RE MACDUFF AND THE CHARITY OF THE WISE

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> [T]hat virtue which rules the sentiment which the Greeks designated under the name of *philanthropie*, is the charity of the wise.
>
> Denis Diderot (1713–1784)

Introduction

In *Re Macduff*,[2] the Court of Appeal held that a gift for 'charitable or philanthropic purposes' is not a valid charitable bequest and, accordingly, is void under the rule against trusts for abstract non-charitable purposes. In reaching this decision the Court took the position that, despite some overlap, the concepts of charity and philanthropy are not synonymous. At first glance this is a straightforward case, attracting little attention in the relevant monographs, yet, as this essay seeks to demonstrate, the Court's decision had a profound impact on the shape of charity law throughout the twentieth century. Its effect was to restrict the development of the fourth head of charity laid down five years earlier by Lord Macnaghten in *Income Tax Special Purposes Commissioners v Pemsel*,[3] by holding that (a) not every purpose beneficial to the community is charitable, but only those that are within the spirit and intendment of the Preamble to the Statute of Charitable Uses 1601, which lists a range of purposes considered charitable at law; and (b) although some charitable purposes are philanthropic, a philanthropic purpose does not fall within the spirit and intendment of the Act per se. Its influence continues to be felt to the present day: certain philanthropic endeavours, such as the advancement of amateur sport and the provision of social recreation, fall outside the common law categories of charity, although in some jurisdictions statutory reform has corrected this, and the judgments of Lindley and Rigby LJJ were

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2 [1896] 2 Ch 451 (CA).

3 [1891] AC 531 (HL). See also Sir John Mummery's article in this issue of CL&PR.

central to the Upper Tribunal's decision in *R (Independent Schools Council) v Charity Commission for England and Wales* that a charity may not pursue its purposes so as to restrict access to the poor.[4] It has also been used to lend weight to the proposition that a charitable purpose cannot be a political one.[5] Despite this, and despite the uncertainties surrounding the exact nature of the concept, philanthropy in truth permeates the heart of legal charity. It runs through both the categories of purposes that have been held to be charitable, and the requirement that charities carry on their purposes for the benefit of a sufficient section of the community. With this in mind, this article seeks to demonstrate the significance of *Re Macduff* on the development of charity law; to unpack the meaning of philanthropy, its relationship with other forms of benevolence and its role within legal charity; to rethink the prohibition on political purposes in light of the relationship between philanthropy and social reform; and, lastly, to argue that, considering that the significance of the legal definition of charity lies in the legal consequences of charitable status, particularly the court's supervisory jurisdiction over those in control of charities and the mischief of the 1601 Act, it is difficult to justify drawing any meaningful distinction between the pursuit of charity and the pursuit of philanthropy.

The Case

The facts of *Re Macduff* are simple enough: the will of the author and Church of Scotland minister, Rev John Ross Macduff, included an incompletely worded gift of money 'for some one or more purposes, charitable, philanthropic or—' and the question for the court was whether this gift was good. In the High Court, Stirling J held that the gift was not bad for its lack of completeness and was analogous to a gift 'for some one or more purposes charitable, philanthropic or of other such nature as I may hereafter name by codicil' where the testator dies having made no such codicil.[6] The question thus became simply whether a gift for 'charitable or philanthropic purposes' was valid. The judge held otherwise on the basis that philanthropy, which he took to mean 'goodwill to mankind at large',[7] is 'wide enough to comprise purposes which are not charitable in the technical sense'.[8] In reaching this decision Stirling J found guidance in two earlier decisions, *James v*

4 [2011] UKUT 421 (TCC), [2012] Ch 214 [127]–[128].

5 *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) 41 (Lord Wright) 65 (Lord Simonds).

6 *Macduff* (n 2) 455.

7 ibid 457.

8 ibid 457.

Allen[9] and *Kendall v Granger*.[10] In the former, a bequest for 'such benevolent purposes, as the Trustees in their integrity and discretion may unanimously agree on' was void for extending beyond the boundaries of legal charity and, as such, was 'too indefinite' for the court to uphold.[11] As the Master of the Rolls observed:[12]

> [A]lthough many charitable institutions are very properly called 'Benevolent,' it is impossible to say, that every object of a man's benevolence is also an object of his charity.

In the latter case, a bequest for 'encouraging undertakings of general utility' failed for similar reasons.[13] Stirling J also considered himself bound by a number of earlier authorities cited by counsel, but not mentioned explicitly in the judgment of the court, in *Kendall v Granger*,[14] though he did not discuss these in any detail: in these cases, trusts for 'objects of benevolence and liberality',[15] 'benevolent purposes',[16] 'benevolent, charitable, and religious purposes',[17] and 'charitable or public purposes'[18] were all held to be void for uncertainty.

A similar approach was taken by the Court of Appeal, which unanimously affirmed Stirling J's judgment, holding that charitable purposes and philanthropic purposes are not synonymous, and that while some philanthropic purposes are legally charitable, a trust for 'charitable and philanthopic purposes' per se—where these words are construed disjunctively rather than conjunctively[19]—is void. At the heart of the court's decision was the belief that a purpose should not be recognised as charitable merely because it fell within one of the four categories of charity laid down by Lord Macnaghten in *Pemsel* four years earlier, viz (1) the relief of poverty, (2) the advancement of education, (3) the advancement of

9 (1817) 3 Mer 17, 36 ER 7.

10 (1842) 5 Beav 300, 49 ER 593.

11 (1817) 3 Mer 17, 17; 36 ER 7, 7.

12 (1817) 3 Mer 17, 18–19; 36 ER 7, 8 (Grant MR).

13 (1842) 5 Beav 300, 303; 49 ER 593, 594–5.

14 ibid.

15 *Morice v Bishop of Durham* (1805) 10 Ves Jun 522, 32 ER 947.

16 *James* (n 9).

17 *Williams v Kershaw* (1835) 5 Cl & F 111, 7 ER 346.

18 *Vezey v Jamson* (1822) 1 Sim & St 69, 57 ER 27.

19 *Macduff* (n 2) 468 (Lopes LJ).

religion, and (4) other purposes beneficial to the community.[20] In the words of Lindley LJ:[21]

> In deciding the case we must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord Eldon says, this Court has taken great liberties with charities; but the liberty is always restricted by falling back or professing to fall back upon the Statute of Elizabeth.

