

**Charity, the Law & the Public Benefit:  
the Legacy of the 1601 Act and the Advancement of Charitable Purposes  
in Northern Ireland in the 21<sup>st</sup> Century**

This paper proceeds from a basic thesis that charity law by promoting the public benefit has an important role to play in facilitating the growth and consolidation of civil society. It examines the law and practice in Northern Ireland, as a case study for this thesis, to ascertain such lessons as may usefully exist for other jurisdictions in these islands and elsewhere. In doing so, it draws from the experience of other common law nations as disclosed in recent charity law reviews. It concludes by considering the future for the role and function of the 'public benefit' test. It estimates the strength and weaknesses inherent in the common law legacy as a vehicle for carrying an appropriate, coherent and effective body of charity law into the next millenium.

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**Introduction**

The laws of England moved with its armies across continents to become established in many countries. As the tide of empire receded it left behind a legacy of colonialism. Structural artefacts stand as a reminder of great English architecture. Language and dialect remain in places from which imperial voices have long since withdrawn. The residue of empire, however, is not confined to audio-visual remnants. It can be detected also in the laws of such countries. The common law of England can now be found in the legislative framework and in the judicial practice of post-colonial nations. The subsequent dynamic processes of their legal systems kept alive and, in some instances, re-vitalised or adapted common law principles. Vestiges of the common law, interacting with indigenous legal precepts, have been invigorating the post-colonial legal systems of many nations. It may be that we in these islands can now learn from the experience of our former colonies.

This paper sets out to examine the significance of the common law legacy, as first embodied in the Statute of Charitable Uses 1601 and now embedded in our current legal framework for charitable activity. It does so by drawing from the findings of a research project and two resulting books which focussed on charity law and practice in Northern Ireland.

## (A) The Legacy

### 1. The Statute of Charitable Uses 1601

Entitled ‘*An Acte to redresse the Misemployment of Landes, Goodes and Stockes of Money heretofore given to Charitable Uses*’ the Statute of Charitable Uses 1601 provided the foundations for modern charity law in the common law world, including the jurisdictions of these islands.

#### 1.1 The preamble

The declaration of purposes to be construed as charitable are listed as follows in the preamble:

Reliefe of aged impotent and poore people,  
some for Maintenance of sicke and maymed Souldiers and  
Marriners, Schooles of Learninge, Free Schooles and Schollers  
in Universities, some for Repaire of Bridges Portes Havens  
Causwaies Churches Seabankes and Highwaies, some for  
Educacion and prefermente of Orphans, some for or towards  
Reliefe Stocke or Maintenance of Howses of Correccion, some  
for Mariages of poore Maides, some for Supportacion Ayde and  
Helpe of younge tradesmen Handicraftesmen and persons  
decayed, and others for reliefe or redemption of Prisoners or  
Captives, and for aide or ease of any poore Inhabitanes  
concerninge paymente of Fifteenes, setting out of Souldiers and  
other Taxes ...

#### 1.2 The statute

The provisions of the 1601 Act were mainly concerned with establishing a body of Commissioners and vesting it with powers to supervise and inspect charitable trusts. The statutory terms of reference of the present Charity Commission, though more extensive and sophisticated, have their origins in these provisions.

#### 1.3 The charitable purposes

The charitable purposes specified in the 1601 Act deserve some attention as all modern charities have derived from this original list.

##### 1.3.1 The list

The existence of a statutorily stated list perhaps implies that a purpose not listed is *ipso facto* not charitable. But, the statute does not purport to address all charitable purposes, instead it is confined to listing and dealing with those which have given rise to fraud and abuse. Moreover, subsequent judicial interpretation of legislative intent established that the list was indicative rather than definitive. It does, however, remain the case that the list constrains the judicial recognition of new charitable purposes; wholly new categories are not possible, a link must be made with the type of purposes listed or since recognised as charitable.

