The Charity Law & Practice Review

OLD HATS, NEW MODELS OR *CHAPEAUX RÉVISÉS*? DEFINING CHARITY

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1. Introduction

In 1976 the Report of the Goodman Committee on "Charity Law and Voluntary Organisation" (1976) made the comment, at p(i), that:

> "We started off, or most of us did, in the firm belief that the old definitions could be disregarded like old hats and in no time at all the talented milliners on the committee would produce a totally new model."

Over recent decades there have been many calls for the disregarding of old hats in charity law, and for the formulation of a new model.[3] A new statutory definition, it has been argued, would provide certainty and clarity in this rather untidy, unprincipled and archaic area of law. But just as the calls for legislative reform have been loud and persistent, so too the lack of response by Parliament to the suggestion

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3 See, for example, the Nathan Committee's recommendation of a statutory definition of charity *Report of the Committee on the Law and Practice relating to Charitable Trusts* 1952 Cmd 8710 paras 120-140);

of a statutory definition has been equally consistent by its silence.[4]

The question of creating a new definition for charity does, however, remain a live issue, for whilst Parliament have steadfastly refused to move, and the judiciary have endorsed the present system,[5] calls for reform continue to abound. In 1993, for example, there was the CENTRIS report.[6] In 1994 the Duke of Edinburgh, in giving the annual Arnold Goodman Lecture, called for a reformulation of the definition of charity on the basis of a sliding scale of philanthropy for tax relief.[7] Again, DEMOS, in 1995, advocated "a simplified set of core legal principles from which organisations should be able to choose - balancing incentives for participants, liability and risk-taking, and accountability".[8] And, most recently, the Commission for the Future of the Voluntary Sector in the 1996 Report proposed "... that a single definition of charity should be introduced, based on a new concept of public benefit, construed in its broadest sense...".[9] That is, one "overarching charitable category ... formulated in terms of benefit to the community".[10]

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4 And the opportunity has not been lacking. A plainly obvious opportunity came with the enactment of the Charities Act 1960, but was not taken up. So, too, with the Charities Acts 1992 and 1993.

5 The judicial welcome for the present system was expressed by Lord Justice Sachs in *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73, at 94): "I appreciate the wisdom of the legislation in refraining from providing a detailed definition of charitable purposes in the 1960 Act...Any statutory definition might well produce a fresh spate of litigation and provide a set of undesirable artificial distinctions." Furthermore, certain recent and much reported academic opinion holds the absence of definition a matter to be viewed with equanimity. Thus, Keeton and Sheridan in *The Modern Law of Charities* (1992, 4th Edn. Barry Rose) at p 8 state: "No statutory or judicial definition of charity, no enunciation from the bench of governing principle; fine distinctions in borderline cases; those elements do not lead inextricably to despair of determining what a charity is. In most instances, faced with a new object, a charity lawyer can be reasonably confident whether a court will hold it charitable or not."

6 B Knight (1993), *Voluntary Action* (London CENTRIS).

7 HRH Prince Philip, Duke of Edinburgh (1994), *Charity or Public Benefit, 11th Annual Arnold Goodman Lecture* (Kent: CAF).

8 G Mulgan & C Landry (1995), *The Other Invisible Hand: Remaking Charity for the 21st Century* (London: DEMOS) p. 117.

9 (1996) *Meeting the Challenge of Change, Voluntary Action into the 21st Century, Report of the Commission on the Future of the Voluntary Sector* (London NCVO) p.8.

10 Ibid, at para 3.2.6.

That there are defects in the present structure is to be acknowledged. For instance, one could note the problems relating to the determination of a sufficient cross-section of the community for the purpose of the "public benefit" element, problems in the arena of gifts to religious officials, and problems with trusts containing political purposes - to name but a few. However, though seemingly in a minority, and appreciative of the need for "tidying", this article inclines rather to the "old hats" than the "new models", or, if necessary, at least to *"les chapeaux révisés"*.