These sentiments were similarly expressed by Rigby LJ, who held that charitable purposes were determined 'according to the standard supplied by the Statute of Elizabeth and by the analogies to that statute'.[22] The third judge, Lopes LJ, was silent on this point, although he alluded to importance of the Statute for the meaning of charity when he observed, like Lindley LJ, that '[g]reat liberties' had been taken with it down the centuries.[23] On this basis, although philanthropy is by definition beneficial to the community—it was taken by Lindley LJ to mean 'goodwill to mankind in general'[24] and by Rigby LJ as that which is intended to 'improve the position of a large class of persons'[25]—a gift for 'philanthropic purposes' per se was held not to be legally charitable on the basis that some philanthropic endeavours fall beyond the spirit of the 1601 Act. This was underpinned by two further considerations. Firstly, the court was concerned that the boundaries of philanthropy were too 'indefinite' for the court to execute a trust for its pursuit.[26] Secondly, the court wished to ensure that a trust that provided some benefit to the rich, but not the poor, could not be upheld under the aegis of charity. In the words of Lindley LJ:[27]

> [I]t is extremely difficult to say, but we can suggest purposes which might be philanthropic and not charitable—purposes indicating goodwill to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptation of the word—that is to say, in the wide, loose sense of indicating goodwill towards mankind or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much

20 *Pemsel* (n 3).

21 *Macduff* (n 2) 467.

22 ibid 475.

23 *Macduff* (n 2) 467.

24 ibid 464 (Lindley LJ).

25 ibid 471 (Rigby LJ).

26 ibid 462, 465, 467 (Lindley LJ) 469 (Lopes LJ) 470 (Rigby LJ).

27 ibid 464.

> whether a trust would be declared to be charitable which excluded the poor.

A similar line was taken by Rigby LJ:[28]

> I can suppose the case of a person saying something to this effect: 'The ordinary objects of charity are in my mind sufficiently provided for; but I regard the position of the well-to-do, or moderately well-to-do, classes as one also requiring consideration, and I leave my residue to trustees in order that they may in their discretion do something towards advancing the happiness and the position in life of those who are not really objects of charity, but who may be made happier, and in some sense better than they now are, with such incomes as they possess.' I doubt whether any one could say that that was not a philanthropic intention—a very wide desire to improve the position of a large class of persons. Philanthropic I should think it was—charitable I feel pretty certain it would not be[.]

An example of such a trust—a gift to 'landowners affected by agricultural depression'[29]—was given by Lopes LJ, which he considered to be philanthropic but not charitable in nature.

Significance

The court in *Re Macduff* was not the first to suggest that a charitable purpose must fall within the spirit and intendment of the Preamble to the 1601 Act,[30] but its effect, coming so recently after the House of Lords decision in *Pemsel*,[31] was to cripple almost from the beginning the development of the fourth of Lord Macnaghten's heads of charity, the catchall category comprising purposes 'beneficial to the community' other than the relief of poverty, advancement of education and advancement of religion.[32] Its attenuating effect on the development of charity law is a recurring theme of the twentieth century caselaw. As Lord

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28 ibid 470–71.

29 ibid 469.

30 See *Morice v Bishop of Durham* (1804) 9 Ves Jr 399, 405; 32 ER 656, 659–60 (Sir William Grant MR), aff'd (1805) 10 Ves Jr 522, 541; 32 ER 947, 955 (Lord Eldon LC). cf *Mellick v President and Guardian of the Asylum* (1821) Jac 180, 184; 37 ER 818, 821 (Plumer MR); *AG v Fowler* (1808) 15 Ves 85, 86–7; 33 ER 687, 688 (Sir Samuel Romilly); *Doe, on the demise of Thompson v Pitcher* (1815) 6 Taunt 359, 366–7; 128 ER 1074, 1077 (Gibbs CJ); on which see G Jones, *History of the Law of Charity 1532–1827* (CUP 1969) 126.

31 *Pemsel* (n 3).

32 ibid 583.

Simonds observed in *Williams Trustees v IRC*:[33]

> My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers, unless it is within the spirit and intendment of the preamble to the statute of Elizabeth[.] The second is that the classification of charity in its legal sense into four principal divisions by Lord Macnaghten in *Income Tax Commissioners v Pemsel* must always be read subject to the qualification appearing in the judgment of Lindley LJ in *In re Macduff*.

Despite suggestions that it is hard to find purposes that are beneficial to the community but fall outside the fourth head,[34] or that a public purpose will be presumed to fall inside in the absence of a clear justification otherwise,[35] it is clear from the subsequent caselaw that *Re Macduff* has had a direct influence in preventing a number of potentially philanthropic endeavours from being held charitable at common law, including the promotion of regional interests in a particular city;[36] settling Jewish people in Palestine and elsewhere;[37] patriotic purposes in the British Empire;[38] emigration uses;[39] the promotion of foxhound breeding;[40] the strengthening of relations between countries;[41] the advancement of recreation;[42] and the promotion of political purposes.[43] This is not restricted to

33 [1947] AC 447 (HL) 455.

34 See e.g. *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 (HL) 147 (Lord Reid).

35 *Incorporated Council of Law Reporting for England and Wales v AG* [1972] Ch 73 (CA) 88 (Russell LJ); *CIR v Medical Council of New Zealand* [1997] 2 NZLR 297 (NZ Court of Appeal) 310 (McKay J) 321 (Thomas J).

36 *Williams Trustees v IRC* [1947] AC 447 (HL) 455 (Lord Simonds).

37 *Keren Kayemeth le Jisroel v IRC* [1931] 2 KB 465 (CA) 478 (Lord Hanworth MR) 489 (Slesser LJ), aff'd [1932] AC 650 (HL) (*Re Macduff* was not cited in the appeal before the House).

38 *AG v National Provincial and Union Bank of England* [1924] AC 262 (HL) 265 (Viscount Cave LC).

39 *Re Sidney* [1908] 1 Ch 488 (CA) 490 (Cozens-Hardy MR).

40 *Peterborough Royal Foxhound Show Society v IRC* [1936] 2 KB 497 (Ch) 501 (Lawrence J).

41 *Re Strakosch (deceased)* [1949] Ch 529 (CA) 537 (Lord Greene MR) (citing not *Re Macduff* itself but *Williams Trustees v IRC* [1947] AC 447 (HL) on the same point).

42 *IRC v Baddeley* [1955] AC 572 (HL) 603 (Lord Reid).

43 *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) 41 (Lord Wright) 65 (Lord Simonds).

England: the English model of charity based on the four heads of charity from *Pemsel*, as reined in by *Re Macduff*, lies at the heart of the common law definition of charity in several other jurisdictions such as Australia,[44] Canada,[45] New Zealand[46] and the Republic of Ireland.[47] Its influence can also be felt in a number of appellate cases in which the court fell it necessary to confirm a novel purpose as falling within the spirit and intendment of the Preamble in order to find it charitable.[48] Limiting the reach of the fourth head has also forced the courts sometimes to engage in highly artificial analogies in order to bring a novel purpose within the spirit and intendment of the Preamble, most famously in *Vancouver Regional FreeNet Association v Minister of National Revenue*,[49] where the Canadian Federal Court of Appeal resorted to comparing the repair of highways with the 'information highway' in order to find that the provision of internet access was a charitable purpose.[50] The case is even arguably one of the driving factors behind the so-called common law 'presumption' of public benefit for purposes

44 To the distaste of some judges: see eg *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 [96] (Kirby J). Note, however, that the Charities Act 2013 introduces a statutory definition of charity that will take effect for Federal purposes, including regulation by the Australian Charities and Not-for-profits Commission, from 1 January 2014.