##### 1.3.2 Distinction between public service and poverty relief

It is apparent that the listed purposes fall into two broad categories: for the poor and for public works. The fault-line running between the two has endured for four centuries and continues to attract controversy (Knight, 1993). In respect of the first category, the assumption that to be charitable a gift or an organisation should, if not dedicated to public utility, be for the benefit of the poor has proved contentious. A great deal of case law has revolved around whether dedication to education, training, religious purposes etc is sufficient to acquire charitable status or whether this must be accompanied by a requirement that the end user also be poor. As the law now stands poverty is not a necessary corollary for a purpose to be deemed charitable. The second category encompasses a range of municipal utilities that today might be regarded as more properly the responsibility of government than of charity. The fact that activities such as constructing or providing bridges, hospitals, schools, universities or churches carry an entitlement to charitable status has built into charity law an assumption that to some extent government and charity are jointly and similarly engaged in public benefit work. This blurring of the distinction between private gifts and public responsibilities is of fundamental importance and is at the conceptual heart of many of our problems in modernising charity law.

### **1.3.3 Religion**

The absence of an explicit reference to religion serves as a reminder that the 1601 Act did not set out to encode a definitive list of charitable purposes. It also reflects the political wariness of legislators who were mindful of the turbulent relationship between religion and royalty. This pragmatic approach, avoiding any mention of religion as such, faded in time as the Protestant religion became established as an important 'pillar of society'. Recognition of gifts to religious purposes, whether Protestant or otherwise, quickly became routine as the threat of religious/political turbulence faded. Arguably, though the reverse is now the case, the same rationale applies and the grounds for withdrawing charitable recognition are strengthening as the social significance of religion weakens.

### **1.3.4 Social control**

It is worthy of note that in addition to several of the 'service' type public utilities found to be deserving of charitable status, there are also some of a 'social control' nature. The maintenance of houses of correction, assisting poor maids into marriage and the rehabilitation of prisoners are purposes which indicate a legislative intent to promote a congruity between the agendas of charities and government on the assumption that both share a common interest in activities which conform with and tend to preserve the values of contemporary society. The in-built assumption, that defending the contemporary status quo is appropriately treated as a priority for both government and charity, thus has its roots in the founding charity law statute. This, again, resonates with the legislative intent behind current charity law reform.

### **1.3.5 Regulating charities and charitable activity**

Finally, the overriding legislative intent to assert the government's right and duty to hold to account those who have been entrusted with gifts to be used for charitable purposes is very clear. The means for achieving this are spelt out in the constitution, terms of reference and powers of the Commission. Then as now, government concern focussed on the following separate strands: protection for donors; prevention of deliberate abuse, careless inefficiency and misuse of status by charities; and providing for the removal of charitable status from bodies found by the Commission to be in breach of stated standards.

## **1.4 Public benefit**

The actual activity now recognised in the law of these islands as being charitable remains as first stated by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531. He then declared that for philanthropic activity to come within the legal definition of charity, it must fit within one of the following types of charitable purpose:

- (i) Trusts for the relief of poverty
- (ii) Trusts for the advancement of education
- (iii) Trusts for the advancement of religion
- (iv) Trusts beneficial to the community not falling under any of the preceding heads.

He added that to be charitable, a gift must be “beneficial to the community”. This accompanying caveat was refined by subsequent case law to become the ‘public benefit test’.

This concept of public benefit lies at the heart of charity law. Marrying a concept of public benefit broad enough to remain responsive to pressures from an ever-changing social context, with philanthropic intent, and with administrative systems and procedures, to produce an integrated and distinctive body of jurisprudence has always been a central challenge for charity law.

#### **1.4.1 Private and public benefit**

For a trust to meet the legal requirements of a charity it must first disclose an element of benefit and secondly, demonstrate that this will accrue to an element of the public. There must actually be a 'benefit' entailed in the gift i.e. it must have some intrinsic value. For example, the courts have ruled that foisting a collection of 'worthless junk' on the public, does not constitute a benefit (in *Re Pinion* [1964] 1 All ER 890) nor does a gift for research into the creation of a new alphabet (in *Re Shaw* [1938] 1 All ER 408).

