

**ASSOCIATION FOR NONPROFIT AND SOCIAL ECONOMY
RESEARCH**

SECOND ANNUAL CONFERENCE

**CARLTON UNIVERSITY, OTTAWA, CANADA
MAY 27-29, 2009**

Are Human Rights too Political to be Charitable?: The Charities Act 2009 and the future of Human Rights Organizations in Ireland.

DR. OONAGH B. BREEN

SCHOOL OF LAW, UNIVERSITY COLLEGE DUBLIN

VISITING RESEARCH FELLOW, HAUSER CENTER FOR NONPROFIT
ORGANIZATIONS, HARVARD UNIVERSITY

EMAIL: OONAGH.BREEN@UCD.IE

I. INTRODUCTION

With the enactment of its new Charities Act 2009 in February, Ireland has bridged a legislative gap of almost 50 years with a statute designed to bring charity law and governance into the 21st century. There are many welcome features in this legislation not least a statutory clarification of what constitutes 'charitable purpose' under Irish law, an outline of the factors to be considered in determining whether public benefit is sufficiently present for an entity to be charitable and the establishment of a new statutory body, the Charities Regulatory Authority, charged with the maintenance of a charities register and the oversight of charitable organizations and the protection of charitable assets. For those organizations entitled to register as charities new governance provisions will ensure greater transparency regarding their funding and charitable expenditure and greater accountability with regard not only to their financial matters but also with regard to mission delivery.

The road to enactment has been long and far from straight with almost twenty years of public consultation, reflection and published reports preceding the 2009 Act's promulgation.¹ The Irish Charities Act makes its debut at a time of similar charity law reform in a number of countries and to a large extent, the slow pace of Irish reform has allowed Irish policymakers to learn and benefit from the experiences of other common law jurisdictions. Thus, the definition of charitable purposes bears many resemblances to the recommendations made by the Australian Charities Definition Inquiry in 2001. Similarly, the creation of a Charities Appeal Tribunal draws inspiration from similar procedures provided for in the charities legislation of England & Wales, Scotland, and Northern Ireland.² The provisions regarding the creation of a charities register and the consequent reporting requirements for registered charities, too, draw inspiration from the UK models.

And yet, it would be wrong to write off the Irish Act as a mere carbon copy of neighbouring charities legislation. The Act, in many ways, introduces new innovations in charity governance. The legislative provisions providing for administrative and legal cooperation between the new Charities regulators and its counterpart regulators nationally and internationally are broader than the

¹ See Costello, Mr Justice D., *Report of the committee on fundraising activities for charitable and other purposes*, (1990, Dublin); Department of Justice *Report of the Advisory Group on Charities/Fundraising Legislation*, (1996, Dublin, The Stationery Office); Department of Social Welfare, *Supporting Voluntary Activity: A Green Paper on the Community and Voluntary Sector and its Relationship with the State* (Stationary Office, Dublin, 1997); Department for Social, Community and Family Affairs, *White Paper on a framework for supporting voluntary activity and for developing the relationship between the State and the Community and Voluntary Sector* (2000); Law Society of Ireland, *Charity Law: The Case for Reform* (Dublin, 2002); Department of Community, Rural and Gaeltacht Affairs, *Consultation Paper on Establishing a Modern Statutory Framework for Charities* (Dublin, December 2003); Breen, *Establishing a Modern Framework for Charities: Report on the Public Consultation for Department of Community, Rural and Gaeltacht Affairs* (Dublin, September 2004).

² See the Charities Trustee and Investment (Scotland) Act 2005; The English Charities Act 2006; and the Charities Act (Northern Ireland) 2008.

comparative provisions found in UK statutes.³ In the area of political activities, the Act makes specific provision for charities to engage in such activity in furtherance of their charitable purposes – thereby explicitly recognizing the right of charities to have some legitimate involvement in this otherwise murky area.⁴ Most interestingly of all, the Charities Act severs the connection between eligibility for charitable status and an automatic entitlement to tax-exempt status. As a result of s.7 of the 2009 Act, an entity may now be a ‘charity’ under the new statutory definition of charitable purpose and yet not be considered eligible *by virtue of that designation alone* for charitable tax-exempt status. This decoupling of charitable and tax-exempt status has long been sought by academic,⁵ government-sponsored⁶ and judicial⁷ commentators who have argued that it is a necessary step in the reform of charity law, being simultaneously facilitative of the evolution of the charity concept while respectful of the state’s need for autonomy in its tax policies, especially those concerned with resource reallocation.

There is one further respect in which the Charities Act 2009 takes a novel outlook on the world of charity and that is in its treatment of human rights. Or, perhaps rather one should say its ‘non-treatment’ of human rights since the Act deliberately excludes reference to ‘the advancement of human rights’ as a charitable purpose in its statutory definition. The story behind that exclusion forms the background to this paper. In piecing together the charity law-political activities-human rights puzzle the paper seeks to tease out the legal implications of the omission of human rights from the perspectives of the various affected stakeholders – the organizations themselves, the general public, the State and its relevant regulators (CRA, Revenue) and political/legal advisers (namely, the Attorney General). By comparing the likely legal effects of exclusion with the possible policy rationales for such omission we can begin to consider whether the current treatment of human rights under the Charities Act can be justified or even defended. In so doing, what emerges is a tangled web of past Revenue practice, misconceived assumptions regarding common law precedents relating

³ See further, O. Breen, P. Ford and G. Morgan, “Cross Border Issues in the Regulation of Charities: Experiences from the UK and Ireland” *forthcoming* (2009) 11(3) *International Journal for Not-for-Profit Law* 5.

⁴ Charities Act 2009, s.2.

⁵ S. Bright, *Charity and trusts for the public benefit – time for a re-think*, (1989) Conv. 28; Law Society of Ireland, *Charity Law: The Case for Reform* (Dublin, 2002) at 94 (proposing that “the option of tiered tax relief depending on the type of charitable purpose being undertaken should be given further consideration particularly as it might allow for the possibility of according voluntary organisations with tax exemptions while reserving the full gamut of relief to those organizations qualifying as charities.”)

⁶ Colwyn Commission, *Report of the Royal Commission on Income Tax* (1920) Cmnd. 615, par. 306 (to the effect that income tax for the purposes of charity should be specifically redefined by Parliament); Radcliffe Commission, *Final Report on Taxation of Profits and Income* (1955) Cmnd 9474 (going further than Colwyn in actually recommending a new definition of charitable purposes for the purposes of taxation)

⁷ See the comments of Lord Cross in *Dingle v Turner* [1972] AC 601, 624 (HL) (“the question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions. The logical solution would be to separate them and to say . . . that only some charities should enjoy fiscal privileges.”)

to political activities and a State's perceived lack of confidence in its ability to engage publicly and yet on its own terms with organizations that challenge the status quo.

II. THE PROMOTION OF HUMAN RIGHTS – SCOPE AND CONTENT

Before embarking on the quest for the intersection of human rights and charity law, it may be useful to consider briefly the scope and content of what we mean by the term 'human rights.' According to the United Nations Office of the High Commission for Human Rights:

“Human rights are rights inherent to all human beings, whatever [one's] nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status All human rights . . . whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.”⁸

From the charity law perspective, the Charity Commission for England and Wales offers a further explanation of what human rights entail in its 2005 guidance, *The Promotion of Human Rights*.⁹ According to the Commission,

Human rights are rights which are fundamental in the sense of being essential to our humanity or to our functioning as human beings; accordingly have a moral dimension; extend to everyone; and prescribe what the State must do for us, and what it must not do (or allow others to do) to us.¹⁰

In the context of Irish law, the Irish Constitution, *Bunreacht na hÉireann* (1937) recognizes and broadly declares certain human rights in the civil, political, economic and social rights field, and leaves scope for the protection of other implicit, albeit un-enumerated, fundamental rights.¹¹ Aside from domestic law, Ireland draws upon international and European human rights legal norms in the

⁸ <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (last accessed May 4, 2009).

⁹ CCEW, *The Promotion of Human Rights*, RR12 (January, 2005) available at <http://www.charitycommission.gov.uk/publications/rr12.asp> (last accessed May 4, 2009).

¹⁰ *Ibid* at para. 10.

¹¹ Thus, the Irish Constitution expressly recognizes, inter alia, equality before the law (Art 40.1), the right to jury trial (Art 38) and habeas corpus (Art 40.4), freedom of speech (Art 40.6.1), association (Art 40.6) and religion (Art 44.2.1) and the right to family and home life (Art 41). The language used in Article 40.3 has been interpreted by the courts as implying the existence of unenumerated rights afforded to Irish citizens under natural law. Such rights upheld by the courts have included the right to marital privacy (*McGee v Attorney General* [1974] IR 284 (SC)) and the right of the unmarried mother to custody of her child (*G v. An Bord Uchtala* [1980] I.R. 32 (SC)).

forms of treaties and conventions; signing more frequently than ratifying and ratifying more often than necessarily incorporating these principles into domestic law. Like many common law countries, Ireland has a dualist legal system, which means that ratified treaties do not automatically become incorporated into domestic law.¹² In practice, Ireland has been slow to give legal effect to human rights treaties and conventions post-ratification, blaming the delay upon the obstacles caused by this dualist legal order.¹³ At an international level although not a member of the United Nations when it adopted the Universal Declaration of Human Rights in 1948, since joining the UN in 1955 Ireland has ratified the six core UN human rights treaties, based on the Declaration.¹⁴ In a European context, Ireland ratified the European Convention of Human Rights in 1953 but fifty years later it remained the only State out of the 44 Contracting States that had yet to incorporate the treaty into domestic law.¹⁵ This tardiness with regard to effective incorporation of human rights treaty provisions has drawn censure from both treaty monitoring bodies¹⁶ and other NGO watchdog bodies.¹⁷ In this regard, the Irish Human Rights Commission has criticized the government's reticence towards incorporation, suggesting ways in which the government might give better effect to its various treaty obligations through more effective incorporation.¹⁸

III. THE LEGAL FRAMEWORK 2009: CHARITY LAW AND HUMAN RIGHTS IN IRELAND

Our story begins with the Charities Act 2009. The Act puts in place a regime that seeks to identify certain entities as worthy of the 'charity' label and in respect of

¹² See Bunreacht na hEireann, Article 29.6 ("No international agreement shall be part of the domestic law save as may be determined by the Oireachtas [Parliament]") and Article 15.2.1 (the "sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [Parliament]...") establishing the dualist nature of the Irish legal order.