45 *Re Cox* [1953] 1 SCR 94 [21] (Kellock J, Taschereau and Faueux JJ concurring), aff'd *Baker v National Trust Co Ltd* [1955] AC 627 (PC). See also *Guaranty Trust Company of Canada v Minister of National Revenue* [1967] SCR 133 [5] (Ritchie J, Hall and Spence JJ concurring); *Scarborough Community Legal Services v Minister of National Revenue* [1985] 1 CTC 98 (FCA) [13] (Marceau J).

46 *NZ Society of Accountants v CIR* [1986] 1 NZLR 147 (CA) 152 (Richardson J), 155 (Somers J); Charities Act 2005, s 5(1).

47 *Re Cranston* [1898] 1 IR 431 (CA) 444 (Lord Ashbourne C) 445 (Fitz Gibbon LJ) 449 (Walker LJ) 452, 455 (Homes LJ). Although the Statute of Charitable Uses 1601 did not extend to Ireland, the Preamble to the Irish Statute of Pious Uses 1634 contained a list of charitable purposes not dissimilar to those in the Elizabethan Act.

48 See eg *Re Hopkins' WT* [1965] Ch 669 (Ch) 678–9 Wilberforce J (trust to find the Bacon-Shakespeare manuscripts); *Scottish Burial Reform & Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 (HL) 149 (Lord Upjohn) (provision of cremation facilities); *Incorporated Council of Law Reporting for England and Wales v AG* [1972] Ch 73 (CA) 88 (Russell LJ) (preparation and publication of law reports); *Re South Place Ethical Society* [1980] 1 WLR 1565 (Ch) 1574–5 (Dillon J) (promotion of ethical principles and rational religious sentiment).

49 [1996] 3 FC 880.

50 ibid [20], [23] (Hugessen JA, Pratte JA concurring).

falling under the first three heads of *Pemsel*,[51] the origin which lies in the attempt by Lord Simonds in *National Anti-Vivisection Society v IRC* to avoid a 'strange mis-reading of Lord Macnaghten's speech in *Pemsel's* case [which] was pointed out in *In re Macduff*' whereby an educational or religious purpose might be treated as charitable even if it was illegal or contrary to public policy.[52] More recently, *Re Macduff* was one of the key authorities cited by the Upper Tribunal in England to justify the new requirement, introduced by the Charity Commission,[53] that every charity must ensure that the poor are able to access its benefits, regardless of whether its purpose is the relief of poverty.[54]

Charity, Philanthropy and Benevolence

Despite this not insignificant impact on the landscape of common law charity, at the heart of *Re Macduff* lies a fundamental problem: despite the ratio of the court, philanthropy in the sense understood by the Court of Appeal in truth suffuses the legal definition of charity. Before considering this point in detail, though, it is enlightening first to unpack the meaning of philanthropy, given how troubled the court was by the apparently elusive nature of the concept.[55]

Meaning of philanthropy

Both the word and the concept come to us from the Ancient Greek φιλανθρωπία (*philanthrôpia*), a compound word formed from φίλος (*philos*), meaning love in the sense of 'affectionate regard or friendship',[56] and ἄνθρωπος (*anthrôpos*), meaning humankind. Its earliest recorded use is generally taken to be the opening lines of Aeschylus's *Prometheus Bound*, which sees the eponymous Titan, lashed

51 As to the true nature of the presumption, which no longer applies in England—if it ever did—by virtue of the Charities Act 2011, s 4(2), see *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2012] Ch 214 [54-71]; P Luxton, 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11 CL&PR 19, 23–5; H Picarda, *The Law and Practice Relating to Charities* (4th edn, Bloomsbury 2010) 39B; J Garton, *Public Benefit in Charity Law* (OUP 2013) 102–06.

52 [1948] AC 31 (HL) 65.

53 Charity Commission, *Charities and Public Benefit* (Charity Commission 2008) Principle 2c.

54 *Independent Schools Council* (n 4) [127]–[128].

55 *Macduff* (n 2) 467 (Lindley LJ) 469 (Rigby LJ).

56 M Sulek, 'On the Classical Meaning of *Philanthrôpia*' (2010) 39 Nonprofit and Voluntary Sector Quarterly 385, 386.

to rocks by Kratos, Bia and Hephaestus as punishment for stealing fire for the benefit of humanity, and for thwarting an attempt by Zeus to wipe out the human race, charged thus:[57]

> τὸ σὸν γὰρ ἄνθος, παντέχνου πυρὸς σέλας,
> θνητοῖσι κλέψας ὤπασεν. τοιᾶσδέ τοι
> ἁμαρτίας σφε δεῖ θεοῖς δοῦναι δίκην,
> ὡς ἂν διδαχθῇ τὴν Διὸς τυραννίδα
> στέργειν, φιλανθρώπου δὲ παύεσθαι τρόπου.

The final clause has been variously translated as an exhortation that Prometheus must cease his contemptuous 'trick of loving man',[58] 'over-benefiting man',[59] 'bent of loving man',[60] 'man-helping want',[61] 'man-befriending ways',[62] 'man-loving ways',[63] and, simply, his 'philanthropy'.[64] It is significant that Prometheus is a deity: the earliest references to φιλανθρωπία depict it as a peculiarly divine characteristic, and it seems that it was not until the time of Plato that the concept was used to describe something displayed by men;[65] in *Euthyphro*, Plato has Socrates contrast the titular antagonist's reluctance to share his wisdom with his own *philanthrôpia*, the 'benevolent habit of pouring myself out to everybody'.[66] Indeed, as Marty Sulek's meticulous tracing of the use of φιλανθρωπία from the 5th to the 1st centuries BCE shows, in Ancient Greek society the concept of philanthropy was nothing if not protean.[67] While for some it retained connotations of its religious origins, for others it described variously an emotional state,[68] a

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57 lines 7–11. A literal translation is 'For thine own glory, The live blaze of all-working fire, he stole, And unto mortals gave. And for such crime Must he pay forfeit to the gods, so that He learn to bear with Zeus's empery, And to refrain from his man-helping wont.': A Webster, *The Prometheus Bound of Æschylus* (MacMillan 1866) lines 7–11.

