category may impede the inclusion of emerging activities that serve

the public benefit. The law may simply include a provision similar to the following: “*Any other activity that is determined to support or promote public benefit.*” Such catch-all categories are not uncommon, even where the law enumerates a list of specific purposes, as in Latvia and Bulgaria. The Polish law does not contain a catch-all category; however it provides that the Council of Ministers may add new tasks. The Hungarian law provides a closed list of activities. However, so far the Parliament has amended the law several times to include other types of activities.

Charities Act, the U.K.

As a common-law country, the United Kingdom relied on case precedent to define “charitable” purposes. Over time, courts in the United Kingdom have classified charitable purposes under four broad categories: relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community. They have accepted the principle that the definition of “charitable purpose” changes to reflect developing social conditions. Recognizing the need for modernization the British government reformed the legislation in 2006. Part I (2) of the new Charities Act sets a framework listing the main charitable purposes as follows:

- (a) prevention or relief of poverty;
- (b) advancement of education;
- (c) advancement of religion;
- (d) advancement of health or the saving of lives;
- (e) advancement of citizenship or community development;
- (f) advancement of arts, culture, heritage or science;
- (g) advancement of amateur sport;
- (h) advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality or diversity;
- (i) advancement of environmental protection or improvement;
- (j) the relief of those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage;
- (k) advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services, or ambulance services, and
- (m) other charitable purposes.<sup>12</sup>

<sup>12</sup> Subsection (4) of paragraph 2 further defines that:

*“The purposes within this subsection (see subsection (2)(m)) are—*

*(a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognized as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17); Charities Act 2006 (c. 50)*

*(b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and*

## 2. *Eligible entities*

The second criterion in determining public benefit status is the type of legal entities that can obtain it. As mentioned above, the public benefit status is usually granted either during the time of or after registration of the organizations. Hence, the organizations must have been registered (or recognized) as legal persons before they apply for public benefit status.<sup>13</sup>

Article 3, paragraph 4, of the Polish law provides the list of organizations that cannot apply for PBO status:

- 1) Political parties;
- 2) Trade unions and organizations of employers;
- 3) Professional self-governments;
- 4) Foundations founded solely by the State Treasury and/or a unit of self-government, unless:
  - a) separate regulations state otherwise,
  - b) the property of the foundation does not belong entirely to the State or its municipal bodies, or is not financed with public resources under the framework of the Law on Public Finances, or
  - c) the foundation performs its statutory activities in the field of science or humanities, particularly for the sake of science or humanities;
- 5) Foundations established by political parties;
- 6) Companies operating pursuant to the regulations governing sport activities.”

Public benefit status is generally available to associations and foundations which are basic forms in most European countries. In addition, depending on the country, this status can be given to a range of other organizational forms.<sup>14</sup> In Hungary, public benefit status is available to associations, foundations and non-profit companies. In Latvia, religious organizations and religious institutions can obtain this status as well. However, during the application for this status, they are required to submit a letter of recommendation issued by the Ministry of Justice

---

*(c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognized under charity law as falling within paragraph (b) above or this paragraph.”*

<sup>13</sup> This is of importance, since in most of the European countries registration is voluntary and thus many organizations operate without being registered. However, in continental Europe, if the organization wants to obtain a public benefit status then it would need to first acquire a status of a legal person.

<sup>14</sup> Usually countries distinguish between two types of non-profit organizations: those of general purpose such as associations, foundations, non-profit companies; and those established for specific purpose which are regulated with separate legislation (trade unions, political parties, etc.) and are generally outside of the public benefit system.

Board of Religious Affairs. In Poland,<sup>15</sup> an association of unit of local governments can also obtain this status.<sup>16</sup>

### 3. *Principal purpose test*

Other criteria often used to decide whether one organization should obtain a public benefit status are the extent to which the organization must be organized and operated for public benefit and its beneficiaries (target group).

#### England

There are five main principles which show whether an organization provides benefit to the public. These are:

- The Benefit:*
- i. There must be an identifiable benefit, but this can take many different forms.
  - ii. Benefit is assessed in the light of modern conditions.
- The Public:*
- iii. The benefit must be to the public at large, or to a sufficient section of the public.
  - iv. Any private benefit must be incidental.
  - v. Those who are less well off must not be entirely excluded from benefit.<sup>17</sup>

In general, a purpose is *not charitable* if it is mainly for the benefit of a named person or specific individuals. It will also not be charitable if the people who will benefit from it are defined by a personal or contractual relationship with each other. For example, the beneficiaries are related or connected to the person who is setting up the charity, or they are defined by common employment or by membership of a non-charitable body such as a professional institute.<sup>18</sup>

Many countries require that the organization **be organized and operated principally to engage in public benefit activities**, however defined. An organization is “organized” principally for public benefit when the purposes and activities contained in its governing documents limit it to engaging principally in public benefit activities. An organization is “operated” principally for public benefit when its actual activities are principally public benefit. “Principally” may mean more than 50% or virtually all, depending on the country. There are different ways of measuring

<sup>15</sup> The Polish Law is an interesting example as it provides a definition of non-governmental organization:

*“Non-governmental organizations are legal entities or entities with no legal personality created on the basis of provisions of laws, including foundations and associations, taking into consideration par. 4. Non-governmental organizations are not bodies of the sector of public finances in the understanding of regulations governing public finances, and operate on a not-for-profit basis.” (article 3, par.1).*

<sup>16</sup> Under specific conditions enumerated in the law, PBO status can also be obtained by legal entities and organizational units operating on the basis of regulations governing the relation between the State and Catholic Church in the Republic of Poland, the relation between the State and other churches as well as religious unions, and the guarantees of the freedom of faith and conscience, provided their statutory goals include the performing of public benefit activities.

<sup>17</sup> For more, and updated information visit: <http://www.charitycommission.gov.uk/spr/pblp.asp>

<sup>18</sup> <http://www.charitycommission.gov.uk/publications/cc21.asp#7>. Further, according to the Hungarian law any related beneficiaries must receive the same services and aid as any and all beneficiaries; i.e., it does not prohibit related beneficiaries from receiving benefits, but it requires equal treatment with non-related ones.

whether the “principally” test has been satisfied – for example, by measuring the portion of expenditures or the circle of beneficiaries.

In the Netherlands, the decisive factor is the **circle of potential beneficiaries**. If the activities are aimed at serving too restricted a group of persons – persons belonging to a family, for example – then the organization is not eligible for public benefit status. If the organization serves both its members and engages in public benefit activities, it may qualify for public benefit status if its public benefit activities make up at least 50% of its overall activities. Similarly, in France, in order to qualify as a PBO, an organization must engage primarily in at least one public benefit activity and provide services to a large, undefined group of individuals in France.<sup>19</sup>

Similarly, Germany requires that an organization receiving tax benefits carry out its public benefit activities *exclusively, directly and unselfishly* (with disinterest). Notably, Poland also requires that a public benefit organization engage *exclusively* in public benefit activities.

#### 4. Governance requirements

Some countries also prescribe a special governing structure for organizations that wish to obtain public benefit status. For example, the mandatory requirement for a two-tiered governing structure aims to ensure that the organizations will have additional internal supervision over their activities and that they are indeed undertaking activities and spending the public funds according to their status and other conditions stipulated in the public benefit legislation.

Bulgarian law follows this approach by requiring that public benefit organizations must have a “*collective supreme body and managing body.*” This requirement is important mainly for the foundations, as generally they can have only one body, and it can be a one-person body. However, if they wish to obtain public benefit status they must have two bodies, one of them collective.

Article 10 (1) Act on PBO, Hungary:

“If the annual income of a public benefit organization exceeds five million HUF, the establishment of a supervisory body separate from the governing body is mandatory, even if such obligation is not prescribed by other laws.”

The Polish law also obliges the organization to have a statutory collegiate institution that will ensure monitoring and supervision, which is separate from the management board and not supervised by the management board. Its members “cannot be members of the management board, nor be their relatives, in-laws or be in work-based dependence; cannot have been pronounced, with a lawful verdict, guilty of a deliberate crime; and may receive, due to their duties in such institution, reimbursement of relevant expenditures or remuneration not exceeding

<sup>19</sup> There are two forms of public benefit status in France: (1) general interest status and (2) public utility status. Qualifying for general interest status, as stated in the text, is satisfied when an organization engages primarily in a public benefit activity and provides services to an appropriate group of beneficiaries. Qualifying for public utility status additionally requires adopting statutes in compliance with model statutes provided by the Conseil d’Etat (containing requirements regarding internal structure, use of funds, and distribution of assets upon dissolution) and satisfying other requirements relating to financial viability and size of the organization.



the limit set in art. 8 point 8 of the Law on Remuneration of Persons in Charge of Certain Legal Units, dated March 3, 2000.”<sup>20</sup>

#### Chapter II, PBO Act Hungary

§ 4. (1) To be registered as a *public benefit organization*, the founding document of the organization shall include:

- a) a description of the sort of public benefit activity—defined in this Act—the organization pursues, and a statement that the organization, if a membership organization, does not exclude non-members from public benefit services;
- b) a statement that the organization pursues business activity only in the interest of realizing its public benefit objectives, without jeopardizing them;
- c) a statement that the organization does not distribute profits, but spends them on the activity defined in its founding document;
- d) a statement that the organization does not pursue direct political activity, is independent of political parties and does not provide financial support to them.

(2) In addition to the requirements set forth in paragraph (1), the founding document of a public benefit organization shall comply with further requirements prescribed in this Act (§ 7).<sup>21</sup>

§ 5. To be registered as a *prominently public benefit organization*, the founding document of the organization shall include, in addition to the requirements set out in § 4, a statement that the organization:

- a) in the course of its public benefit activity fulfills a public duty which must be provided by state organs or local governments pursuant to an act or other law in accordance with the act’s authorization, and
- b) shall disclose through the local or national press the most important data regarding its activities as defined in the founding document and its management.

#### *5. Other criteria/conditions*

In addition to the key criteria mentioned above, some laws prescribe additional criteria which must be met if the organization wishes to receive public benefit status or to be included in the list of organizations eligible for tax and other benefits. Those additional criteria include: restrictions on conducting economic activities, restriction on engagement in political activities, financial management, asset management and distribution, remuneration of board and employees, etc.

---

<sup>20</sup> Article 20 of the Law on PBA and Volunteering, Poland.

<sup>21</sup> Regarding governance and management of the organization (see below).

It is important to note, however, that **any such additional criteria should consider the local circumstances and the goals that the legislature aims to achieve through those requirements.** Burdensome requirements can discourage organizations from applying for this status. For example, in Hungary it is rather easy for an average NGO to comply with the requirements for a regular public benefit status, so around half of the CSOs are regular PBOs. In Poland, due to the difficult criteria and obligations, only around 10% of all CSOs have registered as PBOs. In regulating PBOs legislators should therefore consider whether they aim to increase the level of transparency and accountability and access to the benefits *for the majority of the sector* or if they *aim to create an “elite” group of organizations*, which, for example can partner with the government in delivery of social services (as happens in Poland or in Hungary through the introduction of the second tier status of “prominent” PBOs).

#### Section 11, Income Tax Act of Estonia

A non-profit association or foundation (hereinafter association) which meets the following requirements shall be entered in the list:

- 1) the association operates in the public interest;
- 2) it is a charitable association, that is, an association offering goods or services primarily free of charge or in another non-profit seeking manner to a target group which, arising from its articles of association, the association supports, or makes support payments to the persons belonging in the target group;
- 3) the association does not distribute its assets or income, grant material assistance or monetarily appraisable benefits to its founders, members, members of the management or controlling body (§ 9), persons who have made a donation to it or to the members of the management or controlling body of such person or to the persons associated with such persons within the meaning of clause 8 (1);
- 4) upon dissolution of the association, the assets remaining after satisfaction of the claims of the creditors shall be transferred to an association or legal person in public law entered in the list;
- 5) the administrative expenses of the association correspond to the character of its activity and the objectives set out in its articles of association;
- 6) the remuneration paid to the employees and members of the management or control body of the association does not exceed the amount of remuneration normally paid for similar work in the business sector.<sup>22</sup>

## V. DECISION-MAKING BODY

Who decides which organizations qualify for public benefit status? The question has critical implications for the regulation of public benefit organizations and the entire nonprofit sector. The

<sup>22</sup> Estonia Income Tax Act, <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40007K11&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tulumaksu>

decision-maker has the authority to grant public benefit status, often has the authority to revoke public benefit status, and in some countries is also responsible for supervising and supporting the work of public benefit organizations. By granting public benefit status, the decision-maker lays the foundation for distinct regulatory treatment – treatment that entails both state benefits (usually tax exemptions) and more stringent accountability requirements.

There is no single right answer to the question of who should make the public benefit determination. Instead, countries have adopted a variety of different approaches. In some countries, this authority is vested in the tax authorities (e.g., Germany). In other countries, the courts (e.g., Hungary) or a governmental entity, such as the Ministry of Justice, confers public benefit status (e.g., Bulgaria). Others have empowered independent commissions to decide the question (e.g., England, Moldova). In some countries a state body grants the status, based on a recommendation of an independent commission (e.g., Poland, Latvia). In Estonia, the status is approved by the Government of the Republic after obtaining a recommendation from a Committee of Experts. Each approach has distinct advantages and disadvantages.

- **Tax Authorities**

In many countries, the public benefit determination is made by the tax authorities who decide which organizations are entitled to fiscal privileges based on their publicly beneficial purposes and activities. Countries adopting this approach for at least some categories of public benefit activity include Denmark, Finland, Germany, Greece, Ireland, the Netherlands, Portugal and Sweden. In Denmark, for example, the tax authorities grant public benefit status through an annually published list of qualified organizations. In Finland, the status is granted for a period of five years by the National Tax Board. In Germany, the local tax authorities are responsible for granting public benefit status and verifying that requirements for retaining this status are met every three years. In the Netherlands, official recognition as a public benefit organization is not required, but a CSO may request it. Such recognition helps organizations avoid potential disputes, which is particularly important when large donations are involved. Fiscal authorities in the Netherlands have adopted certain criteria for such requests, which seek to ensure that the CSO has appropriate standards of transparency and accountability.

Vesting the tax authorities with authority over the public benefit determination has the advantage of administrative convenience, in that one entity makes all such decisions. The degree of expertise which they can be expected to bring to the question of public benefit status may depend on whether or not there is a specialized department within the tax department to focus on this question. In addition, the tax authorities in some countries demand this authority, because the determination affects the tax base. A potential disadvantage, however, arises out of the potential conflict of interest between the duty to maximize the tax base and the responsibility for granting a status that reduces the tax base.

- **Single Ministry**

In Bulgaria, the Ministry of Justice – specifically, a Central Registry within the Ministry of Justice – is responsible for public benefit regulation (certification and supervision). Court-registered CSOs pursuing public benefit activities must submit applications and documentation

to the Ministry. Should registration be denied, the applicant may file an appeal within 14 days in the Supreme Administrative Court.

The primary advantage of placing authority within a single ministry is the greater likelihood of consistent decision-making. The creation of a specialized department within the Ministry (as we see in Bulgaria) may also foster the development of specialized expertise relating to public benefit issues. At the same time, a single ministry with many duties may fail to allocate sufficient resources to public benefit issues, in which case expertise is less likely to develop. Perhaps the greatest danger in assigning authority to a single ministry is the danger of arbitrary, politically motivated decision-making. In certain countries, where ministries have decision-making authority on registration questions, there has often been a distinct chilling effect on CSOs pursuing registration.<sup>23</sup>

- **Courts**

Indeed, it is in order to avoid politicized decision-making that some countries have opted to vest **courts** with the power to certify or recognize public benefit organizations. Such is the case in Greece and Hungary. In France, the Conseil d'Etat – its highest administrative court – has authority to decide whether associations and foundations qualify for “public utility” status. Court-based registration can offer the additional advantage of accessibility, in cases where courts throughout the country hold the authority. Furthermore, courts can actually speed up the process of public benefit recognition, in countries where a CSO can apply simultaneously for both registration as a legal entity and recognition as a public benefit entity. Such is the case in both Greece and Hungary. On the other hand, because courts are usually overburdened, the registration process can be slow-moving. Also, courts must deal with a wide range of issues, making it difficult for them to develop specialized expertise in public benefit issues. Decentralized decision-making, finally, is unlikely to produce wholly consistent decisions.

- **Independent Commissions**<sup>24</sup>

Perhaps the most innovative approach is the creation of independent commissions to decide on this status. For example, the Charity Commission for England and Wales is an independent regulator for charity activities. It is part of the government, yet it is independent of the political

---

<sup>23</sup> Very few countries have placed decision-making authority within several line ministries. Romania is one exception. While this approach might seem useful in ensuring ministries with appropriate expertise are evaluating public benefit activities (e.g., the Ministry of Health would review the public benefit application of an CSO pursuing health-related activities), there are far more disadvantages. The danger of political decision-making remains; consider an environmental CSO seeking to engage in environmental advocacy and litigation having to apply to the Ministry of the Environment for certification / registration. The problem of inconsistent decision-making between ministries is acute. Moreover, there will inevitably be jurisdictional gaps, where the CSO-applicant will not know which ministry is competent to handle its application. Furthermore, in Romania, the law has left the formulation of qualifying criteria to each line ministry, creating uncertainty for those ministries that have issued no such criteria, and inviting inconsistency, as criteria may vary from ministry to ministry. This is why they now aim to reform this system.

<sup>24</sup> For more detailed information on the work of the independent commissions granting public benefit status please review the publication “Public Benefit Commissions: A Comparative Overview - Armenia, England / Wales, Moldova,” published by ICNL, 2005 (<http://icnl.org/knowledge/pubs/PBCommissions.pdf>)

process. Its powers are conferred by an Act of Parliament and exercised under the oversight of Commissioners, each of whom is independent of the political process and voluntary sector. The Minister for the Third Sector appoints the Chair and Members of the Commission. The Commission is required to report on its performance to Parliament annually. The key benefits to the commission approach are its independence from political interference and the quality and consistency of decision-making made possible through the concentration of expertise in the Commission. The key disadvantages are the cost of creating and maintaining such a commission and the fact that it is a centralized organ.

Following the example of the Charity Commission, the Moldovan Law on Associations created a similar body, known as the Certification Commission. The Certification Commission consists of nine persons, three of whom are appointed by the President, three by Parliament, and three by the Government. At least one of each of the three sets of appointees must represent a public benefit organization (and not be a civil servant), a government official, or a Member of Parliament. The hope was that including civil society representatives on the Commission will protect against repressive or discriminatory decisions and increase public confidence. Developing the proper mechanism for selecting the civil society representatives, however, remains a critical challenge (see below).<sup>25</sup>

○ *State bodies in cooperation with independent commissions*

Estonia, Poland and Latvia are examples of countries where the decision on the public benefit status is granted by the Government, court or a Ministry. However, in addition to these ministries the laws set up the public benefit commissions with consultative, advisory status.

In Latvia, the Ministry of Finance grants the status, on the basis of an opinion of the Public Benefit Commission. The Commission is a collegial institution, with equal numbers of members from government officials and representatives of associations and foundations. The Commission provides the Ministry of Finance with an opinion on whether the associations, foundations or religious organizations comply with the activities for public benefit status and the requirements for use of property and financial means as prescribed by the Law. The Cabinet approves the bylaws of the Commission, the composition of the Commission and the procedures by which representatives of associations and foundations are nominated and selected.

In Poland, PBOs are registered in the Central Court Registry. The law also establishes a Council for Public Benefit Activities, which does not have a role in registration but which serves as an opinion-providing, advising and supporting body for the Ministry of Social Security (which supervises the activities of the organizations). The Council is composed of 10 representatives of the public administration and local government, and 10 CSO representatives. The members of the Council are appointed and discharged by the Minister responsible for the issues of social

---

<sup>25</sup> The new Latvian Law on Public Benefit Organizations contemplates the creation of a Public Benefit Commission. In the Latvian context, however, the Commission simply acts as an advisory body for the Ministry of Finance, the decision-making body. The Latvian Public Benefit Commission consists of authorized governmental officials and representatives from associations and foundations, in equal numbers. The procedures for selecting representatives of associations and foundations to the Commission are not defined in the law, but instead shall be determined by the Cabinet.

security; however, the members of the Council appointed to represent CSOs are limited to the candidates preselected by the CSOs. The Council has the following duties:

- advising on the issues relevant for the application of the Law;
- advising on the government's legal acts concerning public benefit activities and volunteering;
- providing assistance and expressing opinion concerning conflicts between public administration institutions and public benefit organizations;
- collecting and analyzing information about performed inspections and their outcomes;
- participating in the process of inspection;
- advising in the field of public tasks, commissioning nongovernmental organizations and entities mentioned in art. 3 par. 3 to perform such tasks, and recommending standards of performing public tasks;
- creating, in cooperation with CSOs, the mechanisms of informing them about the standards of performing public benefit activities and about identified cases of violation of those standards.<sup>26</sup>

Estonia, Income Tax Act, Section 11 (9)

“An application for entry of in the list shall be submitted to a regional structural unit of the Tax and Customs Board by 1 February or 1 August. After obtaining the recommendations of the *Expert Committee*, the regional structural unit of the *Tax and Customs Board* shall inform the association by 15 March or 15 September correspondingly of an initial decision to deny entry in the list or to delete the association from the list. Based on the proposal of the Minister of Finance, the *Government of the Republic* shall enter an association in the list or delete an association from the list as of 1 July or 1 January by an order.”<sup>27</sup>

The Estonian Expert Committee was established in 2007, and it consists of nine representatives of NGOs, mostly from umbrella organizations from different fields of activities. They are appointed by the Ministry of Finance after consultations with the CSOs.

○ Challenges of the model

When considering the model of an independent commission as a sole regulator or in partnership with a state body, one should consider several issues before deciding on the approach.

Primarily, **there is a notable difference in the approach to relations between government and the CSO sector in England and Wales and in Central and Eastern Europe (CEE).**

“Charity” in England and Wales has a long history, and it is a deep-rooted and well-supported part of society. Its role has developed to the stage where the cooperation between government

<sup>26</sup> Article 35 of the law.

<sup>27</sup> Estonia Income Tax Act,

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40007K11&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tulumaksu>

and CSOs is generally constructive. The relationship is based on mutually acknowledged strengths, a degree of trust and an officially endorsed partnership approach<sup>28</sup>. This environment enables the Charity Commission to operate at the same time as a regulatory/controlling body and as an enabler/supporting body of the sector: *“Our aim is to provide the best possible regulation of charities in England and Wales, in order to increase charities’ efficiency and effectiveness and public confidence and trust.”*<sup>29</sup>

In most of the CEE countries (and especially countries of South East Europe), governments and CSOs are still struggling to define their relationships. CSOs do not have a “reserved seat at the table” when public policy issues are discussed or legislation is adopted. There is lack of trust about their role, and the CSO image in the society is low. Their own capacity to be a strong partner is also a challenge. On the other hand, the public administration has not yet clearly defined the role it can play beyond regulating CSOs. There is often a lack of vision and trust about how the government could support the development of the sector and thus strengthen their contribution to society.

In considering the composition of the commission, in addition, countries of CEE often raise the issue of participation of the civil society experts. Such participation is beneficial as it can increase the capacity of the commission in considering the current needs and trends in the society when implementing the public benefit status. Indeed, almost all Commissioners in the Charity Commission of England and Wales have been active in the voluntary sector. However, unlike in England and Wales, the participation of such experts remains a challenge in the countries of CEE, mainly because of the difficulties in selecting such experts and regulating potential conflict of interests.

In England and Wales, the democratic culture as well as well-developed and enforced regulations and low tolerance of corruption in public life have created an environment in which potential conflicts of interest are well managed. This would still be in contrast to much of the practice that can be found in countries of CEE, where avoiding conflicts of interest is seen as a necessary burden rather than the natural way of doing business.

Thus, although the model of a Charity Commission in England and Wales might sound attractive to countries of CEE, much of its success is due to the specific historical and cultural context of public benefit organizations in that country. CEE countries should consider the factors mentioned above (level of development of the public administration and of the sector, the culture of partnership, relationship between governments and CSOs, position of the sector in the society, image of the sector, etc.) before deciding whether to follow it as a best regulatory approach for the particular local context.

---

<sup>28</sup> This approach was formally endorsed in 1998 with the launch of the “Compact on Relations between Government and the Voluntary and Community Sector in England.” The Compact includes Codes of Good Practice—on black and minority ethnic groups, community groups, consultation and policy appraisal, funding and procurement and volunteering. <http://www.thecompact.org.uk/>

<sup>29</sup> <http://www.charitycommission.gov.uk/spr/regstance.asp>

“Principles

“In common with other public bodies, the Commission has arrangements under which potential conflicts of interest can be recognized and managed.

“Commissioners on appointment are normally asked to stand down from Chairmanship or other office in charities. It is normal, however, for them to retain existing trusteeships, and for those whose livelihood involves professional involvement with charities to continue with it, provided that it is transparent and is not inconsistent with the Commission’s regulatory role.

“Where a Commissioner’s or other Board member’s circumstances involve, or might appear to involve, clear potential for a material conflict of interest in his or her official role, he or she will declare them in this register, and, where appropriate, withdraw from related Commission business and discussions.”<sup>30</sup>

Finally, the model of independent commissions will have increased chances for success if its **independence from government interference is preserved** and if **the governments are seriously committed to ensure its proper functioning and integrating them in the system**. Indeed, of the big challenges that independent commissions in CEE are facing is the lack of cooperation with the other bodies or the lack of sufficient respect for their opinions and input. For example, in Estonia the challenge is that the Tax and Custom Board and Ministry of Finance are not receptive to the suggestions of this committee as these recommendations are not binding for them.<sup>31</sup> The other challenge is the lack of serious commitment by the commissioners to attend the sessions (especially if their work is conducted without remuneration). Tailoring clear rules and allocating enough resources could ensure the smooth and full operation of the commission<sup>32</sup>; still this cannot guarantee a smooth and successful operation.