¹³ See Ireland's Second Periodic Report under the UN International Covenant on Civil and Political Rights, CCPR/C/IRL/98/2, (1999) at para. 13-17; Ireland's Combined First and Second Periodic Reports under the UN Convention for the Elimination of all form of Racial Discrimination, CERD/C/460/Add.1, (2004), para. 97-101.

¹⁴ These are, respectively, the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Rights of the Child; the International Convention on the Elimination of Discrimination Against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; and the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

¹⁵ Suzanne Egan, *The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation* (2003) 10(1) DULJ 230.

¹⁶ See e.g., Concluding Observations of the UN Committee on Economic, Social and Cultural Rights on Ireland's Second Periodic Report, E/C.12/1/Add.77, (2002), para. 23; Concluding Observations of the UN Human Rights Committee on Civil and Political Rights on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3 (2008) para. 6 ("The State party should ensure that all rights protected under the Covenant are given full effect in domestic law. The State party should provide the Committee with a detailed account of how each Covenant right is protected by legislative or constitutional provisions.")

¹⁷ FLAC, ICCL & IPRT, *Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights* (June 2008).

¹⁸ See, IHRC, *Submission to the UN Committee on the Rights of the Child on Ireland's Second Periodic Report under the CRC*, (May 2006); IHRC, *Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report*, (March 2008), available at www.ihrc.ie.

those entities it imposes registration, reporting and stewardship requirements. Section 46(2) makes it a criminal offence for a body to hold itself out as a 'charity' without being registered on the charity register. To be eligible for registration in the first instance a body must bring its objects within the statutory list of charitable purposes in s. 3 of the Act and satisfy the Charities Regulatory Authority ('CRA') that sufficient public benefit attaches to these objects to satisfy the charity test. To achieve and maintain its charitable status, an organization is furthermore required to remain pure of heart by having 'exclusively charitable purposes' and devoting its income and assets solely to these pursuits.¹⁹ Those organizations eligible for registration or deemed to be registered²⁰ are entitled to use the label 'charity' in their dealings with third parties. Moreover, such organizations are permitted to promote a political cause to the extent that promotion of that cause relates directly to the advancement of the charitable purposes of the body.

It follows that a body that cannot bring itself within the statutory list of charitable purposes or that cannot meet the public benefit threshold will not be eligible for registration. Similarly, an applicant body that engages in a 'political cause' that cannot be tied directly to its charitable purposes will be excluded from registration. Non-registration not only disentitles an organization to the use of the 'charity' moniker (and the public confidence that presumably attaches to this form of statutory accreditation) but it also deprives the donating public of a statutory right of scrutiny of the organization's financial returns and oversight of the rate of achievement of its charitable mission. The refusal of charitable status may also, though not necessarily, adversely affect a body's application for charitable tax-exempt status. Much therefore hinges on the breadth of the definition of 'charitable purpose.'

In its 2003 Consultation Paper on Establishing a Modern Statutory Framework for Charities, the Department of Community Rural and Gaeltacht Affairs signaled its intention to update the common law definition of charity, which then existed in Ireland. The Consultation Paper cited as one of its aims the need to:

"give clear statutory guidance regarding the definition of charity, thereby bringing the definition of charitable purposes into line with a modern perspective of what constitutes charity and protecting against abuse of charitable status."²¹

The definition offered by the Consultation Paper, however, made no reference to the promotion of human rights as a charitable purpose. This initial omission was notable in so far as the Department had, subject to this specific exception, adopted the definition of charitable purpose proposed by the Law Society of Ireland in its report on charity law reform.²² The subsequent public response to

¹⁹ 2009 Act, s.2.

²⁰ 2009 Act, s. 40 provides that organizations that currently enjoy charitable tax-exemption will be deemed to be registered automatically on the new charities register.

²¹ Irish Department of Community, Rural and Gaeltacht Affairs, *Consultation Paper on Establishing a Modern Statutory Framework for Charities*, chapter 4, at 6 (Dublin, December 2003).

²² Law Society of Ireland, *Charity Law: The Case for Reform* (Dublin, 2002).

the Consultation Paper was critical of this omission with many submissions arguing for the specific inclusion of the advancement human rights as a charitable head, a factor reflected in the External Evaluation Report to the Department on the consultation process.²³

By March 2006, whatever the initial reason for omitting reference to human rights, the public outcry against this policy had influenced the Department. When published, the draft Charities Bill's definitional provision parsed out eleven categories of activity under the heading 'other purposes beneficial to the community' that included specific reference to "the advancement of human rights" as a charitable purpose.²⁴ This softening of attitude towards 'human rights' did not endure. Within a period of twelve months, the government published the Charities Bill 2007, which was presented to the Dáil (the lower House of the Oireachtas, the Irish Parliament) in April 2007. The published Bill once more contained no reference to the promotion of human rights and throughout its two-year passage through the Houses of the Oireachtas the government steadfastly refused to reintroduce reference to this purpose in the Bill, rejecting numerous opposition party amendments to this effect.

A study of the parliamentary debates uncovers an incremental hardening of attitude towards human rights on the part of the government as the Charities Bill progressed through the legislative process. From the Bill's introduction, opposition deputies championed the cause of human rights. Responding to calls to re-introduce specific reference to the promotion of human rights, the then-Minister for State, Deputy Pat Carey, appeared relatively open to reconsider the issue during the Second Stage Dáil Debates in November 2007. Agreeing to explore the matter further, the Minister stated that he was "not averse in principle to examining the possibility of revisiting such provisions should it be appropriate, taking into account legal advice available" to him.²⁵

This goodwill towards possible amendment continued into the Committee Stage hearings before the Dáil in January 2008 with the Minister hinting at the possibility of further changes in the context of human rights being tabled at Report Stage. Continuing but as of yet incomplete consultation with other relevant Departments and the Office of the Attorney General prevented the Minister from giving a definitive opinion on the matter in advance of Report Stage proceedings.²⁶

Almost an entire year passed before the Charities Bill came before the Dáil at Report Stage in November 2008. A Cabinet reshuffle saw a new Minister for State, Deputy John Curran, take charge of the Charities Bill. With the new

²³ Breen, *Establishing a Modern Framework for Charities: Report on the Public Consultation for Department of Community, Rural and Gaeltacht Affairs* (Dublin, September 2004).

²⁴ 2006 Draft Bill, Head 3(1)(d)(v) ("other purposes to the benefit of the community, which include . . . the advancement of human rights, social justice, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity").

²⁵ Minister for State, Pat Carey TD, speaking at the conclusion of the Second Stage Debates on the Charities Bill 2007, Dáil Debates, November 15, 2007.

²⁶ Minister for State, Pat Carey TD, speaking during the Committee Stage Debates on the Charities Bill 2007, Dáil Debates, January 22, 2008.

Minister came a new message: the decision to exclude human rights from the statutory list of charitable purposes was now a non-negotiable fact. According to Deputy Curran, the Charities Bill was intended to have a very narrow ambit. In the words of the Minister:

“The Bill endeavours to protect the status of organisations that at present are regarded as charities by ensuring the categories of charitable purposes in section 3 of the Bill reflect those that have developed in common law over many years and have been used by Revenue when considering eligibility for charitable tax exemptions. While the Bill does not seek to narrow such charitable purposes, neither does it seek to expand the range of charitable purposes.”²⁷

Since the advancement of human rights was not a charitable purpose in Ireland at the time of the Bill and because Revenue did not grant charitable tax exemptions to human rights organizations *per se*, the Minister concluded that he would not accept amendments to add a specific reference to human rights to the charitable purposes list.²⁸ The Minister maintained this stance throughout all of the remaining stages of the Charities Bill’s passage through both Houses of the Oireachtas.

Deputy Curran’s position invoked two responses from Dáil Deputies and Senators: on the one hand, they accused the Minister of misunderstanding the role of the legislature – a role, it was argued, that went beyond mere mundane codification of the common law in favour of legislative improvement in the public interest.²⁹ On the other hand, members of the House queried the normative rationale for the exclusion of human rights, particularly in light of its original inclusion in the draft Charities Bill. Senators questioned the legal basis for the exclusion of human rights along with the true motivations for its expunction. It emerged in due course that the exclusion of human rights resulted from a political, and not a legal, decision. It was the Cabinet and not the Attorney General that dictated this course of action. And in this regard, the Cabinet was greatly influenced by Revenue’s existing treatment of human rights organizations. Infuriated by this deference to revenue practice, opposition deputies argued that to allow Revenue to dictate the statutory definition of ‘charitable purpose’ in a context having broader implications than merely tax-related ones amounted to an unwarranted delegation of legislative power.³⁰

²⁷ Minister of State, John Curran TD, speaking during the Report Stage Debates on the Charities Bill 2007, Dáil Debates, November 5, 2008.

²⁸ *Ibid.*

²⁹ In the words of Senator David Norris: “The Minister of State has fundamentally misunderstood the purpose and function of Seanad Éireann under the Constitution. We are here to amend and improve legislation, not maintain the status quo, which is an absurd position” VOL. 192 NO. 12 SEANAD DEBATES 758 (December 4, 2008).

³⁰ *See, e.g.*, the comments of Deputy Michael D. Higgins in the Report Stage Debates in the Dáil, VOL 666 DÁIL ÉIREANN DEBATES (5 November, 2008). (“The net effect of the non-acceptance of my amendment on human rights and equality means, in effect . . . that the Revenue Commissioners serve as a kind of *eminence grise* behind the legislative process. It is not for them to prescribe what shall be the legitimate and endowed activities of any body in regard to human rights They are entitled to express the remit of their own scheme but they are not entitled to

The impassioned speeches in support of the work of human rights bodies; reiterations of the expressed fears of such organizations should human rights ultimately be excluded; and the pointed references on how such omission would make Ireland a legal pariah amongst neighbouring states -- all of whose charity laws included express reference to human rights ultimately were to no avail. At no stage during the parliamentary debates did the Minister elaborate on the actual reasoning underlying Revenue's blanket ban on the granting of charitable status to human rights bodies. The Charities Bill 2007 thus became the Charities Act 2009 with the advancement of human rights remaining firmly outside its bailiwick.