58 EB Browning, *Prometheus Bound, and other Poems* (CS Francis 1851) 9.

59 T Medwin, *Prometheus Bound, A Tragedy* (William Pickering 1832) 7.

60 ER Bevan, *The Prometheus Bound of Aeschylus* (David Nutt 1901) 1.

61 Webster (n 57).

62 W Headlam & CES Headlam, *The Plays of Æschylus* (George Bell 1909) 3.

63 WC Lawton, *The Prometheus of Aeschylus* (Houghton Mifflin 1888) 213.

64 EH Plumptre, *Prometheus Bound* (Harvard University Press 1868) 5.

65 See Sulek (n 56) 389–92.

66 Plato, *Euthyphro* (c 380 BC), translation by B Jowett (first published 1891, Actonian Press 2010) [3].

67 See generally Sulek (n 56).

68 For Aristotle, the catharsis enjoyed by the audience of Greek tragedy turned on *philanthrôpia* in this sense: *Poetics*, 1452b–1453a; see Sulek (n 56) 394.

moral imperative,[69] a mere nicety of social interaction,[70] and, in one notable case, the act of lovemaking.[71] But it is of course *philanthrôpia* as one of the essential features of democratic society that is of most interest for current purposes, as described by Plutarch thus:[72]

> For as nature, in wild growths, such as wild vines, wild figs, or wild olives, makes the fruit imperfect and inferior to the fruit of cultivated trees, so has she given to the brutes an imperfect affection for their kind, one neither marked by justice nor going beyond commodity: whereas to man, a logical and social animal, she has taught justice and law, and honour to the gods, and building of cities, and philanthropy[.]

In this context, Sulek notes that, outside of literary references, from the 3rd century BCE onwards the common meaning of φιλανθρωπία was effectively a 'reference to the financial generosity of private citizens toward public purposes'.[73]

The concept of philanthropy seems to have entered the collective English-speaking consciousness in the early 17th century, and the earliest explicit reference is usually taken to be Francis Bacon's *On Goodness and Goodness in Nature*:[74]

> I TAKE goodness in this sense, the affecting of the weal of men, which is that the Grecians call philanthropia; and the word humanity (as it is used) is a little too light to express it. Goodness I call the habit, and goodness of nature, the inclination. This of all virtues, and dignities of the mind, is the greatest[.]

As with its Ancient Greek forebear, the meaning of philanthropy has shifted across time and context, and is 'not a static social phenomenon'.[75] In particular, during the 19th century connotations of moral virtue were gradually displaced by a utilitarian sense of philanthropy as acts of charitable giving. Doubtless influenced by the emergence of a number of high-profile, affluent individuals such as the Earl of Shaftesbury, the Cadbury brothers, and Joseph Rowntree, and US industrialists

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69 Aristotle, *Nicomachean Ethics*, 1155a; see Sulek (n 56) 394.

70 Diogenes Laertius, *Lives of the Eminent Philosophers*, Book III, Plato, s 98; see Sulek (n 56) 404.

71 Aeschines, Speech 1, s 171; see Sulek (n 56) 405.

72 Plutach, *Moralia*, 'On Love To One's Offspring', III; translation by AR Shilleto (George Bell 1898) 25.

73 Sulek (n 56) 395.

74 F Bacon, *The Major Works* (1612, reprinted OUP 1996) 363.

75 T Adam, 'Introduction' in T Adam (ed), *Philanthropy, Patronage and Civil Society* (Indiana University Press 2004) 5.

such as John D Rockefeller and Andrew Carnegie, who self-identified as philanthropists, this development is nicely illustrated by the shift in emphasis noted by Sulek in the dictionary definitions of philanthropy from the 18th and 19th centuries to the early 20th century.[76] Both Samuel Johnson's *A Dictionary of the English Language*, published in 1755, and the first edition of Noah Webster's *American Dictionary of the English Language*, published in 1828, define philanthropy as simply 'love of mankind';[77] by the first part of the 20th century, the third iteration of Webster's work, now titled *Webster's New International*, gave the meaning as 'a desire to help mankind as indicated by acts of charity, etc.; love of mankind'.[78] Similarly, the first edition of the *Oxford English Dictionary*[79] defined philanthropy primarily as 'love of mankind … now esp as expressed by the generous donation of money to good causes' and gave a secondary meaning as a 'philanthropic action, movement or agency; a charity.' This shift from the moral to the practical was certainly not without its detractors. Bemoaning the perceived loss of philanthropy as 'love for one's fellow man in its broadest sense',[80] Henry Thoreau opined:[81]

> A man is not a good *man* to me because he will feed me if I should be starving, or warm me if I should be freezing, or pull me out of a ditch if I should ever fall into one. I can find you a Newfoundland dog that will do as much.

And in response to Andrew Carnegie's *Wealth*,[82] in which the steel magnate laid down his thoughts on the philanthropic obligations of his fellow industrialists, the Rev Hugh Price Hughes condemned the idea as an 'anti-Christian phenomenon, a social monstrosity, and a grave political peril'.[83] Nevertheless, the die was cast, and the practical meaning of philanthropy, and its interconnectedness with charity in the popular sense of the word, has endured. Today, many contemporary dictionary definitions treat philanthropy and charity as, if not synonymous, then

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76 M Sulek, 'On the Modern Meaning of Philanthropy' (2010) 39 Nonprofit and Voluntary Sector Quarterly 193, 197–98.

77 Johnson also defines it as 'good nature'; Webster as 'benevolence towards the whole human family' and 'universal good will'.

78 (G & C Merriam 1934).

79 Published between 1888 and 1928; the volume containing 'philanthropy' was published in 1908.

80 H Thoreau, *Walden; or, Life in the Woods* (Ticknor and Fields 1854) 81.

81 ibid.

82 (1889) 148 North American Review 653.

83 (1890) 28 (166) The Nineteenth Century 890, 891.

fundamentally interconnected;[84] so too do some scholars of organised civil society.[85]

Philanthropy and legal charity

This is not to say that charity and philanthropy are synonymous in the eyes of lawyers, however. In *Re Macduff*, charity and philanthropy were considered to represent different, overlapping, forms of benevolence, and much was made of the weight of the earlier caselaw holding 'benevolent' purposes not to be charitable on the basis that benevolence alone is not an indicator of charity, which instead requires some need to be relieved. Of particular note are the words of the Master of the Rolls, Lord Langdale, in *Kendall v Granger*:[86]

> There is no charitable purpose which is not a benevolent purpose, and yet, a trust to apply funds to a benevolent purpose has been held not to be a charitable trust, on the ground that there are benevolent purposes which the Court cannot construe to be charitable purposes; and the trustees, being directed to apply it to benevolent purposes, may apply it to benevolent purposes which are not charitable, according to that narrow construction.

Leaving aside the extent to which the term 'benevolence' implies something of the motive behind a gift as much as the nature of the gift itself,[87] which, other than in Ireland,[88] is not generally relevant to charitable status,[89] the meaning is clear: benevolence is essential for charity, though, as the genus to charity's species, it also covers a range of other undertakings that fall outside charity, such as informal

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84 See Sulek (n 76) 200.

