UNIVERSITY COLLEGE DUBLIN

UCD Working Papers in Law, Criminology & Socio-Legal Studies
Research Paper No. 01 / 2022

Charity Law and the Legal Syllabus: Breaking Free from the Equity Straitjacket

Dr. Oonagh B. Breen
UCD, Sutherland School of Law
Oonagh.breen@ucd.ie

UCD Sutherland School of Law

Charity Law and the Legal Syllabus: Breaking Free from the Equity Straitjacket

Liverpool University Symposium on the Future of Charity Law
Friday, April 28, 2017.

Dr. Oonagh B. Breen, Sutherland School of Law, University College Dublin

For most undergraduate law students, the study of charity law is pigeonholed somewhere after extensive discussion of express trusts and resulting trusts and often between lectures on constructive trusts and trustees' duties and liabilities. Charities are discussed in the context of charitable trusts and their difference from the private trust concept studied almost exclusively up until that point. In the 1980s and 1990s, a trust law lecturer would aim, in the few hours at his/her disposal to teach charity law, to cover the Pemsel heads of charity with a seam of case law for each, unpack the anomalies in the treatment of public benefit, recounting the tales of poor and worn out clerks and poor relations and, if lucky, elaborate on the doctrine of cy près and the different treatments of initial and subsequent impossibility. A bountiful year might yield an extra hour somewhere to devote to private purpose trusts, allowing students to contemplate the mysteries of pet animal trusts, statues to commemorate oneself and the difficulties caused by well-meaning people who set out to promote the 'maintenance . . . of good understanding . . . between nations' and 'the preservation of the independence and integrity of newspapers.'[1]

The rollercoaster ride of charity law within the Equity syllabus would inevitably begin with the Statute of Elizabeth and end closer to modern day promises of reform of the regulatory framework for charities, prompting exam questions along the lines of 'discuss the reforms required to bring charity law into the twenty first century' or 'critically consider the influence of the Elizabethan Preamble on the modern-day concept of other purposes beneficial to the community.' Arguably, this educational train was longer still if the station it departed from was outside England and Wales. Teaching charity law in any other common law country requires a decent nod to the English system and jurisprudence before introducing the former's native cases and any twentieth century legislative tinkering with the law of charities as gifted to that former colony. Thus, one might well conclude that the strait-jacket of equity, while maintaining a place holding for charity law on the legal syllabus, certainly has not fitted law graduates with a working knowledge of the dynamic nature of the subject, as we know it in practice today.

With the arrival of the millennium, additional consultation papers on the future of charity law regulation began to appear on the scene and had to be squeezed into the already

[1] *Re Astor's Settlement Trusts* [1952] Ch 534.

overcrowded lecture space as a portent of 'things to come' in the charitable arena. Ranging from the Charities Definitional Inquiry 2000 in Australia to the influential English Private Action, Public Benefit Report in 2002 and the 1999 Broadbent Report in Canada, it was clear that in every jurisdiction the nature of charity law was evolving. The myth that this metamorphosis could be adequately captured within the parameters of a trust law course began to unravel.

Separating fact from fiction . . .

If one were to pick a topic that would make one a 'jack of all trades' academic, it would surely have to be charity law. To fully understand the raison d'être for charities in the first instance, to navigate the emerging regulatory framework now associated with charities and to tackle the interesting 'broader' legal questions that charity law is throwing up requires a much bigger academic net to be cast than equity can necessarily supply. That is not to discount the importance of equity and trusts in the pedagogical story of charity law but it is to recognise that to only teach charity law within the confines of equity is to provide a skewed vision of the subject, divorced from many other important practical considerations.

So, what then are the other subject areas in which charity law should have a toe-hold or alternatively would feature in any bespoke module dedicated to charity law? A starting point would be to locate the study of charity law within the broader sphere of market and state relations. This socio-economic approach would enable the tangled web of non-profit, civil society and third sector acronyms to be more fully fleshed out vis-à-vis the state and market sectors and would allow space to explore the meaning of philanthropy (as opposed to charity) and evolution of social enterprise (as opposed to charity) at the outset. It, too, would provide a ready space to consider the meaty questions of when is something too political to be charitable (if viewed as a form of charitable incursion on the state) and how far should charities be allowed to pursue profits if those profits ultimately end up supporting the mission (if viewed as a form of charitable incursion on the market).

The role of company law in the regulation of charities is something that is never properly raised in the study of charitable trusts. In Ireland, according to Benefacts, there are 3,107 registered charitable corporations, making the company limited by guarantee the most popular legal vehicle for establishing a charity. There is, arguably, as much reason to teach charity law within a company module as within a trust law module on this basis. When one considers the growth in legal forms available to charities and their subsidiary organisations in recent years – whether CIOs, CICs, Bencorps, or LLCs and L3Cs – company law becomes an ever more attractive module for incorporating charity law components.