---

<sup>30</sup>Charity Commission: Registering and Declaring Interests <http://www.charitycommission.gov.uk/tcc/decint.asp>

<sup>31</sup> “Legal and Institutional Mechanisms for NGO-Government Cooperation in Croatia, Estonia and Hungary,” by Katerina Hadzi-Miceva, © ECNL and Institute for Public Affairs (IPA), Poland. The paper was presented by Ms. Hadzi-Miceva at a conference in Warsaw, under the project titled KOMPAS II, financed by the European Union.

<sup>32</sup> Article 39 of the Polish law provides that:

1. The costs of the Council that stem from services, conducting research, and preparing expert studies, as well as the participation in sessions by experts and individuals who are not members of the Council, are partly covered from the budget at the disposal of the minister responsible for social security.
2. Participation in the works of the Council is remunerated with per diems and reimbursement of travel expenses defined in the regulations based upon art. 77(5), point 2 of the Labor Code.
3. An employer should grant an employee who is a member of the Council a leave in order to allow him or her to participate in the sessions of the Council. For the period of the leave the employee is entitled to remuneration calculated to be the financial equivalent of holiday leave. This is covered by the budget at the disposal of the minister responsible for social security.



### Moldova

“...the truly independent performance of the Certification Commission has been frustrated by several problems. Government agencies have demonstrated an indifference and lack of understanding toward the role of the Commission. The President, Parliament and Government, as nominating bodies, have selected Commission representatives without sufficient thought and vision. To date, the Commission still has prepared no detailed procedural regulations, nor does it maintain a website. Even the register of public benefit organizations is not yet practically accessible to the public. Perhaps most importantly, however, lawmakers have not amended the legal framework to provide for sufficient privileges and incentives for public benefit organizations. Public benefit status is, fundamentally, an issue of fiscal regulation. Without corresponding state benefits, public benefit status is largely an empty concept.”<sup>33</sup>

#### ▪ Government decree

In stark contrast to the commission approach, a few countries grant public benefit status by governmental decree. In Belgium, for example, organizations engaged in cultural activities are granted public benefit status by royal decree. In Luxembourg, public benefit status is granted by Grand-Ducal decree after application to the Ministry of Justice. These practices reflect particular historical, cultural and legal contexts, and need not represent models for emulation.

## VI. CERTIFICATION / REGISTRATION PROCEDURES

Whichever organ the state designates to rule on applications for public benefit status, the **certification or registration process should be clear, quick and straightforward and specific rules about when public benefit status is denied should be prescribed.**

Section 4, of the Public Benefit Act, in Hungary lists the specific provisions that must be included in the organization’s founding instrument, including the following:

- (1) the list of public benefit activities;
- (2) a clause stating that the organization conducts entrepreneurial activities solely in the interest of and without jeopardizing its public benefit activities;
- (3) a clause stating that the organization does not distribute business profits, but devotes them to its statutory activities;
- (4) a clause stating that the organization is not involved in direct political activities and does not provide financial aid to political parties; and
- (5) clauses relating to internal governance, conflict of interest and reporting requirements.

<sup>33</sup> “Public Benefit Commissions: A Comparative Overview—Armenia, England/Wales, Moldova,” published by ICNL, 2005 (<http://icnl.org/knowledge/pubs/PBCommissions.pdf>)

The specific procedures of course vary, depending on the country's regulatory scheme. Generally, however, CSOs applying for public benefit status must submit documentation indicating (1) the qualifying public benefit activities; (2) compliance with internal governance requirements, including safeguards against conflict of interest and self-dealing; and (3) compliance with activity requirements (extent of public benefit activity) and limitations on activity (for-profit, political, etc.).

Detailed procedures for public benefit registration are contained in separate public benefit legislation, as in Hungary or Poland. The goal of these requirements is to ensure that the organization is focusing predominantly on public benefit activities, that it is not engaged in other activities to the detriment of its public benefit mission, and that it maintains appropriate standards of transparency.

Section 8, PBO Law, Latvia

- (1) The Ministry of Finance shall take a decision, based upon an opinion of the Commission, to *refuse* the granting of public benefit organization status if:
- (i) the indicated aims in the articles of association, bylaws or constitution of the association or foundation or the activities of the association, foundation or religious organization do not conform to the essentials of public benefit activities;
  - (ii) the State Revenue Service territorial office, the Office of the Prosecutor, another institution or court has determined significant violations of regulatory enactments in the activities of the association, foundation or religious organization;
  - (iii) the association, foundation or religious organization has a tax debt; or
  - (iv) the association, foundation or religious organization has not submitted all of the information and documents referred to in Section 7, Paragraphs two and four of this Law.
- (2) An applicant has the right to appeal a refusal to grant public benefit organization status to a court according to the procedures specified in Administrative Procedure Law.

Procedural safeguards to protect applicants are the norm. These include **time limits for the registration decision**, a requirement for the decision-making body to provide, in writing, the reasons for denying registration, and the right to appeal an adverse decision to an independent arbiter. Hungarian courts must decide on public benefit applications within 30 days – or 45 days, if additional information is required; an adverse decision can be appealed to the superior courts within 15 days. Polish courts must rule on applications within three months, but in practice take about six weeks. Bulgaria imposes even stricter limits for government action; the Ministry of Justice must decide on public benefit applications “immediately.” The failure to grant

registration within 14 days is considered a tacit denial of registration. In the case of denial, the applicant may **appeal** to the Supreme Administrative Court within 14 days. The Charities Act of 2006 introduced the Charities Tribunal, an appeal body, which will deal with appeals against and reviews of Commission decisions and referrals from the Commission or Attorney General involving the operation or application of charity law. The purpose for setting up this Tribunal was to ensure that it would be easier and less expensive for charities to challenge the Commission's decisions.<sup>34</sup> Laws should also contain **grounds for refusal** to grant the organization a public benefit status.

As a procedural shortcut, countries granting public benefit status often allow an organization to **register simultaneously** as a CSO (association or foundation or other organizational form) and as a public benefit organization. Such is the case in Greece and Hungary as well as Kosovo. Bulgaria is an exception; there, courts are responsible for CSO registration and, subsequently, the Ministry of Justice processes applicants for public benefit status.

Some countries also regulate the issue of **registration of an organization after it has obtained and lost the PBO status**. For example, in Bulgaria, such an organization may apply for PBO status one year after it has lost its status. This right can be exercised only once. Latvian law contains the same rule.

A final issue which should be considered in the registration process is if the PBO status is granted **upon a formal checkup that the organization is complying with the legal requirements or upon a substantive checkup of the actual activities of the organization**. For example, in Hungary the process of granting the status is similar to the registration as an association or foundation. The procedure is formal and requires only the submission of the documents required by law to the court. There is not much space for a merit judgment. In England and Wales, the primary purpose of registration is to ensure that the charity has exclusively charitable purposes and its activities in practice will all be charitable. Therefore, the Commission performs a substantive review of the proposed activities listed in the governing documents. If it finds that those proposed activities are not charitable, first it will provide advice on the necessary alteration and if the charity does not comply, the Commission will refuse to register the charity. The secondary purpose of registration is to ensure best practice in the organization. Hence, the Commission recommends the use of model governing documents and will review governing documents submitted and make a best practice recommendation. However, a poorly drafted document is not a reason for rejection of registration.

Facilitating the recognition of public benefit organizations is in the state's interest. Registration requirements that delay such recognition or impose unnecessary requirements will only interfere with the work of public benefit organizations. Whether contained in the law or in accompanying regulations, the legal framework must set forth clear procedural requirements that facilitate registration while imposing appropriate standards of accountability and transparency.

---

<sup>34</sup> <http://www.charitycommission.gov.uk/spr/briefing.asp>

## **VII. BENEFITS FOR PUBLIC BENEFIT ORGANIZATIONS**

Public benefit recognition would have no real meaning if there were no state benefits provided to facilitate the work and sustainability of PBOs. State benefits typically come in the forms of tax exemptions on organizational income, tax incentives for the organization's donors, and VAT relief. PBOs may also receive state subsidies or grants, and preferential treatment in procuring certain government contracts.

Most commonly, the state extends tax benefits to PBOs. **Tax exemptions** may take a variety of forms and are usually available only if the income is used to support the public benefit purpose. The following categories of income may be exempt from taxation:

- Income from grants, donations, and membership dues;
- Income from economic activities;
- Investment income;
- Real property; and
- Gifts and inheritance.

In addition, many countries extend exemptions or preferential rates on value added tax (VAT) to PBOs or to organizations engaged in transactions of certain goods and services related to the public benefit.

Crucial to encouraging private philanthropy to support public benefit activity are tax incentives to individuals and corporations donating to PBOs. Such tax incentives may take the form of tax credits, or more typically, tax deductions. Almost invariably, **donor incentives** are linked to either the public benefit status of the recipient or to enumerated public benefit activities in which the recipient is engaged. For example, Hungary, France and Germany allow only public benefit organizations to receive tax-deductible donations.<sup>35</sup>

The state may also provide **other forms of support** to public benefit organizations, including the following:

- Many sources of grants, including the National Lottery, are available more easily, or exclusively, to charities (UK);
- A PBO may purchase "the right of perpetual usufruct of estates that are owned by the State Treasury or local self-government units" (Poland);
- A taxpayer may allocate 1% of his/her tax payment for the sake of public benefit organizations chosen by him or her (Poland);
- Users of PBO services are entitled to a personal tax exemption for the value of the service received (Hungary); and

---

<sup>35</sup> In France, only general interest associations, public utility associations, and public utility foundations (all categories of PBOs) are entitled to receive tax-deductible donations. In Germany, only certain public benefit organizations (those pursuing general public benefit purposes, benevolent or church-related purposes, or especially support-worthy general purposes) may receive tax-deductible contributions.

- PBOs are eligible for a range of tax benefits related to hosting volunteers—e.g., tax-free reimbursement of expenses related to the volunteer work (Hungary).

## VIII. OBLIGATIONS OF PUBLIC BENEFIT ORGANIZATIONS

The right of PBOs to greater state benefits brings with it more stringent obligations and reporting requirements. Since PBOs are recipients of direct and/or indirect subsidies from the government they are naturally subject to greater government scrutiny. The purposes of this scrutiny are **to protect the public from possible fraud and abuse by CSOs and to ensure that public support is linked to public benefit**. In positive terms, the goals of supervision are **to promote the effective operations of PBOs, by supporting good management, appropriate to the size of the organization, and to ensure that public benefit organizations are accountable to their members, beneficiaries, users and the public**. The degree of supervision should be proportionate to the benefits provided, and not so intrusive as to compromise the organization's independence.

### 1. *Rules regarding use of property, transformation and liquidation*

When PBOs are exempt of relevant taxes, they often face greater **restrictions on the use of their property** than organizations that have not obtained this status, in order to ensure that public money is not used for the private purposes of members closely linked to the organization.

The Hungarian law prescribes that PBOs cannot provide “*targeted grants to responsible persons, supporters and their relatives, with the exception of services available to anyone without limitation and grants corresponding to the founding document and provided on the basis of the legal relationship between civil society organizations and their members.*”<sup>36</sup>

#### Section 12, Latvian Law on PBO

(1) It is prohibited for a public benefit organization to divide its property or financial means between founders, members of boards of directors and other administrative institutions (if such are established), as well as to utilize it so that directly or indirectly a benefit is obtained (guarantees, loans, promissory notes, as well as other material benefits).

(2) The provisions of Paragraph one of this Section shall apply also to the founders, members of boards of directors and other administrative institutions (if such are established) of the public benefit organization, spouses, kin and affine, counting kin up to the second degree and affine up to the first degree.

(3) If a person receives remuneration for work in a public benefit organization, such remuneration shall be reasonable and justified by the work performed and the financial circumstances of the public benefit organization.

<sup>36</sup> Article 14 of the Law.

An important constraint that can be found in many laws is the **prohibition of transformation** of the public benefit organization into an organization pursuing private benefits (e.g., Bulgaria). Section 16 of the Latvian law provides that in the case of the reorganization of an association or foundation, the public benefit status shall not pass on to the acquiring association or foundation, except in the case when the reorganization is performed by way of merger and the association or foundation to be merged is a public benefit organization at the moment of reorganization. In the case of the division of an association or foundation, the divided organization retains the public benefit organization status.

Article 43 (2), of the Bulgarian Law:

The property may not be assigned in any way whatsoever to:

1. the founders and present and former members;
2. persons who have been members of the bodies, and employees of the legal entity;
3. the liquidators, except for their due valuable consideration;
4. spouses of the persons under sub-paragraphs 1 - 3;
5. relatives of the persons under sub-paragraphs 1 - 3 of direct descent—without limit, collateral relatives—to the fourth branch, or in-laws—to the second branch, inclusive;
6. legal entities in which the persons under sub-paragraphs 1 - 5 are managers or may impose decisions or hinder decision making.

**Liquidation rules** are also specifically prescribed in most of the laws regulating the public benefit status. In Latvia, in case of liquidation or withdrawal of the status, the undivided property of the PBO will may be transferred to a PBO specified in a decision of the Commission that has similar aims of activities; and if this cannot be performed then the undivided property will pass to the State, “*which shall utilize it as far as possible in accordance with the aims indicated in the articles of association of the public benefit organization.*”<sup>37</sup> In Bulgaria, the property after liquidation can be transferred to another PBO by decision of the court; and, in case this is not possible, to the municipality by domicile of the dissolved non-profit legal entity.

According to the Polish law, if the organization is removed from the Register, it is obliged, within six months, to spend, on its own activities, the means gained through public fund-raising, which were gathered in the period when the organization possessed the status of a public benefit organization. The means that have not been used in the manner and during the six months will be transferred to an organization that runs statutory activities of the same or similar scope, chosen by the Minister responsible for social security.

---

<sup>37</sup> Article 17, Latvian Law on PBO.

## 2. Supervision and Accountability

### ▪ Supervisory Authorities

The governmental body authorized to regulate PBO activity varies widely from country to country. In nearly every country, **the tax authorities** play a prominent supervisory role, through their control over the tax treatment of PBOs. Indeed, in countries like Germany and the Netherlands, where public benefit regulation is primarily an issue of tax regulation, it is the tax authorities that play the central supervisory role. In other countries, **a ministry** may be vested with primary authority over PBO supervision, such as the Ministry of Justice in Bulgaria or the Ministry of Social Security in Poland. In France, the Ministry of Interior and the *Prefet du Departement* exercise supervision over public utility foundations. In Hungary the **public prosecutors** are the main supervisory body for PBOs (as well as all registered NGOs).

**Other specialized government organs** may be involved with specific aspects of PBO supervision, including the spending of state budgetary funds and general legal compliance. In Hungary, for example, when a PBO has received funding from the state budget, the State Audit agency may monitor the use of these funds; the public prosecutor has authority to investigate potential legal violations. In Bulgaria, the Ministry of Justice can notify the public prosecutor and bodies of State Financial Control, in the event of a violation of law. Similarly, in Germany, the Ministry of Interior Affairs has supervisory authority over non-fiscal infringements, and civic organizations are subject to state control according to the respective laws of the *Bundeslander*, meaning that each state has its own supervisory system.

As highlighted above, the Charity Commission of England and Wales represents a unique approach to the regulation of public benefit organizations (or charities). The Commission has five broad functions: registration, accountability, monitoring, support and enforcement. Underscoring all of these functions is the Commission's general duty to enhance charitable endeavor.

### ▪ Reporting

To ensure that PBOs are transparent and accountable, the state has legitimate interests in receiving information. Relevant information includes (1) **financial information** (e.g., annual financial statements, an accounting of the use of assets obtained from public sources and claimed to be used for public benefit) and (2) **programmatic information** (e.g., a report on activities made in the public interest).

Most commonly, a PBO files reports with the tax authorities, including annual tax returns (even if the organization is exempt) and/or tax benefit application forms (submitted voluntarily), as well as annual activity reports to the supervisory ministry or agency. In France, public utility foundations submit an annual report and financial statement to the competent *Prefet* and the Ministry of Interior. In Germany, civic organizations must present annual reports to the relevant state authorities (according to the laws of the *Bundeslander*) and, to receive tax privileges, to the financial authorities (the tax-exempt status is reviewed every three years). In Poland, PBOs must

prepare and submit an annual activity report and annual financial statement to the Ministry of Social Security. The law states that these organizations “*prepare and announce annual financial statements even when other accounting regulations do not require it.*”<sup>38</sup> In Hungary, a PBO must prepare and make available on its website a public benefit report (containing an accounting report, a summary of public benefit activity, and information regarding the use of public support, the use of its own assets, amounts of budgetary subsidies received, and amount of remuneration extended to senior officers). Interestingly, however, Hungary does not require the submission and filing of a public benefit report with a ministry or regulatory authority, but only that the report be made available for review (if the organization does not have a website, making “publicly accessible” will suffice).

In England and Wales, the accountability framework is graduated according to the size of the charity, with simple reporting of activities and receipts and payment accounts for small charities, and sophisticated reporting and accounting for large charities. The threshold is set at the annual income level of 10,000 British pounds. Those below the threshold need only make reports available for inspection, but do not have to file reports; those above the threshold must complete a more detailed return and send it to the Commission. Those above 250,000 pounds a year must have a full audit undertaken by a qualified auditor.

Appropriate disclosure of information enables the public to exercise oversight responsibilities.<sup>39</sup> Recognizing this valuable role, many countries expressly require public disclosure. In Bulgaria, “The report of the [PBO] shall be public. The notification for availability of the elaborated report, as well as for the place, time and procedure for access thereto, shall be published in the bulletin of the central register.”<sup>40</sup> In Poland, a PBO makes its annual report “public in a manner that is accessible to anyone interested.”<sup>41</sup> In Hungary, “Reports on public welfare activities ... shall be available for review by the public, and anyone may make copies of such at his own expense.”<sup>42</sup>

- **Audits and Inspections.**

In addition to reporting obligations, authorities often employ other monitoring tools, such as government audits and inspections. In Germany, for example, tax authorities may conduct **regular tax inspections**, following notice and an adequate time for the CSO to prepare; VAT inspections may, however, be conducted without prior notice. Hungarian PBOs are subject to supervision by the State Audit Office for the use of budgetary subsidies. In Bulgaria, PBOs are subject to **financial audits for the use of state or municipal subsidies or grants** under European programs. The responsible auditing body must have cause to justify the audit, but there is no requirement of prior notification.

---

<sup>38</sup> Article 23 of the law.

<sup>39</sup> Preferred methods of disclosure include publication in the newspapers (Czech Republic), publication on the website (Hungary) or making the information available to the public at the organizational premises (Hungary).

<sup>40</sup> Bulgarian Law on Nonprofit Legal Entities, Article 40(3).

<sup>41</sup> Polish Law on Public Benefit Activities, Article 23(1).

<sup>42</sup> Hungarian Law on Public Benefit Organizations, Article 19 (5).



In England, the government has no powers to investigate charities as such. The authorities do, of course, have a range of powers – related to terrorism and criminality (police), financial malpractice by companies or banking agencies, childcare (Social Services Inspectorate) – but these are generic and not specific to the charitable sector. Independent of government, the Charity Commission is vested with **supervisory and investigative** power, through which it seeks both to encourage good practices (as a support and advisory body) and to tackle abuse (as an investigative body).

Articles 28-33 of the Polish Law spells out the procedures for carrying out inspections of PBOs in detail.

The Ministry of Social Security is authorized to conduct inspections or to commission a provincial governor to perform the inspection. The Ministry has the right to access an organization's property, documents and other carriers of information, as well as to demand written and oral explanations. Such an inspection must be performed in the presence of a representative of the PBO or other witness. The inspecting officials must prepare a written report; the head of the PBO then has the opportunity to submit a written explanation or objections to the content of the report, within 14 days. Once filed, the inspection report describes the facts found during the inspection, including any deficiencies, and provides not fewer than 30 days to correct them. The PBO Council may accompany the inspection visits conducted by the Ministry responsible for issues of social security.

The Commission's Support Division is responsible for giving advice and guidance to organizations on a range of legal, governance, management and financial issues. To make these services more widely available, the Support Division engages in outreach, including visits to individual charities, road shows open to charities, and conferences. The Commission's Investigation Division is responsible for combating abuse; it can suspend trustees, freeze bank accounts and appoint a receiver and manager to act in place of the trustees. Although the Commission does not have the power to de-register a charity, it can act to dissolve a charity by transferring all of its resources to a comparable charity. These two Divisions, along with the Registration Division, are supported by a team of lawyers and accountants who provide professional expertise.

The key to Commission action is proportionality. Smaller charities (with an annual income of less than 10,000 British pounds) are handled deferentially. "Audit" is not a term the Commission uses; instead it has developed the practice of pre-announced visits to examine a charity's administration. The Commission focuses on larger charities (based on cause) with the aim of promoting good practice. Initiating an investigation without cause runs against the ethos of the Commission.

▪ **State Enforcement, Sanctions and Withdrawal/Termination.**

State sanctions against CSOs often include the **imposition of fines**, for violations such as the failure to file reports.<sup>43</sup> The continued failure to file reports can lead to **termination** and dissolution in most countries. Termination, however, should occur only after the organization is given notice and an opportunity to remedy the deficiency. With both fines and termination orders, the CSO usually has the opportunity to file an appeal.

Additional sanctions may be available against public benefit organizations; these typically include the **loss of tax benefits** or the **termination of PBO status**. In Bulgaria, for example, no fines can be levied against PBOs; instead, systematic non-compliance with reporting requirements can lead to the PBO's termination. In Germany, Kosovo and Romania, PBOs that fail to file reports may also lose their public benefit status. Somewhat similarly, public benefit companies in the Czech Republic may lose comprehensive tax benefits in the year of breach and other more limited tax benefits in the following year.

**Revocation of public benefit status should only be available as a sanction under exceptional circumstances.** If an organization in Hungary violates the law or its founding charter, for example, the court can revoke its public benefit status at the request of the public prosecutor, but only after notifying the organization and giving it the opportunity to remedy the situation. In Poland, if the PBO fails to eradicate problems identified during the inspection process within a given time period, the Minister of Social Security can file to have the organization removed from the State Court Register. Note that in both cases the government must first notify the organization of the violation and give it an opportunity to eliminate the problem, and the decision on revocation is made by the court. In Latvia, the Ministry of Finance, prior to taking a decision regarding the withdrawal of public benefit organization status, has the right to request an opinion from the Public Benefit Commission regarding the violations. The status may be withdrawn only if the organization has not rectified the problem within the set deadline specified in the written warning by the Ministry.

## **IX. CONCLUSION**

The regulatory approach to public benefit status differs in countries throughout Europe. The main aims in introducing this status are to promote public benefit activities and to ensure that tax benefits granted to PBOs are related to purposes and activities which are of benefit for the public and the society. However, public benefit status can be also introduced in order to extend other types of state benefits to organizations engaged in activities for the benefit of the society, or to support cooperation between the governments and CSOs, or to enhance the image and accountability of the sector. The goals that legislators aim to achieve in introducing this status

---

<sup>43</sup> Such is the case in Bulgaria, where the state may penalize CSOs from 50-500 EUR. In Poland, an association that does not comply with requests for documentation is subject to a one-time fine not to exceed 50,000 zlotys (approximately 11,300 EUR), which may be waived if the association complies immediately after the fine is imposed. In Slovakia, a foundation failing to file a report may be fined from SKK 10,000 to 100,000 (approximately 250-2500 EUR). In many countries (Bosnia, Croatia, Serbia and Montenegro), fines may be levied against both the organization and against the responsible representative of the organization.

should drive the general policy in regulating public benefit. Consideration should also be given to numerous local factors (existing legal framework, local culture and traditions, existing benefits, the level of development of the third sector, the relationship with the government) that will influence the implementation of the regulation, in order to ensure that it achieves the desired result.

This article aimed to raise the most common questions and best practices discussed in countries throughout CEE when launching a process to introduce public benefit status. Those include:

- What are the regulatory approaches in Europe? Should the state regulate in the framework law, tax laws, or enact a separate law on public benefit status?
- What are the criteria for granting public benefit status? Which are the eligible entities that can apply for this status? To what extent should the activities of the organizations be of public benefit in order to receive this status, and who should they target?
- Who grants the public benefit status? A tax authority, court, independent commission, a line Ministry?
- What is the procedure for granting public benefit status?
- What are the benefits and obligations for public benefit organizations?

Where appropriate, the article also describes the difference in regulating public benefit in England and Wales (as common law countries) and countries in continental Europe. The article does not aim to answer all questions, as the specific approach depends on the local circumstances and overall environment. Policymakers and legislators throughout Europe have been creative in adopting various solutions, described here, hoping to achieve the goals of the legislation. We hope that those solutions can serve as an inspiration, while the lessons learnt can guide the countries which have yet to define and introduce the concept in their societies.

**Europe**

**Defining “Charity” and “Charitable Purposes”  
in the United Kingdom**

**Nuzhat Malik<sup>1</sup>**

**INTRODUCTION**

Charities are a part of every society. The word “charity” is derived from a Latin word “caritas,” meaning care. In ordinary term it means no more than generosity to the poor and needy. The legal meaning of word is much wider. It incorporates other purposes for the benefit of the community as a whole.