85 See e.g. L Salamon, *America's Nonprofit Sector: A Primer* (Foundation 1992) 10.

86 (1842) 5 Beav 300, 302–3; 49 ER 593, 594.

87 See e.g. the primary definition in the current *Oxford English Dictionary*, which is 'disposition to do good, desire to promote the happiness of others, kindness, generosity, charitable feeling': <www.oed.com/view/Entry/17711?redirectedFrom=benevolence&> accessed 21 July 2013.

88 In this jurisdiction, the motive of the donor of a gift is a relevant factor: see *Re Cranston* [1898] 1 IR 431 (CA) 446 (FitzGibbon LJ); *AG v Becher* [1910] 2 IR 251 (Ch); *Shillington v Portadown UDC* [1911] 1 IR 247 (Ch); *Re the Worth Library* [1995] 2 IR 301 (HC) 335. The Charities Act 2009, s 3(3)(a) also provides that gift is not charitable unless it is 'intended' to benefit the public.

89 *Re Hummeltenberg* [1923] 1 Ch 237 (Ch) 241 (Russell J); *Re Grove-Grady* [1929] 1 Ch 557 (CA) 572 (Lord Hanworth MR) 588 (Russell LJ); *Roman Catholic Archbishop of Melbourne v awlor* (1934) 51 CLR 1, 23–4 (Rich J); *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) 44 (Lord Wright). cf the earlier cases *Farewell v Farewell* (1892) 22 OR 573 (Ontario HC) 580–1 (Boyd C); *Re Foveaux* [1895] 2 Ch 501 (Ch) 507 (Chitty J).

acts of altruism[90] and goodwill 'to a particular individual only'.[91] This is echoed by Lord MacDermott's assertion in *National Deposit Friendly Society Trustees* that 'there can be no doubt that … benevolence [is] still of the essence of legal charity'.[92] What kind of benevolence, then, is associated with charity? Our starting point must be to note that legal charity certainly encompasses benevolence to those in need, which is, by some accounts, a common lay understanding of charity.[93] As Lord Esher MR observed when *Pemsel* was before the Court of Appeal,[94] 'in the minds of all ordinary persons charity implies the relief of poverty'.[95] This is clear from Lord Macnaghten's subsequent listing of the relief of poverty as the first head of *Pemsel*;[96] however, like the popular understanding, legal charity is certainly not limited to *financial* need, as Lord Watson observed in the same case:[97]

> Whilst it is applicable to acts and objects of a purely eleemosynary character, it may with equal propriety be used to designate acts and purposes which do not exclusively concern the poor, but are dictated by a spirit of charity or benevolence.

Lord Herschell echoed this view:[98]

> Its object is to render assistance to those in dire want of it, to meet a form of human need which appeals to the benevolent feelings of mankind, but not one which has its origin in the lack of money. … I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

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90 i.e. acts falling outside the charitable sector as they lack the appropriate organisational form, i.e. a trust or a company, or some variation thereon.

91 *Macduff* (n 2) 457 (Stirling J); see also *Ommanney v Butcher* (1823) Turn & R 260, 273; 37 ER 1098, 1102, where the Master of Rolls took a testamentary reference to 'private charity' to mean 'assisting individuals in distress' and, as such, benevolent but not legally charitable.

92 [1959] AC 293 (HL) 315.

93 Though note Lord Macnaghten's caution in *Pemsel* that 'no-one has yet succeeded in defining the popular meaning of the word "charity"': *Pemsel* (n 3) 583.

94 (1888) 22 QBD 296 (CA).

95 ibid 307. See also *Baird's Trustees v Lord Advocate* (1888) 15 Sess Cas (4th series) 682 (SC) 689 (Lord Shand).

96 *Pemsel* (n 3) 583.

97 ibid 558.

98 ibid 572.

It is equally clear that legal charity encompasses some endeavours that are not concerned with benevolence towards those in need, however broadly conceived, but with benevolence to mankind in general and so are philanthropic in the sense understood by the Court of Appeal in *Re Macduff*.

Having determined the nature of the benevolence represented by philanthropy, the Court of Appeal in *Re Macduff* was keen to ensure that the legal definition of charity remained true to the spirit of the Preamble to the Statute of Charitable Uses. Yet the Preamble has been described as listing 'contemporary examples of philanthropy',[99] and it is difficult to argue with this analysis if we consider the purposes mentioned therein: [100]

> [T]he relief of aged, impotent and poor people … maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities … repair of bridges, ports, havens, causeways, churches, seabanks and highways … education and preferment of orphans … relief, stock or maintenance for houses of correction … marriages of poor maids … supportation, aid and help of young tradesmen, handicraftsmen and persons decayed … relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

Although, as the preceding analysis has shown, there is considerably more to the concept of philanthropy than goodwill to mankind, or to a section thereof, even on this simple definition (as adopted by Lindley and Rigby LJJ) it is fair to say that philanthropy suffuses the Preamble. Firstly, every purpose in the Preamble is capable of being carried on for the benefit of the world at large, even if its pursuit may result in some benefit to private individuals or a private class. As Lord Greene MR observed in *Re Compton*:[101]

> In the case of many charitable gifts it is possible to identify the individuals who are to benefit, or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character.

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99 J Kendall and M Knapp, *The Voluntary Sector in the UK* (Manchester University Press 1996) 1.

100 Translated into modern English by Slade J in *McGovern v AG* [1982] Ch 321 (Ch) 332. See also Alison Dunn's article in this issue of CL&PR.

101 [1945] Ch 123 (CA) 129. See also Windeyer J in *Stratton v Simpson* (1970) 125 CLR 138, 144 ('every charitable trust is a trust for a purpose or purposes that are charitable, not a trust for a person or persons, although persons benefit from the fulfilment of the purpose'); *Joseph Rowntree Memorial Trust Housing Association Ltd v AG* [1983] Ch 159 (Ch) 176 (Peter Gibson J).

So, for example, the relief of poverty may be achieved through almsgiving; education may be advanced through the provision of scholarships,[102] or prizes,[103] or by endowing teaching positions;[104] and religion may be advanced through the funding of religious offices,[105] or associated pensions,[106] or even gifts to the holders of such offices.[107] Many purposes falling under the fourth head or its statutory equivalents may also involve the provision of private benefits, such as where medical treatment is provided under the advancement of health and the saving of lives;[108] or social housing;[109] or where relief is given to those otherwise in need.[110] In each case individuals take a benefit from the purpose, but this of course does not detract from its philanthropic nature.[111] Neither does the fact that many of the Preamble's purposes are also capable of being pursued in a manner that we might think as more in the nature of charity in its 'popular or vulgar'

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102 See e.g. *R v Newman* (1669) 1 Lev 284, 83 ER 409; *Re Levitt* (1885) 1 TLR 578 (Ch); *Re Welton* [1950] 2 DLR 280 (Nova Scotia SC); *Wilson v Toronto General Trusts Corporation* [1954] 3 DLR 136 (Saskatchewan CA); *Re Weaver* [1963] VR 257 (Victoria SC); *Re Leitch (deceased)* [1965] VR 204 (Victoria SC); *Re Lysarght* [1966] Ch 191 (Ch); *Re Lambert (deceased)* [1967] SASR 19; *Re Umpherston (deceased)* (1990) 53 SASR 293 (South Australia SC).