IV. THE BASIS FOR REVENUE'S TREATMENT OF HUMAN RIGHTS ORGANIZATIONS – MCGOVERN V ATTORNEY GENERAL

The basis for Revenue's refusal to grant charitable tax-exempt status to human rights organizations appears to be the English decision of *McGovern v Attorney General*.³¹ It will be recalled that in that case, a test case by Amnesty International, Slade J. refused to grant charitable status to a human rights trust, which included amongst its educational and poverty relief objectives, the objective to secure the release of prisoners of conscience by procuring the reversal of governmental policy or decisions by lawful persuasion. This object was held to be political in nature and thus tainted all of the objects, making the trust non-charitable. Revenue are not required to publish decisions granting or refusing charitable tax-exempt status so no other guidance or reasoning exists in the public domain. In its 2001 Charities Manual, however, Revenue make specific (albeit fleeting) reference to *McGovern* under the heading 'non-charitable political purposes,' citing the case as authority for the proposition that "*The Amnesty International Trust was founded with the object of securing worldwide observance of the Universal Declaration of Human Rights - exemption refused.*" Revenue provide no further guidance on how they interpret this case but given the obvious significance accorded the case, *McGovern* merits further examination as to the reasons underlying it.

Is the promotion of human rights a charitable purpose?

In *McGovern* Slade J held that to be charitable Amnesty would have to satisfy the court as to three matters, namely: that the promotion of human rights was a charitable purpose; that the manner of such promotion was of public benefit; and that the proposed objects of the trust were exclusively charitable. With regards to the first of these three elements, Slade J. accepted that the Elizabethan Preamble was broad enough to capture trusts that sought to relieve human suffering and distress. Citing Lord Herschell in *Pemsel* to the effect that:³²

"[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"

define any activity. [Revenue] . . . are not entitled to put a boundary to the consideration and advancement of human rights nor of equality.")

³¹ [1982] 1 Ch 321.

³² *Pemsel* [1891] AC 531, at 572 (HL).

Slade J. was willing to accept that a trust in the nature of Amnesty's trust was 'a trust established for good compassionate purposes' which subject to satisfaction of the requirement of public benefit and the presence of other exclusively charitable objects could be charitable under English common law. This finding is important. It supports the proposition that there is nothing intrinsically non-charitable in the promotion of human rights. Compassion for one's fellow human being accompanied by an urge to relieve his distressed condition, particularly when a consequence of his condition is the deprivation of the very rights that we hold fundamental and inherent to every individual, appears to be intrinsically charitable. It may yet fail the charity test for lack of public benefit but this is an entirely separate consideration from whether the underlying purpose is essentially altruistic and other-regarding. Coming within the list of charitable purposes (regardless of whether the source of that list is statutory or based on common law analogy) is a necessary but not a sufficient condition for charitable status. Slade J. recognized this in his judgment in *McGovern* in a way that the policy advisers and drafters of the Irish Charities Act 2009, who excluded human rights from s. 3 of the Act, did not.

An alternative explanation of the charitable nature of the protection and enforcement of human rights is to view it as analogous to 'the mental and moral improvement of man,' a heading which has long been held to fall within the spirit and intendment of the Elizabethan Preamble.³³ The Charity Commissioners for England and Wales ('CCEW') availed of this option in recognizing human rights promotion as a charitable purpose from 2002 onwards until it was given a statutory basis in the Charities Act 2006.³⁴ No similar accommodation exists in Ireland. Unlike neighbouring statutes, which specify the extent to which former common law jurisprudence remains relevant,³⁵ the Irish Charities Act makes no reference to the status of previous charity common law authorities. To the extent that such case law is persuasive authority for human rights promotion being charitable by analogy, there remains the competing argument that the legislative history of the 2009 Act should preclude the court from reading into the statutory list a purpose that the legislator very definitely wished to exclude.³⁶

³³ See *In re Scowcroft* [1898] 2 Ch. 638, 641 (a village club and reading-room, "to be maintained for the furtherance of Conservative principles and religious and mental improvement" held charitable); *Re Hood* [1931] 1 Ch 240 (trust to spread Christian principles and "to aid all active steps to minimize and extinguish the drink traffic" upheld as charitable); *Re Price* [1943] Ch 422 and *Re South Place Ethical Society* [1980] 1 WLR 1565. See also, Graham Moffatt, "Charity, Politics and the Human Rights Act 1998: Much Ado About Nothing?" (2002) 13 *Kings College Law Journal* 1, 13.

³⁴ In this regard see English Charities Act 2006, s. 2(2)(h); Charities Trustee and Investment (Scotland) Act 2005, s. 7(2)(j) and Charities Act (Northern Ireland) 2008, s. 2(2)(h). See also Section V, *infra*.

³⁵ See the English Charities Act 2006, s.2(4) and the Charities Act (Northern Ireland) 2008, s.2(4) both of which provide for continued use of common law precedent in conjunction with future analogous extensions of the statutory definition when determining whether a purpose is charitable.

³⁶ *People (Director of Public Prosecutions) v. McDonagh* [1996] 1 I.R. 565, 570 (SC) (holding that "It has long been established that a court may, as an aid to the construction of a statute or one of its provisions, consider its legislative history, a term which includes the legislative antecedents of the provisions under construction as well as pre-parliamentary material and parliamentary

Does the promotion of human rights provide sufficient public benefit?

In *McGovern*, the Revenue Commissioners argued that the primary purpose of the Amnesty trust was political in so far as it sought, through its clauses relating to the relief of prisoners of conscience, to change the laws or policies of the UK or foreign governments. The presence of these political objects, Revenue argued, automatically ruled out the possibility of charitable status. Slade J. agreed that if a primary objective of the trust were to change existing law this would equate to a political objective thereby preventing charitable status on the grounds of undeterminable public benefit. Essentially, the judge opined that the incursion of politics into the realm of charity must result in the court's refusal of jurisdiction to decide the public benefit issue on two grounds, namely judicial impartiality/neutrality and the separation of powers. In explaining the effect of these principles on public benefit, Slade J stated:

“[First], the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change [in the law] will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in law is desirable [the court] must still decide the case on the principle that the law is right as it stands since to do otherwise would usurp the functions of the legislature.”³⁷

These principles applied not only to proposed changes to domestic law but *a fortiori* to trusts that sought to alter the laws of a foreign country since, according to Slade, the judge would have even less ability to judge whether the proposed change would be for the public benefit in terms of the foreign local community. Going still further beyond the authorities of *Bowman* and *National Anti-Vivisection Society*, Slade J held attempts to influence *government policy* was just as political and thus suffered from the same negative public benefit associations as attempts to change or otherwise influence reform of the law. It followed that since the primary manner in which relief of prisoners of conscience would be achieved was through pressure on national and foreign governments to change their laws and policies, such activity was political and deprived the trust of charitable status.

Had the primary purpose of the trust been deemed to be charitable (i.e., other than the changing of law or policy) then Amnesty would have been entitled to use “ancillary political means” to achieve its purposes.³⁸ The effect of this ‘ancillary hook’ has been to leave the door to the political arena slightly ajar for charities. Charities may advocate or campaign for policy or law reform provided that such activity furthers an existing charitable objective of the organization and does not dominate the activities of the charity. In practice, there appears to be

material relating to it. . . . When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may be on 'superficial examination.”)

³⁷ *McGovern*, *supra* n.31, at 336-337.

³⁸ *McGovern*, *supra* n. 31 at 340 (per Slade J., “As will appear later, the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable.”)

an unspoken acceptance of the ancillary hook in Ireland but in the absence of public Revenue guidance, it is difficult to say whether this toleration results from a regulatory blind eye being cast on otherwise compliant charities or whether all charities may avail of this leniency without fear of losing their charitable tax-exempt status.³⁹

The Irish Application of the McGovern Principles

The subtleties of *McGovern* are lost in translation in the Irish Revenue Commissioners' summation of the case. The Revenue pronouncement makes no accommodation for the possibility that the promotion of human rights may be a charitable purpose *per se*. Nor is there any indication given that the Revenue would accept that a human rights charity could engage in ancillary political activity supportive of its overall charitable purposes in a manner that did not threaten its charitable status. Rather, the citation of *McGovern* gives the impression – an impression amply borne out by the subsequent Charities Bill debates – that the very act of promoting human rights is so inherently political as to constitute the antithesis of charity.

Even if it is accepted that *McGovern* is not an authority for the proposition that human rights can never be charitable, one is still left with the seemingly unassailable second finding of Slade J. to the effect that if the primary purpose of any organization is to change the law or government policy, such a purpose is political in nature and therefore can never be charitable since the court cannot (and indeed, should not) determine the public benefit of any such change. To argue otherwise and thus undermine Revenue's reliance on *McGovern*, one must breach the bastions of the judicial neutrality and the separation of powers principles that exclude consideration of public benefit from the realm of political activity. Let us take each of these principles in turn beginning with the principle of judicial neutrality.

(a) Political Activity and Judicial Neutrality – Easy Bedfellows?

“Political purposes are non-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” (per Lord Parker, Bowman v Secular Society)⁴⁰

According to the principle of judicial impartiality, when it comes to the sphere of political activity the court is neutral on the issue of whether a change in the law would be in the public benefit or not. On this basis, if the enforcement of human

³⁹ Barnardos, the children's charity, for instance, employs a 'Director of Advocacy' and an advocacy team to raise awareness and promote policy and legislative change that will benefit children. According to its website, Barnardos, "campaign[s] when we focus on specific goals around key issues and taken specific actions to reach these goals. Sometimes it will need public involvement in order to demonstrate to political decision-makers that there is a real support for what we're putting forward. Other times it is better to make the case to policy-makers directly or it can mean examining a key piece of legislation/ policy and showing just what impact this will have on children or a particular group of children. Sometimes it can involve all of the above depending on who needs to be persuaded of what and when." Available at http://www.barnardos.ie/policies_and_campaigns/what-is-advocacy.html (last accessed May 6, 2009).