Charitable trust is a significant area of law in the United Kingdom, as charitable trusts enjoy some advantages over other trusts. Above all, UK charities do not pay income tax on their investment income devoted solely to charitable purposes under s505 of the Taxes Act 1988. Charitable trusts do not pay capital gains tax on the disposal of assets provided they are devoted to charitable purposes only, under s256 of the Taxation of Chargeable Gains Act 1992. However, charities are required to pay Value Added Tax on goods and services purchased.

The problem with the law on charities is that it does not define “charitable purposes.” This article attempts to clarify the reforms recently made to the law and to determine the extent to which the Charities Act 2006 clarifies the definition of charitable purposes. The definition of charity<sup>2</sup> is “any institution, corporate or not, which is established for charitable purposes and is subject to the control of the high court.” The Charities Act 1990 defines charitable purposes in s46 as “purposes which are exclusively charitable according to the law of England and Wales.” This leaves us in very unclear situation.

Some background is helpful. The preamble to the Charitable Uses Act 1601 never defined “charities” or “charitable purposes.” The Charities Act 1993 then came into force. This statute did not significantly clarify “charitable purposes” within the act. The Charities Act 2006 is the latest law on charities. I will examine the extent of its clarity in due course. One might object to a statutory definition on the ground that it would be too restrictive. Viscount Simmonds in *IRC v Baddeley*<sup>3</sup> stated, “There is no limit to the number and diversity of ways in which a man will seek to benefit his fellow men.”

In 2001, the Prime Minister’s strategy unit commissioned a review of law and regulations of charities and not-for-profit organisations. Following the review, a document entitled “Private Action, Public Benefit” was published in September 2002. This assessed strengths and weaknesses of the legal framework of charities.

---

<sup>1</sup> Nuzhat Malik, LLB, LLM, [nuzhat-malik@hotmail.com](mailto:nuzhat-malik@hotmail.com), is a legal and political analyst, practicing as a legal consultant on cross-jurisdiction litigation in the UK and Pakistan.

<sup>2</sup> L.B. Curzon, Dictionary of Law, 6<sup>th</sup> Ed, Pearson Longman

<sup>3</sup> (1955) AC 572

My aim is to consider how precisely the law defines “charitable purposes.” I do not examine charities law in detail, but simply attempt to clarify the reforms to the Charities Act 1993 in respect of the definition of “charities” or “charitable purposes.”

First, I analyze the Charitable Uses Act 1601. This focuses on the intentions of the legislation and what definition, if any, is provided. Second, I explain the *cy-près* doctrine. Trusts for political purposes are discussed next. The fourth section details the Charity Commission and its functions along with the role of Charity Commissioners. Section five examines whether the Charities Act 1993 significantly changed the law. Along with the 1993 legislation, it also considers any developments of case law and the judicial definition of “charities.” The sixth section focuses on the Charities Act 2006. It analyzes how clear it is compared to its predecessors. I investigate the difficulties this new legislation is trying to overcome and its objective and purpose. Finally, the last section provides an overview and conclusion.

## **1. THE LEGACY OF CHARITABLE USES ACT 1601**

### **BACKGROUND**

Charity is a deep-rooted element of human behavior. It aims to provide emotional, spiritual, and material comfort to those in need as taught by many religions and communities. The development of the law on charities has been uneven for over several centuries. In medieval times, the ecclesiastical courts had a policy of upholding gifts for pious and charitable purposes whenever possible. Such gifts were restricted by legislative policy, because they placed land in mortmain and disinherited gifts, resulting in the loss of the incidents of tenure to the lords and increasing the power of the religious institutions. However, the need to regulate in a more systematic manner resulted in a change of legislative policy. The statute of Charitable Uses Act 1601 came into force. It is referred as the Statute of Elizabeth I.

### **CHARITABLE USES ACT 1601 (STATUTE OF ELIZABETH I)**

The preamble statute, the Charitable Uses Act 1601 gives guidance as to what purposes are charitable and it lists:

the relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning; free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriages of poor maids; support, aid, and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants covering payments of fifteens, setting out of soldiers, and other taxes.

Although there is no set definition provided for charitable purposes, before any institution can be accepted it must meet the three requirements:

- I. The purpose of the institution must be within the spirit and intendment of the preamble to the Charitable Uses act 1601.
- II. The institution must exist for the benefit of the public.
- III. The institution must be exclusively charitable.

For more than 200 years after the enactment of the statute, no attempt was made to classify the objects or purposes held to be charitable as within the spirit and intendment of the preamble. In *Morice v Bishop of Durham*,<sup>4</sup> Sir Samuel Romilly put forward a classification of charities under four heads: relief of the indigent, advancement of learning, advancement of religion, and advancement of objects of general public utility.

The charitable uses Act 1601 was repealed by the Mortmain and Charitable Uses Act 1888. Section 13(2) of the 1888 act expressly preserved the preamble to the former statute. On the basis of its continued existence, Lord Mac Naughton laid down the most influential classification of charitable purposes in *Commissioners of Income Tax v Pemsel*.<sup>5</sup> He accepted Sir Romilly's first three categories—relief of the indigent—advancement of learning, and advancement of religion—but changed the fourth category to encompass other purposes beneficial to the community that do not fall in the other categories.

### **Public Benefit Test**

The public benefit test distinguishes public trusts from private trusts. The first prong of the two-part test involves the usefulness of the activity to the society. If the purpose falls within the first three heads of the *Pemsel* classification, then *prima facie* it satisfies the first prong. If it falls within the fourth head, then it must benefit the public under the judicial definition of charities.

The second requirement of the public benefit test is the identification of the public to be served. It should be a large section of the society or even the public at large. However, trusts for relief of poverty are an exception. The satisfaction of the test is the question of law for the judge to decide.

The public element test will fail if there is a personal bond between the donor and the beneficiaries. The public must be the community, and not persons with family or blood relationships. In *Re Compton*,<sup>6</sup> the Court of Appeal decided that the test was not satisfied where the gift was on trust for education of the children of three named relatives. Lord Greene MR stated, "I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant . . ."

Where the donor sets up a trust for the benefit of the public at large but expresses a *preference*, not an obligation, in favor of specified individuals, the gift is capable of satisfying the public element test. Lord Simonds laid down the requirements to satisfy the test in *Oppenheim v Tobacco Securities Trust Co Ltd*<sup>7</sup>:

- a) The beneficiaries are not numerically negligible; and
- b) The beneficiaries have no link in contract or blood between themselves or with the narrow group of individuals.

---

<sup>4</sup> (1805) 10 Ves. 522, 531

<sup>5</sup> (1891) A.C. 531

<sup>6</sup> (1945) Ch 123, CA

<sup>7</sup> (1951) AC 297, HL

It is a question of degree as to whether the beneficiaries constitute a section of public adequate to satisfy the public element test. In *Gilmour v Coats and Others*,<sup>8</sup> the test for public benefit failed because the gift was made to a Carmelite Convent which consisted of 20 cloistered nuns.<sup>9</sup> However, in *Neville Estates Ltd v Madden & Others*,<sup>10</sup> the members of the Catford Synagogue were held to satisfy the public element test because the objects of the gift were not numerically negligible and were integrated with the rest of society.

Trusts for the relief of poverty are not subject to the public element test, and a contractual bond between donor and donees does not invalidate the gifts. The courts reviewed the authorities and decided that gifts to relieve poverty amongst employees of a company were charitable in *Dingle v Turner*.<sup>11</sup>

### **The Relief of Poverty**

Just like “charities” and “charitable purposes,” “poverty” has never been defined by the courts or the statute. Poverty is a question of degree depending on the circumstances. In *Re Coulthurst’s Will Trust*,<sup>12</sup> Lord Evershed established that “poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to ‘go short’ in the ordinary acceptance of that term, due regard being had to their status in life, and so forth.”

The trust for relief of poverty is also based on the words in the preamble “the relief of aged, impotent, and poor people.” In the case of *Re Glyn*,<sup>13</sup> it was decided that the words should be construed disjunctively. Thus, a trust for the relief of the aged or impotent will be held to be charitable regardless of the existence of poverty. As for poverty, a gift under this head of Mac Naghton’s classification must provide the basic necessities of human existence, such as food, shelter, and clothing. Gibson J in *Joseph Rowntree Memorial Trust Housing Association Ltd v AG*<sup>14</sup> stated, “The word ‘relief’ implies that the person in question have a need attributable to their condition.... The word ‘relief’ is not synonymous with benefit.”

Case outcomes vary. In *Re Sanders*,<sup>15</sup> the gift was held not to be charitable because members of the working class are not necessarily in poverty. On the other hand, *Re Niyazi’s Will Trusts*<sup>16</sup> construed a gift for the construction of a “working men’s hostel” as charitable.<sup>17</sup>

---

<sup>8</sup> (1949) 1 All ER 848, HL

<sup>9</sup> The nuns devoted themselves wholly to prayer and did not engage in any activity outside the convent. The community of nuns was held to be insufficiently integrated with society. Lord Simonds stated, “A gift to two or ten or a hundred cloistered nuns in the belief that their prayers will benefit the world at large does not from that belief alone derive validity any more than does the belief of any other donor for any other purpose.”

<sup>10</sup> (1962) 1 Ch 832, HC

<sup>11</sup> (1972) AC 601, HL

<sup>12</sup> (1951) Ch 661, CA

<sup>13</sup> (1950) 2 WLR 1150

<sup>14</sup> (1983) 1 All ER 288

<sup>15</sup> (1954) 1 Ch 265, Ch D

<sup>16</sup> (1978) 3 All ER 785, HC

<sup>17</sup> Megarry VC stated, “The connotation of lower income is, I think, emphasised by the word ‘hostel.’ The word hostel has to my mind a strong flavour of a building which provides somewhat modest accommodation for

## The Advancement of Education

The origins of this classification are found in the preamble Statute of Elizabeth: “the maintenance of schools of learning, free schools, and scholars in universities” and “the education and preferment of orphans.” “Education” has been given a broad interpretation; courts require some evidence of “instruction” to uphold such a trust. Research was also held to qualify as education in *Re Hopkins*.<sup>18</sup> The trust money was to be used to search for the manuscripts of plays commonly ascribed to Shakespeare but believed by the society to have been written by Bacon. Wilberforce J stated, “The discovery of such manuscript, or of such manuscripts, would be of the highest value to the history and to literature.” In *McGovern v AG*,<sup>19</sup> Slade J summarized the principles concerning research and charities for advancement of education as follows:

(1) A trust for research will ordinarily qualify as a charitable trust if, but only if (a) the subject matter of the proposed research is a useful study; and (b) it is contemplated that knowledge acquired as a result of the research will be disseminated to others; and (c) the trust is for the benefit of the public. (2) In the absence of a contrary context, however, the court will be readily inclined to construe a trust for research as importing subsequent dissemination of the results thereof. (3) Furthermore, if a trust for research is to constitute a valid trust for the advancement of education, it is not necessary either (a) that a teacher/pupil relationship should be in contemplation, or (b) that the persons to benefit from the knowledge to be acquired should be persons who are already in the course of receiving education in the conventional sense.

Mere acquisition without dissemination or advancement will not fall under the classification according to *Re Shaw, Public Trustee v Day*.<sup>20</sup> Gifts upheld as charitable for the advancement of education include *inter alia* trusts for choral singing,<sup>21</sup> the diffusion of knowledge and training of students in Egyptology,<sup>22</sup> encouragement of chess-playing among young people,<sup>23</sup> and the publication of law reports that record the development of judge-made law.<sup>24</sup> By contrast, training spiritualistic mediums was held to lack educational value to the public in *Re Humeltenberg*.<sup>25</sup>

Promotion of sports is not considered charitable in itself. However, trusts to promote sports and related activities connected with educational institutions do qualify as charitable. In *IRC v McMullen*,<sup>26</sup> a trust to provide facilities for football and other sports for pupils at schools and universities was held to be charitable. The court emphasized that the concept of education

---

those who have some temporary need for it and are willing to accept accommodation of that standard in order to meet the need.”

<sup>18</sup> (1964) 3 All ER 46, HC

<sup>19</sup> (1981) 3 All ER 493

<sup>20</sup> (1957) 1 All ER 745, HC

<sup>21</sup> *Royal Choral Society v IRC* (1943) 2 All ER 101

<sup>22</sup> *Re British School of Egyptian Archaeology* (1954) 1 All ER 887

<sup>23</sup> *Re Dupree's Trusts* (1944) 2 All ER 443

<sup>24</sup> *Incorporated Council of Law Reporting for England and Wales v AG* (1972) Ch 73

<sup>25</sup> (1923) 1 Ch 237

<sup>26</sup> (1981) AC 1



changes over time, so activities formerly not considered to fall in the category of advancement of education may well qualify now.

### **The Advancement of Religion**

The charitable Uses Act 1601 refers to “the repair of . . . churches.” The Oxford Dictionary defines religion as “recognition on the part of man of some higher unseen power as having control of his destiny and as being entitled to obedience reverence and worship.” It is stated in *Charities: A Framework for the Future*<sup>27</sup> that “the present position is that any religious body is entitled to charitable status . . . so long as its purposes are directed to the benefit of the public.” The court of chancery makes no distinction between any religions and this was upheld in *Thornton v Howe*.<sup>28</sup> Although the preamble only refers to the repair of churches, regulations under the Charities Act 1993 treat non-Christian religions as charitable.<sup>29</sup>

In order to establish a charity for the advancement of religion, two elements must be satisfied: the religion must be recognized as a religion by the courts and the activities of the charity must promote or advance that religion. All the world’s main religions and many individuals’ sects are accepted under the first criterion. In *Re South Place Ethical Society*,<sup>30</sup> it was established that the study and dissemination of ethical principles could not constitute religion. The society was held to be charitable for the advancement of education but not religion. Dillon J stated, “Religion, as I see it, is concerned with man’s relation with God and ethics is concerned with man’s relations with man . . . their beliefs may be to them the equivalent of a religion but viewed objectively they are not religion.” Hinduism and Buddhism do not involve belief in God but because they are universally regarded as religions they may be accepted as exceptions to the usual rule. The Charity Commission rejected the application for the Church of Scientology<sup>31</sup> to register as a charity for the advancement of religion on the grounds that although the church believed in a supreme being, the belief did not find expression in conduct indicative of reverence or veneration for the supreme being; study and therapy or counselling did not amount to worship.

Religion may be advanced in many ways such as maintenance of places of worship, gifts for the clergy, and the active spread of religion. In *United Grand Lodge of Freemasons in England and Wales v Holborn BC*,<sup>32</sup> Donovan J said, “To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious beliefs . . . [or] religious supervision to see that its members remain active and constant in the various religions they may profess.”

---

<sup>27</sup> (1989) Cm 694, para. 2.20

<sup>28</sup> (1862) 31 Beav 14

<sup>29</sup> Also see *The Goodman Report* (National Council of Social Services, Charity Law, Voluntary Organisations, 1976, London: Bedford Square Press)

<sup>30</sup> (1980) 1 WLR 1565, HC

<sup>31</sup> *R v Registrar General, ex p Segerdal* (1970) 2 QB 697. Buckley LJ: “Worship I take to be something which must have some . . . prayer or intercession.”

<sup>32</sup> (1957) 1 WLR 1090, HC

## Other Purposes Beneficial to the Community

This covers a range of undefined objects deemed to be charitable taking account of social realities. The Elizabethan Statute refers to a list of miscellaneous purposes as charitable and this head covers them. Although there is a wide scope, not every purpose beneficial to the community qualifies as charitable. To qualify under this head, the purpose must be beneficial to the community in a way that the law considers charitable—that is, the purpose must fall within the spirit and intent of the preamble, according to *AG v National Provincial and Union Bank of England*.<sup>33</sup> Viscount Cave held, “Lord Mac Naughton did not mean that all trusts for purposes beneficial to the community are charitable . . . it is not enough to say that the trust in question is for public purposes beneficial to the community, or for the public welfare; you must also show that it is a charitable trust.” Thus, charitable trusts under this head of classification are limited to purposes that are

- a) Beneficial to the community
- b) Not within any of the other three heads, and
- c) Recognized by the law as charitable.

In *Incorporated Council for Law Reporting v AG*,<sup>34</sup> the court took a very liberal approach. It suggested that when a purpose is beneficial to the community, it raises the presumption of a trust; then the question is whether there are any grounds for holding it to be outside the scope of the 1601 statute. The approach has not been widely followed. Therefore it seems that there is merit in Lord Reid’s more constrained interpretation in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*.<sup>35</sup>

It is not possible to list all purposes that fall under this fourth head. Those that have been upheld by the courts include trusts for animals<sup>36</sup>; relief of aged, sick, and disabled people<sup>37</sup>; and recreational facilities.<sup>38</sup>

## Purposes Must Be Exclusively or Wholly Charitable

A gift to charity must be devoted wholly and exclusively to charity. If the gift does not confine itself to charity or it aims to benefit an object that is not charitable then the trust will fail. Trusts with purposes such as “for worthy causes,” “for benevolent purposes” or “for charitable or benevolent purposes”<sup>39</sup> are not exclusively charitable and thus are void. The courts have the power to sever the offending objects from the charitable ones but problems may arise where there is competition between main and subsidiary objects, and where disjunctive instead of conjunctive language is used to link charitable and non-charitable purposes in the same instrument.

---

<sup>33</sup> (1924) AC 262, HL

<sup>34</sup> (1972) Ch 73

<sup>35</sup> (1968) 3 All ER 215, HL

<sup>36</sup> *Re Wedgwood, Allen v Wedgwood* (1915) 1 Ch 113, CA

<sup>37</sup> *Joseph Rowntree Memorial Trust Housing Association v AG* (1983) 1 All ER 288, HC

<sup>38</sup> *Guild v Inland Revenue Commissioners* (1992) 2 All ER 10, HL. The gift was held to be charitable under the Recreational Charities Act 1958.

<sup>39</sup> *Chichester Diocesan Fund v Simpson* (1944) AC 341

### **Main and Subsidiary Objects:**

Where a charitable gift confers a private benefit to a non-charitable purpose at the same time, it may be void under the rule that the trust must be wholly and exclusively charitable. Such trust can only be valid if those non-charitable purposes are entirely subsidiary to the main charitable purposes. Lord Cohen in *IRC v City of Glasgow Police Athletic Association*<sup>40</sup> stated a test: “the main purpose of the body . . . is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that purpose.” A gift beneficial to surgeons was upheld as a gift for the advancement of surgery.<sup>41</sup>

### **Disjunctive and Conjunctive Language:**

On the construction of the clause, the courts may decide that the word “or” ought to be interpreted disjunctively and the word “and” conjunctively. Where disjunctive language is used, the charity is likely to fail. For example, in a trust for “charitable or benevolent purposes,”<sup>42</sup> it is up to the trustee to devote the funds to charitable purposes or to benevolent purposes that are not charitable; the trust would therefore fail. However, where conjunctive language is used, such as a trust for “charitable and benevolent purposes,” the gift will be valid for benevolent purposes that are charitable. This was held in *Re Best*.<sup>43</sup>

There are some exceptions to the rule that the purposes must be wholly and exclusively charitable. They are incidental purposes and severance.

### **Incidental Purposes:**

If the main purpose of the trust is charitable and the non-charitable purpose is incidental, then the gift is valid. This approach is illustrated by Jenkins’s<sup>44</sup> judgment in *Re Coxen*.<sup>45</sup> He says that where the amount applicable for non-charitable purposes cannot be quantified, the gift as a whole fails for uncertainty.

### **Severance:**

Where the funds are payable partly for the charitable purposes and partly for non-charitable purposes, the courts are entitled to intervene and order apportionment. A court will divide the funds equally between charitable and non-charitable objects in accordance with the maxim “equality is equity.” In *Salisbury v Denton*<sup>46</sup> the fund was divided equally into two parts and one portion was devoted to the charitable purposes.

---

<sup>40</sup> (1953) AC 380

<sup>41</sup> Royal College of Surgeons v National Provincial Bank Ltd (1952) AC 631. Also see *Re Coxen* (1948) Ch 747

<sup>42</sup> AG v National Provincial and Union Bank of England (1924) AC 262, HL

<sup>43</sup> (1904) 2 Ch 354, HC

<sup>44</sup> “The result of the authorities appear to be: (a) that where the amount applicable to the non-charitable purpose can be quantified the trust fail *quoad* that amount but take effect in favour of the charitable purpose as regards the remainder; (b) that where the amount applicable to the non-charitable purpose cannot be quantified the trusts both charitable and non-charitable wholly fail because it cannot in a such a case be held that any ascertainable part of the fund or the income thereof is devoted to charity . . . in which case amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift.”

<sup>45</sup> (1948) Ch 747, HC

<sup>46</sup> (1857) 3 K & J 529, HC

## 2. THE CY-PRÈS DOCTRINE

The expression originated from *ici-près* (near here) or *aussi près* (as near as possible). The doctrine is applicable to gifts for charities that fail owing to impossibility or impracticality. The court of chancery exercised jurisdiction over this matter; however, the power now resides with the Chancery Division of the High Court and the Charity Commissioners. The principle requires two conditions to be satisfied: (a) it has become impossible or impracticable to carry out the original charitable purpose; and (b) the donor has manifested a general charitable intention. It has also been extended to charitable purposes that, though not impossible or impracticable, are unsuitable. The funds will be used for a purpose as near as possible to the original purpose stated by the settler; where the failure arises at the outset, the settler's original trust will not be created.

On the birth of the cy-près doctrine, Lord Eldon in *Moggridge v Thackwell*<sup>47</sup> said:

I have no doubt, that cases much older than those I shall cite may be found; all of which appears to prove, that if the testator has manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated, shall not destroy the charity: but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.

This is in accordance with the rule that the intention of the donor must be carried out, for the donor's intention was to benefit his soul by charitable works.<sup>48</sup> If the initial gift is not charitable as defined by the law, or if there is no initial or subsequent failure, the cy-près order will not be made. Provided that the testator has shown general charitable intentions, there could be an initial failure where on the death of the testator it is impossible or impracticable to carry out the specific charitable intentions.

The test of "impossibility" was construed broadly in *Re Dominion Student's Hall Trust*,<sup>49</sup> where Evershed J stated, "The word 'impossible' should be given a wide significance." The most striking English case on the need for impossibility is *Re Weir Hospital*.<sup>50</sup> The decision shows where the boundary between difficulty and impossibility lies independently of legislation, although the scheme rejected in this case could be made under the Charities Act 1993.<sup>51</sup> Cozens-Hardy MR said, "But there can be no question of cy-près until it is clearly established that the directions of the testator cannot be carried into effect. . . It is contrary to principles that a testator's wish should be set aside, and his bounty administered not according to his wishes but according to the view of the commissioners."

Where the charitable bodies exist at the date of vesting but cease to exist subsequently, it becomes impossible or impracticable to carry out the testator's intention. This is called subsequent failure of the charitable gift. The cy-près is applied in this case regardless of any initial general charitable intentions shown by the testator. Once the gift vests in the charity, the donor himself or his heirs cannot benefit on a subsequent liquidation of the charity, under *Re*

---

<sup>47</sup> (1803) 7 Ves 36, 69

<sup>48</sup> Tudor, *Charities*, 7<sup>th</sup> ed, p229

<sup>49</sup> (1947) 1 Ch 183, HC

<sup>50</sup> (1910) 2 Ch 124, CA

<sup>51</sup> Section 13 (1) (a) – (e), which re-enacts s13 of the Charities Act 1960

*Wright*.<sup>52</sup> The Court of Appeal rejected the argument that the date for deciding whether the charitable purpose was practical was the trustee's death and concluded that it was the death of the testatrix. The cy-près rule was applied to the funds. For example, in *AG v City of London*,<sup>53</sup> the trust funds were to be used for the advancement of the Christian religion among the infidels in Virginia. The cy-près orders were made when it became clear that there were no "infidels" in Virginia any longer.

### 3. TRUST FOR POLITICAL PURPOSES

Trusts for political purposes are not charitable. Political purposes include gifts to the political parties or funds that are to be used to support them or to attempt to change the law. The trust in *McGovern v AG*<sup>54</sup> failed because the trust was not exclusively charitable and some of its purposes were political. Slade J held,

The court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the United Kingdom for one or both of two reasons: first, the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.

Trusts for political purposes are not charitable even though they are for public benefit independent of any political party, under *Re Bushnell*.<sup>55</sup> In *Re Hopkinson*<sup>56</sup> it was held that the trust was not charitable because it was not only for adult education but the purpose behind it was political based on the memorandum of Labour Party.<sup>57</sup> Vaisey J stated, "Political propaganda masquerading—I do not use the word in any sinister sense—as education is not education within the Statute of Elizabeth." The classic illustration on this point is *National Anti-Vivisection Society v IRC*.<sup>58</sup> The House of Lords held that the society concerned did not fall within the fourth criterion because it was not beneficial to the community. One of its objects was held to be political, as it was advocating the change in the laws. On this basis the House overruled *Re Foveaux*.<sup>59</sup> Lord Simonds stated, "We are satisfied that the main object of the society is the total abolition of vivisection. . . . It can only be by Act of Parliament that that element can be supplied."

Bodies not registered as charities include the National Anti-Vivisection Society, the National Council for Civil Liberties, the Campaign Against Racial Discrimination, the Martin Luther King Fund, the Human Rights Society, the United Nations Association, Amnesty International, and the Disablement Income Group.