103 See e.g. *Thompson v Thompson* (1844) 1 Coll 381, 63 ER 464; *Farrer v St Catharine's College, Cambridge* (1873) LR 16 Eq 19 (Ch); *Re Mariette* [1915] 2 Ch 284 (Ch); *Chesterman v Federal Commissioner of Taxation* [1926] AC 128 (PC); *Perpetual Trustee Co Ltd v Groth* (1985) 2 NSWLR 278.

104 See e.g. *Jesus College Case* (1615) Duke 78; *Hynshaw v Morpeth Corporation* (1629) Duke 69; *AG v Margaret and Regius Professors in Cambridge* (1682) 1 Vern 55, 23 ER 306; *AG v Earl of Winchelsea* (1791) 3 Bro CC 373, 29 ER 591; *Yates v University College London* (1875) LR 7 HL 438; *Re Buckland* (1887) 22 LJNC 7.

105 See e.g. *AG v Molland* (1832) 1 Y 562, 159 ER 1114; *Thornber v Wilson* (1855) 3 Drew 245, 61 ER 897; *Re Simsoney* [1946] Ch 299 (Ch).

106 *Re Davies* [1915] 1 Ch 543 (Ch).

107 See e.g. *AG v Cock* (1751) 2 Ves Sen 273, 28 ER 177; *AG v Sparks* (1753) Amb 201, 27 ER 135; *Re Delany* [1902] 2 Ch 642 (Ch); *Re Garrard* [1907] 1 Ch 382 (Ch); *Re Flinn* [1948] Ch 241 (Ch). cf *Re Meehan* [1960] IR 82 (HC).

108 *Re Smith's Will Trusts* [1962] 1 WLR 763 (CA) 768 (Upjohn LJ). See e.g. *Taylor v Taylor* (1910) 10 CLR 218; *Re McIntosh* [1976] 1 NZLR 308 (SC); *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 382 (SC).

109 *Joseph Rowntree Memorial Trust Housing Association Ltd v AG* [1983] Ch 159 (Ch) 176 (Peter Gibson J). cf *Helena Housing Ltd v Revenue and Customs Commissioners* [2012] EWCA Civ 569, [2012] 4 All ER 111.

110 See e.g. *Re Twigger* [1989] 3 NZLR 329 (HC); *Baptist Union of New Zealand v AG* [1973] 1 NZLR 42 (SC).

111 Note also Lord Macnaghten's warning in *Savoy Overseers v Art Union of London* [1896] AC 296 (HL) 313 that the court should not 'confuse the purpose of [a] society with the object of individual members [who benefit] in joining it'.

sense,[112] i.e. with the aim of relieving those with a particular need rather than benefiting society more widely. Where the relief of need is inherent in the purpose, as with, for example, the relief of aged, impotent and poor people, this need not undermine its philanthropic nature if it is carried on for the benefit of the public rather than a restricted private class;[113] charity and philanthropy, as the Court of Appeal in *Re Macduff* intimated, are not mutually exclusive. Significantly, one set of purposes—the repair of bridges, ports, havens, churches, causeways, seabanks and highways—can only meaningfully be understood as being beneficial to mankind generally, or a section thereof, rather than alleviating those in need in any meaningful sense. This is reinforced by the rules of public benefit under the fourth head of charity that mean that it would not be charitable to carry on such repairs—leaving aside churches, the repair of which would fall under the advancement of religion—for the benefit of an arbitrary class rather than for anyone who wished to use the structure in question. As Viscount Simonds wondered rhetorically in *IRC v Baddeley*:[114] 'Who has ever heard of a bridge to be crossed only by impecunious Methodists?'[115]

Philanthropy as Social Reform

For some commentators—and indeed high-profile philanthropists[116]—the distinction between charity and philanthropy is not merely a distinction between providing for the needy in particular and providing for mankind in general, but rather a distinction between almsgiving and other forms of direct relief for those in need ('vulgar' charity)[117] on the one hand, and those endeavours that seek not to

112 *Pemsel* (n 3) 582 (Lord Macnaghten).

113 As indeed the relief of the aged and the impotent must be, as they fall under the fourth, not the first, head of *Pemsel*, as 'aged, impotent and poor' is read disjunctively: *Joseph Rowntree Memorial Trust Association Ltd v AG* [1983] Ch 159 (Ch) 171 (Peter Gibson J); *Re Dunlop* [1984] NI 408 (Ch).

114 [1955] AC 572 (HL).

115 ibid 592. This question was originally posed by the appellant's counsel, and noted in the judgment of the Master of Rolls in the Court of Appeal [1953] Ch 504 (CA) 519 (Evershed MR).

116 See eg JG Rockefeller, 'The Difficult Art of Giving', reproduced in D Burlingame (ed), *Philanthropy in America: A Comprehensive Historical Encyclopedia* (ABC-CLIO 2004) 684: 'The best philanthropy, the help that does the most good and the least harm, the help that nourishes civilisation at its very root, that most widely disseminates health, righteousness, and happiness, is not what is usually called charity'.

117 T Kelley, 'Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law' (2005) 73 Fordham LR 2437, 2438.

alleviate the symptoms of social problems but to address their causes.[118] On this analysis, philanthropy is the 'prudent sister of charity',[119] concerned with the more strategic task of 'providing opportunities for bettering the human condition'[120] through the shaping of public policy.[121] Advocates of this understanding of philanthropy may even condemn the palliative acts of charity as doing more harm than good: perpetuating, rather than abolishing, social problems,[122] and operating to 'keep the poor under control' and so preserving an inequitable status quo.[123] This is by no means a recent development, as RH Bremner observes:[124]

> Throughout most of the nineteenth century, philanthropy meant not financial support for educational, charitable, and cultural improvements but advocacy of humanitarian causes such as improvement in prison conditions; abstinence or temperance in use of alcohol; abolition of slavery, flogging and capital punishment; and recognition of the rights of labor, women, and nonwhite people.

Thus the nineteenth centuries saw the emergence of a range of reform societies such as the Birmingham Political Union, and later the broader Chartist movement, campaigning for the extension of suffrage; the London Trades Council and the International Workingmen's Association campaigning for workers rights; the short

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118 See generally MG Gurin and J Van Til, 'Philanthropy in its Historical Context' in J Van Til *et al* (eds), *Critical Issues in American Philanthropy: Strengthening Theory and Practice* (Jossey-Bass 1990); WF Ilchman, SN Katz and EL Queen II (eds), *Philanthropy in the World's Traditions* (Indiana University Press 1998) x.