Some of the advantages of retention of the current position were put forward by the Government in the 1989 White Paper "Charities - A Framework for the Future", which concluded:

> "There would appear, therefore, to be few advantages in attempting a wholesale redefinition of charitable status - and many real dangers in doing so".[11]

In the Government's view the "loose framework - set by the 1601 Preamble and clarified by Lord McNaghten" has enabled the courts to develop the law coherently and consistently, rendering it sensitive to changing needs whilst "... maintaining the fundamental principles on which the concept of charity rests". And, in rejecting various avenues of reform, the White Paper argued that any attempt at definition might jeopardise valuable flexibility, that efforts to list charitable purposes could lead to the creation of case law no less complex than that already extant, and that to enact the McNaghten classification could lead to confusion and uncertainty.

This article will argue that the traditional status quo has merit on three counts: its conformity with a traditional Equity "approach"; its flexibility; and the capacity of charity and its control to endure. Aware of wider moves towards Europeanisation, this article will also examine the challenge to our domestic definition of charity by closer integration with Europe.

2. Arguments in support of the existing law

(i) Conformity with the traditional Equity "approach"

It is believed that the current structure, with its lack of a precise definition, coincides with one of Equity's fundamental precepts. This is, that Equity has more regard for the substance of a matter than its form. A commonly cited illustration of this

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11 Cm 694, May 1989, para 2.17.

concept is the way in which Equity looks to the substance of a covenant rather than its wording when deciding whether it is of a restrictive nature.[12] Another example can be found in Equity's historical jurisdiction over wards of court, where, when considering the welfare of the child, the courts refused to constrain "welfare" by imposing upon it a precise definition, rather preferring to construe the notion "in its widest sense".[13] This approach of Equity is as current as it is historical. For example, in the recently developed area of liability of accessories who assist in a breach of trust, Equity has moved away from a formulaic insistence on "knowledge" to a more substantive analysis of the dishonest state of mind of the accessory, thereby enabling courts to take into account all the circumstances of a situation.[14] Were a definition of charity to be introduced by statute then, it is felt, the subject would no longer display at its core this deeply rooted Chancery "quality".

(ii) Flexibility

In the White Paper earlier mentioned, the Government emphasised the merit of flexibility. The regard in which they held this quality is reflected in their view that an attempt to define charity "... might put at risk the flexibility of the present law *which is both its greatest strength and its most valuable feature*".[15]

It is obvious that this meritorious quality is derived to a considerable extent from the way in which the Statute of Elizabeth has been so moulded by interpretation as to create a "living" preamble. It has followed also from the regarding of the *Pemsel* "categories" as constituting no more than a classification. A further contributory factor to this beneficial fluidity is found in the fact that the current definition is formed of a series of component parts (i.e. the preamble as interpreted, the public benefit requirement, and the need for a wholly and exclusively charitable purpose). Being so composed, it affords the judges the chance, when determining charitable status, of juggling with the various elements, and so arriving at a workable rational

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12 *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 1 AC 799. *Snell* also cites as illustrations the principles governing precatory words (in trusts) and mortgages.

13 Per Lindley LJ in giving the judgment of the Court of Appeal in *Re McGrath* [1893] 1 Ch 143, 148.

14 See Lord Nicholls in *Royal Brunei Airlines v Tan* [1995] 3 All ER 97.

15 Cm 694, para 2.11, emphasis supplied. Earlier, in the 1970s, Goodman noted that there were those who believed "... that to define is to confine believing the very flexibility of the law in relation to charities is, and should be, its strength", (p.14).

solution. This approach has a practical value which should not be lightly forsaken.[16]

Further support for such fluidity can be seen from the separate point that the law favours flexibility in other analogous areas where it regulates ventures which, though emanating from private sources, have a public "dimension". From a range of possible areas merger regulation provides a useful example.[17] Whilst, at first glance, mergers may seem an unlikely pursuit for analogy, from a broad economic viewpoint the law's involvement in both the arenas of charity and merger regulation is geared to the most effective deployment of society's resources, and so a useful comparison can be made.