---

<sup>52</sup> (1954) Ch 347, CA

<sup>53</sup> (1703) 3 Bro CC 171

<sup>54</sup> (1981) 3 All ER 49, HC

<sup>55</sup> (1975) 1 WLR 1596

<sup>56</sup> (1949) 1 All ER 346

<sup>57</sup> The memorandum of the Labour Party was headed "A Note on Education in the Labour Party"

<sup>58</sup> (1948) AC 31

<sup>59</sup> (1895) 2 Ch 501

Promoting good race relations, endeavoring to eliminate discrimination on racial grounds, and encouraging equality of opportunity between persons of different racial groups are considered to be of public benefit since the Race Relations Act 1976. In the 1984 Annual Report, the commissioners said they now consider such purposes as charitable, whereas they were formerly deemed political under *Re Starkosch*.<sup>60</sup>

Although a political purpose cannot be charitable, political activity may be permissible if undertaken in furtherance of some charitable purpose. CC9 Political Activities and Campaigning by Charities (September 1999) has guidelines for trustees in engaging in such activities. If trustees engage in any political activity, it must be in furtherance of and ancillary to the charity's main objects. The trustees must be able to show that this activity will be aid the actual purpose of the charity and benefit its beneficiaries.

Generally, a charity may engage in the following activities unless its governing instrument precludes it from doing so, under the Commissioners' Annual Report for 1981, paragraph 55:

- I. Where the government or a governmental agency is considering or proposing changes in law and invites comments or suggestions from charities, they can quite properly respond.
- II. Where a Green or White Paper is published by the government, a charity may justifiably comment.
- III. Where a Parliamentary Bill has been published, a charity is justified in supplying to Members of either House such relevant information and arguments to be used in debates as it believes will assist the furtherance of its purpose.
- IV. Where a bill would give charity wider powers to carry out its purpose, it can quite properly support the passage of the Bill; and it can support or oppose any Private Bill relevant to its purposes, since private legislation does not normally have a political character.
- V. Where a question arises as to whether a government grant is to be made or continued to a particular charity, the charity is entitled to seek to persuade Members of Parliament to support its cause.
- VI. Where such action is in furtherance of its purpose, a charity may present to a government department a reasoned memorandum advocating changes in the law.

Since the essence of any living law and of any healthy democracy is change, it is difficult to see why trusts for political purposes should not be capable of being valid trusts, though not charitable trusts with fiscal advantages.<sup>61</sup> The argument on the contrary could be that it is not safe to do so. It might become common that a few individuals would form an association asking for some change in the law, and then would be accorded the financial advantages of other charities. Giving such advantages to political purpose trusts would mean promoting them and encouraging more such groups in the society.

---

<sup>60</sup> (1949) Ch 529

<sup>61</sup>Chapter 7, pp 439 Sweet & Maxwell, *The Law of Trusts and Equitable Remedies*, 11<sup>th</sup> Ed.

#### **4. THE CHARITY COMMISSION**

The Charity Commission was established by the Charitable Trusts Act in 1853. The purpose of its creation was to provide inexpensive and simple means of dealing with problems encountered by charities. Until then, they were dealt with by the Court of Chancery. The constitution of the Charity Commission is now governed by the Charities Act 1993.

##### **The Charity Commissioners and Their Functions**

The commissioners are appointed by the Home Secretary. There are five commissioners and two of them have to be lawyers. The commissioners are seldom personally involved in a particular case; generally they act as a board and are subject to the jurisdiction of the High Court in the exercise of their quasi-judicial powers. Appeals from their decisions may be made to the High Court. Although the Home Secretary appoints the Charity Commissioners and answers questions in relation to charity matters, in Parliament he has no jurisdiction over them. If the Charity Commission is criticized in the Parliament, the Home Secretary can only advise and influence them to take whatever remedial action is necessary.

Section 1(3) of the Charities Act 1993 states that the general function of the commissioners shall be “to promote the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses.” The Commissioners have the right to advise but they cannot intervene directly unless the trustees are in breach of their duties.

##### **Legal Proceedings**

The commissioners retain the power to take action to protect the charity property without establishing that misconduct and maladministration has occurred. Such actions include suspending trustees, freezing the charity’s bank accounts and properties, and appointing a receiver to run the charity’s affairs for a period.

The Charities Act provides that the commissioners may sue and can be sued in the name of the Charity Commissioners for England and Wales. Any proceedings will not be affected by change in their membership. The Charities Act 1993, section 32, empowers the commissioners to exercise equal powers as the Attorney General in respect of taking, avoiding, or ending legal proceedings. Section 33(1) of the same act lists the persons who may bring proceedings in respect of charitable matters.<sup>62</sup> The High Court has jurisdiction only over charities registered in the UK, as decided by the Court of Appeal in *Gaudiya Mission v Brahamchary*.<sup>63</sup>

##### **The Charities Register**

The commissioners are required to maintain a register which is open to the public. Exempt charities and excepted charities need not be registered. Exempt charities include the British Museum, the Victoria and Albert Museum, and registered Friendly Societies; excepted charities are the Boy Scouts and Girl Guides Association and certain charities connected with

---

<sup>62</sup> The charity, any charity trustees, any person interested in the charity, in case of local charity any two or more inhabitants of the local area. Attorney General is always required to be included as a party to legal proceedings.

<sup>63</sup> (1997) 4 All ER 957, CA

promoting the efficiency of the armed forces. Religious organizations and places of their worship need not register. Charities that have neither any permanent endowment nor the use or occupation of any land and whose total income does not exceed £1,000 per annum need not register.

### **5. THE CHARITIES ACT 1993**

As has already been examined, “charities” and “charitable purposes” have never been defined by the law. There have been classifications through the development of the case law but no statutory definition. The Charities Acts 1960 and 1992 did not take the position of the preamble any further. In 1993, legislation was passed which was to provide better guidance. Section 96(1) of the Charities Act 1993 lays down that “charity” means a body or trust that

- a) is established for charitable purposes only, and
- b) falls subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

Charities Act 1993, Part X, section 97 states that “charitable purposes” means purposes that are exclusively charitable according to the law of England and Wales. But what is exclusively charitable under the law of England and Wales? This has been the ambiguity since the preamble of 1601. Amendments to the 1960 act are set forth in the Charities Act 1993, Schedule 6. However, the 1993 Act did not make any substantial change as to the definition of charitable purposes.

The Charity Commission and its functions were among the main changes brought by this Act. Sections 3 and 4 deal with the registration of charitable bodies with the Charity Commissioners. Section 13 extends the occasions when the *cy-près* doctrine may be available. Both were discussed above.

### **6. THE CHARITIES ACT 2006**

The Charities Bill was published on 20 December 2004. This was the result of a review carried out by the Prime Minister’s Strategy Unit in September 2002. The review was entitled “Private Action, Public Benefit,” involving strengths and weaknesses of the framework of charities. Before responding to these recommendations, the government sought views on them through an open public consultation from September 2002 to January 2003. The results of the Strategy Unit’s recommendations were summarized in a report called “Charities and Not-for-Profit: A Modern Legal Framework.” The Charities Bill 2004 contained most of these recommendations and received Royal Assent on 8 November 2006.

Part 1, section 1 of the Act gives the meaning of “charity.” It reads:

(1) For the purposes of the law of England and Wales, “charity” means an institution which—

- a) Is established for charitable purposes only, and
- b) Falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect of charities.

Section 2 provides the meaning of “charitable purposes”:



(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—

- a) Falls within the subsection (2), and
- b) Is for the public benefit (see section 3)

(2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

- a) The prevention or relief of poverty;
- b) The advancement of education;
- c) The advancement of religion;
- d) The advancement of health or the saving of lives;
- e) The advancement of citizenship or community development;
- f) The advancement of the arts, culture, heritage or science;
- g) The advancement of amateur sports;
- h) The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- i) The advancement of environmental protection or improvement;
- j) The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- k) The advancement of animal welfare;
- l) The promotion of the efficiency of the armed forces of the crown, or of the police, fire and rescue services or ambulance services;
- m) Any other purposes within the subsection (4)

The law has defined the purposes of charity for the first time. The preamble to the 1601 statute has formed the foundation of the modern definition of the “charitable purposes.” This is also a reflection of the development of the case law. The list above is intended to be comprehensive. All these purposes were charitable under the old law with the exception of (g) the advancement of amateur sports. Section 5 (2) of the section amends section 1 (2) of the 1958 Act so that facilities made available to men only are to be regarded as charitable on the same basis as facilities made available to the public or women only.<sup>64</sup> The previous provisions are now thought to be incompatible with the European Convention on Human Rights.

All these purposes have some resemblance to the preamble or the earlier cases. As Lord Wilberforce summarized in *Scottish Burial Reform and Cremation Society v City of Glasgow Corp*<sup>65</sup>: “The purpose in question, to be charitable, must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment of the preamble to the

---

<sup>64</sup> The Recreational Charities Act 1958, s1 (2) provides that “It is a charitable purpose to provide, in the interest of social welfare, facilities for recreation or other leisure-time occupation where those facilities are available either to the public as a whole or to women only.”

<sup>65</sup> (1968) AC 138

[Charitable Uses Act 1601] . . . [and] decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied.”

On the list in s2 (2) above, each head covers a range of purposes that fit the description but are purposes in their own right. It is very broad and covers more or less everything that is to be a charitable purpose.

Sections 6 and 7 of Chapter 1 of the Act establish the Charity Commission and deal with the Commission’s objectives, functions, and constitution. Section 6 (1) inserts a new section into the 1993 Act creating a body corporate called the Charity Commission for England and Wales. The Commission will be a Non-Ministerial Government Department and subsections (4) and (5) ensure that it will have a significant degree of independence from Ministers and Government Departments in the performance of its functions.

Sections 15-18 cover changes to the rules governing the application of the cy-près doctrine. Section 15 amends section 13 of the 1993 Act. There have been other amendments in relation to cy-près schemes, application cy-près of gifts by donor unknown or disclaiming, and application cy-près of gifts made in response to certain solicitations, but they fall outside the scope of this article.

## **7. CONCLUSION**

The legal redefinition of “charity” and “charitable purposes” in the 2006 legislation has consolidated the law. The position of the law of charities is much clearer than the past. Although it is the first attempt of the legislature to provide a legal definition, it has covered purposes within the “spirit and intendment” of the preamble. This statute has shaped the whole law of charities according to the developing needs of the society.

The Charities Act 2006 identifies a wide range of purposes as charitable. This encourages the establishment of charities, which benefits the public at large. However, it must be remembered that charitable trusts enjoy fiscal advantages. If every small institution starts registering as a charity, then the economy is likely to suffer. Therefore, I suggest that there must be strict brackets so the trusts registering as charitable have real charitable purposes and are beneficial to the public.

The topic warrants further research because of potential ambiguities and issues not identified here.

*Europe*

## **Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers**

Alison Dunn\*

### **I. Introduction**

Since the low general election turnouts in 2001 and 2005, there has been much debate over the declining participation of the electorate in the political process in England and Wales and the wider UK, and whether it signals a broader decline in the public's political engagement.<sup>1</sup> It has been argued that the low electoral turnout is a product of the country's political culture and its institutions and can only be remedied by a change in the electoral process.<sup>2</sup> But the decline in voting is just one factor in the concern over the public's apparent diminishing input into political and decision-making processes. The public's identification with political parties has fallen to almost a quarter of what it was in the 1960s, and attendant party membership has also plummeted.<sup>3</sup> Lack of trust in politicians and a failure on the part of the main political parties to clearly communicate their policies and distinguish them from those of the other parties have been identified as key factors in the decline.<sup>4</sup> As explanations, these sit alongside the marginalization

---

\* Newcastle Law School. An earlier version of this paper was presented at the International Society for Third Sector Research's 8<sup>th</sup> International Conference, University of Barcelona, 9-12 July 2008. I am grateful to the participants and fellow panelists for their comments.

<sup>1</sup> The voting turnout for the 2001 general election was 59.38%, the lowest since 1918, rising just 2% in 2005: see [www.ukpolitical.info/Turnout45.htm](http://www.ukpolitical.info/Turnout45.htm) and UK Election Statistics 1918-2004, House of Commons Research Paper 04/61, p. 17; General Election 2005, House of Commons Research Paper 05/33, p1.

<sup>2</sup> See L Baston & K Ritchie, *Turning Out or Turning Off? An analysis of political disengagement and what can be done about it* (London, Electoral Reform Society, 2004). Given that turnout rates provide little if any information on why members of the electorate are choosing not to vote and whether they are politically engaged in other ways, the situation is rather more complex than a purely process argument would suggest.

<sup>3</sup> The British Election Study Survey's research ([www.essex.ac.uk/BES/data.html](http://www.essex.ac.uk/BES/data.html)) has found that those who identified very strongly with the Conservative party has dropped from 48% in 1964 to 14% in 2001. A similar picture is presented for the Labour Party, which has fallen from 41% to 16%. For the Liberal Party, just 7% very strongly identified with the party in 2001, compared with 32% in 1964. See also P Mair & I van Biezen, "Party membership in twenty European democracies, 1980-2000" (2001) 7(1) *Party Politics* 5-21.

<sup>4</sup> See *Power to the People: The Report of Power: An Independent Inquiry into Britain's Democracy* (York, The Power Inquiry, 2006), part 1; C Jeffrey, "Turnout: a crisis in UK politics?" in I Stewart & R Vaitilingam (eds), *Seven Deadly Sins* (London, ESRC, 2005). Electoral Commission, *An Audit of Political Engagement 3, Research Report* (London: Electoral Commission and the Hansard Society, 2006) found that a majority of the public felt they had a lack of knowledge about politics and that only a minority were politically active (14%), para 3.1. Eurobarometer 68, Autumn 2007 found that just 30% of citizens in the UK trust their government, and just 1 in 4 trust EU institutions.

of the ordinary voter in the face of corporate interests and non-voters' perceptions that election results are foregone conclusions.<sup>5</sup>

But the involvement of the public in the political sphere is not as arid as voting turnout and traditional party membership would suggest. If one looks beyond party political lines and traditional forms of democratic engagement, the picture of public participation looks more positive. Many non-voters engage in activity and advocacy within their communities. Indeed, membership in and financial and human resource contributions to voluntary and community organizations remain strong and may well signal a countertrend.<sup>6</sup> This form of non-party political engagement, often termed "good causes activism" or "social advocacy," has prompted the view that there is not so much a decline in political engagement as disaffection with traditional party politics.

Whilst no evidence suggests that contributions to voluntary and community organizations inexorably lead to a propensity to vote, attempts to reengage the public through the sector have been a focus for the current Labour government for some time.<sup>7</sup> This concern has at least two aims. The first is to capitalize on the trust placed in voluntary and community organizations and the capital therein for service provision. This enables the state to take advantage of the skills within the sector, often for lower cost, and to offer "choice" to the public, however illusory. Service provision has come to define much of the UK voluntary and community sector in recent years and has caused sharp divisions and differences of opinion on the value of such activities, particularly in terms of whether they threaten the independence of organizations and the wider voluntary and community sector through "state capture."<sup>8</sup>

Rather than focus upon that debate, this article is concerned with the second aim of the drive to involve voluntary and community organizations in reengaging the public. This aim, to provide "voice," is to utilize the trust placed in the sector and to take advantage of their reach and beneficiary base in order to reinvigorate interest in civic affairs through engagement and civic renewal with a particular focus upon stimulating community cohesion.<sup>9</sup>

The need for voluntary and community organizations to be put at the heart of government initiatives in service delivery and civic renewal has meant that closer attention is being paid to

---

<sup>5</sup> See C Crouch, *Coping with Post Democracy* (London, Fabian Society, 2000), "Turnout 'at 80-year low'," BBC News Online, 8 June 2001, [http://news.bbc.co.uk/vote2001/hi/english/newsid\\_1376000/1376575.stm](http://news.bbc.co.uk/vote2001/hi/english/newsid_1376000/1376575.stm)

<sup>6</sup> Baston & Ritchie, n2 above, p8; M Barnes, J Newman & H Sullivan, *Power, Participation and Political Renewal* (Bristol, Policy Press, 2007); V Lowndes, L Pratchett & G Stoker, *Making Participation Count in Local Politics* (London, IPPR, 2006).

<sup>7</sup> See Electoral Commission, *Audit of Political Engagement* (London: Electoral Commission and the Hansard Society, 2004) and Electoral Commission, *Rules of Engagement* (London: Electoral Commission and the Hansard Society, 2004), and for Labour policy: E Miliband, *Changing Lives, Changing Society, Hinton Lecture 2006* at [www.ncvo-vol.org.uk/press/speeches/?id=3621](http://www.ncvo-vol.org.uk/press/speeches/?id=3621)

<sup>8</sup> For discussion see A Blackmore, H Bush & M Bhutta, *The Reform of Public Services: the role of the voluntary sector* (London: NCVO, 2005). A recent Third Sector Review set out a framework for partnership: *The future role of the third sector in social and economic regeneration: final report* Cm 7189 (London: HM Treasury and the Cabinet Office, 2007).

<sup>9</sup> See *Next Steps on Volunteering and Giving in the UK: A Discussion Document* (London: HM Treasury and Home Office, 2002); *The future role of the third sector in social and economic regeneration*, *ibid*, at 3.9. For discussion of the tension between the two aims see A Dunn, "Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process" (2008) 71(2) *Modern Law Review* 247-270.

the activities they undertake and how they are regulated. Broader pressures too have had an effect. In particular, the rise in terrorism and counter-terrorism strategies prompted by the alleged use and abuse of sector organizations by terrorist groups have put a focus on regulating the activities of voluntary and community organizations. Whilst much of this regulation has focused upon transparency and governance in terms of financial and resource administration and risk management, the broader political activities of organizations have not escaped scrutiny. This article considers recent legal developments in England and Wales concerning the regulatory barriers that restrict charities from enjoying full democratic engagement through campaigns, protests and other such political activities. In particular, a focus is placed upon the interpretation of the law by the sector's independent regulator, the Charity Commission for England and Wales. In so doing the point is made that in practice the rules on political activities often apply disproportionately between organizations and that there is a consistent regulatory struggle to reach a balance between engaging the public (as they operate through organizations) and protecting them.

## **II. Political activity under English and Welsh charity law**

The law and policy on the political activities of charities in England and Wales constitute a study in contrasts. On the one hand, politicians and to some extent the government's Office of the Third Sector, have championed the lobbying role that charities and wider not-for-profit organizations can undertake and have praised their effectiveness in doing so.<sup>10</sup> Research has shown the route to democratic participation that voluntary and community organizations offer,<sup>11</sup> and movements are afoot to increase campaigning and advocacy infrastructure and capacity in the sector through a national support service.<sup>12</sup> On the other hand, there is a lack of a consistent or comprehensive position at a policy level as to the precise role that the voluntary and community sector can play in civic engagement and renewal. Where a focus has arisen it has tended to center upon encouraging volunteering or grassroots community work rather than "upward" activism through lobbying or other forms of advocacy.<sup>13</sup> Moreover, the legal framework in which campaigning takes place has been described as "a minefield of confusion,

---

<sup>10</sup> The Office of the Third Sector is a government department set up in 2006 with the aim of supporting the nonprofit sector. Research with Members of Parliament suggests that two thirds were more persuaded by lobbying by charities (62%) than by business groups (31%), and 91% were of the view that charity lobbyists were effective at communication: P Parvin, *Friend or Foe? Lobbying in British Democracy: A discussion paper* (London, Hansard Society, 2007), chapter 2, pp23-26. These figures are to be viewed with a measure of cynicism since there is no independent information or criteria to validate the responses.

<sup>11</sup> W Paxton & N Pearce, "The Voluntary Sector and the State" in W Paxton, N Pearce, J Unwin & P Molyneux, *The Voluntary Sector delivering Public Services: Transfer or Transformation* (York, Joseph Rowntree Foundation, 2005), pp16-17; J Howard & D Sweeting, "Neighbourhoods, democracy and citizenship," in I Smith, E Lepine & M Taylor (eds) *Disadvantaged By Where You Live?* (Bristol, Policy Press, 2007), p119.

<sup>12</sup> A campaigning and advocacy workstream has been created by Capacitybuilders for this very purpose, see <http://www.capacitybuilders.org.uk/index.aspx>

<sup>13</sup> See *Next Steps on Volunteering and Giving in the UK: A Discussion Document* (London: HM Treasury and Home Office, 2002); Home Office, *Improving Opportunity, Strengthening Society: The Government's strategy to increase race equality and community cohesion* (January 2005); Department for Communities and Local Government, *Preventing Violent Extremism – Winning Hearts and Minds* (April 2007); Commission on Integration and Cohesion, *Our shared future* (June 2007), Commission on Integration and Cohesion, *Themes, Messages and Challenges* (June 2007).

obstruction and outdated interpretations of the law.”<sup>14</sup> These difficulties with framework laws apply to determining the legal status of an organization as a charity, which is the most restricted of the sector organizations in terms of political campaigning and advocacy.

**(a) Determining charitable status and activities**

A charity under English and Welsh law is one which is constituted for at least one of a list of thirteen possible purposes under the Charities Act 2006 and which delivers public benefit.<sup>15</sup> Organizations that satisfy these requirements will be registered with the Charity Commission for England and Wales, the charity regulator, and subject to its scrutiny and reporting requirements.<sup>16</sup> Organizations that take charity status must be wholly and exclusively charitable, meaning that any non-charitable activity they undertake must be subsidiary to the main charitable purpose and in furtherance of it.<sup>17</sup> Political aims do not fall within the list of possible charitable purposes under the 2006 Act and as a result any political activity that a charity undertakes must be subsidiary to and in furtherance of a primary charitable purpose. Political activities are broadly defined and will cover any activity or purpose which furthers the interests of a political party or cause or which seeks to change the laws, policies, or decisions of UK or other governments (with the one exception that enforcing an existing law is acceptable).<sup>18</sup> The factors used to determine whether a political activity is subsidiary have never been precisely defined within the law and are instead judged on a case-by-case basis taking into account the type, duration, and extent of the activity and its link to an organization’s charitable purpose.<sup>19</sup> In that sense the rule is easily criticized as vague and arbitrary.

Yet there has developed a general perception (or, rather, a misconception) on the part of the Charity Commission and the sector that the level of resources applied to the activity is the decisive factor. This primary focus upon resources, whilst understandably often a significant feature, is without a firm legal authority and adds to the confusion in the interpretation and

---

<sup>14</sup> *Report of the Advisory Group on Campaigning and the Voluntary Sector* (London: Advisory Group, 2007) at [www.bateswells.co.uk/Files/News/CampaigningReport.doc](http://www.bateswells.co.uk/Files/News/CampaigningReport.doc) p2.

<sup>15</sup> UK charity law is administered according to three separate jurisdictions: England and Wales, Scotland and Northern Ireland. This paper covers England and Wales only, although parallels can be drawn with the other jurisdictions. The thirteen charitable purposes listed in section 2 Charities Act 2006 are: “the prevention or relief of poverty; the advancement of education; the advancement of religion; the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; the advancement of environmental protection or improvement; the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage; the advancement of animal welfare; the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; any other purposes within subsection (4).”

<sup>16</sup> Section 1A Charities Act 1993, inserted by section 6(1) Charities Act 2006. Under section 1B Charities Act 1993 (as amended) the Charity Commission’s statutory objectives are to increase public confidence in charities, promote understanding of public benefit, promote trustee compliance with legal obligations and effective use of charitable resources, and enhance charity accountability.

<sup>17</sup> See *Royal College of Surgeons of England v National Provincial Bank, Ltd* [1952] AC 631 *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 at 402 per Lord Reid.

<sup>18</sup> This definition comes from *McGovern v Attorney-General* [1982] Ch 321 at 334ff, per Slade J.

<sup>19</sup> It’s “a question of degree of a sort well known to the courts,” per Lord Normand *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 77.



application of the law. Moreover, it serves to inculcate a level of inequality between organizations. Those charities with greater financial resources can allocate funds more liberally on political activities and stay within the rules by virtue of a *proportionate* expenditure of their overall budget. Poorly resourced organizations on the other hand may more readily transgress the rules with a much lower campaign expenditure and will probably be less able to mount a wide-reaching campaign or to employ the necessary skills to increase their campaigning capacity.

The cumulative effect of the breadth of the definition of “political,” the shifting boundary of acceptable subsidiary activities, poor awareness of the rules, and the (mis)focus upon resource allocation often lead to the problem of self-censorship within organizations whereby trustees limit even legitimate political activity. It is worth emphasizing that it is not the case that charities cannot undertake political activities. Some are very organized in Westminster. The Samaritans, for example, recently set up its own all-party parliamentary group, and it is one of three charities that have done this, noting that the purpose was to promote “its brand” to Members of Parliament.<sup>20</sup> Other organizations are creating new roles specifically for lobbyists,<sup>21</sup> and a number of charities already have access to policy makers through privileged rights of entry to the Houses of Parliament.<sup>22</sup> Rather, the point is that the rules are vague and imprecise and limit the nature and extent of activities and tend to have a disproportionate bite on smaller organizations or those that lack financial or skill capacities.<sup>23</sup> One consequence of the rules, then, is that only a limited selection of sector organizations, neither representative of the whole nor fully engaging with the public, are able to get their voices heard by policy makers.

The rules restricting charitable purposes and activity were developed almost one hundred years ago and remain controversial, not least because they stand on uncertain legal authority.<sup>24</sup> Earlier cases, predominantly in the animal welfare field, had been prepared to demonstrate that the judiciary could be neutral on issues of political controversy and so determine charitable status of organizations whose purposes were intrinsically political.<sup>25</sup> These cases were later overruled by the House of Lords in *National Anti-Vivisection Society v Inland Revenue Commissioners*.<sup>26</sup> The justifications of the Law Lords were that the judiciary has no means of determining if a political purpose has public benefit; they cannot usurp the functions of the legislature or the executive in allowing a purpose that seeks to change the law or governmental decisions or policy; and in any event, the law is right as it stands and it would ill-behoove the judiciary to

---

<sup>20</sup> N Thomas, “Samaritans sets up own parliamentary grouping,” *Third Sector*, 7 February 2007, p7.