⁴⁰ [1917] AC 406, 442 (HL).

rights requires a change in a government's law or policy, the court will view this as a political purpose and will refuse jurisdiction even to entertain evidence as to whether such reform is in the public interest. Charity law and human rights law scholars alike have challenged the legitimacy of this position. Writing almost a decade before *McGovern* Sheridan described Parker's notion of judicial impartiality as 'a strain on credulity.'⁴¹ Judges, Sheridan claimed, were surely the best-qualified persons to decide whether a change in the law was in the public benefit or not. Their decisions are based on the evidence heard before them in court. If a judge cannot make up his mind whether a change in the law would be in the public benefit then the applicant has failed to make out his case and the trust should not be charitable. But, cautioned Sheridan, such instances should not be taken to govern those other clear cases in which a judge could make up his mind on the public benefit issue.⁴²

That judges in fact do weigh up the evidence and decide whether changes in the law are for the public benefit is borne out by the case law. In *National Anti-Vivisection Society v Inland Revenue Commissioners*, the House of Lords held that the appellant society, which sought the repeal of the Cruelty to Animals Acts 1876, was not charitable.⁴³ In concluding that the appellant's activities lacked public benefit, their Lordships balanced the great advances to medical knowledge resulting from vivisection against the moral concerns for the unfortunate beasts subject to the experiments and found that public benefit favored retention of the practice, as regulated by the 1876 Act.⁴⁴ In so doing, the House over-ruled *Re Foveaux*,⁴⁵ which had held some fifty years previously that societies for the suppression and abolition of vivisection had 'public purpose' and were charitable, notwithstanding the 1876 Act. Although the cases reached opposite conclusions the decision process revealed that the judges were not neutral on the public benefit issue in either case. Similar murmurings in support of judicial activism in the determination of public benefit are evident in New Zealand⁴⁶ and Australia.⁴⁷

⁴¹ L.A. Sheridan, "Charity versus Politics" (1973) 2 *Anglo-American L. Rev* 47, at 58.

⁴² *Ibid.*

⁴³ [1948] AC 31 (HL).

⁴⁴ *Ibid* at 48 (per Lord Wright, "[In] ordinary life people often have to decide between a moral and a material benefit. . . . The scientist who inflicts pain in the course of vivisection is fulfilling a moral duty to mankind which is higher in degree than the moralist or sentimentalist who thinks only of the animals. Nor do I agree that animals ought not to be sacrificed to man when necessary. A strictly regulated amount of pain to some hundreds of animals may save and avert incalculable suffering to innumerable millions of mankind. I cannot doubt what the moral choice should be.")

⁴⁵ [1895] 2 Ch. 501.

⁴⁶ In *Re Collier (dec'd)* [1998] 1 NZLR 81, at 90 although Hammond J accepted the conventional view that trusts to change the law were not charitable, he harboured some reservations: "Is it really inappropriate for a judge to recognise an issue as thoroughly worthy of public debate, even though the outcome of that debate might lead to a change in the law?"

⁴⁷ See the comments of Santow J. in *Public Trustee v Attorney General (NSW)* [1997] 42 NSWLR 600 ("Persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance. Much will depend on the circumstances including whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end. . . . But if persuasion towards legislative change were never permissible, this would severely

Writing in the immediate aftermath of *McGovern*, Nobles argued “the refusal to accept jurisdiction is incompatible with the duty to consider the question of public benefit on the evidence available. An exception to this duty must be based on some principle. Slade J’s judgment fails to provide one.”⁴⁸ Human rights law scholars echoed these sentiments in substantive terms. The idea that it was not for the court to judge whether proposed changes in the law were good or bad stemmed, according to Weiss,⁴⁹ from an assumption that the proposed changes in the law were intrinsically a matter of choice of values and that this choice belonged exclusively to the appointed sovereign legislator. Such reasoning, however, could not apply to trusts seeking to promote changes when “the choice of values for positive enactment by the national legislators no longer exist[ed]” as was the case when the “specific changes in the law are actually required by a common standard of values such as that of international human rights.”

The ‘common standard of values’ referred to by Weiss in the context of human rights law has further crystallized in the thirty-year period since the decision in *McGovern*.⁵⁰ With the enactment of the Human Rights Act, 1998 the UK has incorporated the European Convention on Human Rights into domestic law; Ireland has come close to incorporation⁵¹ with the passing of the European Convention on Human Rights Act 2003, the purpose of which according to the Act’s long title is “to enable further effect to be given, subject to the constitution, to certain provisions of the convention.” These actions reflect a further shift in political thinking that sees the assimilation of human rights norms into domestic law as being in the public interest. To date, the enactment of the Human Rights Act 1998 in England has forced judges there to consider whether the law is right as it stands when viewed in light of the European Convention’s rights, drawing the judiciary ever closer to political debates regarding social justice and equity and leaving precious little room for judicial neutrality.⁵² Even if the judicial neutrality argument can be overcome, *McGovern* provides one further obstacle to considering whether the enforcement of human rights is in the public interest and therefore charitable and it is to this last principle that we now turn our attention.

undermine the efforts of those trusts devoted to charitable ends that ultimately depend on legislative change for their effective achievement.”)

⁴⁸ Richard Nobles, “Politics, Public Benefit and Charity” (1982) 45 *Modern Law Review* 704, at 707.

⁴⁹ Weiss, “Quot Homines tot Sentientiae or Universal Human Rights: A Propos *McGovern v The Attorney General*” (1983) 46 *Modern Law Review* 385, at 388.

⁵⁰ See Lord Irvine of Lairg, “The development of human rights in Britain under an incorporated Convention on Human Rights” (1998) *Public Law* 221 (noting that, “today we talk readily of human rights law. There is now a corpus of law, international and national, recognising fundamental freedoms, International Human Rights law. Fifty years ago it would not have been possible to talk of such a body of law. Until then very few issues would have been regarded in any way as the province of international law.”)

⁵¹ *C.f.* Egan, *supra* n. 15.

⁵² English Human Rights Act 1998, s. 3 (requiring English courts to interpret legislation in a manner consistent with the European Convention); s. 4 (empowering the courts to issue a ‘certificate of incompatibility’ whenever an existing law cannot be interpreted in a manner consistent with Convention).

(b) Usurpation Principle/Separation of Powers – A Judicial Fiction

“However desirable the changes may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands.”⁵³

Although Tyssen’s views above have resonated positively in the past with Lords Wright,⁵⁴ and Simonds⁵⁵ and more recently with Slade J.,⁵⁶ the notion that the court should swear blind allegiance to the eternal correctness of the law does not withstand scrutiny. Experience shows that the courts frequently depart from older precedents as the law evolves. In the context of legislation, Irish courts play a particularly active role under the Irish Constitution, which appoints them as constitutional guardians, ensuring that only those laws compatible with the Constitution are upheld and receive force of law.⁵⁷

That society’s understanding of ‘charitable’ and ‘political’ also evolves over time and thus requires re-evaluation in light of the public benefit concept is evident from the UK experience in the area of race relations. In 1948, the English Court of Appeal held that a bequest to strengthen the bonds of unity between South Africa and England and to assist in the appeasement of racial feeling between the Dutch and English speaking sections of the South African community was not a valid charitable but rather constituted a political purpose.⁵⁸ Some thirty years later, however, public and political opinion had changed and Westminster decided that appeasement of racial feelings was in the public interest and to this end passed the Race Relations Act, 1976. The ripple effects of this legislative change are evident in the 1983 Annual Report of the Charity Commissioners for England and Wales, which in that year reversed its policy that appeasement was not charitable. Explaining the change, the Commissioners stated:

*“We took the view that *Re Strakosch* did not freeze the appeasement of racial feeling as a political purpose for all time. In England and Wales the question of whether it would be beneficial to the public to appease racial feeling appeared to be no longer a political one as legislation had been passed in an attempt to enforce good race relations.”⁵⁹*

That the introduction of the English Human Rights Act 1998 might have a similar effect on the perception of human rights as the Race Relations Act had on racial harmony was well anticipated by judicial and academic commentators alike. The Lord Chancellor, Lord Irvine predicted that the Human Rights Act would:

⁵³ Tyssen, *Charitable Bequests* (1st ed., 1898) at 176.

⁵⁴ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 50.

⁵⁵ *Ibid*, at 62.

⁵⁶ *McGovern*, *supra* n.31, at 335-338.

⁵⁷ See Arts 26 & 34 Bunreacht na hÉireann. See also Sheridan, *supra* n. 41 (noting that a judge is not bound to approve the ‘eternal correctness of the law.’)

⁵⁸ *Re Strakosch* [1949] 1 Ch 529, 538 (CA) (“The problem of appeasing racial feeling within the community is a political problem, perhaps primarily political.”)

⁵⁹ ANNUAL REPORT OF THE CHARITY COMMISSIONERS FOR ENGLAND AND WALES (1983) paras 18-20.

“create a more explicitly moral approach to decisions and decision making; [would] promote both a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike, and a culture in judicial decision making where there [would] be a greater concentration on substance rather than form.”⁶⁰

Other commentators went so far as to suggest that legitimization of human rights under the 1998 Act in time would, in *Re Strakosch*-like fashion, free it of the political purpose perceptions that dogged it previously.⁶¹ To be sure, when compared to the provisions of the European Convention on Human Rights the previously ‘troublesome’ objects of the McGovern trust converge almost seamlessly with what are now objects of English law by virtue of the 1998 Act.⁶² And yet, no similar developments in thinking with regards to human rights have occurred in Ireland.

V. THE EVOLUTION OF HUMAN RIGHTS AS A CHARITABLE PURPOSE IN ENGLAND & WALES

In policy terms, it may be useful to outline briefly the chronology of events that have led policymakers in the UK from the position outlined in *McGovern* above to the view that promotion of human rights are charitable and not *per se* political. A review of the road travelled by the UK may possibly open up a similar policy pathway for Irish policymakers.

The coming into force of the Human Rights Act 1998 in 2000 focused the minds of British policymakers, including the Charity Commission on all matters rights-related. The 2002 Cabinet’s Strategy Unit Report, *Public Benefit Private Action* proposed that the new Charities Bill should make explicit reference to human rights as a charitable objective thereby “allowing charities to play their full part in the vital tasks of protecting human rights both in the UK and overseas” although still preventing them from having political purposes.⁶³

The Charity Commission capitulated and as part of its review of the charities register in 2002 published guidance explaining why the promotion of human rights from now on would be recognized as a charitable purpose. It also considered the various ways (including political campaigning) in which a charity might promote human rights.⁶⁴

⁶⁰ Irvine, *supra* n.50, at 236.