Under the Fair Trading Act 1973 certain mergers (whether completed or proposed) may be referred to the Monopolies and Mergers Commission for inquiry into their impact upon the public interest, and, in this context, the Act guides the Commission on the "governing" criteria for the ascertainment of that interest. Thus, in determining whether a particular merger may harm the public or not, section 84 requires the Merger Commission to take into account all relevant matters and to have regard to the desirability of matters including promoting effective competition, consumer interests, cost reduction, innovation, the entry of newcomers to the market and the balanced distribution of industry and employment. This loose provision has been criticised for its vagueness, but it has enabled the Commission to range widely in its deliberations, and contributed to the development of a regime respected for its pragmatic quality. Under its influence, the members have been able to take into account not only impact upon competition, but also upon broad issues including employment, regional problems and even public health.[18]

Where the law is concerned to advance the "public good" by the promotion of the efficient allocation of economic resources, the changing needs of the community (and, too, the speed with which those needs can change) call for an accommodating rather than a precise regime. Vivid testimony to the point was made not long ago in the DTI's Consultation Paper of August 1997 containing a draft Bill for the reform

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16 A parallel is found in the tort of negligence, where the judges are able to juggle with "duty", "breach" and "damage" to arrive at a sound conclusion.

17 The planning control of land use and development is another such area. So, too, is section 84 Law of Property Act 1925 (as amended) which provides a regime for the discharge and modification of restrictive covenants.

18 See e.g. (regarding "non-competition" issues) *Euro-Canadian Shipholdings/Furness Withy/Manchester Liners* HCP (1975-1976) 639, *Charter Consolidated/Anderson Strathclyde* Cmnd 8771 (1982) and *Prosper de Mulder Ltd/Croda International plc* Cm 1611 (1991).

of competition law.[19] In proposing to make no change to merger control, the Department applauded on the ground of flexibility the capacity of the existing law to have taken into account where necessary public interest issues other than the principal one of impact on competition. Just as mergers call for a pragmatic rather than an exact approach, it is likewise with charities.[20]

(iii) Capacity to endure

The well charted history of the development of charity and its legal regulation displays a regime with a distinctive capacity to endure. From its early religious origins in the Ecclesiastical courts, through the later battles with the State, the Mortmain legislation and pressures of fiscal jealousy, charity and its control have emerged from their early religious leanings to become a fully fledged player in secularised society.[21] For this conspicuous ability to provide for shifting requirements, the law and practice have been held in considerable esteem. The White Paper to which reference has been made above, comments on their evolution as being "... remarkably coherent and consistent",[22] and speaks of the loose framework of the law as enabling the courts to develop it "...in a way which has been sensitive to changing needs while maintaining the fundamental principles on which the concept rests".[23]

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19 *A Prohibition approach to anti-competitive agreements and abuse of dominant position: draft Bill*, DTI, August 1997. At the time of writing, March 1998, a Competition Bill is proceeding through Parliament. While it advances fundamental changes in the domestic competition law of the UK, it leaves intact the structure of mergers control.

20 We acknowledge that whereas the aim of the law in both spheres is the furtherance of society's interests via the effective deployment of its wealth, the way in which private and public considerations meet differs. In the case of mergers, the public interest lies completely in the consequences of the venture. In the case of charities, it lies only secondarily (from the tax aspect) in consequences primarily, it is the venture's very purpose. Further, we respectfully agree with the European Commission that because voluntary organisations are neither wholly private nor public in nature, it is fundamental for the law to demarcate "...their proper sphere of operation from the territory occupied by purely private activity, by Government or by commercial companies and other forms of profit making enterprise", (*Promoting the Role of Voluntary Organisations and Foundations in Europe*. Com (97) 241, p.26). But we do believe that a valid parallel may be drawn on the matter of the desirability of a flexible approach in the context of the public "dimension".

21 See, for example, G Jones (1969) *History of the Law of Charity 1532-1827* (Cambridge University Press (with G Moffat); (1994) *Trusts Law: Text and Materials,* (2nd Edn, London, Butterworths) Chapters 17 & 18.

22 Cm 694, para 3.70.

23 *Ibid.*, para 2.7.

What then is charity's next challenge? Will the existing law be able to endure into the next millennium without requiring a new definition? The increasing secularisation of society, welfare provision and partnership with local and central government stand as examples of the hurdles facing the evolution of charity law as it moves towards the 21st century.[24] Whilst not underestimating the importance of these domestic movements, it is thought that so long as the definition of charity remains flexible, it should be able to adapt to such social change.