#### **1.4.2 Applying the test**

Two requirements are imposed. Firstly, the rule is not that all persons in the relevant class of the public should derive a benefit but only that they should all be eligible to do so. The class of persons who might benefit may be either a section of the public or a class of the community, or a section of the community. Conversely, it will not be met and the trust will not be charitable if those who might benefit are merely ‘a fluctuating body of private individuals’.

Secondly, the rule does not impose an absolute bar on any private benefit accruing from a charitable gift. It does, however, require that any private benefit conferred must be incidental.

##### 1.4.2(i) Applying the test; private classes

Where a class is defined so that its membership is fixed then it is necessarily private; a ‘closed’ class cannot be a public one. A class of specified individuals can never be construed as a public class. Nor can a class that derives from a personal relationship with specified individuals. A sub-section of the public or ‘a class within a class’, and a section of the public as defined by means other than locality, are both outside the definition of public.

##### 1.4.2(ii) Applying the test; public classes

The courts have come to recognise that certain restrictively defined classes will nonetheless be sufficiently ‘public’ for the purposes of acquiring charitable status. Where the class is defined by locality, the intended recipients living in the same place, this will be deemed to meet the requirement of being ‘public’. Where the class is

defined by its faith then the courts construe this as a non-personal relationship nexus and therefore intrinsically public in nature. A class is often defined by the common relationship of its members as descendants of a named person or as descendants of particular group. The former is open to challenge on the grounds of the personal nexus test. The latter may well satisfy the 'public' requirement. If the class is defined by membership of a particular profession then it is likely to be considered too closed though common nationality may be sufficient to meet the 'public' requirement.

#### **1.4.3 The test in relation to charitable purpose**

The courts have inferred with increasing regularity that trusts falling within the first three of *Pemsel's* categories will be 'assumed to be for the benefit of the community and therefore charitable, unless the contrary is shown'. No such presumption applies in respect of gifts within the fourth category which attracts the most stringent application of the public benefit test. The test is applied in a similarly relaxed fashion to trusts for the advancement of education. In relation to trusts for the promotion of health, however, the test is applied most rigorously. A charitable trust is distinguished from a public trust by being confined to "either such charitable purposes as are expressed in the Statute or to purposes having analogy to those".

### **(B)**

#### **Charity Law and the Public Benefit in Northern Ireland**

For most of its history, charity law within the different jurisdictions of the UK has evolved more or less uniformly. This was the case from at least the Statute of Charitable Uses 1601, through the mortmain legislation of the 18<sup>th</sup> century, the rulings in cases such as *Commissioners for Special Purposes of Income Tax v Pemsel* (1891) AC 531, including the rating and fundraising legislation, to the Charities Act 1960.

In the past 40 years, however, changes have occurred and continue to unfold in all other UK jurisdictions except in Northern Ireland. This has now left the charity law of Northern Ireland significantly out of step with that of its UK neighbours. The charity law project set out to identify the nature of the jurisdictional differences in charity law and to examine consequences of those differences for charities and charitable activities in Northern Ireland.

## **2. Charity law; the current legislative framework**

The modern charity law framework for all jurisdictions in these islands was established by that formative Westminster statute - the Charities Act 1960. As time passed, in all other UK jurisdictions except Northern Ireland, the common template provided by that Act was further developed.

### **2.1 Statute law in Great Britain**

In England and Wales, the law is now as stated in the Charities Act 1993 and is likely to be further amended as a result of the recommendations of the Charity Commission and the National Council for Voluntary Organisations (2001). In Scotland the law is to be found in the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 and in the Charities Accounts (Scotland) Regs 1992 but, again, there are further changes pending as a result of the report of the Scottish Charity Law Review Commission (2001).

## **2.2 Statute law in Northern Ireland**

In Northern Ireland the law remains largely framed by the Charities Act (NI) 1964, which was closely modeled on the Charities Act 1960, as supplemented by the Charities (NI) Order 1987. The powers it makes available to the court and to agencies such as the Charities Branch are essentially facilitative. The basic framework is supplemented by statutes such as the Recreational Charities Act (NI) 1958, the Rates (NI) Order 1977, the Companies (NI) Order 1986, the Companies Orders of 1990 and most recently the Trustee (NI) Order 2001. In short, this jurisdiction now has the most dated and the most non-interventionist legislation relating to charities within the United Kingdom.