⁶¹ Graham Moffatt, “Charity, Politics and Human Rights Act 1998” (2002) 13 *Kings College Law Journal* 1, 11.

⁶² Article 3 of the Convention (Prohibition of torture) provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ Article 9 (Freedom of thought, conscience and religion) provides in clause 1 that ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.’). These provisions together would seem to provide an appropriate legal basis for the relief of prisoners of conscience in the context of the public benefit. For more detailed discussion of this proposition, *see* Moffatt, *supra* n. 61.

⁶³ UK CABINET STRATEGY UNIT REPORT, PUBLIC BENEFIT, PRIVATE ACTION (2002), at 4.41.

⁶⁴ Charity Commission for England and Wales, RR12 – Promotion of Human Rights (2002). This guidance was revised and republished in 2005.

In that same year, the Annual Report of the Commission reported that the Commission had recognized ‘the promotion of human rights’ as charitable in its own right and registered its first human rights charity under this heading.⁶⁵ Prior to this date, although many organizations with human rights agendas had been registered, their objects couched their human rights work under the headings of relief of poverty or advancement of education.⁶⁶ The enactment of the Charities Act 2006 has since provided a statutory basis for human rights.

The Commission’s 2005 revised guidance, *The Promotion of Human Rights*, confirmed that human rights promotion was charitable by analogy with the “moral or spiritual welfare or improvement” of humans. In terms of public benefit, as with the Race Relations Act 1976, the Commission placed great reliance on the enactment of the Human Rights Act 1998 as the demonstrable basis of the public benefit inherent in the promotion of human rights.⁶⁷ Human rights organizations could therefore engage in raising awareness of human rights, promoting their popular support, monitoring human rights abuses, providing technical advice to governments or international bodies on the laws regulating such rights. Additionally, those bodies could advocate the “adoption of, and compliance with, international and regional codes of human rights,” as legitimate objectives of a charity.

In terms of enforcement of human rights or eliminating infringements of human rights, the 2005 guidance provides that it is charitable "to procure the abolition of torture by all lawful means" and to procure the abolition of torture, extra-judicial killing and 'disappearance'. According to the Commission, since human rights abuses of this nature are, almost by definition, contrary to the domestic law of the country in which they take place, trying to eliminate them will not generally involve trying to change domestic law. Even where a country’s domestic law is inconsistent with international rights standards, a charity may campaign for legislation or changes in government policy provided that it does so as an ancillary activity of its predominant charitable purpose.⁶⁸ The line however remains drawn when it comes to political purposes; the Commission categorically states that “an organisation which has purposes which include the promotion of human rights by seeking a change in the law, or a shift in government policy, or a reversal of a government decision has (at least in part) political purposes and cannot be a charity.”⁶⁹

Although these changes enabled an increasing number of human rights organizations to register as human rights charities in the period between 2002

⁶⁵ CHARITY COMMISSION FOR ENGLAND & WALES, MAKING A DIFFERENCE: ANNUAL REPORT 2002-03 at 4.

⁶⁶ *Ibid.*

⁶⁷ RR12 – Promotion of Human Rights (2005 version) at para 12 provides, “There is an obvious public benefit in promoting human rights. For individuals whose human rights are thereby secured, the benefit is immediate and tangible. There is also a less tangible, but nonetheless significant, benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. That provides sufficient benefit to the community to justify treating the promotion of human rights as a charitable purpose in its own right.”

⁶⁸ *Ibid.*, at paras 32 -36 (“Provided that its political activities are not the dominant means by which it carries out its charitable objects, a human rights charity may engage in political activity which is unrelated to its other activities.”)

⁶⁹ *Ibid.*, at para 33.

and 2007,⁷⁰ those bodies still experienced practical difficulties in carrying out their missions stemming from a lack of legal clarity over the acceptable limits of campaigning and political activity for charities.⁷¹ The Charity Commission's most recent guidance on campaigning and political activities, although not aimed specifically at human rights charities, goes somewhat towards providing the clarity sought by these organizations.⁷² The guidance, updated and reissued in 2008, marks a significant change in thinking towards political activity, abandoning the *McGovern* ancillary/dominant test (which charities had difficulty applying) in favour of a graduated test that looks at the overall mission of the charity and its use of political means and allows a charity to devote all of its efforts to a political activity for a limited time without endangering its charitable status, provided always that the political activity does not become the reason for the charity's existence.⁷³ To a degree, this evolution in Commission thinking is reactive, prompted by UK Government and nonprofit think-tank collaboration on the need for a better model to regulate the role of charities in the political arena.⁷⁴

The new guidance distinguishes "campaigning" (defined as "awareness-raising and efforts to educate or involve the public by mobilising their support on a particular issue, or to influence or change public attitudes"⁷⁵) from "political activity" (said to include activities which involve "trying to secure support for, or oppose, a change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in the UK or abroad"⁷⁶). The effect of the political activity leniency clause in CC9 means that charities can now engage in political activity for a change in the law if it supports their charitable purposes. For human rights organizations, given that promotion of human rights is a charitable purpose, it follows that activities aimed at ensuring that certain fundamental rights norms are respected will not automatically fall foul of the political activity rules.

VI. IMPLICATIONS OF IRISH CHARITIES ACT FOR HUMAN RIGHTS ORGANIZATIONS

⁷⁰ According to CCEW records, 206 charities have registered with objects relating to human rights since the charity register was set up in 1960. Of this number, 100 (49%) have been established as charitable companies with many of these registrations taking place since 2002. See RS-16, *infra*.

⁷¹ Charity Commission for England and Wales, RS 16 – Charities working in the Field of Human Rights (2007) ("Some of these charities said they would like greater clarity in understanding the extent to which charities can engage in campaigning, and the Commission is currently rewriting our guidelines to make this clearer.")

⁷² Charity Commission for England and Wales, CC 9 -- Campaigning and Political Activities by Charities (2008).

⁷³ *Ibid.*

⁷⁴ The Advisory Group's Report on Campaigning and the Voluntary Sector (May, 2007) (recommending that that charities should be able to engage exclusively in political (excluding party political) activity without endangering their legal status) followed by Cabinet Office, The future role of the third sector in social and economic regeneration: final report (July 2007) (in which the British Government agreed to work with the Charity Commission to update guidance on political activities and campaigning by charities, taking into account the recommendations of the Advisory Group) may be identified as the true catalysts of this change.

⁷⁵ CCEW, CC-9, *supra* n. 72 at 7.

⁷⁶ *Ibid.*

The practical significance of the omission of the promotion of human rights from the statutory definition of charitable purpose in Ireland in terms of tax law and charity law has yet to be tested but even now it is possible to work through a number of hypotheses regarding the likely effect of this exclusion on human rights organizations, the general public and the state.

Let's first consider the broad situation in which the Charities Regulatory Authority ('CRA') refuses to register a human rights organization as a charity. The Charities Act requires a charitable organization to have exclusively charitable purposes and to apply all its charitable assets in the furtherance of those purposes. If the CRA adopts a strict literal interpretation of s.3, taking account of the legislative history of the Charities Act, it is quite likely that a human rights organization with specific objects to advance human rights in its governing documents will be deemed ineligible to register as a charity. The presence of an object promoting human rights would seem to fail the 'exclusively charitable' requirement notwithstanding that the organization might have other 'valid' charitable purposes. It might fail simply because it is not on the s.3 list or because the CRA equates the enforcement of human rights with having a political purpose that falls outside the limited exception provided in s.2(1) of the Act.

A number of consequences flow from this finding: first, an unregistered human rights body cannot use the label 'charity' in relation to its work without committing an offence. Second, because these bodies fall outside the scope of the Charities Act, the Act's disclosure and reporting provisions do not apply to them. It follows that there will be reduced public scrutiny of annual financial returns and no statutory obligation on human rights organizations to report on the extent to which they have been successful in achieving their charitable mission. This outcome is a double-edged sword: not only is the public deprived of the application of the legal oversight framework to the activities of human rights organizations but equally these organizations are excluded from a statutory governance regime created to increase confidence in nonprofit organizations that have charitable objects. In short, non-registration places human rights organizations outside the charity governance framework, which ultimately cannot be in the state's interest either.

In practice, two types of human rights organization will be particularly affected: foreign human rights charities wishing to operate in Ireland and new Irish human rights organizations entrants. In the case of the former, the Charities Act requires a foreign charity operating in Ireland to register with the CRA if it wishes to hold itself out as a charity.⁷⁷ Given the narrower Irish definition of 'charitable purpose' such registration may only be possible by amending its existing objects, a feat that is both troublesome and expensive for the charity and likely to provoke the review of its home-regulator, such as the CCEW.⁷⁸ Such

⁷⁷ Thus an organization such as British-Irish Human Rights Watch, a charity registered with the CCEW with the objective of ensuring that proper respect for human rights is established in Northern Ireland in the wake of the conflict, and operating in both Britain and Ireland, will be required to register with the CRA if it wishes to hold itself out as a charity in the Republic.

⁷⁸ For broader discussion of the likely difficulties for foreign charities operating in Ireland under its narrow definition of charitable purpose *see* Oonagh B. Breen, "Neighbouring perspectives:

foreign charities will in most cases receive tax exemption from their home tax authority and so will not be dependent upon Irish Revenue Commissioners recognition for relief. Our second category – new Irish human rights entrants – is not so fortunate. Although Revenue have long refused to recognize human rights bodies as charitable, they have operated a separate tax exemption scheme that gives select human rights bodies the same tax exemption as if they were charities. Under s. 209 of the Taxes Consolidation Act, 1997 where a body:

- a) enjoys consultative status with either the United Nations or the Council of Europe and has as its sole or main object the promotion of observance of the Universal Declaration of Human Rights or the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and
- b) is precluded by its rules or constitution from the distribution of its assets to any of its members, that body will be granted similar income tax exemptions to bodies that qualify for charitable tax-exemption.