There are, though, broader horizons to consider. Society's increasing "internationalisation" suggests that while charity begins at home, it cannot end there. And in this context, the leading question has to be "what of impact from Europe"? Not long ago Parker and Mellows wondered whether "... the membership of this country of the European Economic Community - as well as the growing number of trans-national charities - [might] impel us to embark on a statutory rationalisation of the law",[25] while quite recently the Commission on the Future of the Voluntary Sector regarded "developments in the European Union as being of potentially substantial influence for the sector".[26]

Interestingly, developments in the European Union which have the potential to impinge upon the legal basis of English charity law appear, at present, to be only tentative. As noted by the Commission on the Future of the Voluntary Sector, there is a proposal for the creation of a trans-European legal entity (the "European Association statute"[27]), which would involve the imposition of a new legal structure upon the broader voluntary sector. Yet it is doubtful whether such would be

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24 See the comments of G Moffat (1994) *Trusts Law, Text and Materials,* (2nd Edn, London, Butterworths), p. 624.

25 *The Modern Law of Trusts*, (6th Edn, London, Sweet & Maxwell) p.304.

26 (1996) *Meeting the Challenge of Change, Voluntary Action into the 21st Century: Report of the Commission on the Future of the Voluntary Sector* (London: NCVO) p.7

27 Com (93) 252. This proposal is based upon the European Company Statute. As explained in Com (93) 252, the content of the Commission's proposals are "To create European Statutes enabling co-operatives, mutuals and associations to take advantage of the freedom to provide services and enjoy the right of establishment throughout the Community in the same way as companies can, without having to forgo their specific character as groupings of people." The practical effect of this proposal would be the development of a Europe-wide legal recognition of organisations in the voluntary sector, enabling voluntary organisations effectively to operate in each member state without having to be formally registered in each member state.

implemented.[28] If development of the social economy sector domestically is difficult, so similarly, harmonisation across Europe may prove impractical.[29]

In the absence of outright harmonisation, however, less drastic measures might pertain. Two such have been suggested by the Commission on the Future of the Voluntary Sector, viz:[30]

> "A more limited approach to the issue might involve the identification by the EU of the commonly accepted characteristics of charities. It would then be possible for member states to identify and record organisations established in their jurisdiction having those characteristics so that donors could claim the appropriate tax reliefs in their own countries for donations to such institutions. A more piecemeal approach would be for individual member states in Europe to agree with other states' mutual recognition of charitable institutions and the giving of mutual tax reliefs."

An approach on more gentle lines, such as suggested here, clearly presents a lesser challenge to the central legal "core" than does any idea of comprehensive, EU wide

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28 (1996) *Meeting the Challenge of Change, Voluntary Action into the 21st Century: Report of the Commission on the Future of the Voluntary Sector* (London NCVO) para. 2.7.5, 3.7.2. Hanbury & Martin say: "Harmonisation on non-profit making bodies in the EU by the introduction of the "European Association", a new legal structure, has been proposed (see Annual Report [of the Charity Commission] 1991, paras 17-22; 1992, paras 105-112; 1995, para 108). However, English charity law and the civil law of voluntary organisations are so different that little progress has been made:" *Modern Equity* (15th Edn, London, Sweet & Maxwell) p. 378. The Report of the Charity Commission for 1995 at para 108 makes the point that there is a wish to ensure that were any regulation implemented "it [would] not undermine charity law, nor provide a means for taking charity property outside our jurisdiction".

29 Other proposals have come from the recent (and earlier noted) communication from the Directorate General XXIII of the Commission entitled *Promoting the Role of Voluntary Organisation and Foundations to Europe* Com, (97) 241, which was adopted by the College of the Commission on 4th June 1997. They concern developing the policy of the voluntary sector, and promoting better understanding about partnerships, training and funding across the member states. (The Commission make the comment in this Communication that "The importance of having clear, positive legal and fiscal frameworks for voluntary organisations and foundations to work in cannot be underestimated" (para 5). Later, they speak of the civil and common law approaches to the demarcation of the "non-profits" sector's sphere of operation, taking the view that the effects of the differences in approach can be exaggerated. Even so, the Commission's proposals in the document really concentrate on policy and do not, we believe, go to the roots of legal definition.)

30 (1996) *Meeting the Challenge of Change, Voluntary Action into the 21st Century, Report of the Commission on the Future of the Voluntary Sector* (London NCVO), paras 3.7.3, 3.7.4.

regulation. Further, on the notion of the identification of commonly accepted characteristics of charity, our existing law, with all its richness, might be just as able to yield those characteristics as any more modern definition, which, though perhaps more sleek, in such an exercise could prove more arid. (And, it may be added, if ever the existing law were successfully to be mined for such deposits, an intriguing and novel dimension would be added to its proven capacity to endure.)