<sup>21</sup> N Thomas, “New role at Cancer Research for political lobbying,” *Third Sector*, 14 March 2007, p3.

<sup>22</sup> Register of Interests of Lords Members' Secretaries and Research Assistants, Session 2007-08, <http://www.publications.parliament.uk/pa/ld/ldsecret/080707/memi01.htm> Helen Warrell, “Lords access: ‘it’s who you know’,” *Third Sector*, 9 July 2008, p4.

<sup>23</sup> Some have argued that the concern with the effect of the rules on smaller organizations is overplayed because, according to the chief executive of Bassac, Ben Hughes, small groups “do not embark on structured mainstream campaigning,” citing instead the problem of skills and knowhow, cited in I Das-Gupta, “Political rules ‘do not harm small groups’,” *Third Sector*, 21 November 2007, p5.

<sup>24</sup> The House of Lords decision in *Bowman v Secular Society* [1917] AC 406 is taken as the modern starting point of the rule where Lord Parker, obiter, drew upon *De Themmines v De Bonneval* (1828) 5 Russ 288, 38 ER 1035. A general rule was laid down by the House of Lords in *National Anti-Vivisection Society v IRC* [1948] AC 31.

<sup>25</sup> In much the same way as the court stands neutral on issues of religion: *In Re Foveaux* [1895] 2 Ch 501 at 503 per Chitty J.

<sup>26</sup> [1948] AC 31, Lord Porter dissenting.

suggest otherwise by awarding privileged legal status to a group campaigning for change. Dissenting judicial views have sought to limit these rules to matters of acute political controversy rather than day-to-day political fare and to attempts to change Acts of Parliament only rather than repealing other forms of legal or policy rules or government decisions.<sup>27</sup> These alternative judicial approaches have also focused upon distinguishing the *means* by which a charitable purpose is achieved from the *end* itself: thus, if the ultimate aim of an organization is to ensure a charitable end—say, protection of the environment—the fact that the only means of achieving that aim is through a political act such as requiring or repealing an Act of Parliament does not of itself turn the charitable end into a political one. The consensus of judicial opinion, however, has favored a broad and deep approach to interpreting and restricting political acts.

Whilst there has been much academic concern with the law in this field,<sup>28</sup> there has been a clear and consistent voice from the government and the judiciary that these rules do not require revision. Indeed, calls for the law to accept greater political activity by charities have long been resisted by governments on the policy basis that the public need protection against “fundamentalism,” as do donors and taxpayers who may not wish their fiscal contributions used to further political ends that they may not hold or have not endorsed.<sup>29</sup> This view has also been adopted by some sector commentators, who fear that if the rules were to change, there could be hijacking of a charity’s campaigning ability to further corporate agendas or those of other powerful interests seeking to take advantage of a more liberal ability to lobby for political change and that this would not afford protection for the public.<sup>30</sup> Indeed, on broad policy grounds most common-law-based societies accept that charities advantaged by legal and taxation status should not support or be political parties. Nevertheless, most charitable objects rely upon some political means for their execution and it is at this juncture that the policy and legal rules become indeterminate.

### **(b) An agenda for change**

Recently, however, there has been a groundswell of support to revisit the rules on political campaigning by charities in England and Wales. A self-styled “Advisory Group” on campaigning and the voluntary sector, chaired by Baroness Kennedy, reported in May 2007 recommending that trustees of charities be able to engage exclusively in political activities in furtherance of their charitable objects, e.g. to eradicate the subsidiary rule.<sup>31</sup> The report noted the contradictions in the law, particularly in terms of the view that the court and the Charity

---

<sup>27</sup> Lord Parker’s in *Bowman v Secular Society* [1917] AC 406 had focused only on these matters. Dissenting views, such as those of Lord Porter and Greene MR in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 have tried to narrowly interpret Lord Parker’s dicta but subsequent cases have extended the rule to any political activity broadly defined.

<sup>28</sup> See for example, E Burt, “Charities and Political Activity: Time to Rethink the Rules” (1998) 69 *Political Quarterly* 23; M Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicholson, 1979); C Rickett, “Charity and Politics” (1982) 10 *NZULR* 169.

<sup>29</sup> See, for example, White Paper, *Charities: A Framework for the Future* Cm 684 (London, HMSO, 1989), chapter 2; *Private Action, Public Benefit* (London: Strategy Unit, 2002); *Charities and Not-for-Profits: A Modern Legal Framework* (London: Home Office, 2003).

<sup>30</sup> See N Seddon, *Who Cares? How state funding and political activism change charity* (London, Civitas, 2007).

<sup>31</sup> The *Report of the Advisory Group*, n 14 above at p5. It is probably no coincidence that Baroness Kennedy also chaired the earlier *Report of Power*, n4 above.



Commission were unable to determine the public benefit of controversial political issues at the same time as requiring them to assess public benefit in other contentious areas, such as in the case of independent schools.<sup>32</sup> It criticized the breadth of the construction of the term “political” and called for a clarification of the law and for an opening up of the legal rules to allow all political activities save support of political parties.<sup>33</sup>

In so doing, the report linked engagement of the public in the democratic sphere with liberalizing the charity rules. The report noted the public disengagement from the broad political sphere in terms of a lower propensity to vote, to trust in politicians, or to take up membership of political parties. The report also posited the view, as noted above, that at the same time as voter turnout has declined, members of the public have become more active in their communities as individuals and as members of voluntary and community organizations. Given this pressure from within organizations and their membership, it is argued, there is a natural progression to allow organizations more political leeway to harness the political will of their membership. To turn the policy rationale on its head: far from needing to protect the public from political activity by charities, the law should encourage the public to participate in democratic processes through such organizations. The Advisory Report thus took a two-handed approach to arguing for a revision of the rules in this field, reinforcing the questionable foundations of the law with the pressing policy need to reengage the public in the political sphere.

To different degrees a number of other reports have also emphasized the connection between participative and representative politics, advocating harnessing individual activism into a broader more formal democratic sphere.<sup>34</sup> It is certainly the case that membership of voluntary and community organizations has increased at a time when traditional political engagement has fallen. But there is little evidence to link the two or to suggest that membership of a charity or other voluntary and community organization that campaigns as part of its work equates with a political mandate for that organization from its members. There are, of course, many reasons why members may join an organization and for this reason alone membership doesn't necessarily indicate either that there is support for all of the charity's aims or that the members are politically engaged with the organization. As demonstrated in the context of UK voluntary and community organizations, it is usually the case that less than 10% of an organization's members will be “active participants,” and often membership of organizations occurs because the person joining wishes to have access to “information, advice, support and representation”

---

<sup>32</sup> Specifically the contradiction in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, where the House of Lords held that the public benefit to society in terms of the morality derived from preventing vivisection (the aim of the organization) was of lesser importance than the public benefit to the public in health terms derived from the science of animal testing. At the same time the House of Lords declared that the court could not determine the public benefit of a political purpose. Another contradiction, though not one noted in the report, is that a charity cannot have a purpose that attempts to change the law or governmental policy overseas, one rationale being that to do so could affect political and economic relations between this country and the country in which the charity undertakes its activities; yet nevertheless a charity could undertake a political campaign to achieve the same where it is ancillary to primary charitable purpose, even though that might affect political and economic relations in the same way.

<sup>33</sup> *The Report of the Advisory Group*, n14 above, p16.

<sup>34</sup> See, for example, *The Report of Power*, n4 above, G Blake et al, *Community engagement and community cohesion* (York, Joseph Rowntree Foundation, 2008).

rather than to support a lobbying issue.<sup>35</sup> Nevertheless charities and other voluntary and community sector organizations represent a tangible link between the public and the democratic process, whether through active participation or through awareness-raising. The central argument of the Advisory Report is that this link should be given the legal flexibility to develop more fully.

The Advisory Report, although ostensibly presenting little that was new in terms of analysis of the law, nevertheless tapped into the policy push for civic engagement and found favor in government circles, particularly with the then-Minister for the Third Sector, Ed Miliband. The timing was propitious. The Government's Third Sector Review, published shortly after the Advisory Group's report, set out four common goals for government and the sector, viz.: enabling voice and campaigning, strengthening communities, transforming public services, and encouraging social enterprise.<sup>36</sup> In terms of voice and campaigning, the Third Sector Review recognized the uncertainty in the current law, which requires political activities of charities to be no more than subsidiary to an acceptable charitable purpose. But whilst the Review underlined the overriding need for an organization to have a purpose charitable in law (i.e., not a political purpose or linked to a political purpose), it nevertheless appeared to accept that political means could play a more prominent role in achieving that charitable purpose since "it is surely possible, in a well-run charity, for political activity to be 'dominant' within a charity and yet still enable it to further its charitable purpose."<sup>37</sup>

This Review's acknowledgment of the role that political activities can play as a dominant activity was significant, and the first time a UK Government has put forward a view other than the need for charities to keep political activities in check to protect the public.<sup>38</sup> The government certainly did not take that view in the run up to the most recent revision of framework regulation, the Charities Act 2006, where it forcefully rejected the idea that the law should change on this issue.<sup>39</sup> Yet one year on, reconsidering the rules was thought significant enough to form a pledge in a Government Green Paper designed to develop a regulatory environment for a "modern Britain."<sup>40</sup> Sensing a wave of opinion in their favor, a coalition of charities, including sector umbrella bodies and those originally involved in the Advisory Group, sought an amendment to charity law through the Constitutional Reform Bill to allow charities to devote all their resources to political campaigning, excluding activities that would be party political.<sup>41</sup> Although this was

---

<sup>35</sup> G Jordan & W A Maloney, *Democracy and Interest Groups: Enhancing Participation?* (Basingstoke, Palgrave Macmillan, 2007), pp164, 130-131.

<sup>36</sup> *The future role of the third sector in social and economic regeneration: final report* Cm 7189 (London: HM Treasury and the Cabinet Office, 2007).

<sup>37</sup> Ibid, paras 2.30 -2.31. Creating the right enabling environment for advocacy and campaigning focused upon ensuring better consultations, building skills and capacity, and ensuring rights under the Compact, see para 2.27.

<sup>38</sup> See, for example, White Paper, *Charities: A Framework for the Future* Cm 684 (London, HMSO, 1989), chapter 2; *Private Action, Public Benefit* (London: Strategy Unit, 2002); *Charities and Not-for-Profits: A Modern Legal Framework* (London: Home Office, 2003).

<sup>39</sup> See *Charities and Not-for-Profits: A Modern Legal Framework* *ibid*.

<sup>40</sup> Green Paper, *The Governance of Britain* Cm 7170 (2007), 168.

<sup>41</sup> I Das-Gupta, "Coalition seeks legislation to permit political campaigning," *Third Sector*, 10 October 2007, p1.

ultimately unsuccessful,<sup>42</sup> the Charity Commission was separately instructed to take the matter forward by reconsidering its guidance to charities on political activities and campaigning to see if charities could be afforded greater scope in the political field.<sup>43</sup> This provoked impassioned discussion in the House of Commons on the propriety of changing the rules and eroding the public and taxpayers' protection from essentially political organizations, and eventually led the government's Third Sector Minister to some backtracking in debate.<sup>44</sup> Nevertheless, some members of the sector were hopeful that the Charity Commission's review of its guidance would prompt actual change, not least because of the groundswell of support and the extensive media reporting. With one proviso, this hope went largely unrealized.

### **(c) Charity Commission review**

As regulator, the Charity Commission provides guidance to trustees on a number of matters relating to the running and administration of charities. The Charity Commission first published guidance on political activities by charities in 1995 following an investigation the previous year into the activities of the charity War on Want, and this has been updated frequently since. The purpose of the guidance is to provide trustees with assistance, advice, and support in determining the regulatory boundaries between acceptable and unacceptable political conduct. The guidance does no more than interpret the law and explain the consequences for charities and their trustees of infringement.

With the law both ill-defined and far-reaching, providing guidance in this field is not to be underestimated.<sup>45</sup> In the past the Charity Commission has been criticized both for the guidance's often admonitory tone,<sup>46</sup> and its overemphasis upon risk-management.<sup>47</sup> As regulator, the Charity Commission has sought to explain the consequences to charity trustees of overstepping regulatory boundaries but in doing so has tended to draw those boundaries quite tightly, particularly in the law's gray areas. Indeed, on occasion, the guidelines have blurred good practice into legal principle and this has led to the further criticism that the Commission's guidelines fail sufficiently to encourage political conduct as a legitimate activity by charities and their trustees. In 2007, following a survey published by the Sheila McKechnie Foundation which had found that respondents were of the view that the guidance from the Charity Commission was

---

<sup>42</sup> The Advisory group is now seeking evidence for charities as case studies to show difficulties of the current law and guidance, see I Das-Gupta, "Advisory group to switch tack on campaigning law," *Third Sector*, 7 November 2007, p2.

<sup>43</sup> n36 above, para 2.32, referring to the *Report of the Advisory Group*, n14 above.

<sup>44</sup> In a House of Commons debate on the government's Third Sector Review, which took place in mid-October 2007, when Ed Miliband was pushed by Greg Clark, shadow charities minister, whether the government was in favour of charities using 100 per cent of their resources to campaign, he said that that was not his view (HC Deb vol 464 col 980-1056 18 October 2007). Phil Hope, current Minister for the Third Sector, in a letter to Third Sector, 7 November 2007, denied the government had backtracked.

<sup>45</sup> A point accepted by the Charity Commission and by the Government: Charity Commission *Leaflet CC9* (London: Charity Commission, 1995), para 8; White Paper, n38 above, para 2.38. See also *Private Action, Public Benefit*, n38 above, para 4.50 where the existing rules were described as "notoriously unclear."

<sup>46</sup> *Private Action, Public Benefit* n38 above, para 4.56.

<sup>47</sup> The emphasis on risk-management was particularly evident in the Charity Commission's 2004 guidelines, written after an earlier version of the guidelines was thought to be too cautionary in tone.

confusing,<sup>48</sup> the Charity Commission published supplementary advice.<sup>49</sup> This additional advice was welcomed by some within the sector as being more open and encouraging of campaigning than previous guidance, but uncertainty remained particularly with regard to the distinction between general campaigning (which is acceptable) and political campaigning (which is not).<sup>50</sup> Nevertheless, other research has found that the problem goes much deeper in the sense that some charities were generally unaware of the existence of the Charity Commission's guidelines or of the types of activity which will infringe the rules. Indeed, recent examples of infringement show a pervasive lack of understanding.<sup>51</sup> Given this fact, along with the already entrenched degree of self-censorship by charity trustees<sup>52</sup> and the penalties that can be imposed for infringing the rules,<sup>53</sup> it would appear that many charities are still misdirected when it comes to considering what political conduct they can legitimately undertake.

Following the Third Sector Review, the revised Charity Commission guidelines were considered by the Charity Commission at an open board meeting on 31 January 2008 and formally published in March.<sup>54</sup> An explanatory paper by Caroline Cooke, head of Regulatory Policy at the Commission, noted that the new guidelines were informed by changes in the environment in which charities operate, the lack of knowledge on the part of trustees of the guidelines, the phenomenon of trustee self-censorship, and a concern over maintaining public trust.<sup>55</sup> It should be noted at the outset that the guidelines are attendant upon the current and existing law since the Charity Commission fills no more than an interpretive role in this field. Given that the actual law has not changed and the Commission has no authority to alter the underlying legal principles, these revised guidelines do no more than attempt to clarify the existing guideline's explanatory language.<sup>56</sup> Were the Charity Commission to do otherwise, it would have been acting outside its statutory powers and have put itself in a position of conflict as

---

<sup>48</sup> See *Survey of Campaigning Activities and Charity Commission Guidance (CC9)* (London: nfpSynergy, 2006) at <http://www.nfpsynergy.co.uk/freereports/>

<sup>49</sup> Charity Commission, *Campaigning and political activities by charities – some questions and answers* (London, Charity Commission, 2007).

<sup>50</sup> See I Das-Gupta, "One step forward for campaigning," *Third Sector*, 25 April 2007, p10; N Thomas, "Call to rewrite campaign rules," *Third Sector*, 11 April 2007, p3.

<sup>51</sup> For example, on 3 January 2008 sixty-three organizations forming the British Muslim Initiative, of which sixteen were charities, posted a letter on the *Guardian* newspaper's website backing Ken Livingstone's bid for reelection as mayor of London, which contravenes the requirement not to support a political party or candidate. In addition, the Smith Institute think tank was found to have poor governance structures which did not ensure party political neutrality: Charity Commission, *The Smith Institute inquiry report*, 18 July 2008. nfpSynergy research, n48 above, found that up to half of charities surveyed were unaware or not sure about the Charity Commission guidelines. See also A Dunn, "Hippocratic Oath or Gordian Knot? The Politicisation of Health Care Trustees and their Role in Campaigning" (2007) 18 *King's Law Journal* 481-502.

<sup>52</sup> See nfpSynergy, n48 above.

<sup>53</sup> The Charity Commission has the ability to freeze bank accounts and seek injunctions to prevent activity. Excessive political activity may also prompt the Charity Commission to consider where the purpose of the organization is properly charitable.

<sup>54</sup> Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activities by Charities* (March 2008).

<sup>55</sup> *Campaigning and political activities by charities, Board Paper Number (08) OBM 3*.

<sup>56</sup> Noted within the guidelines, see Charity Commission, n54 above, para B2.

a body independent of Government influence.<sup>57</sup> Only primary legislation, revision by the Law Lords, or a determination by the new Charity Tribunal can formally change the existing legal rules. For this reason alone, the hope that the Charity Commission would provide sustained change was forlorn.

The Charity Commission's revised guidelines were drawn up with a focus group of sector representatives and their purpose is expressly to clarify confusion that has arisen over the use of terms "dominant" and "ancillary" activities used in previous guidelines to explain the subsidiary rule. The new guidelines avoid these terms and overall are more encouraging to trustees, emphasizing that political conduct can be a legitimate and beneficial course of action for a charity.<sup>58</sup> Where confusion remains, however, is in the phraseology that the Charity Commission has chosen to clarify the terms "dominant" and "ancillary." The new guidance takes a step back and makes a distinction between general campaigning activities, which can be pursued where they *further* charitable purposes, and political activities, which can only be pursued if they *support* charitable purposes.<sup>59</sup>

Although examples are provided of what could count as a general campaigning and a political activity in this role (*viz.*, the former includes issue awareness raising and calling for existing laws to be enforced, and the latter influencing political parties, responding to government consultations, and seeking public support for a change in the law), a definition of "furtherance" and "support" is absent and leaves the Charity Commission's guidelines with the same linguistic difficulty as before, if not a more serious one.<sup>60</sup> The difference between dominant and ancillary political activity is conceptually clear even if the precise boundary and the unit of analysis are not. The difference between "to further" a charitable purpose by campaigning and "to support" it by political campaigning is not conceptually clear and is hard to explain, and the boundary between the two is difficult to determine. One has to feel some sympathy for the Charity Commission, since they are only interpreting the law, an imprecise and confusing law at that, but these new guidelines may well create new confusion whilst not entirely ameliorating the original one. This is a significant point given, first, that the instruction to reconsider the guidance was to open up the field and, second, that research has shown that the greater "clear, coherent and consistent" structures and frameworks for community engagement, the greater the effectiveness in practice.<sup>61</sup> The same is true of the legal framework for political activity: clarity in communication encourages effectiveness in political participation, a point that may have been lost in the new Charity Commission guidelines.

That said, four points worthy of note come out of the revised guidelines. The first is the unprecedented emergence of an explicit statement that a charity can use most or all of its

---

<sup>57</sup> Under section 1A(4) inserted into the Charities Act 1993 by section 6(1) of the Charities Act 2006: "In the exercise of its functions the Commission shall not be subject to the direction or control of any Minister of the Crown or other government department." See also comments of Francesca Quint in J Plummer, "Is this a new dawn for political campaigning?," *Third Sector*, 22 August 2007, p16-17.

<sup>58</sup> Charity Commission, n54 above, para B2, C2, E1, G1, Appendix 1.

<sup>59</sup> *Ibid.*, n54 above, paras A1, C1

<sup>60</sup> "Contributing to the achievement of the purpose" is sometimes used in the guidance as an alternative to "support," see *ibid.*, paras C1 and C5.

<sup>61</sup> Blake et al, n34 above, p36 drawing on the experience of community cohesion and community engagement strategies in three case studies.

resources on a political campaign provided that the political campaign is not the only activity that the charity carries out and that it does not become the sole reason for the organization's existence.<sup>62</sup> This approach has been criticized for creating a situation whereby organizations could finesse the rules by nominally undertaking a second activity to justify the primary political activity. If this were the case the organization would become essentially political in nature but be able to retain its charitable status through *de minimis* alternate activities.<sup>63</sup>

This criticism, however, reflects a lack of understanding of both the current law and of the inability of the Charity Commission to change the rules. It has never been the case that charities could not devote most or all of their resources to a political campaign. The subsidiary criteria have always enabled charities to do this, albeit for a short period of time and provided, crucially, that the political activity is a legitimate means to achieve the charitable outcome.<sup>64</sup> As noted above, in determining whether an activity is subsidiary, the courts examine a number of factors, putting the political campaign in the context of the overall work and resources of the charity. The recognition that this is the case puts the Charity Commission's guidance more in the line with the actual law and is to be welcomed as providing more accurate and encouraging advice to trustees in terms of planning and carrying out political activities.

However, whether this change in the guidelines will be successful in terms of encouraging charity trustees to enter the political arena remains to be seen, particularly in the case of trustees of smaller or less experienced organizations. As noted above, one problem under the current law has not been the law itself, but the lack of awareness amongst charity trustees across the whole sector (i.e., beyond the larger, more organized and politically active organizations) of their rights to undertake political activities. This pervasive lack of understanding extends beyond the regulation to knowledge of the existence of the Charity Commission's guidelines and to the relevance of the guidance to the work of a trustee's charity. The Charity Commission's encouragement of trustees to undertake political activity as a beneficial action in its newly reissued guidelines will amount to little if the much broader process of educating trustees on the nature and extent of their role and their ability to seek to influence the policy process is not undertaken too.

Second, these new guidelines raise the possibility of "regulation creep" with regard to the understanding of a "political" act. Mr. Justice Slade in *McGovern v Attorney General* made it clear that the term "political" encompassed activities that furthered the interests of a political party or cause or that sought to change the laws, policies, or decisions of UK or other governments.<sup>65</sup> In terms of government policy and decisions, this has been broadly interpreted to include not just government departments but also agents of the government that can make policy or governmental decisions. Given the current plurality of government and the extension of public bodies, particularly through the outsourcing of government activities (such as service delivery), this is entirely appropriate within the ambit of a "political" activity. To that end the Charity Commission's guidance makes clear that government should be construed widely, suggesting as

---

<sup>62</sup> Charity Commission, n54 above, paras C1, C5-6.

<sup>63</sup> "It creates a whopping great loophole: any charity could make political campaigning its dominant activity so long as it took a single other activity, however small," N Seddon, "Beware the rise of the political charity," *Third Sector*, 6 February 2008, p15.

<sup>64</sup> See Charity Commission, n54 above, paras C1 and C3.

<sup>65</sup> n18 above.

agencies of government the “UN, EU and its bodies, World Bank, NHS trusts, regional assemblies, non-departmental public bodies and agencies except registered charities.”<sup>66</sup>

But a crucial nuance here is not transparent in this guidance or in its earlier incarnations.<sup>67</sup> A body that makes a decision in its capacity as an agent of government and that relates to a matter properly deemed government policy or a government decision will fall within the rules and any attempt by a charity to seek a change in those policies or decisions will be properly regarded as a political act. But the same body that makes day-to-day decisions not pertaining to government policy or government decisions or undertakes other policy matters outside their agency role should not fall within the rules. So any attempt by a charity to seek a change in these latter policies or decisions will not properly constitute a political act under the *McGovern* definition.

Yet the Charity Commission’s guidance focuses upon the *actor* being lobbied rather than the real trigger for political engagement, the *action* that the actor undertakes. Focusing simply on the actor widens the net of the regulation and brings into its scope many activities by bodies that charities may wish to challenge or seek to change but which, following Charity Commission guidance, they could be reluctant to do so, categorizing the activity as political. Of course, it is often difficult in practice and without sufficient information to draw a line between the two, but trustees need to be aware of the distinction that the law makes. It also follows that despite the guidelines’ exclusion of them, registered charities or indeed any organizations that undertake service delivery could qualify as public bodies making government decisions or policy, depending on their scope to act.<sup>68</sup> If that is the case, they would also fall within the rules. The application of the regulation thus widens in two directions: one through a lack of detail in the Charity Commission guidelines to all activities of government agents, and the second at a policy level through the increasingly modern trend of using charities and other sector bodies to fulfill state functions.

The third point to arise from the new guidelines is recognition that some purposes defined as charitable in section 2 of the Charities Act 2006 could be interpreted as more explicitly political than others. Four in particular stand out: the promotion of human rights, the advancement of animal welfare, the prevention of poverty, and the advancement of citizenship and community development. It has always been the case that some heads of charity are more intrinsically linked to a political agenda than others. Organizations working in the field of human rights, for example, have had to tread a careful line, particularly in terms of questioning overseas government policy. Intriguingly, the Charity Commission appears to suggest that there may be some room to maneuver in these fields by providing more “tailored guidance,” yet presumably still remaining within the boundaries of campaigning work supporting a charitable purpose.<sup>69</sup>

---

<sup>66</sup> Charity Commission, n54 above, para B5.