At present, just one organization enjoys s.209 status – Amnesty International (Irish Section).⁷⁹ The problem with s. 209 is its extremely limited scope. The section requires bodies to enjoy consultative status with either the UN or the Council of Europe. The conditions pertaining to such status require an organization to have international focus. Thus, new domestic human rights organizations that concentrate on issues relating solely to Ireland will be ineligible for tax relief. Moreover, even if a body has the necessary international outlook, it must be in existence for at least two years before applying for UN consultative status, thus placing additional obstacles in the way of the body receiving the tax relief it might otherwise be entitled to its establishment if it were viewed as a charity. To this extent, the external badge of ‘consultative status’ with the UN or Council of Europe is a flawed proxy, which arguably relates more to an organization’s geographic interests than its substantive merits and may explain why the current s.209 list of qualified bodies is so short.⁸⁰

A second option open to the CRA, depending upon how it interprets its powers, would be to decide to register human rights organizations as charitable, thereby

legal and practical implications of charity regulatory reform in Ireland and Northern Ireland” (2008) 59(2) *Northern Ireland Legal Quarterly*, 223–43; Oonagh B. Breen, Patrick Ford & Gareth G. Morgan, “Cross-Border Issues in the Regulation of Charities: Experiences from the UK and Ireland” (2009) 11(3) *International Journal of Not-for-Profit Law* 5.

⁷⁹ Confirmed in correspondence by the author with both the charity in question and with the Revenue Commissioners, May 2009.

⁸⁰ The Council of Europe, for instance, requires that aspiring NGOs seeking consultative status “be international and representative, both geographically and in its sphere of activity,” with permanent headquarters, a structured organisation and a secretary general (see <http://www.coe.ro/nog.html>). Even if consultative status is sought merely to satisfy Irish tax law requirements, a recognition time lag will still occur since the organization must be in existence for 2 years before applying for UN consultative status. Additionally, at UN level there are funding stipulations that require the organization to derive the major portion of its funding from contributions from national affiliates, individual members, or other components. See UN Guidelines for Association between the UN and NGOs available at <http://esango.un.org/paperless/content/guidelines.pdf>

ignoring the legislature's expressed intention. The CRA could, for instance, hold that a human rights organization was charitable based on its other charitable objectives (such as of preventing poverty or advancing education or perhaps relieving human distress).⁸¹ References to the promotion of human rights might be read as ancillary to the achievement of these otherwise charitable objects. In other words, the CRA could adopt the pre-2002 approach of the English Charities Commission: facilitating the registration of human rights organizations as long as they were prepared to couch their activities in more conventional charitable purposes. Yet even *prima facie* registration would not protect such a body if the reality of its human rights activities went further than its stated charitable objectives, bearing in mind the Act's prohibition on the promotion of any political cause not directly related to the body's recognized charitable purposes. It follows that the omission of human rights from s.3 results in a presumptive disadvantage for an entity engaged in this work since it cannot rely on the charitable nature of human rights promotion in defending the merit of its actions as being 'legitimately' political within the meaning of s.2(1).

With respect to those human rights bodies that are deemed to be registered charities under s.40 of the 2009 Act -- i.e., those bodies that have gained charitable tax-exempt status by submerging their human rights objectives beneath a camouflage of other charitable purposes -- these too may face governance difficulties under the new regime if their stated objects diverge from their current activities.⁸² Registered charities will be required to report annually to the CRA on the ways in which they have sought to achieve their stated mission.⁸³ Charities engaged in human rights promotion that falls outside the scope of their specific objects may find themselves either conceding that they were acting *ultra vires*, thereby exposing themselves to breach of trust, or alternatively claiming that such activity was covered by their objects, perhaps leading to the finding that their objects were not exclusively charitable in the first place, thereby endangering their charitable status.

Unlike in Britain, the incorporation of the ECHR into Irish law has not changed the legal or political environment for human rights activities in this jurisdiction.

⁸¹ There is some evidence that the Revenue Commissioners currently adopt this approach with regards to the award of charitable tax-exemption to certain human rights organizations. Such bodies will be deemed to be registered charities under s.40 of the Charities Act 2009. In virtually all cases, the bodies qualifying in this category are parent bodies or charitable subsidiaries of a governing structure which enjoy narrower educational or poverty relief objects than their non-charitable operating subsidiary affiliates. In this regard, *see* Amnesty International Ireland Foundation – the charitable arm of Amnesty International Irish Section; and Trust for Civil Liberties, Human Rights and Fundamental Freedoms, the charitable sister organization of the Irish Council for Civil Liberties, a non-charitable human rights NGO.

⁸² English regulatory experience demonstrates that the existence of such a state of affairs is far from idle speculation. *See* CCEW, RS 16, Charities working in the field of human rights (2007) in which the Commission implicitly acknowledged the use of camouflage charitable objects in the era when human rights was not charitable in its own right, "Since the Commission recognised the promotion of human rights as a separate purpose in 2002, some charities may now have educational objects which they no longer fulfil. We recommend that all charities regularly review their objects and that they update them (approaching us when necessary) so they accurately reflect the charity's current objectives and activities."

⁸³ Charities Act, 2009, s.52.

Incorporation was a political rather than a legal choice, necessitated by Irish Government commitments in the Northern Ireland Peace Agreement to ensure equivalency of human rights protection in both Ireland and Northern Ireland.⁸⁴ With the enactment of the Human Rights Act 1998 and the British Government's stated commitment towards a similar process for Northern Ireland, the Irish Government had little choice but to incorporate in the Republic to ensure the promised parity of treatment.⁸⁵ Like its English counterpart, the Irish Act adopts an indirect "interpretative" method of incorporation under which national courts are merely obliged to take account of Convention rights in cases that raise Convention issues. This lesser form of incorporation -- although understandable in the context of the UK, which professes a strong form of parliamentary sovereignty -- does not sit as easily in an Irish context where the principle of parliamentary sovereignty does not apply.⁸⁶ Moreover, the Irish Act provides an even weaker version of the UK Act since Irish Ministers (unlike their British counterparts) are not required when introducing a Bill to parliament to make statements relating to the compatibility of the proposed legislation with the Convention.⁸⁷ In fact, no reference to the Irish Human Rights Act was made during the debates on Charities Bill.

In summary, therefore, there has been little development in thinking towards the facilitation of human rights observance as a charitable purpose over the past 30 years. The provision in s.209 of the Taxes Consolidation Act 1997 is too limited to fully embrace the essentially charitable nature of human rights promotion. Consultative status was never meant to be an external filter for separating 'meritorious' human rights organizations from other NGOs. No debate has taken place in Ireland regarding the extent to which promotion of human rights today is for the public benefit and no public attempt has been made to rebut the principles of judicial neutrality and legislative usurpation with the result that the enforcement of human rights appears at least in Ireland to be just too political to be charitable.

VII. HUMAN RIGHTS, CHARITY LAW AND POLITICS: ANTITHETICAL OR COMPLEMENTARY ENDS?

"There seems to be no reason why judges should be unable to determine whether the advocacy of change in particular laws is for the public benefit. It may be possible to decide it is, even if there remain doubts about the rights and wrongs of the change itself. In a free democracy the promotion

⁸⁴ Northern Ireland Peace Agreement, Rights, Safeguards and Equality of Opportunity, Section 6(2) & (9) (April 10, 1998).

⁸⁵ See Egan, *supra* n.15.

⁸⁶ See Egan, *supra* n.15 (predicting that the Act 2003 would have little tangible effect on human rights litigation in Ireland because of the Government's decision "to give effect to Convention rights in domestic law in the most indirect manner possible.")

⁸⁷ Human Rights Act, 1998, s.19. In the event that a British Minister cannot make the necessary statement, he/she can still state the government's intention to proceed with the Bill (s.19(2)), as was the case with the Communications Act 2003. Thus, while it might be said that the section does not serve as an effective barrier to incompatible legislation, it does raise awareness of the issue and focus the mind of the Minister in question in light of the statutory requirement to publish the statement accordingly.

of controversial views may well be for the public benefit.”⁸⁸

Perhaps more so than any other area of law, the promotion of human rights observance and the enforcement of human rights norms involve an element of moral/political/legal persuasion of the state. Given that human rights are defined by reference to the state (human rights “prescribe what the State must do for us and what it must not do (or allow others to do) to us”)⁸⁹ it is inevitable that the state is a necessary party to any worthwhile human rights debate. And here lies the nub of our problem: if our definition of ‘political’ continues to be so broad as to encompass any activity that brings pressure on a government to reconsider or change its policies or law, technically the promotion of human rights will always be viewed as primarily political. Syllogistically, if by ‘primarily political purposes’ we mean ‘lacking in public benefit’ it follows that promotion of human rights will never be charitable.

In practice, one can draw a line between the approach of common law countries⁹⁰ and that of civil law countries⁹¹ in their treatment of charities that engage in political activities. Civil law countries do not restrict non-governmental organizations’ freedom of political speech on the basis of their legal status in the way that common law countries do. Attempting to explain the rationale for the common law’s more restrictive approach to political activity, Perri 6 and Randon attribute it to a combination of a shared language and the effects of British imperialism “rather than any process of independent common realisation or working out of the inherent nature of the idea of charity.”⁹² The Irish experience would seem to support this viewpoint with a dearth of case law,⁹³ no express government policy on the issue and no Revenue guidance on campaigning by charities to mitigate the current stringent restrictions on political activity.

Contrary to Cotterell’s claim above that there are no reasons why a judge should not be able to decide that advocacy for changes in law or policy is in itself in the public benefit,⁹⁴ detractors frequently advance a number of such arguments. These objections may be summarized conveniently as being that: (a) since it is the government’s obligation to look after the public welfare any argument against government could never be for the public benefit; (b) given the tax advantages enjoyed by charities, all political involvement by them should be constrained; (c) it would be subversive of democracy to allow unrepresentative groups over which no donor has control lobbying government for change that

⁸⁸ RBM Cotterell, “Charity and Politics” (1975) 38 *Modern Law Review* 471, at 474.

⁸⁹ See Section II, *infra*.

⁹⁰ Countries such as Australia, Canada, the United Kingdom, the United States and Ireland.