119 R Payton, *Philanthropy: Voluntary Action for the Public Good* (MacMillan 1988) 36.

120 K O'Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge 2007) 13.

121 See RH Bremner, *American Philanthropy* (2nd edn, University of Chicago Press 1988) 3; O Lunz, *Philanthropy in America* (Princeton University Press 2012) 5, 10-11.

122 See A Carnegie, 'The Best Fields for Philanthropy' (1889) 149 (397) North American Review 682, 686: 'one of the chief obstacles which the philanthropist meets in the efforts to do real and permanent good in this world is the practice of indiscriminate giving; … nine hundred and fifty out of every thousand dollars bestowed to-day upon so-called charity had better be thrown into the sea'; also RH Bremner, (n 121) 2; J Sealander, 'Curing Evils at their Source: The Arrival of Scientific Giving' in LJ Friedman and MD McGarvie, *Charity, Philanthropy and Civility in American History* (CUP 2002) 217–18.

123 D Siegel, *Charity and Condescension: Victorian Literature and the Dilemmas of Philanthropy* (Ohio University Press 2012) 105. See also J Davis Smith, 'The Voluntary Tradition' in J Davis Smith, C Rochester, and R Hedley (eds), *An Introduction to the Voluntary Sector* (Routledge 1995) 17–19; in the US context see W Gamber, 'Antebellum Reform' in Friedman and McGarvie (n 122) 132–34.

124 RH Bremner, *Giving: Charity and Philanthropy in History* (Transaction 1996) 121; see also, in the US context, LJ Friedman and MD McGarvie, 'Philanthropy in America: Historicism and its Discontents' in Friedman and McGarvie (n 122) 8.

time committees campaigning for restrictions on child labour; and the various councils of the temperance movement. Indeed, despite Lord Parker's assertion in *Bowman v Secular Society Ltd* that the Chancery court had 'always refused' to uphold political trusts,[125] a number of reform societies were considered charitable in the nineteenth century, and in some cases remain charitable to this day: the Anti-Slavery Society, founded as the Society for the Mitigation and Gradual Abolition of Slavery throughout the British Dominions in 1807;[126] the Howard League for Penal Reform, founded as the Howard Association in 1866; the Charity Organisation Society, founded as the Society for Organising Charitable Relief and Repressing Mendicity in 1869;[127] and the National Anti-Vivisection Society, founded as the Victoria Street Society in 1875.[128]

On this basis, perhaps the most significant impact of the rejection of philanthropy has been in reinforcing the prohibition on political purposes. This is generally traced back to *De Themmines v De Bonneval*,[129] in which a trust to promote papal supremacy over the authority of the state was held void—although there is no explicit mention of the political nature of the purpose in the judgment[130]—and the subsequent dictum of Lord Parker in *Bowman v Secular Society* that a trust for political purposes is never charitable 'because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit'.[131] However, it was not until the House of Lords decision in *National Anti-Vivisection Society v IRC* that the prohibition was expressly used to deny charitable status to an organisation with political aims[132]—the repeal of the Cruelty to Animals Act

125 [1917] AC 406 (HL) 441.

126 See *Langford v Gowland* (1862) 3 Giff 617, 66 ER 554, where an application for *cy-près* was made on the assumption that a gift to the Society, which had been wound up before the testator's death, was charitable; the application was denied but because of a lack of a general charitable intention (see *Re Lysaght* [1966] Ch 191 (Ch)) and not for want of a charitable purpose.

127 On which see M Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson 1979) 44–5, 79–80.

128 The Society was considered charitable in a number of cases prior to the House of Lords holding otherwise in *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL): see *Re Douglas* (1887) 35 Ch D 472, 477 (Kay J); *Pemsel* [1891] AC 531 (HL) 550 (Lord Halsbury LC); *Re Foveaux* [1895] 2 Ch 501 (Ch); *Re Cranston* [1898] IR 431 (CA) 443 (Lord Ashbourne C); *Re Wedgwood* [1915] 1 Ch 113 (CA) 122 (Swifen Eady LJ). cff *Re Grove-Grady* [1929] 1 Ch 557 (CA) 582 (Russell LJ).

129 (1828) 5 Russ 288, 38 ER 1035.

130 See J Garton, '*National Anti-Vivisection Society v IRC*' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart 2012) 529, 541.

131 *Bowman* (n 125) 442.

132 [1948] AC 31 (HL).

1876—and although the decision turns on the supposed inability to determine the public benefit in a political purpose, both Lord Wright and Lord Simonds added weight to their arguments by citing *Re Macduff* to indicate that even if its purpose was 'in some sense beneficial to the community' it would still not have been charitable as 'the legal significance [of that phrase] is narrower than the popular'.[133] In a similar vein, *Re Macduff* was used by Harman J to justify denying charitable status to the research into the new alphabet proposed by the testator in *Re Shaw's WT*,[134] which the judge considered comparable to a political purpose,[135] on the basis that this fell outside not just the advancement of education but also the fourth head of *Pemsel*. In *McGovern v AG*,[136] Slade J describes the political objects of Amnesty International, to which he would deny charitable status, as 'philanthropic purposes of an excellent character';[137] although *Re Macduff* was neither mentioned by name in his judgment nor cited in argument by counsel, its influence can clearly be felt when he states that 'the mere fact that an organisation may have philanthropic purposes … does not by itself entitle it to acceptance as a charity in law',[138] and that 'however philanthropic' a purpose it must fall within the spirit and intendment of the Preamble and be 'of a nature recognised by the courts'.[139] The significance of *Re Macduff* as a means of bolstering the prohibition on political purposes has also been noted in Canada by both Federal and provincial appellate courts.[140]

Charity, Vagueness and the Missing Analogy

The Court of Appeal in *Re Macduff* were not blind to the philanthropic nature of certain charitable purposes; rather, it seems that the judges' concern was that philanthropy ought not to be the characteristic on which an analogy is made between a novel purpose and a purpose contained in the Preamble, or by extension a purpose previously recognised as charitable by the courts, on the basis that the term was 'too general and too indefinite'[141] and 'too uncertain for the Court to give

133 ibid 41 (Lord Wright).

134 [1957] 1 WLR 729 (Ch) 737, 740.

135 ibid 742.

136 *McGovern* (n 100).

137 ibid 329.

138 ibid.

139 ibid 331.

140 *Re Patriotic Acre Fund* [1951] 2 DLR 624 (Saskatchewan CA) [29] (Martin CJS); *Toronto Volgograd Committee v MNR* [1988] 3 FC 251 (Federal CA) [11] (Stone J).