<sup>67</sup> A Dunn, n51 above, pp492-493.

<sup>68</sup> Charities providing care home services were rejected as public bodies for the purposes of human rights legislation by the Court of Appeal in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 on the basis that the contract between the charity and the local authority determined the nature of their relationship as private. But the House of Lords in *YL v Birmingham City Council* [2007] 3 WLR 112 linked the for-profit status of an organization providing service delivery as a determining factor in whether it was a private body, leaving scope for future interpretation of nonprofit organizations to be classed as public bodies.

<sup>69</sup> Charity Commission, n55 above, paras 10-11

The proposal suggested is that the Commission look at individual heads of charity, starting with human rights charities, and consider where there might be greater scope for political activity.

Certainly there has been the argument that the rephrasing of some purposes in the Charities Act 2006 must inherently admit of a political program, e.g., specifically “prevention” (rather than relief) of poverty and “promoting” human rights, which involve, respectively, looking at the root causes of poverty and upholding international law for human rights.<sup>70</sup> While welcome for those specific categories of charity, this approach will be questionable if it does not provide parity for all organizations, whatever category of charity they fall within. If the enduring legal and policy rationales have been that the court cannot assess public benefit for a political purpose and that the public, donors, and taxpayers require protection, then to decide otherwise for some heads of charity and not others would be more than a little perverse, particularly given the irony that it was organizations operating in these very fields which first prompted the judicial rule against political purposes and activities a century ago. If there is a rationale to allow some charities more freedom to politically campaign, then there is no policy argument to restrict others across the board.<sup>71</sup>

A final point is that there is a proviso to the earlier suggestion that the Charity Commission guidelines do not change the law, and that proviso rests on the distinction between the law’s tenets and its application. Despite the fact that the Charity Commission has essentially done no more than undertake an exercise in re-explaining the current law, the regulator’s own approach to applying its guidelines may prompt a change in practice. It remains to be seen whether, following the new emphasis in the guidelines on devoting time and resources to political activities as a beneficial activity, greater leniency is afforded by the Commission as regulator in enforcing the rules and whether there is over time a change in its practice of registering as new charities organizations that are ostensibly political in nature, such as campaigning groups. If the latter occurs, a challenge to that practice brought before the Charity Tribunal or subsequently a higher court would allow for more formal judicial reconsideration of the cogency of the current rules and for the opportunity to either reject the Charity Commission’s approach or accept that the social and policy environment has changed since the political activity rules were first established in 1917. Thus, although initially the Charity Commission’s guidelines do not seem ground-breaking *per se*, they may well prove to be a significant turning point in the long term.

### **III. Conclusions**

It is evident from the recent debates and reinterpretations of framework laws restricting the political activities of charities in England and Wales that the regulatory environment has not moved as far as the social or policy context. Whilst charities can undertake political activities, they may do so only in limited circumstances underpinned, first, by a body of case law that has doubtful provenance and, second, by a far-reaching understanding of what encompasses a political act. The failed attempts to refresh the law in this field emphasize the difficulties that charities have in responding to a policy push for democratic renewal through engaging with the public at a participative political level in terms of grassroots civic engagement and upwards

---

<sup>70</sup> Letter of Rosamund McCarthy, *Third Sector*, 12 September 2007, p13.

<sup>71</sup> There is the hint that it may ultimately lead to changes across all heads: Charity Commission, n55 above, para 11.



advocacy. Whilst the evolution of legal rules is traditionally slow, the mismatch between the regulation and the policy context can create tension where organizations are encouraged to take part in civic engagement but are not given all the legal tools to do so.

Where regulatory barriers are set too high, they can counteract a push for policy development. There is a need to continually reevaluate whether the purpose of the regulation is still feasible and expedient. In recent years, the trend of charity regulation in England and Wales has been to ensure transparency, good governance, operational efficiency and protection both of those that interact with charities, such as users, beneficiaries, donors, and volunteers, and of members of the wider public, who place trust in the charity “brand.”<sup>72</sup> One policy behind this trend is a concern with proper financial management of public resources, heightened recently by allegations of the abuse of charities as channels for terrorist financing.<sup>73</sup> Although it is clearly necessary to ensure that there is appropriate fiscal governance of charities and that criminal behavior is not allowed to flourish, it is also important to ensure that regulation is appropriate for the circumstances. The legal and policy purpose of the regulation of political activities of charities has rarely been judicially reasoned or rationalized in a modern context. The confusion evident in practice over the scope and interpretation of the legal rules shows why regulators urgently need to reappraise the appropriateness of these restrictions in the current policy climate and ensure that the rules remain proportionate to their aims.

It is also clear outside the regulatory framework that there is a pressing need for greater education of charity trustees. Quite often medium and smaller charities do not take advantage of the legal process, not because they are uninterested in doing so, but either because they lack the appropriate skills or knowledge base or because they have little awareness of the full range of permissible political activities open to them. Urgent investment needs to be made by policymakers and the Charity Commission as regulator in providing education and capacity building outside the guidelines to trustees and their organizations in this field.

The renewed interest in the political activities of voluntary and community sector organizations highlighted above in the recent interpretive developments of charity framework laws comes at a time when transparency in lobbying is in the public eye.<sup>74</sup> Sector evidence given to the Parliamentary Public Administration Select Committee on lobbying has emphasized that there should be informed public debate on political issues but that corporate and private interests should not have more influence or greater access than other groups to the policy or decision-making processes.<sup>75</sup>

---

<sup>72</sup> See *Private Action, Public Benefit*, n38 above, *Charities and Not-for-Profits: A Modern Legal Framework*, n38 above.

<sup>73</sup> See Home Office and HM Treasury, *Review of Safeguards to Protect the Charitable Sector (England and Wales) from Terrorist Abuse: A Consultation Document* (Home Office, May 2007) followed by Home Office and HM Treasury, *Review of Safeguards to Protect the Charitable Sector from Terrorist Abuse: Summary of Responses and Next Steps* (December 2007).

<sup>74</sup> The Parliamentary Public Administration Select Committee chaired by Tony Wright MP launched an ongoing inquiry into the lobbying industry on 21 June 2007, considering in particular if there should be external regulation of lobbyists to encourage transparency over the activities lobbyists undertake and for whom and for what agenda they undertake them.

<sup>75</sup> Minutes of evidence taken by the committee, 15 May 2008, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpublic/c137-vii/c13702.htm>

The need for the public to be engaged but also protected from lobbying agendas being hijacked by private or extreme political interests underlies much of the regulation in this field, and striking a balance between the two is not always easy. It is not just between the voluntary and community sector and other organizations that there is a difficulty. Striking a balance between organizations *within* the voluntary and community sector can be difficult when interpretation of the law tends to favor larger, more organized, and well-resourced organizations that are not always representative of the whole sector or of the issues with which the sector is concerned. Indeed, the rules restricting charitable political activity provide us with a recognition that whilst it is not the purpose of the regulatory framework to ensure that all organizations are equal in terms of their *ability* to contribute to the democratic sphere (which should be left to general market forces), it is the law's responsibility to provide a framework whereby all organizations are equal in terms of their *opportunity* to act.

As such, the law should create a level regulatory playing field between organizations within the sector and between sector organizations and other organizations, such as for-profits. Failure to do so creates particular tension where the sector is drawn into public engagement through the government's civic renewal and community cohesion programs but not given a broader and equal platform to campaign. In the civic engagement agenda, there must be support for the entire voluntary and community sector, most obviously through the regulatory framework to enable charities and other organizations to deal with the communities on the ground, but also to combat policy difficulties through upwards advocacy. Research has shown that there are barriers "to getting heard" within communities, for example through lack of opportunity, poor communication, or of internal community divisions,<sup>76</sup> but nevertheless cohesion and political engagement through the regulatory framework remains a necessary component. Ensuring that all are provided with a voice also means translating that upwards to policy-making. Access to formal political structures is important in terms of "opening pathways to decision-making processes"<sup>77</sup> and that is why the voluntary and community sector, and charities in particular, require a sustained and sustainable opportunity to engage with the public at a political level and to help promote participative democracy.

---

<sup>76</sup> Blake et al, n34 above, pp31-32.

<sup>77</sup> Ibid., p49.

*Europe*

## **Financial Reporting in European NPOs: Is Now the Time for a Common Framework?**

**Claudio Travaglini<sup>1</sup>**

### **INTRODUCTION**

The role of the nonprofit sector in the European Community is widely recognized by the Commission and European Parliament,<sup>2</sup> which look to these organizations to promote the development and integration of EU citizens in activities relevant to the societies of member states. Recognizing the importance of these enterprises, European central bodies seek to promote growth through funding programs for training and professionalization and through communications that define the roles and the operations of these entities.

This social economy or Third Sector is very heterogeneous, not only in the types of organizations and operations, but also in the types of relationships with civil society and especially in reporting and accounting practices (Jerger and Lapsley, 1998). The European Commission and Parliament have largely avoided issuing specific rules for financial reporting applicable to all players in the social economy. (Not-for-profit enterprises engaged in business, mainly cooperatives and social cooperatives, are covered in an indirect way by the Community directive in accounting.) A large area of doubt results, particularly concerning associations and foundations, which makes it difficult to gauge the results of these actors' contributions to the social economy. The gray area, paradoxically, covers just those types of entities that have become more pervasive within civil society and that are especially well positioned to promote integration among EU citizens.

The enlargement of the Community to twenty-five nations, connected with the free movement of people and activities, raises to extraordinary importance the need for a framework for nonprofits to report accounting information and a model annual budget that are common to all European states. Developing a common framework requires an analysis of national accounting models, including the role of cultural factors (Doupnika and Riccio 2006). It is therefore vital to develop cultural and legislative analyses for those countries that have imposed accounting requirements on players in the Third Sector. Through these analyses, we may derive a path for the creation of a single accounting model.

---

<sup>1</sup> Claudio Travaglini, [claudio.travaglini@unibo.it](mailto:claudio.travaglini@unibo.it), is a Professor in the Department of Management at Bologna University in Italy.

<sup>2</sup> "The importance to the European economy and society of cooperatives, mutual societies, associations, foundations, and social enterprises (which together are sometimes referred to as the Social Economy) is now receiving greater recognition at Member State and European levels. Not only are they significant economic actors, they also play a key role in involving their members and European citizens more fully in Society. Social Economy enterprises are helping to meet the demands of a changing Europe. They are important sources of entrepreneurship and jobs in areas where traditional 'investor driven' enterprise structures may not always be viable."  
(<http://ec.europa.eu/enterprise/entrepreneurship/coop/index.htm>)

This article seeks to highlight possible areas of overlap in accounting models, through an analysis of accounting regulations applicable to not-for-profit organizations in the United Kingdom, Spain, and Italy.

## **A COMPARISON**

The accounting reports for a nonprofit aim to inform the stakeholders about the institutional mission and the means by which the organization has used resources in carrying out its activities, gauged in light of its nonprofit nature (Travaglini 2005). Although the comparison can only start from an analysis of the rules on accounting reports, a prerequisite is understanding the procedures for training and identification.

The comparison between the methods chosen by each state to regulate the accounting reports of nonprofit entities, in my opinion, must also highlight the technical process of formal accounting and the integration of nonprofits' accounting in the model of any national or international principles and procedures for accounting and publicizing the results.

The process of harmonizing accounting requirements for the Third Sector is taking place in Europe at different speeds. All countries, however, intend to work toward national accounting standards or principles and reporting requirements for nonprofit organizations. There is some opposition toward integrating the models of accounting for nonprofit entities with international accounting standards. Some national bodies, responsible for regulating accounting and reporting of nonprofit entities, seem to be aware of the need to make the process more transparent and provide more useful information concerning the management of the organizations. The result may be new frameworks, perhaps borrowing from those of other countries or perhaps developed from scratch.

Instead of regulation by the European Commission and Parliament, the individual states appear to be ready to develop national schemes that may in turn converge on generally compatible accounting and reporting requirements. Which approach is preferable is a debatable matter.

## **THE UNITED KINGDOM**

The United Kingdom has a centuries-long history of regulating nonprofits, dating back to 1601 and the Statute of Charitable Uses. "However, it was only with the advent of the Charities (Statement of Accounts) Regulations 1960 (SI 1960 No. 2425) that charities were required to keep proper books of accounts, prepare financial reporting consisting of an income and expenditure account as well as a balance sheet, and keep those records for at least seven years" (Chitty & Morgan (2001), quoted in Cordery & Baskerville, 2007, p.11).

Today, the economic and financial reporting of nonprofits in the United Kingdom is governed by Accounting and Reporting by Charities: Statement of Recommended Practice (SORP). The current SORP is the result of continuous updating since 1988.<sup>3</sup> It took several adjustments to adapt the model of reporting to the needs of nonprofit entities and to bring it into line with the different accounting standards and financial institutions in the United Kingdom. The SORP currently in force is the result of a dialogue between the members of Charity

---

<sup>3</sup> For evaluations of the impacts of regulation on British charity, see Bird & Morgan-Jones 1981, Ashford 1989, Gambling, Jones, Kunz & Pendlebury 1990, Hines & Jones 1992, Williams & Palmer 1998, and Connolly & Hyndman 2000.

Commission and the Accounting Standards Board. The interaction has resulted in a model of reporting consistent throughout the UK based on accounting standards for small businesses that refer to specific International Accounting Standards.

The SORP aims to provide a clear and transparent representation of the activities and financial standing of nonprofit entities with an annual income exceeding £ 100,000. The charity Commission seeks to enable citizens to compare the results and activities of organizations operating within the national territory, as well as to give operators of those organizations a guide for compliance.<sup>4</sup>

The model annual report that the SORP proposes provides a series of qualitative information, such as describing the evolution of the nonprofit during the accounting year of reference, as well as quantitative data. The SORP Annual Report must include the following:

- a) Reference and Administrative Details of the Charity, its Trustees and Advisors: This information specifies the nonprofit, its directors, and any independent or dependent auditor.
- b) Structure, Governance and Management: The nonprofit must state its internal organization, its choice of legal form, and its governance structure and rules.
- c) Objectives and Activities: The institution must highlight its objectives, role, and methods.
- d) Achievements and Performance: The activities must also be shown through performance indicators or sectoral comparisons, to highlight the role and importance of nonprofit. This section must include fundraising activities and results.
- e) Financial Review: This section should present the financial position of the entity and explain the reserves and the change that occurred over the previous period, giving reasons for such change.
- f) Plans for Future Periods: Here the nonprofit should present its objectives and plans for the next accounting year.
- g) Statement of Financial Activities: This document accounts for how the nonprofit has used its resources.
- h) Balance sheet: This document discloses assets and liabilities, including intangible assets.

---

<sup>4</sup> The accounting recommendations of this SORP are based on Financial Reporting Standards currently in issue and have been developed in conjunction with the Charities SORP committee, an advisory committee made up of charity finance directors, charity auditors, academics, charity advisers and charity regulators. The committee is also structured to reflect the different charity jurisdictions of the UK. Sector involvement has been a central part of producing this SORP. The research, input and feedback provided by the sector and the SORP Committee has informed each stage of its development. The resulting document provides a platform for transparent and consistent reporting by charities. The Commission would like to thank the SORP Committee, and all those who responded to the consultation on the exposure draft as well as all those who prepared research papers and publications that have informed this SORP's development. (Accounting and Reporting by Charities: Statement of Recommended Practice, 2005)

- i) **Cash Flow Statement:** The document supplements the Statement of Financial Activities, representing cash flows, their origins, and their uses.
- j) **Notes on the Accounts:** Here the nonprofit should explain the accounting standards used and how they were interpreted.

The document is then drawn up under the supervision of auditors, who may be independent (an independent person who is reasonably believed by the charity trustees to have the requisite ability and practical experience to carry out a competent examination of the accounts) or internal, depending on the income levels of the nonprofit:

Gross Income of Charity	Minimum Permitted Scrutiny of Accounts
< £10,000	Approval of accounts by trustees only - no external scrutiny require
£10,000 to £250,000	Independent examination by an examiner of the charity's choice
£250,000 to £500,000	Independent examination by a professionally qualified examiner
> £500,000	Audit by a registered auditor

SOURCE: GARETH G. MORGAN, 2006

Once approved, the annual report is lodged at the Charity Commission, which makes the information publicly available.

## **SPAIN**

In Spain the rules of accounting for nonprofits were promulgated by Royal Decree 776/1998, de 30 de abril. The decree imposes a model derived from the Plan Countable General usually applied to commercial entities. The result has allowed the integration of accounting models, but without modification in light of the real needs of nonprofits. The Spanish model, however, is still relatively young, so it may be premature to judge its operation.

Spain provides two standards, depending on the value of a nonprofit's assets, the level of its revenues, and its average number of employees. Smaller nonprofits are subject to fewer accounting rules.

The "model de cuenta anuales" includes these requirements:

- a) **Balance:** This document lists balances, debts, and equity.
- b) **Cuenta de resultados:** This document aims to explain the economic situation of the nonprofit, integrating information on receipts and expenditures.
- c) **Memory:** This document, predominantly qualitative, gives information relating to the organization, its administrators and governing bodies, as well as information on changes during the accounting year.

A comparison of the two models shows that both nations first proposed a general pattern of reporting, which was then revised and supplemented with the help of national accounting organizations. The result seeks to harmonize regulators' need for information with nonprofits' situations.

<b>Country</b>	<b>Regulatory body</b>	<b>Acts and Standard</b>	<b>Basis of Accounting</b>	<b>Annual Report</b>
<b>UK</b>	UK GOV.	1993 Charities Act 1995 Charities (accounts and reports) Regulations 1997 Charities (annual return) Regulations	Accrual (cash accounting is allowed for small entities)	Reference and Administrative Details of the Charity, Its Trustees and Advisors; Structure, Governance, and Management; Objectives and Activities; Achievements and Performance; Financial Review; Plans for Future Periods; Statement of Financial Activities; Balance Sheet; Cash Flow Statement; Notes on the Accounts
	Charity Commission	1988 SORP Statement of Recommended Practice: Accounting by Charities		
<b>SPAIN</b>	Spanish Gov.	1964 Association Act and the Royal Decree of 1994 National Foundations Act	Accrual	Statement of Financial Activities; Balance Sheet; Notes on the Accounts
		1998 Chart of Accounts		
	AECA	ED for the Accounting in NPO's		

SOURCE: TORRES & PINA

The UK has preferred to harmonize with the SORP accounting standards based on English accounting standards. The result looks relatively deeply into specific issues. The Spanish system, by contrast, is heavily influenced by the culture and structures of accountability of continental Europe.

Though the evolutionary path was almost the same, the documents differ in terms of content. The British annual report is more comprehensive and complex in the information requested. The English model seems to give greater attention to the role of auditors and

emphasizes making the results public. In terms of the information requested, though, the two are similar.

	UK	SPAIN
<i>GAAP and national accounting standards incorporated</i>	Accounting standard incorporated: Statements of Standard Accounting Practice (SSAPs); Financial Reporting Standards (FRSs); Urgent Issues Task Force abstracts (UITFs);	Integrations of accounting principles: Principio de Prudencia; Principio de entidad en funcionamiento; Principio de Registro; Principio del Precio de Adquisición; El Principio del Precio de Adquisición deberá respetarse siempre; Principio de Correlación de Ingresos y Gastos; Principio de No Compensación; Principio de Uniformidad; Principio de Importancia Relativa.
<i>Incorporation of accounting International Accounting Standard</i>	Partial (IAS 10, 22, 29, 32 e 39)	In progress

## ITALY

The process of promoting a model of annual report for nonprofits in Italy is taking its first steps. The Italian Agency for Onlus recently approved the document "Guidelines and Schemes for the Preparation of Balance Sheets of a Nonprofit Entity." The document, of a non-binding nature, is directed at nonprofits with revenues exceeding € 100.000,00. It aims to promote uniform accounts that allow comparisons over time and among the various actors. The Italian document listing requirements, drafted with the help of academic experts and accountants, has yet to integrate national accounting standards. Accordingly, it remains embryonic.

The accounting model proposed in Italy provides for the compilation of four documents, which will be reduced to two for smaller entities (accounts of receipts and payments along with Notes). The full version requires the following:

- a) Balance sheet: The document follows the proposed model of the balance sheet for commercial entities, except that commercial entities must get an external audit.
- b) Cash management: The document compares income and expenses for the year in dual sections, as with the Spanish model.



- c) Notes: The document describes the entity, its governance structure, and its changes during the year, as well as the accounting principles followed.
- d) Mission report: The document lists the aims of the nonprofit and the means through which it pursues them, along with indicating the stakeholders.

The guidelines proposed by the Italian government are less detailed than those of the other two countries, but these are simply a point of departure. Italy generally follows the Spanish structure, though Italy requires less of smaller entities and requires non-accounting information as to the organization's mission. Though Spain and Italy require comparable information—a record of accountants' findings—the two Mediterranean countries impose no requirement of disclosure.

## **CONCLUSION**

The UK, Spain, and Italy impose many similar requirements. The differences largely reflect local cultures and the role of nonprofits. The principle of standardization itself is the first point of overlap. So is the idea of consulting with national accounting organizations and heeding national accounting principles.

Perhaps the next step is to implement international standards. The result would allow comparison of different nations' Third Sector organizations. The standards might require an account of the overall economic situation, balance sheets, and a qualitative description of the organization and changes that occurred during the year. Development of an accounting framework that could cover all European nonprofits would begin by emphasizing the common points that now exist and try to resolve those small differences among them, such as the arrangements for publicity and review of accounting data.

## **REFERENCES**

- Agenzia per le ONLUS, Linee guida e schemi per la redazione dei bilanci di esercizio degli enti non profit, Milano, 22 Maggio, 2008
- Charity Commission (2003), "Charity Accounts: The Framework," CC61, <http://www.charity-commission.gov.uk>.
- Charity Commission (2004), "Charity Commission," <http://www.charity-commission.gov.uk>.
- Charity Commission (2005a), "Accounting and Reporting by Charities: An Exposure Draft of the Statement of Recommended Practice," <http://www.charitycommission-uk.gov.uk>.
- Charity Commission (2005b), "Facts and Figures," <http://www.charitycommission.gov.uk>,
- Chitty, D. and Morgan, N. (2001), "Charities an Industry Accounting and Auditing Guide," London: Institute of Chartered Accountants in England and Wales.
- European Commission, (1997). Promoting the role of voluntary organizations and foundations in Europe. Luxembourg, Office for Official Publications of the European Communities.
- Doupnika, T.S., and E. L. Riccio (2006). "The influence of conservatism and secrecy on the interpretation of verbal probability expressions in the Anglo and Latin cultural areas " *The International Journal of Accounting* **41**(3): 24.

- Hyndman, N.S. (1990). "Charity accounting: an empirical study of the information needs of contributors to UK fund raising charities," *Financial Accountability & Management*, 6, pp. 295–307.
- Real Decreto 776/1998, de 30 de abril, por el que se aprueban las normas de adaptación del Plan General de Contabilidad a las entidades sin fines lucrativos y las normas de información presupuestaria de estas entidades
- Travaglini, C. (2005). *Un primo quadro interpretativo per l'analisi dei bilanci delle aziende nonprofit*. First European Istr- Emes, Parigi.
- Torres, Lourdes & Vicente Pina, (2003), "Accounting for accountability and management in NPOS. A comparative study of four countries: Canada, the United Kingdom, the USA and Spain," *Financial Accountability & Management*, 19(3),263-285.

## **Europe**

# **Why Is the European Foundation Statute Needed?**

**Gerry Salole<sup>1</sup>**

As the foundation sector continues its growth and internationalization, it is becoming increasingly evident that foundations need a European-level legal tool, the European Foundation Statute, in order to operate effectively with optimal impact on public good. Recent research suggests that there are currently no fewer than 95,000 public benefit foundations in 24 EU Member States.<sup>2</sup> Foundations in the EU have seen dramatic growth over the past 15 years. In nine countries (Belgium, Estonia, France, Germany, Italy, Luxembourg, Slovakia, Spain and Sweden), 43% of foundations were set up during the last decade.<sup>3</sup> The current operating environment does not, however, take into account the enormous growth of the sector and its internationalization in our globalized society.

The European Foundation Centre (EFC) demands a debate on improving the sector's environment, taking into account the specific needs of foundations and their funders. Foundations' characteristics and needs should be understood before a new legal instrument can be discussed. While even within the EU each Member State has a slightly different understanding of what foundations are, the EFC has developed a functional definition of foundations. Foundations are independent, separately constituted nonprofit bodies with their own established and reliable sources of income. They are usually but not exclusively funded by an endowment, and have their own governing boards. They have been given goods, rights, and resources to perform work and provide support for public benefit purposes, either by supporting organizations or individuals or by operating their own programs. They do not have members, but associate private resources for public interest purposes.

### **Internationalization**

Like other entities, foundations are increasingly working across borders, and have every right to operate on a European-level playing field. In 2007 two-thirds of EFC members were working across borders and active outside their country of origin.<sup>4</sup> Individual and corporate donors are more mobile, and increasingly have assets or investments in several countries. The internationalization of foundations' work stems from the international nature of the complex problems that foundations seek to address. Issues such as migration, global health, and the environment do not stop at national borders. The international interest of founders, their rising geographical mobility during their working lives and upon retiring, and the related increased geographical spread of their assets across Europe and beyond also mean that foundations are more likely to be working and investing across borders. But laws are not keeping up with these trends. Foundations often have to open branches in several countries. Europe should allow foundations to pool resources for public benefit projects. The European Foundation Statute could foster the removal of national barriers to foundations. Since

---

<sup>1</sup> Gerry Salole is Chief Executive of the European Foundation Centre.