3. *Chapeaux révisés?*

Whilst, as this article has argued, there are a number of cogent reasons against reforming the definition of charity - namely that it accords with the fundamental approach of Equity to substance not form, it is flexible, and it has the capacity for endurance -it may be that the modernisers nevertheless succeed in their desire for reform. If reform proves to be inevitable, it is hoped that in the formulation of a new definition the inherent characteristics of charity, as highlighted above, are not sacrificed to the suffocating influences of statute.

If there were to be a new definition, a modified version of that presented by the Commission on the Future of the Voluntary Sector may be workable. There might be formulated a definition (a *chapeau révisés*) which is one of broad principles plus illustrations. Given the moves within Europe, such an approach to redefinition would have the advantage of being very much in the European style.

That an approach based upon broad principle plus illustrations is workable is evident from approaches taken in other areas of law. One may consider, in this context, those Articles in the Treaty of Rome which deal with cartels and abuses of market dominance, i.e. Articles 85 and 86. Article 85(1) opens with the broad prohibition (as being incompatible with the common market) of agreements and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Article then proceeds to provide a list of activities which may in particular offend.[31] This list is not exhaustive, indeed, by using the words "and in particular", the Article itself indicates that the activities listed are but instances of conduct which may be prohibited. Likewise, in their challenging of an abuse of a dominant position, the provisions of Article 86 are similarly couched. They begin with a sweeping statement of the prohibition of abuses on grounds of incompatibility with the common market, and then follow this general principle with (again) a

31 Including, for instance, price fixing, quota schemes, market sharing, and discrimination.

similarly non-exhaustive list of particular instances of abuse.[32]

The position is likewise if one turns from competition to consumer protection, and examines the EC Directive on Unfair Terms in Consumer Contracts and its implementing Regulations.[33] Here similarly there is a measure which depends not upon any all-embracing and exact definition, but upon a mixture of broad, general principles and illustrative instances.

If a definition could be devised on these lines, it would correspond well with the increasing Europeanisation of our law at large: but not only that, it might not prove such an abrupt divergence from the past as to lose the benefit of a measure of continuity.

4. Conclusion

A first point to make by way of conclusion is that it may not perhaps be best to jettison a long established area of Equity before it ceases to have worth.[34] For reasons which have been submitted above, the existing law of charity remains of value. Secondly, there appears to be no significant problem from "Europeanisation". However, if the reform movement gains ground, as well it may, no harm would come from the adoption of a European style of "definition". Indeed, European developments can only increase, and for this fact alone, it might be argued that for the present, at least, the "heart" of the existing law might be left alone.

This article puts forward some points towards a preference for an "old hat" or, at

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32 A list including, for example, the imposition of unfair prices or conditions, the limitation of production and the imposition of "tying" terms.

33 Council Directive 93/12 EEC, OJ. L95/29. The implementing Regulations are the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994 No. 3159. The aim of the Directive (and its implementing Regulations) is to render non-binding any terms in a consumer contract which have not been individually negotiated and are found to be "unfair". A term is "unfair" if, "contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations ...to the detriment of the consumer" (Reg. 4), and an assessment of "unfairness" has to be made with regard to matters including, inter alia, the strength of the bargaining position of the parties and the extent to which the seller dealt equitably with the consumer (Sched 2 to the Regulations). For guidance, an indicative and non-exhaustive list of terms is provided which may be regarded as unfair (Reg. 4 and Sched.3).

34 As, for instance, some might think has occurred with the loss of the equitable doctrine of part performance, consequent upon the enactment of the Law of Property (Miscellaneous Provisions) Act 1989, section 2.

least, a "*chapeau révisés*". If this view is outmoded, a ravishing new model may have to be devised. But, if this is indeed so, its fashioning will surely prove no easy task. Even St. Paul, in a letter to the Corinthians, was able to speak only of certain qualities of charity, of the grave consequences of its absence, and of its overshadowing even the gifts of hope and faith themselves.[35] There was no attempt at definition. And we can only conclude that as charity has about it a timelessness, it will be truly a talented milliner who is able to capture its elusive grace.

35 1 Corinthians 13.1, Authorised Version.