## **2.3 Current characteristics of charity law in Northern Ireland**

The charity law project posed the research question - Is charity law in Northern Ireland now an appropriate, effective and sufficient framework for facilitating charitable activity? To address this question the project examined the legislation, the case law and it applied the public benefit test to identify and assess any lack of fit between the law and charitable activity.

### **2.3.1 Jurisdictional characteristics of charity law; legislation**

In Northern Ireland the law relating to fundraising is particularly problematic. Street collections continue to be governed by regulations issued under the authority of the Police, Factories etc (Miscellaneous Provisions) Act 1916. House collections remain rooted in the House to House Charitable Collections Act (NI) 1952. The lack of any provisions requiring the registration or the regulating of charities also marks a significant point of departure from that prevailing elsewhere in the United Kingdom.

### **2.3.2 Jurisdictional characteristics of charity law; case law**

In practice the legislation generates little litigation and very few substantive judgments. It is probable that one reason for this is the considerable expense involved in commencing proceedings in the High Court. The ethos associated with charities possibly inhibits litigation. Paradoxically, the usefulness of intermediary fora (e.g. the Charities Branch, Customs and Excise and the Lands Tribunal) in filtering out and determining issues which would otherwise feed into the court system, may also be contributing to the general problem that the judiciary rarely have opportunities to deliberate on the principles underpinning contemporary charity law. There is no equivalent to the comprehensive service of examination, exposure and dissemination provided by the judgments issued by the Charity Commission in England and Wales.

However, it should be noted that the fact that some judgments in this jurisdiction are taken by the High Court exercising its inherent jurisdiction enables the judiciary here to apply principles forged by their counterparts in England and Wales. Similarly, the Inland Revenue, guided by the decisions of the Charity Commission, applies its rulings uniformly across the UK making no distinction between Northern Ireland and any other region. Thus, to an extent, these two institutions are able to apply by proxy some of the more significant legal developments occurring elsewhere in the UK.

## **2.4 The public benefit test in Northern Ireland**

Much has changed in this jurisdiction since the introduction of the last formative charity law statute in the early 1960s. More than 30 years of social unrest have done great damage to its social and economic infrastructure and has had a general de-stabilising effect. The trauma of those years also served to distract attention from issues of social inclusion which were being addressed in the neighbouring jurisdictions of Scotland and England and Wales.

### **2.4.1 The public benefit test and peace and reconciliation**

Peace and reconciliation is not explicitly recognised as a charitable purpose in Northern Ireland despite the fact that no society in north-western Europe has, in recent decades, generated more violence, suffered more casualties and become more fragmented and aggressively polarised than the communities constituting this jurisdiction. The role of institutions such as the police and social welfare agencies, regarded as contributing to civic cohesion and community security in other societies, are here treated with suspicion by a large proportion of the population. The role of the Churches, which attract a presumption of charitable status, and which control the resources, activities and orientation of a large proportion of Northern Ireland's charities, have in practice tended to provide for member benefit rather than cross-community benefit and have, arguably, thereby accentuated community divisions. Grass-roots community development initiatives, seen as a healthy and vibrant answer to social deprivation in other societies, are viewed and sometimes function as vehicles for subverting legitimate authority in Northern Ireland. The deep-rooted cultural divisions between the Catholic and Protestant communities, coupled with a myriad of factional divisions between their respective political representatives, are now distinctive characteristics.

This is a jurisdiction in which the social context for charity law has clearly greatly changed since the current statutory framework was introduced. Some of these changes are of a wholly different order to those experienced in the adjoining jurisdiction and would benefit from new legislative provisions that are sensitive to the differences.

### **2.4.2 The public benefit test and the social inclusion agenda**

Whereas other modern western societies have spent some decades wrestling with issues such as - how best to respond to the problems suffered by those disadvantaged by a social perception of inadequacy due to disability, race, age, gender etc - in this jurisdiction these issues have largely been on hold. Instead, as communities coped with the more immediate pressures of direct violence and the not unrelated phenomenon of the highest level of unemployment in these islands, social inclusion policies were quietly deferred.