<sup>2</sup> "Foundations in the European Union: Facts and Figures," May 2008, p.7, available at [http://www.efc.be/ftp/public/EU/EURweb/EFC-RTF\\_EU%20Foundations-Facts%20and%20Figures\\_2008.pdf](http://www.efc.be/ftp/public/EU/EURweb/EFC-RTF_EU%20Foundations-Facts%20and%20Figures_2008.pdf). Lithuania, Malta and Romania do not yet have their figures.

<sup>3</sup> "Foundations in the European Union: Facts and Figures," May 2008, p.8

<sup>4</sup> Based on the information in EFC member profiles for approximately 200 members.

EFC's creation in 1989, increasing numbers of foundation members have launched joint projects and programs. EFC's members are important drivers of European civil society, fueling organizations on the ground and contributing to EU policies which promote and develop civil society.

### **Economic weight**

The foundation sector also has considerable economic weight in terms of its asset base, expenditure, and employment rates, which were examined in a recent EFC study.<sup>5</sup> A sample of 55,552 foundations in 15 countries found combined assets of some €237bn, an average of €4m per foundation, based on 2005 data.<sup>6</sup> The 58,588 public benefit foundations surveyed in 14 EU countries reported total spending of €46bn, an average of €1m per foundation.<sup>7</sup> The foundation sector plays an important role in the labor market for both salaried and voluntary workers. Not only do they act directly as employers themselves, but by funding organizations and individuals in the non-profit sector they indirectly support employment and voluntary engagement in their areas of interest. In ten EU countries (Belgium, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, the Netherlands, and Spain), according to figures mostly from 2005, some 34,400 foundations employ a total of 311,600 staff, which makes an average of nine employees per foundation.<sup>8</sup> Volunteering remains an important feature of the foundation sector. The 31,800 foundations sampled in seven EU countries (Belgium, Finland, France, Germany, Hungary, Italy, and Spain) have 231,600 volunteers, an average of seven volunteers each. We also need to bear in mind that the figures do not include the total employment created or sustained by foundations. Many foundations give grants or provide capital support to employment-creating and sustaining initiatives in the fields in which they operate. Their contribution to employment creation should therefore be interpreted in this larger context.

### **Barriers to foundations' work**

Foundations that could in terms of their asset base and international orientation make a difference to public good at the European level currently face the frustration of administrative, legal, and fiscal barriers to their work. The EFC has examined the differences in European foundation laws and concluded that the operating frameworks of foundations in the EU are diverse.<sup>9</sup> This is a richness deeply rooted in the legal traditions as well as cultural and socioeconomic development of the countries concerned. At the same time it gives rise to operational barriers and hindrances to cross-border work and cooperation of foundations and their funders, who have to struggle with very different national and even regional foundation laws. Barriers to foundations' work within the EU exist despite the fact that the EC Treaty explicitly provides individuals and economic entities the possibility to move within the EU and benefit from the single market.<sup>10</sup>

#### Legal uncertainty over recognition

One of the barriers faced by foundations in their cross-border work is the legal uncertainty over foreign foundations' legal personality and public-benefit status. In principle, a foundation's legal

---

<sup>5</sup> "Foundations in the European Union: Facts and Figures," May 2008, pp.6-7

<sup>6</sup> *Id.*, p.5

<sup>7</sup> Also based mostly on 2005 figures. *Id.*, p.6

<sup>8</sup> *Id.*, p.7

<sup>9</sup> "Foundations' Legal and Fiscal Environments – Mapping the European Union of 27," 2007

<sup>10</sup> Articles 39 to 55 of the EC Treaty regarding free movement of people and services and articles 56 to 60 concerning free movement of capital

personality status is ordinarily accepted by most EU countries. However, we are aware that the legal recognition in other EU Member States has caused problems for some foundations. As a general rule, a domestic registration is required, and some countries even require a special recognition, such as Estonia and Italy.<sup>11</sup> In Poland and Bulgaria, foreign foundations need to go through special recognition procedures and set up representative offices. In some countries, such as Hungary, branches of foreign foundations may not be set up. In those countries where foundations are defined as pursuing certain public benefit purposes only, foreign foundations that pursue different purposes may face difficulties. Previous solutions set up to address the issue of recognition of nongovernmental organizations<sup>12</sup> have failed, as not enough states became party to them. The most efficient solution would therefore be the European Foundation Statute.

#### Increased administrative costs

The lack of recognition of foreign foundations results in increased cost linked to the creation and administration of several “recognized” legal entities in the countries where a foundation needs to operate to fulfill its objectives, and use of available assets/funds which otherwise would have been distributed as grants or used for program activities. There are also additional costs arising from the legal advice that is needed from multiple sources on a regular basis in order to establish and maintain foundation branches in several EU Member States. Having to operate under several legal entities also creates added difficulties with maintaining a common and effective policy strategy among the various legal entities. Foundations have had to set up several local organizations to operate in different countries.

The EFC is aware of many foundations that face practical obstacles and added costs in their everyday cross-border activities. The Carpathian Foundation International is based in Hungary, with additional national organizations established in Hungary, Poland, Romania, Slovakia, and Ukraine.<sup>13</sup> Naturally there are considerable costs arising from the establishment of several national organizations. Running offices in five different countries is expensive, and there are also costs resulting from having to consult legal advisors in all the countries in question, during the setting-up phase of the organization and on a regular basis thereafter, to keep up with the changing legal environment in each country.

Each national entity is also required to have a different governance structure in line with national rules, which complicates things further. The German Körber Foundation has considered setting up several national foundations for the EUSTORY network because of the lack of a European Statute.<sup>14</sup> The network, which supports teaching history to young people across several EU Member States, is suffering from the lack of a European framework for its activities. Some foundations also struggle to find the appropriate legal structure when they have a pan-European public interest objective and are therefore forced to establish themselves as national entities despite their pan-European mission. An example of a foundation encountering this type of problem is the RISE

---

<sup>11</sup> Gallop., B. in “Foundations in Europe: Society, Management and Law,” 2002, p. 752

<sup>12</sup> European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations 1986, <http://conventions.coe.int/treaty/en/Treaties/Word/124.doc>

<sup>13</sup> Based on an interview with Janos Lukacs, the Executive Director of the Carpathian Foundation, 8 May 2008. Additional information is available on the organization’s website at [www.carpathianfoundation.org](http://www.carpathianfoundation.org)

<sup>14</sup> More information on the network: EFFECT magazine, vol. 2, issue 1, Spring 2008, p. 25, <http://www.efc.be/ftp/public/Communications/EFFECT/Spring2008/effectspring08creativity.pdf>

Foundation for rural development.<sup>15</sup> The mission of the RISE Foundation covers all aspects of conservation and development of the rural world, promoting private investments, the advancement of private property, and cooperation between land managers and rural communities. It currently operates across all 27 EU Member States and has reported to the EFC that it faced a number of challenges during its setting-up phase. Problems were faced in dealing with different legal systems, in drafting the articles of incorporation, in fundraising, and in supporting transnational projects. The administrative barriers resulting from non-recognition of foundations' legal forms is best solved through a specific legal form like the European Foundation Statute.

#### Fiscal barriers

In addition to the administrative and legal barriers, problems are also found in foundations' domestic and/or foreign fiscal environments. Non-resident foundations are discriminated against in most EU countries as regards income tax. This was brought to light in the recent European Court of Justice (ECJ) "Stauffer" case,<sup>16</sup> where German tax law did not grant the same tax treatment on rental income for property owned by a foreign public benefit foundation. Foundations also face non-refundable withholding tax on cross-border investments, as well as national gift and inheritance tax. Unlike resident foundations, foreign foundations in most countries are unable to receive tax-deductible individual or corporate donations.

#### **European Foundation Statute vs. other solutions?**

While most scholars in the field of foundation law agree that change is needed and foundations need to be included in the single market, there have been a variety of opinions on what is the best approach.

According to a recent publication by Ineke Koele, national governments are rightfully concerned about the flow of charitable donations due to security concerns, and a practical solution should be found in order to determine the equivalency of a foreign philanthropic organization to a domestic one.<sup>17</sup> Foreign foundations should be required to meet the essential requirements for tax exemption, as asking them to comply with national tax laws to the letter would practically mean that no foreign foundations would qualify for tax incentives. Koele suggests that a solution could be found through cooperation between legal counsels based in donor and recipient countries comparing the application of various national laws impacting foreign foundations. While such an approach could provide a pragmatic solution to the fiscal barriers that foundations encounter, it would not solve the administrative and legal barriers faced by foundations in their cross-border work.

Oonagh Breen's recent article in the *International Journal of Not-for-Profit Law*<sup>18</sup> suggests how to improve the laws governing the charitable sector, favoring the judicial approach over the legislative. Here one may raise the question of who should drive reform of foundation laws: the foundation sector itself, judges, or legislators? The EFC is of the opinion that legislators must act on several fronts to respond to EU reality and to ensure that national laws do not conflict with the EC

---

<sup>15</sup> <http://www.risefoundation.eu/>

<sup>16</sup> ECJ case number C-386/04

<sup>17</sup> Ineke Koele, *International Taxation of Philanthropy*, 2007, pp. 364-367

<sup>18</sup> "EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society," *International Journal of Not-for-Profit Law* Issue 3 Vol 10, June 2008  
[http://www.icnl.org/knowledge/ijnl/vol10iss3/special\\_3.htm](http://www.icnl.org/knowledge/ijnl/vol10iss3/special_3.htm)

Treaty. The EFC believes that a European Foundation Statute, drafted by European legislators, will enable cross-border work free of red tape. This legislative approach must obviously work in parallel with the courts that are currently challenging national tax laws and their legislators. However, an EU-level regulation would be a quicker and more effective approach to solving the problems faced by foundations in their day-to-day activities. Current judicial proceedings focus on tax problems while the European Foundation Statute would offer an appropriate tool for cross-border cooperation.

What can we expect from court decisions? While the ECJ, in its ruling on the Stauffer case, stated that discriminatory German tax law is against the EC Treaty, and thus provided a precedent for infringement procedures against other EU countries with discriminatory tax laws, the process is far too slow to guarantee a fair treatment for public benefit foundations across the EU. It can take years for a case to clear the ECJ as with the Stauffer case and the ongoing Persche case.<sup>19</sup> The Stauffer case, concerning an Italian foundation receiving rental income from Germany, subject to German corporate tax, was launched in 1997. The ECJ's decision on the case was only given in 2006. A ruling on the Persche case, which concerns the tax deductibility of a cross-border in-kind donation made in 2003, is expected in 2009. In the light of a recent ECJ ruling on Lidl Belgium,<sup>20</sup> the ECJ seems to be applying the EC Treaty more strictly to cross-border company and non-profit activity. While it is hoped that the outcome will open doors for cross-border giving in the EU, this is in no way guaranteed. It is therefore not sensible to leave the future of cross-border foundation work to judges, but preferable to encourage private giving and support through a specific legal tool.

In addition, the implementation of such court decisions takes even longer, and respective national legislators may find different and sometimes unexpected ways to react. For example, the German government has just suggested a rather non-international approach to bringing German foundation law in line with the EC Treaty. The current law proposal introduces tax incentives for foreign-based organizations as long as they benefit the German public, but with the possibility that activities that benefit Germany's reputation abroad would also be deemed to benefit the German public.<sup>21</sup>

Before the European Commission brings cases to the ECJ, it tries to encourage Member States to act through so-called infringement procedures. If the Commission is of the opinion that a national rule is in conflict with the EC Treaty, it will start a procedure against that Member State. There are currently infringement procedures against countries that tax foreign foundations in a discriminatory way – Belgium,<sup>22</sup> Ireland,<sup>23</sup> and the UK<sup>24</sup> are under the scrutiny of the Commission. While the

---

<sup>19</sup> ECJ case number C-318/07

<sup>20</sup> ECJ case number C 414/06

<sup>21</sup> Proposal for German tax law revision 2009

[http://rsw.beck.de/rsw/upload/Beck\\_Aktuell/Regierungsentwurf\\_JStG.pdf](http://rsw.beck.de/rsw/upload/Beck_Aktuell/Regierungsentwurf_JStG.pdf)

<sup>22</sup> European Commission press release IP/06/1879

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1879&format=HTML&aged=0&language=en&guiLanguage=en>

<sup>23</sup> European Commission press release IP/06/1408

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1408&format=HTML&aged=0&language=en&guiLanguage=en>

<sup>24</sup> European Commission press release IP/06/964

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/964&format=HTML&aged=0&language=EN&guiLanguage=fr>

infringement procedures are slowly making Member States one by one change their national foundation tax laws in a direction that is more cross-border friendly, the process can be very time-consuming. So far, only Poland, Finland, Slovenia, and the Netherlands have opted to bring their laws in line with the EC Treaty regarding cross-border giving to public benefit foundations. In addition to the slow pace of the infringement procedures and ECJ procedures, the main problem again is that they only address the tax issue and do not provide solutions to the administrative and legal barriers that foundations face. The EFC says foundations need positive laws as the courts only fix problems after they occur. This is why the EFC has always advocated a specific legal tool for foundations *as well as* mutual recognition and equal tax treatment.

### **What kind of Statute is needed?**

The kind of European Foundation Statute that the EFC advocates would for the first time enable the creation of real European foundations. It is clear that a Statute addressing the needs of foundations is required and the existing pan-European company forms do not fit foundations' and European funders' needs. The Statute would offer European citizens the opportunity to use their capital to benefit the European public good and to shape Europe without having to deal with 27 different legal regimes and too much red tape. European initiatives are at the moment often hobbled because founders have to choose one "legal" home for the foundation. The Statute should offer an innovative European tool, including a common framework for issues like foundations' legal capacity, governance, and accountability in cross-border work, particularly given national concerns over financing terrorism. Unlike the European Company Statute (*Societas Europaea*)<sup>25</sup> created in 2001, EFS would not be a lowest-common-denominator of national foundation laws, providing only some superficial rules and referring to the 27 different national laws and complex provisions. Only few companies have adopted the SE due to its complex nature, and this is not what the foundation sector wants. The EFS should be more comprehensive, as is seen in the recent European Commission proposal for the European Private Company Statute,<sup>26</sup> designed to help small and medium-sized enterprises' cross-border activities. This new tool is more European and simpler than *Societas Europaea*.

The European Foundation Statute should be comprehensive and clear. The EFC has put together a proposal for a European Foundation Statute.<sup>27</sup> A European Foundation should have a legal personality, which is acquired upon registration. It should also be defined as an organization with an independent governance structure and a source of income, possibly from an endowment. It should pursue public benefit purposes and be supervised by a public authority. European Foundations should be required to have minimum capital upon registration to indicate a level of seriousness about their activities; however, the minimum capital should be small enough to make it feasible for new initiatives to establish themselves as a European Foundation. The European Foundation should be able to benefit from the same tax treatment as a local public benefit organization in all 27 EU Member States.

---

<sup>25</sup> Council Regulation 2001/2157/EC of 8.10.2001

<sup>26</sup> Proposal for a Council Regulation on the Statute for a European private company COM(2008) 396/3  
[http://ec.europa.eu/internal\\_market/company/docs/epc/proposal\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf)

<sup>27</sup> [http://www.efc.be/ftp/public/EU/LegalTF/european\\_statute.pdf](http://www.efc.be/ftp/public/EU/LegalTF/european_statute.pdf)



## **Additional benefits of the European Foundation Statute**

In addition to providing solutions to the barriers that foundations encounter in their cross-border work, a Foundation Statute would also provide further benefits to the foundation sector. The EFS would help to clarify terms and the concept of foundations as organizations with their own resources and independent governance. It would also help to develop a common definition of “public benefit purpose” foundations, as currently the term “foundation” is much too loosely used. The governance systems of foundations in EU Member States are subject to different levels of state supervision and therefore to different levels of responsibilities of supervisory authorities. With regard to transparency and publicity requirements and related auditing issues, no general publicity regime applies in any EU country, while many Member States ensure that interested parties are provided, upon special request, with access to documents of foundations or of supervisory authorities. The European Statute for Foundations can be seen as a benchmark and quality label in terms of governance, transparency, and accountability in cross-border work and financing, at a time when the prevention of terrorism financing is of key concern to national governments as well as European and multilateral institutions.

A European Foundation Statute would also provide new opportunities regarding EU citizenship and have a positive impact on EU policy. A number of EFC members are involved in initiatives promoting European citizenship, and the Statute would create an EU tool for doing so.<sup>28</sup> The Statute could be a new legal instrument of support for citizens’ action and participation at the European level in their various fields of interest, including public health and consumers’ rights, rule of law, and cultural and other fundamental rights.

A prominent trend is also the increase in private giving for the public good, and ample evidence suggests that the newly wealthy give to philanthropic causes across borders. Individuals such as Bill Gates and George Soros give extensively to international causes. Many wealthy individuals in the US and elsewhere are pooling their resources for public benefit projects.<sup>29</sup> According to a study by Barclays Wealth in 2007,<sup>30</sup> a growing number of wealthy individuals in the UK transfer a large slice of their wealth to public benefit causes already in their lifetimes, and they are often willing to give internationally due to globalization and breakdown of barriers to international business. This trend also occurs in other Member States. A European Foundation Statute could help channel this newly created private wealth to public benefit activities across Europe.

The Statute would also help to underpin EU competitiveness: knowledge society, research, and innovation. A large number of foundations in Europe operate in the field of education, including informal education and vocational training. They have also been at the forefront of funding fellowship and scholarship schemes for teachers and students to underpin their mobility, skills, and competence. While funding equal access to learning, foundations also support excellence in research and technological development (R&D). For instance, France has important research players such as Institut Curie and Institut Pasteur, both of which are operating foundations. Foundations’

---

<sup>28</sup> Foundations' Support of European Citizenship - A Snapshot, 2006, <http://www.efc.be/ftp/public/EU/CIT/EuropeanCitizenshipSupport.pdf>

<sup>29</sup> Looking out for the future: an orientation for twenty-first century philanthropists, Katherine Fulton, Andrew Blau: Monitor Company Group, 2005, <http://www.futureofphilanthropy.org/files/finalreport.pdf>

<sup>30</sup> Barclays Wealth insights white paper: the changing face of philanthropy: today, tomorrow and beyond. London: Barclays Wealth, 2007, [http://www.barclayswealth.com/files/Barclays\\_Wealth\\_White\\_Paper\\_Changing\\_face\\_of\\_philanthropy.pdf](http://www.barclayswealth.com/files/Barclays_Wealth_White_Paper_Changing_face_of_philanthropy.pdf)

contributions to R&D accounted in 2002 for about 0.04% of GDP, with a gross expenditure in R&D/GDP ratio in France equal to 2.2% (according to 1999 Eurostat data).<sup>31</sup> A European Foundation Statute would be a new instrument for pooling expertise and resources for European-level work in these areas, which require increased scaling up of funds. European foundations active in the field of science and research can contribute to achieving the EU's goals regarding competitiveness and building a more effective European research area.

Some issues are cross-border in nature, such as migration, which European foundations address in their work. Effective work on such issues requires the appropriate legal tool. Across the EU, countries' experiences and approaches to migration issues are characterized by certain national specificities. Countries are experiencing different stages of migration and minorities' development processes. The current stage is primarily dominated by post-migration and integration challenges. Foundations active in the field see the need to come together to address the challenges of managing migration, including refugees and asylum-seekers, the development of cohesive and integrated communities, and advance work to combat trafficking in human beings, including children and women, in the enlarged Europe and abroad. Many foundations are involved in funding such projects in a cross-border context<sup>32</sup> and some have also established networks to pool resources in this area. An example of such an initiative is the European Programme for Integration and Migration, initiated in 2005 by a group of foundations from seven different countries, aiming to improve the lives of migrants.<sup>33</sup> The Roma Education Fund, a cross-border initiative supported by foundations from four different EU Member States, supports the inclusion of Roma in national education systems.<sup>34</sup> The European Foundation Statute could aid foundations and funders in reaching their goals in this important area.

It is imperative to make cross-border work easier given the complex global problems foundations face, such as environmental issues and climate change, global health, migration, and intercultural dialogue. The growth of foundations and their professionalization have been partly addressed nationally. But we now need to take full account of the European dimension.

### **How does a Statute fit into the EU agenda?**

The European Commission launched a study in 2007 to examine regulatory differences, internal market barriers, and their costs. The study assesses the foundation sector's scale and economic weight plus the impact a European Foundation Statute would have on the sector and Europe's economy. It will consider how to remove barriers, including regulatory measures. The study, carried out by the Max Planck Institute for International Private Law (MPI) and the Centre for Social Investment (CSI) at the University of Heidelberg, will conclude in 2008. Following the results of the study, foundations will ask the European Commission to submit a proposal on the European Foundation Statute Regulation for the European Parliament and Council to review.

---

<sup>31</sup> Giving More for Research in Europe: The role of foundations and the non-profit sector in boosting R&D investment, European Commission (2005), [http://ec.europa.eu/invest-in-research/pdf/download\\_en/rec\\_5\\_7800\\_giving\\_4\\_051018\\_bat.pdf](http://ec.europa.eu/invest-in-research/pdf/download_en/rec_5_7800_giving_4_051018_bat.pdf)

<sup>32</sup> The Contribution of the Voluntary Sector to Migrant Integration in Europe, Study by Centre on Migration, Policy & Society, [http://www.efc.be/ftp/public/EU/Eurob/MiG/COMPAS\\_Report.pdf](http://www.efc.be/ftp/public/EU/Eurob/MiG/COMPAS_Report.pdf), pp. 13-14

<sup>33</sup> <http://www.epim.info/>

<sup>34</sup> <http://romaeducationfund.hu/>

The EFC has been advocating for a specific legal form for public benefit foundations since 2001. Work on the European Foundation Statute has been looking more promising after 30 years of deadlock in the field of company law, following the introduction of new legal forms: the European Company Statute adopted in 2001, the European Economic Interest Grouping<sup>35</sup> and the European Co-operative Society adopted in 2003<sup>36</sup>, and the more recent proposal for a European Private Company Statute (*Societas Privata Europaea*, SPE).<sup>37</sup> Following these European law developments, there seems to be little doubt that the legal basis of the EFS would be the same as for the other European Statutes. The legal basis for all the forms mentioned above is Article 308 – the “catch-all” Article, with the recognized difficulty being that this Article requires the unanimous approval of the Member States. Article 95, which would require a qualified majority at the Council and a co-decision in the European Parliament, seems to be out of question for the European Foundation Statute, as the ECJ ruled in 2006 against Article 95 as the legal basis for the European Co-operative Society.<sup>38</sup>

All this is part of the wider revision of European Company Law. In 2001 the European Commission set up a High Level Group of Company Law Experts to review current trends in the field of European company law as well as the need for new European legal forms. Following the public consultation on revision of company law<sup>39</sup> by the high-level group and the group’s conclusions<sup>40</sup>, the Commission announced a plan for modernising company law in 2003.<sup>41</sup> The Directorate-General Internal Market undertook a further public consultation on the issue in 2005,<sup>42</sup> in which a considerable number of individual foundations as well as the EFC participated and stressed the added value of a European legal form for foundations. In November 2006, Commissioner Charlie McCreevy mentioned in a letter to the EFC that the Commission “will continue to pursue its reflection” on the Statute and in spring 2007 a call for tenders for the feasibility study on a European Foundation Statute was finally launched.

It is easy to forget that donors and public benefit foundations are pursuing specific missions. Neither their objectives nor the problems they address always stop at national borders. Foundations and their funders should therefore be permitted to carry out their work in order to maximize public good across the EU, and the European Foundation Statute is the most effective tool for ensuring this.

---

<sup>35</sup> Regulation (EEC) No 2137/85 on the European Economic Interest Grouping

<sup>36</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)

<sup>37</sup> Proposal for a Council Regulation on the Statute for a European private company COM(2008) 396/3

<sup>38</sup> ECJ case number C-436/03, ruling of 2 May 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:143:0004:0004:EN:PDF>

<sup>39</sup>The consultative document of the High Level Group of Company Law Experts, [http://ec.europa.eu/internal\\_market/company/docs/modern/consult\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf)

<sup>40</sup>Report of the high-level group of company law experts on a modern regulatory framework for company law in Europe, 4 November 2002, [http://ec.europa.eu/internal\\_market/company/docs/modern/report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf)

<sup>41</sup> Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM 2003/0284, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0284:EN:HTML>

<sup>42</sup> Public consultation on future priorities for the Action Plan on the Modernisation of Company Law and Corporate Governance, [http://ec.europa.eu/internal\\_market/company/docs/consultation/consultation\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/consultation/consultation_en.pdf)

**Article**

## **The Development of NGO Support Organizations: The Early Years of the Australian Council for Overseas Aid**

**Dr. Patrick Kilby<sup>1</sup>**

### **Introduction**

The relationship between development NGOs and Government has been an important issue in both the civil society and public policy discourse for the past three decades. The general view is that development NGOs are dependent on Government for support and approval in a number of key areas including regulation, funding, and as a source of public legitimacy; and so they engage with Government in a generally cooperative manner (Lissner 1977; Edwards and Hulme 1997; Baig 1999; Zaidi 1999). There is also a view that NGOs, as values-based organizations, are often perceived as having problems with accountability to their supporters, to government, and to the people with whom they work. They are also seen as being amateurish (or not businesslike); too restricted in their focus; beset by scarcity of funds; fragmented; and paternalistic in their outlook (Lissner 1977; Brown and Kalegaonkar 2002). These views of NGOs are not necessarily in conflict with each other, but it is the latter view of NGOs not being accountable and amateurish that is seen to hinder developing strong relationships with government and other stakeholders. These weaknesses, Brown and Kalegaonkar argue, lead to a demand for the development of specialist support organizations that share NGO values but whose primary task is to "...provide services that strengthen the capacities of [NGOs] to accomplish their mission" (Brown and Kalegaonkar 2002, p. 239).