The role of the charity trustee, while certainly influenced by the fiduciary standards of trust law is also largely governed by company law, an issue rarely mentioned in the current treatment of charitable trusts lectures. This raises many important issues relating to the

governance of charities, the proper procedures relating to board meetings, the treatment of conflicts of interest, and the issue of private inurement. From a company law perspective, alerting students to the absence of shareholder oversight in charitable corporations and educating them on alternative mechanisms for ensuring probity and adherence to charitable purpose would enable students to think about compliance and enforcement in a broader fashion. It is, of course, equally open to argument that the role of the charity trustee and his/her duties and responsibilities is something that is never sufficiently explored in the context of charitable trust law lectures either. In both cases, we are presented with the same fundamental dilemma: how are we to encourage a future generation of well-informed charitable board members, chairs (and volunteers) if we do not enlighten and equip them with the necessary tools in charity law?

With the growth in the number of charity regulators since the turn of the century and the introduction of new administrative tribunals in many jurisdictions to hear appeals from charity commissions in the first instance, the importance of administrative law comes to the fore. The decisions of the tribunals can be pivotal in the creation of new charity law. One thinks of the decision of the Tribunal of First Instance in the Independent Schools Council v The Charity Commission, for instance, and its implications for the Charity Commission's subsequent treatment of public benefit guidance. Administrative law's more general concern with the processes of applying for registration and the mechanisms for challenging decision made by the Charity Regulator also inform our understanding of the charity regulation regime. Indeed, the growing interaction between Charity Regulators and other peer Regulators (whether Revenue, Company Registrar, Housing Regulator, the Health Information and Quality Authority, the Garda) or with other Charity Regulators (e.g., the MOU between the CCEW and OSCR) spawns a new need to better understand how these administrative cooperative arrangements work and where does the power lie. Equally important, although perhaps falling more so into the realm of constitutional law, is the changing role and responsibilities of the Attorney General as parens patriae of charities and in this role the public policy powers of the State through the AG to intervene to protect charitable assets and beneficiaries. What is the scope of this prerogative power, what are the mandates and strictures regarding its exercise and how are modern charity regulation frameworks changing the way we think about the AG and his/her responsibility?

An obviously important area that is touched upon in trust law but never fully elaborated is the role of tax policy and the application of tax law to charities. Most students will be able to cite Lord Cross' view in Dingle v Turner to the effect that it is:

> unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for 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 . . . But, as things are, validity and fiscal immunity march hand in hand.[2]

Undergraduate revenue law courses in Ireland tend not to devote much discussion to charitable tax relief, focusing more on the main principles of direct taxation, the ethics of tax avoidance and the differences from tax evasion.

The topic of fundraising regulation, so hugely important in the life of non-profits, does not make it onto the charity syllabus outside of the bespoke courses that teach non-profit law in the round. If we are not teaching or at least raising the tough topics in this area for discussion – how do we regulate online fundraising or fundraising via social media platforms?; what is the most effective moment in time at which to regulate – before, during or after solicitation?; does co-regulation of fundraising produce better compliance outcomes than self-regulation of fundraising? – how can we expect the next generation of students to begin to explore these issues as research questions at masters level or above?

The Way Forward – The Importance of discarding the Strait Jacket

For me, the law of charities begins and ends with the notion of stewardship – private wealth handed over irrevocably to the charitable realm to achieve public good is at the heart of charity law. The role of the law in this regard is to ensure good stewardship of these assets so that they are used in the most effective manner to achieve the stated charitable purpose. This requires good governance of the charitable organisation which is best demonstrated by ensuring accountability and transparency.

Accountability – the buzz word in an age when the charity scandals have been coming thick and fast and public confidence and trust has been damaged as a result – brings the educator very quickly to the issue of the importance of good financial reporting and importance of being able to interpret a statement of accounts and understand an auditor's opinion. The ability to decipher the real meaning behind what is not said, as much as what is said, in a Director's annual report (or a Trustees' Annual Report) is an invaluable skill too. So very few law students are ever exposed to figures on a balance sheet that even alarm bell results may be lost on them.

We cannot lay the blame for this at the door of Equity: trust law students are in no way special in this regard, as an ongoing complaint among hiring law firms tends to be that students do not develop sufficient commercial awareness during their law studies. The power of teaching a student how to read a set of financial accounts, to be able to interrogate whether a charity is a going concern and to identify if there are issues arising from the numbers that deserve

[2] Dingle v Turner [1972] AC 601, 624 [HL].

(and perhaps have not received) special comment or explanation by the charity trustees in their report should not be under-estimated.

Issues of good governance and stewardship of charities bring us right back to our starting point within Equity as the home of charity. Perhaps it is inevitable that the altruism associated with charity and the moral tendencies associated with Equity mean that Equity and charities are inevitable bed fellows. They are not monogamous, however. Constraining the study of charity law to Equity and Trusts harms both as it leads to only superficial coverage of matters that are fundamental to the proper functioning of civil society while simultaneously adopting a silo approach to the teaching of charity law that deprives other modules of important input. In the absence of sophisticated law school curricula that provide the space to teach bespoke charity law/NGO law modules, it remains even more important to let the influence, example and relevance of charity law pervade the core curriculum far beyond the borders of Equity.

Questions or comments welcome: Oonagh.breen@ucd.ie

ooOoo