141 *Macduff* (n 2) 467 (Lindley LJ).

effect to it'.[142] These concerns would be echoed by Viscount Simonds half a century later when *Re Macduff* was used to deny charitable status to a trust to promote the moral, social and physical well-being of a Methodist community in East London,[143] which he considered to be 'a laudable object of benevolence and philanthropy' but one whose 'ambit is far too wide to include only purposes which the law regards as charitable'.[144] Yet the purposes that comprise legal charity are themselves anything but certain: although charity is a 'term of art',[145] it is not capable of precise definition. As Harman LJ commented in *IRC v Educational Grants Association*:[146]

> It has been the attempt of our generation to define 'charity'. A number of very able people a few years ago sat down to try and do it, but it defeated all of them and they retired in disorder.

Indeed, Lindley LJ in *Re Macduff* clearly considered charity to be no less problematic a term than philanthropy when he described them as 'two words of so vague a meaning that it is extremely difficult to say' where one ends and the other begins.[147] The lack of a clear definition of charity is underscored by the fact that each of the jurisdictions that have in recent years attempted a statutory clarification of the meaning of charity have opted not for conceptually clear exhaustive criteria but instead continue the common law model of laying down recognised charitable purposes and anticipating future development by permitting the courts to draw analogies therewith to recognise novel purposes.[148]

This points to a fundamental problem at the heart of the common law model of charity: although it is well-established that the definition of charity develops in incremental steps, reasoning by analogy with existing caselaw every time a new charitable purpose is recognised, no court has ever essayed any meaningful indication of what the factors relevant to any analogy ought to be. The nature of the problem was laid out by Russell LJ in his discussion of the meaning of the

142 ibid 469 (Rigby LJ).

143 *Baddeley* (n 114).

144 ibid 589.

145 So described in *NAVS* (n 52) 41 (Lord Wright); *Camille and Henry Dreyfus Foundation Inc v IRC* [1944] Ch 672 (CA) 685 (Lord Evershed MR); *Independent Schools Council* (n 4) [14]; Luxton, *The Law of Charities* (OUP 2001) 111; Picarda (n 51) 10. See also Robert Meakin's article in this issue of CL&PR.

146 [1967] Ch 993 (CA) 1011.

147 *Macduff* (n 2) 464.

148 See the Charities Act 2011, s 3(1)(m); also the Charities and Trustee Investment (Scotland) Act 2005, s 7(2)(p); Charities Act (NI) 2008, s 2(2)(l), (4); Charities Act 2009 (Ireland), s 3(1)(d).

'spirit and intendment' of the Preamble in *Incorporated Council of Law Reporting for England and Wales v AG*:[149]

> I have much sympathy with those who say that these phrases do little of themselves to elucidate any particular problem. 'Tell me', they say, 'what you define when you speak of spirit, intendment, equity, mischief, the same sense, and I will tell you whether a purpose is charitable according to law. But you never define. All you do is sometimes to say that a purpose is none of these things. I can understand it when you say that the preservation of sea walls is for the safety of lives and property, and therefore by analogy the voluntary provision of lifeboats and fire brigades are charitable. I can even follow you as far as crematoria. But these other generalities teach me nothing.'

If philanthropy is not a relevant factor, then what is? Whilst it may be easy to make connections between certain charitable purposes—as we have seen, the relief of need in particular runs through several of them—it is harder to determine the quality that links the other purposes if it is not benevolence to the public or a section thereof. And given this, what is it that is lacking in the obvious analogies between the advancement of amateur sport and the advancement of recreation, or between the advancement of human rights and the promotion of political purposes—each of which would fairly be described as philanthropic if carried on for a sufficient section of the public—to justify the latter falling outside the charitable sector? The courts have never been explicit. It is tempting to suspect that those philanthropic purposes rejected as charitable by the courts are those that the judges, despite their protestations that this is not a relevant consideration when determining charitable status,[150] did not wish to see favoured by the tax reliefs available to the charitable sector.[151] However, we would be wise to note Russell LJ's explanation of the approach of the courts to the incremental development of charity in the formative, post-Preamble years:[152]

> [T]hey deliberately kept open their ability to intervene when they thought necessary in cases not specifically mentioned, by applying as the test

149 *Incorporated Council of Law Reporting* (n 35) 88.

150 See e.g. *Dingle v Turner* [1972] AC 601 (HL) 614 (Viscount Dilhorne) 614 (Lord MacDermott) 614 (Lord Hodson); TG Watkin, 'Charity: The Purport of "Purpose"' [1978] Conv 27, 282. See also Peter Luxton's article in this issue of CL&PR.

151 See e.g. *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 [200], where Iacobucci J considered the impact on the public purse a factor weighing against recognising the society in question as charitable under the fourth head; also *Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217 [43] (Rothstein J).

152 *Incorporated Council of Law Reporting* (n 35) 88.

> whether any particular case of abuse of funds or property was within the 'mischief' or the 'equity' of the Statute.

If the need to control the abuse of funds or property lies at the heart of the legal definition of charity, because control can be achieved through the various supervisory powers of the court when recognising that a charitable trust has attached to assets,[153] then it is difficult to see why the application of funds to philanthropic purposes, whether indicative of benevolence to mankind or social reform, should not attract the same protection as those purposes that have been recognised as charitable over the centuries: if those who control assets that have been devoted by others to the benefit of the wider community are given greater freedoms to abuse their position than those who control charities, we are in an unfortunate place indeed.

Conclusion

In rejecting philanthropic purposes per se as legally charitable, the Court of Appeal in *Re Macduff* immediately cut down the potential of Lord Macnaghten's classification of charitable purposes in *Pemsel* into the four heads of charity, which would shape the common law model of charity across the twentieth century and beyond. Its influence pervades both the rules that determine what is means to be a charitable purpose, requiring that these be brought within the spirit and intendment of a Preamble that was erroneously characterised as not philanthropic in nature, and also the rules that go to whether a purpose is carried on for the benefit of a sufficient section of society, it being one of the key authorities enabling the Upper Tribunal to hold in the *Independent Schools Council* case that charitable status is dependent on ensuring adequate access for the poor. Yet the judgments belie the fact that philanthropy, as benevolence to mankind, runs through the very heart of legal charity, evident not just in the Preamble itself but in the various purposes recognised as charitable over the centuries and in the ways in which the courts have deemed it appropriate or inappropriate to restrict access to the benefits of charity. Insofar as some philanthropic endeavours today fall outside the charitable sector, despite also meriting protection and regulation by the courts, *Re Macduff* represents an opportunity lost. Although the protean nature of philanthropy as a concept, which so troubled the court, cannot be overlooked, the Chancery courts have not been deterred on other occasions from exploiting similarly imprecise concepts, such as equity, conscionability and of course charity itself; *Re Macduff* has denied us a potential century's worth of caselaw that could have developed, reworked and refined the concept into something of equivalent sophistication and formality, not to say worth, as legal charity is today.

153 See further Garton (n 51) 59–67.