### **2.4.3 The public benefit test and poverty**

Finally, there is also the problem of poverty in Northern Ireland. For many decades it has had the unenviable reputation of sustaining the highest level of scores across a range of poverty indicators (e.g. standard of housing stock, proportion of working population unemployed, numbers in receipt of welfare benefits etc) of any jurisdiction in the UK. During thirty years of violence the industrial and manufacturing foundations, underpinning the traditional social structures of this jurisdiction, have virtually disappeared. There is now a pressing need to focus the resources of charities on regenerating those communities traumatised by violence, dislocated by associated large-scale shifts in population and/or desolated by unemployment.

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## **The Charity Law Reviews and Possible Lessons for the Public Benefit Test in Northern Ireland and Elsewhere**

Across the common law world many nations have recently found it necessary to undertake charity law reviews. Either there is something in the air or similar factors are coming into play to trigger the same sell by date for charity law in nations such as Ireland, Scotland, New Zealand, Australia, Canada and England and Wales.

### **3. Common themes in the charity law reviews**

The reviews tend to focus on definitional matters. What exactly is the legal definition of 'charity' in the modern world? How can it be legally differentiated from other forms of not-for-profit activity, particularly from the activities of government bodies? What should be the 'public benefit' test that determines charitable status? These are recurring themes in all reviews. There are other themes not readily attributable to the common law legacy such as those concerning trading, training schemes for the unemployed and community development. Other more technical concerns, to do with issues such as mechanisms for ensuring accountability and fundraising, are also often present and may even trigger the immediate need for review, but it is the commonality of a concern for definition that is most apparent.

The reviews reveal that certain aspects of the common law legacy, derived from the 1601 Act and subsequent case law, remain prominent in the current approach to charity law throughout the common law world. Some of the characteristic components have proved very serviceable. However, charity law is also freighted with other common law characteristics of a less serviceable nature. It is these which have been disclosed in the various reviews and which may now be prompting many common law nations to initiate a legislative reform of their charity laws.

#### **3.1 An emphasis on the rights and duties of the individual**

Perhaps the most distinctive common law characteristic was traditionally expressed in the catch phrase 'no writ no action'; i.e. unless a would-be litigant could fit his particular circumstances into the pre-ordained, standard template for that type of case then the courts would offer him no redress. This insistence on a case by case approach, a fixed reliance on precedent and an obdurate refusal to exercise any of the judicial discretion and flexibility typical of the equitable jurisdiction has prompted some to castigate the common law as that most pernicious of legal doctrines. In this part of the common law world it has resulted in a bar on class actions; rights and duties fall to be determined by the courts on a case by case basis.

#### **3.2 The extension of status by analogy rather than principle**

The listing of specific recognised charitable purposes was very typical of the common law. There were similar lists for all subject areas which were left to be judicially extended and classified rather than legislatively shaped into integrated coherent units by governing principles. The common law was typified by a rigidity of the specified, by fact based rather than principle-oriented case law in which new cases could be accommodated only by distinguishing them from the old. The results can be seen today in the endless lists and categories of purposes, rather than in a coherent body of law governed by clear principles, which are recognised as charitable by common law nations.

### **3.3 A respect for institutions**

The common law was not concerned with matters of public policy or contemporary politics but it did require an almost feudal respect for king and for country and for the institutions of the land. This approach gave rise to certain presumptions and prohibitions around which tensions have formed in the charity laws of many modern westernised common law nations.

#### **3.3.1 The presumption of charitable status for religious organisations**

The presumption that the activities of a religious organisation are charitable is not untypical of common law nations; it is given a statutory endorsement in the Republic of Ireland. However, there is an argument that in those countries where religion no longer functions as a 'pillar of society', and perhaps particularly in those where it is a divisive force, the activities of religious organisations should be subject to a more stringent and broadly based public benefit test before qualifying for charitable status.