⁹¹ By which is meant countries such as Belgium, Denmark, France, Hungary, Israel, Poland, the Netherlands and Spain.

⁹² Perri 6 and Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (1995, Dartmouth Publishing) at 113.

⁹³ According to Perri 6, *supra* n. 92, at 99 “In Ireland the legal force of the constraints remains unclear. Restriction is implicit in English pre-independence case law, which has not been expressly over-ruled and it is assumed that political objects are recognized as outwith the charity concept but this has simply never been put to the test in the courts.”

⁹⁴ *Supra* n. 88.

might not even represent the wishes of their anonymous donors; and (d) at worst allowing for such a precedent would create a slippery slope leading to all lobbyists and interest groups obtaining charitable status.

In practice, very few modern common law states subscribe rigidly to an absolute ban on political activities for charities. Thus one finds that many common law jurisdictions have, over time, created space within the political sphere for charities to act. More often than not, it is the legislature rather than the courts that opens the door to charitable participation in the political arena. This has been the experience in the UK with the government prompting the Charity Commission to move from the judicially inspired “dominant/ancillary” test to the more leniently interpreted “means not ends” test, as now expressed in CC9 on Charitable Campaigning. Similarly, in Canada and United States, federal restrictions prescribe the amount of money that a charitable organization can spend on political activities.⁹⁵ Whereas these quantitative restrictions may prove limiting as to the degree of political activity in which a charity can engage, they do provide a zone of charitable autonomy for political action at least up to these defined limits.

In some instances, the courts have assisted in the creation of safe political spaces for charitable activity. Thus in the US, the Supreme Court of Pennsylvania held that a charitable trust is not invalid merely for contemplating the procurement of changes in the existing law that the donor thinks beneficial for those in whose favour the trust was created.⁹⁶ Holding that the cause of law reform and public participation in the legislative and government processes are themselves for the public benefit and thus neatly avoiding discussion of whether it is in the public benefit for the court to decide political questions, the Supreme Court stated:

⁹⁵ See Canadian Revenue Agency, Policy Statement on Political Activities, CPS -022 (September, 2003) available at <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html> (last accessed May 12, 2009) (providing that the Canadian Income Tax Act’s requirement that a charity spend “substantially all” of its income on charitable activities means that 90% or more must be spent in this manner, allowing as a general rule that a charity that devotes no more than 10% of its total resources a year to political activities to be operating within the substantially all provision.). In the US, the IRS advises that a body will be ineligible for charitable status if a substantial part of its activities is attempting to influence legislation. A 501(c)(3) organization may engage in some lobbying, but too much lobbying activity risks loss of tax-exempt status. Organizations may, however, involve themselves in issues of public policy without the activity being considered as lobbying. See <http://www.irs.gov/charities/article/0,,id=163392,00.html> (last accessed May 12, 2009).

⁹⁶ *Taylor v Hoag*, 273 Pa. 194, 116 A 826 (1922) (Pa SC) holding at 199, “We are led to conclude that a trust for the a public charity is not merely invalid because it contemplates the procuring of such changes in existing laws as the donor deems beneficial to the people in general or to a class for whose benefit the trust is created. “ *Taylor v Hoag* has been followed in *International Reform Federation v. District Unemployment Compensation Bd.* 131 F.2d 337, 340 C.A.D.C. (1942) (“Undoubtedly some cases may be found sustaining the view that organizations seeking changes of law are engaged in political activity and therefore neither charitable nor educational, whatever the motive. The ground for such holdings is that the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. But this reasoning is not convincing, and we prefer the more modern view that so long as the purpose can be thought by some to be in the public interest, the court is not concerned with its wisdom.”) See also, *Estate of Breeden*, 208 Cal.App.3d 981, 987 (Cal. App. 4 Dist. Mar 16, 1989).

“To hold that a change in a law is in effect an attempt to violate that law would discourage improvement in legislation and tend to compel us to continue indefinitely to live under laws designed for an entirely different state of society. . . With the wisdom of the proposed change, the courts are not concerned. We perform our duty in determining whether or not the method adopted to make the change violates established law.”⁹⁷

Similarly, in Australia, the Supreme Court of New South Wales in *Public Trustee v Attorney General of New South Wales* suggested that McGovern had erred when it held that if a main purpose of a trust is political then the trust could not be charitable. In Santow J’s view, a charity advocating for a change in the law in the direction in which the law tends to be changing did not prevent a trust being a charitable trust. To this end, the judge counseled, one should look to see whether the object to promote political change is so persuasive and predominant as to disqualify the trust from being a charitable trust.⁹⁸ Even Ireland is not immune to the accommodation of political activity in the charitable sphere when that activity is directly linked to the attainment of specified charitable purposes.⁹⁹ To be sure, this accommodation will not assist human rights organizations if the promotion of human rights continues to be viewed (wrongly, as this paper argues) as falling outside the statutory definition of charitable purpose but the broader point regarding the legitimate interaction of charity and politics stands.

It is submitted that there are stronger public benefit arguments in favour of, than against, charities’ involvement in political activities. In a system in which government traditionally look after the needs of the median voter, individuals dissatisfied with this level of service and, having either different needs or requiring more of a particular service than the median citizen, traditionally turn to other sources for fulfilment of their needs and if necessary, protection of their rights. To this end, charities have long catered for those individuals neglected or marginalised by the state or by society, in general.¹⁰⁰ In service of those beneficiaries, for whom existing government policies and laws fall short, it would seem impossible at times to untangle charitable provision from political action.

Aside from whatever benefit such advocacy may eventually bestow on the beneficiaries themselves, it is arguable that the inclusion of the charity sector in the political debate is good for society and leads to a healthier, pluralistic civil society.¹⁰¹ The public benefit in such advocacy for change arises from the need

⁹⁷ *Taylor v Hoag*, *supra* n.96, at 200.

⁹⁸ [1997] 42 NSWLR 600, at 621C. Justice Santow later elaborated further on his views in "Charity in its Political Voice - a Tinkling Cymbal or a Sounding Brass?" (1999) 18 *Australian Bar Review*, 225. See also Young CJ in *Attorney General for NSW v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128.

⁹⁹ Charities Act 2009, s.2(1).

¹⁰⁰ Burton A. Weisbrod, *The Nonprofit Economy* (1988, Harvard Univ Press).

¹⁰¹ There are many proponents of the value of free speech to democracy and society. In this regard see, Alexander Meiklejohn, *Free Speech and its Relation of Self-Government* (Harper, 1948) (arguing that free speech is essential to allow informed participation in a democracy); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) (arguing that free speech restrictions enhance suspicion of government and undermine public trust); and the

for government to have a diversity of views before it when it comes to consider policy. In the words of one commentator, “it is precisely because charities are expressive of different views, values and experiences that their involvement in the political process is so important.”¹⁰² Plurality in this context should include room for dissenting voices.

Given that charitable organizations are private actors operating for the public benefit, it could be argued that the restrictions on charities’ right to advocate for change amounts to an unwarranted restriction on their freedom of speech. Both the UN Declaration and the European Convention on Human Rights extend the right to freedom of speech to organizations. Although this right is qualified by state exigencies, judged within a state’s margin of appreciation, the English Court of Appeal has recognised (albeit in the context of defamation law rather than charity law) the public benefit inherent in this free-flow of information.¹⁰³ Taking this perspective on board, one could argue that the calls for the changes in government policy or law made in *McGovern* were wrongly classified as ‘political’ and more correctly fall within the definition of ‘matters of public interest to the community.’¹⁰⁴

It is conceded that the courts are not always willing to defend the notion of free speech in this regard. In *R v Radio Authority, ex p. Bull* the English Court of Appeal upheld the Radio Authority’s decision to ban Amnesty’s radio advertisements highlighting the violation of human rights then occurring in Rwanda and Burundi.¹⁰⁵ The court held that to promote the observance of fundamental human rights by campaigning to change the laws or policies of governments was a political object within the meaning of the Broadcasting Act 1990. In reaching this decision, the Court drew upon charity law and, in particular, the *McGovern* decision.¹⁰⁶ Although UK charity law’s thinking on

pluralist arguments of Joseph Raz, “Free Expression and Personal Identification” (1991) 11 *O.J.L.S.* 303, 312 (arguing that freedom of speech is of value because it can validate personal ways of life).

¹⁰² Eleanor Burt, “Charities and Political Activity: Time to Rethink the Rules” (1998) *Political Quarterly* 23, 27.

¹⁰³ *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862, 909 (CA) (“We do not for an instant doubt that the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community.”)

¹⁰⁴ See Chesterman, *supra* n. 106, at 347.

¹⁰⁵ *Regina v Radio Authority, ex p. Bull* [1998] QB 294 (CA).

¹⁰⁶ *Ibid* at 307, per Lord Woolf (rejecting the submission of the appellant’s counsel to the effect that the promotion of human rights could not be viewed as political since it sought only to ensure observance of fundamental principles of international law by holding “the problem with this submission is that it makes no allowance for the fact that regrettably the laws and policies of many countries do not match the standards set by the United Nations Charter. To campaign to change those laws and policies so that they comply with the Charter is political even though it is also commendable.”). Criticising the decision, Chesterman has bemoaned the loss of a good opportunity by the court to inject into the judicial definition of ‘political’ “some acknowledgement of the importance of freedom of public discussion of political matters within a democratic society.” Michael Chesterman, “Foundations of Charity Law in the New Welfare State” (1999) 62 *Modern Law Review* 333, 345.

human rights has advanced since 1997,¹⁰⁷ it is arguable that broadcasting law's concept of 'political' has not.¹⁰⁸

The claim that the privileged tax status of charities should somehow deprive them of their right to advocate for change cannot withstand scrutiny. As Burt has cogently argued other commercial organizations enjoy tax privileges (consider, for instance, the lower rate of corporation tax that applies to companies) and yet these entities are free to engage in the political process regardless of whether taxpayers agree with their policy positions.¹⁰⁹ Nor can one claim that tax exemptions give charities an unfair advantage in the lobbying process, not least because they represent unpopular causes or those less well able to present their cases.¹¹⁰ Moreover, in Ireland given that s.7 of the Charities Act 2009 severs the link between the award of charitable status and the granting of charitable tax exemption, the argument in favour of restricting charitable voice on the basis of tax privileges holds even less ground.