This article uses the Australian Council for Overseas Aid (ACFOA)<sup>2</sup> as case study of a support organization, and in particular its early years from the mid-1960s, and argues that the dependency model of NGO relations with government is fairly weak in the Australian context, with the driver for the development of a support organization being more from Government than from the NGOs wishing to strengthen relationships with government. Generally in Australia, the relationship between NGOs and government has been more complex, and a model of varying degrees of mutual dependency is a better descriptor of relations over much of ACFOA's life, in particular the early years. This history, however, was also characterized by ongoing tensions both with Government and also within the broader NGO community, around both policy and approaches to development practice.

ACFOA was founded in 1966 as an NGO support organization at the instigation of Sir John Crawford, a senior academic at the Australian National University and formerly the holder of senior positions in the Australian Government, though he had no real links to the NGOs at the time. Crawford saw it as important for the then-growing voluntary aid sector in Australia to be

---

<sup>1</sup> Dr. Patrick Kilby coordinates and lectures in the Masters in Applied Anthropology and Participatory Development Program at the Australian National University, Canberra.

<sup>2</sup> In 2002 ACFOA changed its name to the Australian Council for International Development (ACFOA) but for the purposes of this article the original name will be used.

able to speak with a common voice. At the time NGOs were seen as growing very quickly but in a haphazard, fragmented, and fairly insular manner (Crawford 1964).

Crawford facilitated a number of meetings in 1964 and 1965 among the voluntary aid agencies, resulting in ACFOA being formally established in 1966 with 25 members. Over the next forty years ACFOA has grown to become an integral part of the development landscape in Australia, having represented its members through periods of intense community interest in foreign aid through the 1970s into the 1980s, periods of “aid fatigue” in the 1990s, and then a renewed interest in aid in the 2000s. ACFOA has also provided a focus for its member agencies through this time on advocacy, disaster coordination, and in later years on accountability and standards-setting across the NGO community in Australia.

The ACFOA story is also about the relationship between the voluntary development agencies and the Australian Government. At one level the story supports the thesis of Brown and Kalegaonkar (2002) on the role of support organizations being involved in representing the interests and capacity building of their member NGOs; but it also challenges views of NGOs as being dependent on Government for funding and as a source of legitimacy as characterized by Edwards and Hulme (1997). For example, while ACFOA received government financial support to cover some of its core costs from the outset, it was another decade before the Australian Government was funding ACFOA’s members’ programs. It was also in this early period that ACFOA became not only an important advocate for the official aid program, but also at times a harsh critic of the direction Government was pushing the aid program—in a sense, biting the hand that fed it. A common theme throughout the forty-year history of ACFOA has been a strong level of mutual dependence with Government set in a context of a continuing level of ongoing tension, both between ACFOA and the Government and within ACFOA and its membership. This article focuses on the first ten years of the ACFOA’s life, a period critical in shaping ACFOA and its role, and one that brought out the growing tension between representing the members’ interests and the rising role of development education in influencing government policy and public opinion on aid.

ACFOA’s first five years were characterized by a search for purpose, while in the second five years it became a very vocal leader and advocate for social justice in development policy. It was in this latter period that divisions emerged both within its membership and in its relationship with Government. These tensions and their resolution provide a valuable account of how civil society processes and the tensions arising from them are important in both public policy terms and in NGO practice itself. It also highlights the dual role that support organizations can have as both leaders of and facilitators for their constituency.

### **The Formation of ACFOA**

The origins of ACFOA probably lie in the enthusiasm for foreign aid and development that developed in the 1960s with the first Development Decade, and with it the call for stronger public involvement in the aid program.<sup>3</sup> This call for voluntary action came from a perceived moral obligation to act on the levels of poverty and injustice around the world (Lockwood 1963).

---

<sup>3</sup> The first Development Decade 1960-1970 as launched by the UN General Assembly in 1961 and was characterized by a strong focus on aid for agricultural development and the green revolution, as well as by a fundamental questioning of the nature of development whereby André Gunner Frank and the radical social movements of the time had a strong influence on development discourse at the time (Legum 1970; Schmidt and Pheo 2003).

In particular, forums like the Strasbourg seminar held by the Council of Europe in July 1963 sought increased cooperation among NGOs, given the fast-growing public interest in aid (ACFOA 1964). The strong interest and growth in the work of NGOs emerged from the end of the Second World War and into the 1950s. While international NGOs had been working with the poor in varying degrees for more than 200 years,<sup>4</sup> the end of the Second World War marked a strong growth in support and interest in NGOs, initially in the areas of conflict and reconstruction and then in the devastating famines such as occurred in India in the early 1950s and in China later that decade (Lissner 1977).<sup>5</sup>

NGOs were also receiving official recognition, especially in their work in conflict and post-conflict situations. For example, the Quakers received the Nobel Peace Prize for their refugee work in 1947. In the 1960s, this interest by NGOs took on an official guise through the formation of the Freedom from Hunger Campaign (FFHC), which started in 1961 as a global movement of the Food and Agricultural Organisation (FAO) to raise funds and awareness of the issues of global injustice (FAO 1961; Lissner 1977). The same trends also were occurring through this period with FFHC in Australia in its first year of fundraising (1963) raising over one million pounds<sup>6</sup> (AFFHC 1963; Anderson 1964) and becoming the major fundraising arm for international development, with funds being distributed to the other existing aid agencies.

At the same time, there was a perceived proliferation of NGOs involved in aid (Casey 1964). Even though their numbers were small by today's standards, around thirty, they were new on the scene and were beginning to engage with Government on matters of aid policy. John Crawford, who had been involved in some of the global issues around development, picked up on the call for closer cooperation among NGOs in the European context (ACFOA 1964) and the themes of the first development decade, calling for closer cooperation and greater commitment to development and aid both public and private (Lissner 1977). His first step was to convene a two-day seminar hosted by the University and funded by a private foundation in April 1964 to discuss NGO cooperation (Crawford 1964). Twenty-six agency representatives attended as well as officials from the Department of External Affairs. While agencies presented on what they were doing and what they would see cooperation among themselves offering, generally they were wary of the whole project. However, Crawford "charmed them into cooperation" (Webb 2006). The upshot was another, more focused meeting in July of that year, funded by the Department of External Affairs, attended by nineteen NGOs. There, the NGOs supported a resolution to set up a body (ACFOA 1964). ACFOA itself held its first official meeting April 5 and 6, 1965, with a group of seven founding members, and a further fourteen members being admitted at the time.

The formula agreed to was one of collaboration among agencies rather than integration, and doing so within a relatively simple structure (ACFOA 1965a). The focus was to be on advocacy on relief and development, and refugees and migration, with research, development

---

<sup>4</sup> Lissner (1977) tracks the history from missionary organizations since the seventeenth century, then agencies like the Red Cross of the mid-nineteenth century and Save the Children of the early twentieth century, and the like, so that before the Second World War there were 655 international NGOs. This figure doubled in the post-war years to more than 1300 when ACFOA started (p.59).

<sup>5</sup> Lissner (1977) is used extensively in this article because his study covers similar issues from the perspective of mainly European but also to a lesser extent US NGOs over a similar period, 1968-1975 p.15.

<sup>6</sup> This amounts to \$40m in 2000 constant dollars but if the size of the economy is also taken into account would be well over \$100m in current terms.

education, and government relations undertaken under each theme (ACFOA 1964). The role of Government in this whole process was important, including officers of the Department of External Relations preparing the key discussion papers for Crawford (ACFOA 1964; ACFOA 1965a). One of the first acts of the ACFOA Executive was to seek fifty percent of ACFOA's running costs from the Department of External Affairs (ACFOA 1965b), and while this was not immediately agreed to, the Department did cover the cost of the first Council meeting in August 1965 (ACFOA 1965c) and subsequently covered around half ACFOA's running costs. From this account of the sequence of events it is clear that Government was instrumental in ACFOA's formation, and the links and authority that Crawford could exert both with government and the agencies were substantial, both in getting the NGOs on board and later in keeping the Government at bay (Cullen 2007). What is less clear is whether Government led the process or was led within it.

This genesis of a peak organization of aid NGOs in Australia is a little different from what happened in other places. Lissner argues that umbrella organizations emerged after World War II "... when extensive cooperation between government and voluntary agencies necessitated closer coordination among voluntary bodies themselves" (Lissner 1977). Lissner goes on to cite the case of American Council of Voluntary Agencies for Foreign Service (1943) and Swiss Aid (1947) as early examples. In Australia the formation of the umbrella body *preceded* (by almost a decade) substantial cooperation programs between Government and the NGOs.

There were other ways also in which ACFOA story did not follow the trend of NGO cooperation/co-optation with government. Lissner argues that agencies' search for legitimacy is the reason they engage with government. This way they gain "...government acceptance as a mark of quality that negates the idea of amateurism" (Lissner 1977, p. 106), which is in line with comments twenty-five years later by Brown and Kalegaonkar (2002). While this trend may emerge much later in ACFOA's life, at the time of its formation there was little evidence of this search for legitimacy. It was Government, or Crawford with a strong background in Government, that saw the advantages to both the Government and NGOs and pushed the process, maybe as the Government's way of negating what it saw as the "reality" of amateurism. What occurred instead is that ACFOA's links with Government, which were very clear at its foundation, raised issues of ACFOA's legitimacy or at least its relevance with its own members rather than with Government.

The new Council set out ACFOA's role and relationship both with Government and its members, under an overall principle that

... the huge and widening gap between the poorer and wealthier nations of the world and between rich and poor people within nations which result in deprivation of basic human rights for more than half the world's population constitutes a denial of natural justice and is a continuing threat to world peace (ACFOA 1966b, p.1)

This wording with the focus on human rights, inequality, justice and peace, in a sense set the focus for ACFOA's development education and advocacy work for the next forty years. The policy also carefully spells out the nuances necessary for working with government "... depend[ing] largely on meeting these various motivations in a common interest" recognizing Government's motivation as "national interest," while for NGOs "the point of entry is a concern to help people in need" (ACFOA 1966b, p.3). The policy also notes that "Constructive criticism

is an expression partnership,” signalling the ongoing tension both within ACFOA and with Government, which ACFOA has had to live with and which came to the fore in the early 1970s.

### **The 1970s: the Rise of Development Education**

I have always considered the most useful function ACFOA can perform is that of bringing constantly before the Australian people the needs of developing countries and the possibility which exists for developed countries both at governmental level and through their individual citizens, to help meet those needs ... I hope ACFOA's educational activities among youth groups everywhere, including universities will increase over the next few years (Crawford 1972a, p.1).

While there had been a focus on development education since the early 1960s, informing the public of issues of development and stressing "... the formation of public opinion" (AFFHC 1963, p.1), it was not until the 1970s and the Second Development Decade of 1971, which called for a more active involvement of civil society and NGOs in development forums and in the development debate, that led to a strong push for development education within that program of action.

The Education Unit of ACFOA started in January 1971 with the employment of an education officer and the engagement of a lobbyist (Sullivan 1974). One of the first activities that ACFOA was involved in was to bring to public attention the situation in then East Pakistan (to soon become Bangladesh) and the rising refugee crisis. This was part of a global campaign including the Concert for Bangladesh (also a film) and a hunger strike in Australia by an Indonesian student Paul Ponomo as a protest of the Australian Government's inaction in the Bangladesh situation. There was widespread press coverage and major demonstrations, letter-writing campaigns, and media support (ACFOA 1972a). This all led to the first public embarrassment of a Government instigated by ACFOA and the NGOs, and was to set the tone of development education being closely aligned with the activism of the time. Yet the ACFOA constituency included many agencies with strong altruistic but conservative values that generally eschewed political action.

The flagship of the Education Unit was the Development News Digest, a bimonthly development issues magazine launched in mid-1972, whose approach was to bring to the fore the key issues of social justice at the time—the most significant being the anti-apartheid campaign, in which the Springbok tour of 1971 was critical, and the war in Vietnam. On both issues, some within the ACFOA membership believed that these campaigns went beyond their mandate and were too political (ACFOA 1972b). While this more radical approach to development education had strong backing from the Protestant and Catholic Church aid arms and other groups, it did represent a radical departure from existing approaches to aid, which were about service delivery to reach the people the state was unwilling or unable to reach. At best, by this view, ACFOA should lobby for more aid and fairer trade arrangements, all within the existing system. Given the Cold War backdrop, many of these radical movements were seen to be "fellow travellers" with Third World socialist and communist regimes. This approach of seeking change to the existing order sowed the seeds for the later divisions that were to emerge between the traditional aid agencies and the development education and solidarity support organizations that were also members of ACFOA. Another issue, which strictly speaking fell outside the mandate of ACFOA but with which it was concerned in its development education work, was the plight of Aboriginal Australia, with many member agencies involved in indigenous issues.



## **The Divisions Emerge**

Despite the success of the development education work, its official recognition and sanction, and the increasing profile given to foreign aid under the new Labor Government, questions began to emerge in late 1973 and early 1974 as to whether the work of ACFOA, especially its development education work, was moving away from the needs of the members and their concerns. The advocacy work on South Africa and Vietnam in particular concerned some members, who felt that ACFOA should take a less partisan and more neutral stance on the political issues of the day. In early 1974, the Red Cross withdrew from any association with the Development Education program (ACFOA 1974c), and the Education Unit was formally advised of disquiet among members and for the need for greater and more effective communication with members (Sullivan 1974). In an address to the Council meeting later in 2004, Brendon O'Dwyer, an Education Officer, noted a split in voluntary agencies in Europe, which he had visited:

... one that could be roughly summed up as a gap between the basically fund raising agencies and those concerned with development education and social change. I see a similar gap developing in Australia within the ACFOA member agencies.... [It is] unfortunate ... if the issue became one of radical versus conservative: both need each other (O'Dwyer 1974).

The experience in Europe of rising tensions between development educationalists and those whom Lissner refers to as agency fundraisers<sup>7</sup> led to the "Frascati Consultation" in 1972 on the role of Development Education in development agencies, and aimed at bridging the gap (Lissner 1977). These efforts did not resolve anything in Europe or in Australia, where the existing divisions among members plus a concerted campaign against ACFOA by conservative political forces at the time through the National Civic Council put a lot of pressure on ACFOA through 1975.

In the end it became too much, and in a special meeting of the Executive, one of the Education Officers was sacked (ACFOA 1975a). This event became a *cause celebre*, with reports in the press (anon. 1975; Hill 1975; Marr 1975; Juddery 1975a; Juddery 1975b) and even a suggestion in Parliament of undue political influence from the Opposition spokesman for Foreign Affairs, who was believed to have met with the Executive shortly before the sacking (Kerin 1975).<sup>8</sup> These events did not mean the end of the ACFOA Education Unit, but they did set in motion a rethinking on development education and the relations with Government, and the role a peak body with a support role to the NGO community should take (ACFOA, 1976b). However, it was not until two years later that the Unit itself was cut back, and its work became a little less challenging of mainstream development work.

## **Conclusion**

The events within ACFOA through 1974 and 1975 highlighted the strength of ACFOA in its public policy work and its influence on government as well as the fundamental divisions

---

<sup>7</sup> Even though Lissner categorizes the tension as being between development educationalists and fundraisers, it is probably fairer to say it was between development educationalists and agency management, which has to consider not only the needs of fundraisers but also the agency's values base and its image and relationships with other stakeholders, including Government.

<sup>8</sup> This suggestion of direct political influence is unlikely, given that the meeting that the ACFOA Executive had with Andrew Peacock, the Opposition spokesperson, actually followed the sacking (Batt, 1975)

within the aid community that emerged through ACFOA's development education work. These events also point out that simple characterizations of NGOs' dependent relations with Government and the role of support organizations, which were popular then as much as now (Lissner 1977); (Edwards and Hulme 1997; Brown and Kalegaonkar 2002), did not apply in the Australian case, and more generally are probably much more nuanced than the literature indicates.

ACFOA is one of the few peak bodies in any country that represents the vast majority of agencies involved in aid and development issues. In most other countries there is more than one such body. What is unique about ACFOA at the time, which has persisted, is that its membership represented a broad diversity of views. While the notion of overseas aid is driven primarily by altruism—the desire to see people better off—the approaches vary considerably from a service-delivery role, whereby the NGO pick up where the state or local social organizations cannot (this is seen as the role of the traditional NGO), through to the role of political influence (important during the Cold War, when official aid programs had a strong political motivation), through the role of social movements operating on the belief that fundamental injustices can be dealt with only through fundamental social changes and challenges to existing social structures, to advocacy and development education (Lissner 1977).<sup>9</sup> These views of aid are present most of the time, and many if not most agencies have elements of all three motivations in their work. But what is interesting is that through the 1970s there was a strong social movement stream among ACFOA members for a more just world in the development sector, which radically challenged some of the prevailing service-delivery models. ACFOA was and is unique in that it enabled these diverse views to sit alongside each other. As the events of the 1975 have shown, these can boil over into division and conflict. Still, there have been only a few resignations of members over the organization's forty-three-year life.

The other key element of the story is the relationship with the State. In the 1960s the growing influence of NGOs was largely welcomed by Government and probably harkens to the European corporatist view of the State, which sees a social contract (either formal or informal) between civil society actors such as churches, unions, and more recently NGOs, and the formal mechanisms of state. This is different from the US tradition, which sees the voluntary sector's engagement with the State on policy more constrained. In Australia in the 1960s the rapidly growing interest among the population in aid and aid issues provided the Government an opportunity to capture some of that enthusiasm to gaining legitimacy for its own work in development. It could be argued that the rationale for its involvement in the formation of ACFOA was part of a strategy to build a stronger postwar engagement with the Asia-Pacific region by working more closely with the nascent development community in line with global trends.

An important element of the ACFOA experience is that at the very beginning, its establishment had not only a State imprimatur but also a very active role, through the intercession of a former highly respected civil servant in the form of Sir John Crawford, plus resources in the form of research (and some funding of meetings) and official representatives

---

<sup>9</sup> Lissner has identified six roles or options for agencies in relation to government: subservient role; a partnership role; a compensatory role; a corrective role; a disobedient role; and a subversive role (Lissner 1977). The first three are about undertaking program with government support, and the latter three are about advocacy of varying forms of intensity.

having an observer role at most meetings. This sent a clear signal that the Government saw the need as most important, certainly more so than the fairly skeptical NGO members; and this probably explained the relatively slow development over the first five years. After these establishment years, ACFOA developed its voice in engagement with the State, and this was taken advantage of by the agencies involved in the burgeoning global development education movement of the early 1970s, giving them a voice in Canberra, the seat of Government.

These tentative first steps were to develop into a pattern of work and approach over the following thirty years. Development education (later to be more focused on advocacy), engagement with government on aid policy and issues, and a leadership role on major emergency were to be hallmarks of ACFOA's approach. In the following years ACFOA faced the issues of East Timor and human rights more generally as well as the human-induced catastrophes and genocide such as those experienced in Cambodia and Ethiopia, plus the challenge of developing a more mainstream role in official aid programs.

More broadly this account is relevant to the global discussions on NGOs and NGO support organizations, as it poses the question as to whether the ACFOA case is the exception that proves the rule of NGO dependency on Government as per Lissner, Edwards, and the others cited here, or whether these dependency processes may be more nuanced. The ACFOA account I have presented depicts a complex relationship that developed over time and one that is also found in other cases: for example India, where the relationship of NGOs to Government was likewise characterized by periods of compliance, rebellion, and suspicion, perhaps in sharper relief than the Australian experience (Sen, 1999). The other important question is whether that period of the 1960 and 1970s represented a time in which, compared to now, ideological divisions were more defined, the diversity of views and public debate were more robust, and most important, Government allowed a more vigorous role.

## **References**

- ACFOA (1964). Minutes of Voluntary Aid Meeting No. 2 July 27. Records of the Australian Council for Overseas Aid; MS9374, Box 1 Folio 1. Australian National Library - Canberra.
- ACFOA (1965a). Minutes of Meeting of Voluntary Aid Organisations April 6 and 7. Records of the Australian Council for Overseas Aid, MS9347, Box 57, Folder 294. Australian National Library, Canberra.
- ACFOA (1965b). Minutes of Executive Committee April 12. Records of the Australian Council for Overseas Aid, MS9347 Box 57, Folder 294. Australian National Library, Canberra.
- ACFOA (1965c). Minutes of First Council Meeting, August. Records of the Australian Council for Overseas Aid; MS9374, Box 1 Folio 1. Australian National Library, Canberra.
- ACFOA (1966b). ACFOA Standing Policy. Records of the Australian Council for Overseas Aid; MS9374, Box 3 Folder 15. Australian National Library, Canberra.
- ACFOA (1972a). Aid as a Political Issue. Development News Digest. 1: 1-12.
- ACFOA (1972b). Minutes of ACFOA Executive March 24-25. Records of the Australian Council for Overseas Aid, MS9347 Box 57, Folder 300. Australian National Library, Canberra
- ACFOA (1974b). Council Minutes 31 Aug. -1 Sept. Records of the Australian Council for Overseas Aid, MS9347, Box 57, Folder 300. Australian National Library, Canberra.
- ACFOA (1974c). Minutes of Executive Committee, Feb. 8. Records of the Australian Council for Overseas Aid, MS9347 Box 57, Folder 300. Australian National Library, Canberra.

- ACFOA (1975a). Minutes of Executive Committee Meeting, Aug 1. Records of the Australian Council for Overseas Aid, MS9347 Box36, Folder 176. National Library of Australia, Canberra.
- AFFHC (1963). National Committee Minutes. Records of Australian Freedom From Hunger Campaign, MS4529, Box 3, Folder 17. National Library of Australia, Canberra.
- Anderson, N. (1964). "Australian Voluntary Foreign Aid Activities." Australian Outlook August: 127-142.
- anon. (1975). "The Overflow Column:charity at home." The National Times. August, 25-30.
- Baig, Q. (1999). NGO governing bodies and beyond: a Southern perspective on Third Sector governance issues. International Perspectives on Voluntary Action; Reshaping the Third Sector. D. Lewis. London, Earthscan.
- Brown, L. D. and A. Kalegaonkar (2002). "Support Organizations and the Evolution of the NGO Sector." Nonprofit and Voluntary Sector Quarterly 31(2): 231-258.
- Casey, R. (1964). Letter to Crawford from Lord Casey. Records of the Australian Council for Overseas Aid: MS9374, Box 1 Folio 3. Australian National Library, Canberra.
- Council of Europe (1963). "Strasbourg Seminar Report," Records of the Australian Council for Overseas Aid, Box 1, Folder 8. Australian National Library, Canberra.
- Crawford, J. (1964). Letter John Crawford to Paul Hasluck Records of the Australian Council for Overseas Aid: MS9374, Box 1 Folio 1. Australian National Library, Canberra.
- Crawford, J. (1972a). Opening Address ACFOA National Council, August 12-13. Records of the Australian Council for Overseas Aid, MS9347, Box 57, Folder 300. Australian National Library, Canberra
- Cullen, P. (2007). Personal communication on the founding of ACFOA, Marulan, Jan 13.
- Edwards, M. and D. Hulme (1997). NGOs State and Donors: Too Close for Comfort. London, Save the Children Fund UK and MacMillan.
- FAO (1961). Report of the Conference of FAO Eleventh Session, Rome 4-24 Nov. [www.fao.org/dorep/x5572e/x5572e00.htm](http://www.fao.org/dorep/x5572e/x5572e00.htm) accessed 14 Jan 2007. Rome, FAO.
- Hill, H. (1975). Overseas Aid - posturing with the poor? Nation Review. Aug 29-Sept 4 Aug 29-Sept 4.
- Juddery, B. (1975a). Discussion on Dismissal Expected. Canberra Times. Canberra. Aug 23.
- Juddery, B. (1975b). Aid Body refers dismissal to sub-committee. Canberra Times. Canberra. Aug 25.
- Kerin, J. (1975). Adjournment Debate House of Representatives August 28. Hansard. Canberra, Australian Parliament.
- Lissner, J. (1977). The Politics of Altruism: a study of the political behaviour of voluntary development agencies. Geneva, Lutheran World Federation.
- Lockwood, J. (1963). "The Call for Voluntary Service Overseas." Social Service Quarterly Autumn.
- Marr, D. (1975). "The politics of Charity." Development News Digest 11 (March): 1-23.
- O'Dwyer, B. (1974). Address to ACFOA Council: Minutes 31 Aug.-1 Sept. Records of the Australian Council for Overseas Aid, MS9347, Box 57, Folder 300. Australian National Library, Canberra.
- Schmidt, H. and H. Pheo (2003). "Introduction." Contemporary European History 12(4): 387-394.
- Sullivan, M. (1974). Letter Sullivan to Campbell ADAA Jan 23. Records of the Australian Council for Overseas Aid, MS 9347, Box 14, Folder 8. Australian National Library, Canberra.
- Sullivan, M. (1974). Memo Michael Sullivan to Brendan O'Dwyer re ACFOA Education Unit, May 17. Records of the Australian Council for Overseas Aid, MS 9347, Box 14, Folder 9. Australian National Library, Canberra.
- Webb, J. (2006). Interview, Dec, 9. Melbourne.
- Zaidi, S. A. (1999). "NGO failure and the Need to bring back the State." Journal of International Development 11(2): 259-271.