#### **3.3.2 An assumption that the purposes of public service bodies and charities are coterminous**

Public utility has been recognised in law as worthy of charitable status since the 1601 Act when the building of bridges and other such civic provisions were clearly stated as examples of charitable purposes. The retreat of the public sector and the devolving of responsibility for service provision to the voluntary sector has now become a widespread phenomenon in the common law world, accompanied by a concern to clarify the distinction between the remits of government and charity in relation to public benefit service provision. Many common law nations are now wrestling with a need to find a legal basis for distinguishing between public service and charitable purpose and the attendant respective responsibilities of government bodies and ngos.

#### **3.3.3 The prohibition on political activity by charities**

The respect for king and country and the institutions of the land, underpinning the 1601 Act, continues to find expression in the long-standing prohibition on political activity by charities which can be found in the law of many common law nations. This presents a widespread problem requiring a fine distinction to be drawn between political purposes and charitable purposes. The distinction is not easily made: deprivation, homelessness, unemployment, civil liberties, animal rights, conservation etc are all matters which in practice are often the business of both politicians and charities. The complexities of this situation have become further complicated by the growing dependency of charities upon government funding which has led to concerns about a muting of dissent in the voluntary sector (Deakin, 1996)<sup>45</sup>. There is evidence, from a number of common law countries, that charity law is experiencing difficulties in responding to the political activities of charities.

### **3.4 A regulatory environment**

Finally, it has to be conceded that the common law was always a law based on rules; in all situations where the courts recognised duties owed by a defendant to a litigant there were rules for the enforcement of those duties. These rules were accompanied by a complex system for levying and collecting fines. This led to an emphasis on administration rather than adjudication and to a fundamental concern with financial matters. In many ways the development of charity law has been driven by a concern to improve control of charity finances.

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<sup>45</sup> See, for example, and Canada, *Society of Immigrant & Visible Minority Women v Minister of National Revenue* [1996] Supreme Court of Appeal, Canada.

## Conclusion

The conclusions of this paper are modest. It is the view of this writer that on balance the common law legacy has the capacity to continue guiding the development of charity law in Northern Ireland, in Great Britain and elsewhere in the common law world in an appropriate and effective fashion. It has served us reasonably well over the past 400 years and there is no good reason to make a fresh start with a new statute comprehensively codifying charitable purposes. To do so would be to risk having to abandon a wealth of illustrative case law which, bequeathed to the common law world, has provided the benchmarks against which all commonwealth nations have been able to fix the evolution of their respective bodies of charity law.

However, it would be prudent to take account of the fact and reasons for the recent rash of charity law reviews and to consider introducing new but limited legislative provisions to strengthen the application of the public benefit test, particularly as regards religious and political activity. The grounds for a distinction between public service and charitable purpose may similarly require careful statutory delineation. Also, as in Northern Ireland, where the statutory mechanisms relating to registering, monitoring, ensuring fiscal probity, transparency and ultimately providing for the accountability of charities are weak or non-existent then this merits the introduction of specific legislation. The findings from an impressive number of scholarly reviews are now available to signpost the direction of possible legislative adjustment to the charity law of these islands.

To conclude, there is perhaps a further perspective on our charity law legacy, drawn from the Northern Ireland experience, which is worth reflecting upon. Not only must we be satisfied that our legacy is appropriate and effective but we must also ensure that it is sufficient to address the increasingly complex social needs of the third millennium. Northern Ireland provides an unfortunate and extreme case study of what can go wrong in a modern western society when a sizeable section of its citizens feel alienated. It also illustrates the difficulties of accommodating the interests of smaller minority groups when their legitimate needs are pushed to one side by an illegitimate use of power by others. There is little evidence that charities, their financial resources, manpower and entrepreneurial flair have been employed or have made any impact on the particularly acute and long-standing social inclusion issues in Northern Ireland. It may well be that our common law legacy needs some legislative attention to ensure that it provides sufficiently - as well as appropriately and effectively - for advocacy and for the meaningful representation of minority groups in the society of the Third Millennium.

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