Finally, the rather paternalistic notion that to allow charities to involve themselves more fully in political activity will in some way exploit donors who give their money in good faith can also be discounted as a wholly unwarranted interference with individual preferences and liberty.¹¹¹ Unconvinced by arguments relating to the perils of information asymmetry and drawing comparisons between charitable donors and investors in for-profit firms, Perri 6 argues that it is not at all obvious as to why, if these fears are true, similar constraints are not imposed on for-profit firms and why it is imagined that general constraints on campaigning actually protect donors.¹¹² These views would seem to find support in the evidence Oxfam presented to the Charity Commission investigation into its campaigning activities in 1991. Oxfam demonstrated that its donors wanted it to do more such advocacy work on behalf of its beneficiaries rather than less.¹¹³

¹⁰⁷C.f. Feldman and Stevens, "Broadcasting advertisements by bodies with political objects, judicial review and the influence of charities law" (1997) *Public Law* 615, 622 (arguing that "while the law of charities informed (perhaps inappropriately) the interpretation of the term 'political' . . . the law of human rights should, in turn, inform the development of the law of charity," an observation not dissimilar to that made by Weiss almost 25 years earlier – see *supra* n. 49, both of which went unheeded until specific reform of the Charities Acts began in 2002.

¹⁰⁸ See *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 (HL). See also Tom Lewis and Peter Cumper, "Balancing freedom of political expression against equality of political opportunity: the courts and the UK's broadcasting ban on political advertising" (2009) *Public Law* 89.

¹⁰⁹ Burt, *supra* n. 102, at 27.

¹¹⁰ See John G. Simon, "Foundations and public controversy: an affirmative view" in F. Heimann (ed.) *The Future of Foundations* (Spectrum Books, 1973) at 76. See also Perri 6 & Randon, *supra* n. 92 at 155-156 (arguing that even if such tax status gave charities an unfair advantage "this would be at most an argument for taxing lobbying expenses differently, and not for prohibition.")

¹¹¹ Perri 6 & Randon, *supra* n. 92.

¹¹² Perri 6, *supra* n. 92, at 157-159.

¹¹³ Charity Commissioners of England and Wales, Report of an Inquiry under s. 6 of the Charities Act 1960 into the campaigning activities of Oxfam submitted to the Charity Commissioners, April 8, 1991, at 13 (detailing how its campaign drawing attention to the Pol Pot regime in Cambodia was a response to the high level of public disquiet over the situation in Cambodia with Oxfam receiving over 20,000 letters offering donations and asking what practical action they could take to meet the perceived need.)

VIII CONCLUSION: ARE HUMAN RIGHTS TOO POLITICAL TO BE CHARITABLE?

The answer to the opening question – are human rights too political to be charitable – seems, unfortunately, to be yes for the time-being in Ireland. This paper has sought to chronicle the development of legal thinking towards human rights and charity law and to apply this template to the current Irish legal position in the hope of arriving at the policy position underlying it. In the absence of a sound policy basis, legal rules exposed to the light should live short and withering lives.

The paper identifies a number of assumptions regarding charity law, human rights and politics in Ireland. First, the government remains suspicious of any group that seeks to challenge existing government practice or policy from outside the political arena. This suspicion manifests itself not only in the current exclusion of human rights from the Charities Act and the prevailing practice of limited tax relief for human rights organizations already discussed but also in the form of broadcasting and electoral law restrictions that limit the ability of charities to engage in advocacy and campaigning in the pursuance of their missions. The *McGovern* principles on what constitutes a political purpose continue to apply outside the realm of charity law in this regard.¹¹⁴ Political purposes are broadly defined in the Irish Electoral Acts 1997-2001 as being “to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority”¹¹⁵ and thus affect the very work in which charities may legitimately engage by imposing registration requirements and donation limitations upon them.¹¹⁶

The impact and effect of these limitations have been identified as a major concern amongst Irish civil society actors. In its current Inquiry into Civil Society, the Carnegie Trust has begun to explore more fully the basis for the marginalisation of dissent in Ireland.¹¹⁷ The Carnegie researchers may not have to dig too deep beneath the surface for tangible examples of such marginalisation. Strategic cuts in government funding for human rights bodies have led critics to complain that the government is using the cover of the current

¹¹⁴ *C.f.* Irish Radio and Television Act, 1988, s. 10(3) and UK Broadcasting Act 2003, s.319. See also Broadcasting Commission of Ireland’s decision to ban advertisement of development NGO, Trocaire, on the grounds of its political ends, reported in John Downes, “RTE and Broadcasting Watchdog differ over Trocaire Ad” THE IRISH TIMES, March 7, 2007. By way of comparison in England see *Regina v Radio Authority*, ex p. Bull [1997] 2 All ER 561; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2006] All ER 30 (CA) *affm’d* in [2008] 1 A.C. 1312 (HL).

¹¹⁵ Electoral (Amendment) Act 2001, s. 49.

¹¹⁶ Section 23C of the Irish Electoral Act 1997, inserted by s.49 of the Electoral (Amendment) Act 2001, requires third parties (including charities) to register with the Standards in Public Office Commission as soon as they receive a donation in excess of €127 for “political purposes” whereas section 23A(2) of 1997 Act prohibits receipt of donations for political purposes from foreign based organizations or persons who are not citizens of Ireland.

¹¹⁷ See *The Marginalisation of Dissent – A Challenge for Civil Society* at <http://democracy.carnegieuktrust.org.uk/files/Dissent.pdf> (last accessed May 13, 2009).

economic recession to dismantle existing equality and human rights frameworks in Ireland. Certainly, the losses suffered by agencies concerned with the promotion of equality and social justice and specifically human rights would seem to be disproportional with the losses suffered by other non-rights based bodies. The deletion of the references to equality and diversity in the Charities Bill coincided with a Government decision to cut funding to and to merge a number of state-sponsored bodies dealing in the areas of equality and poverty. The Irish Equality Authority's budget was cut by 43 percent in 2008 whereas the Irish Human Rights Commission lost 24 percent of its annual budget. In addition, the Government decided in late 2008 to close its own anti-racism advisory body, the National Consultative Committee on Racism and Interculturalism¹¹⁸ along with the Combat Poverty Agency (a government agency with responsibility for tackling poverty and promoting social inclusion), transferring the latter's functions to the Department of Social and Family Affairs. Anecdotally, the dismantling of these particular bodies has been attributed to their very success in taking the government to task in its delivery of services and its treatment of rights.¹¹⁹

Political dissent does not sit well with those in power. This is even more so the case when those challenging the status quo are supported financially by the ruling regime.¹²⁰ Whereas common wisdom advises against biting the hand that feeds you, it is harder to justify a system that forbids you to bite in the first place and thereafter live with the consequences of your actions. Civil society works best when we allow the inherent tensions that exist between the state, the market and the third sector to come to the fore and influence the development of public policy. The power balance between each sector might best be described as cyclical with the influence of each sector depending on its own ascendance or decline in relation to the others such that market, government and the third sector act as necessary checks and balances on each other over time. In the democratic scheme there may well be good reasons for imposing certain restraints on the political freedom of charities or businesses to engage in the government's space just as in a well-functioning society there may be constraints placed on the state with regards to its interventions in the other two sectors. But the sectors do overlap and should inform each other. In the absence of a rational, substantiated argument it is next nigh to impossible to justify a

¹¹⁸ See <http://www.nccri.ie/>. See also Philip Watt, "Budget cutbacks weaken State's capacity to combat racism" THE IRISH TIMES, November 19, 2008.

¹¹⁹ See the comments of Senator David Norris speaking on the Human Rights Issues Motion, Seanad Debates 635, February 4, 2009 ("One of the reasons for the Government's attitude appears to be that the preponderance of issues taken up by these groups involves criticism of services provided by Government agencies. Historically, we have a good and proud Civil Service establishment but it is only human to resent what may be perceived as incessant criticism. However, it is the responsibility of Government to resist this tendency . . . Just as there has been shown to be a golden circle in our financial establishment, so it seems there is a brass circle in our bureaucratic establishment that is only too happy to incite or collaborate with Government in the undermining of agencies perceived to be critical of the State.")

¹²⁰ Whether tax exemptions should be classified as a state subsidy granted to charities or are more correctly acknowledged as a consequence of charitable activity simply falling outside the relevant tax base in the first place is a whole other question outside the scope of this current paper. See further Evelyn Brody, "Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption" (1998) 23(4) *Journal of Corporation Law*, 585.

complete prohibition on charities engaging in political activity. Silencing a sector – essentially marginalizing dissent – adversely affects all of civil society and not just the sector constrained.

The past political constraints on charities in Ireland have not been well developed or enunciated. Rather the constraints on political activity in general and human rights work in particular represent the remnants of an outdated adopted policy, lacking a coherent basis of its own and ill fitting with current views and aspirations both on human rights observance and enforcement and the place of participatory democracy in modern society. It is regretted therefore that in the moment of policy change that the Charities Bill brought about – the first such moment in almost 50 years – the government shied away from thinking through a new landscape for charitable engagement with society. It is to be hoped that this rethinking has just been postponed and not abandoned. Section 6 of the Charities Act 2009 requires of the Minister that not later than 5 years after the establishment day, he/she commence a review of the operation of the Act. In the Seanad Debates on the Bill, the Minister, with a tincture of regret, acknowledged that the government's approach to human rights was not to every deputy's liking but that there would be an opportunity to revisit the matter within the context of the Act's mandatory review in the future.¹²¹ Time has not yet started to run in this regard but one must remain hopeful that the next five years will provide a space for Irish policymakers not only to revise their opinions regarding the charitable nature of human rights but to develop a more informed, and one might say, modern outlook on the role of advocacy for legal change in the context of charity law.

Oonagh B. Breen

School of Law, University College Dublin

Visiting Fellow, Hauser Center for Nonprofit Organizations, Harvard.

¹²¹ Minister of State John Curran, Charities Bill 2007 Committee Stage Proceedings 192 SEANAD DEBATES 759, December 4, 2008 (“A policy decision was made that the legislation would reflect and maintain the *status quo*. Knowing it was a complex area in which to introduce regulation, the next phase will be a mandatory review within a specified period.”)