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October 31, 2010

Dear Readers,

This is a highly interesting and instructive issue of the Journal, drawing on discussions of issues in many countries and from several regions. We are grateful to the authors who submitted these papers to us for allowing us to present them to our wide readership around the world. Here is a summary of what the issue includes:

Making Gifts to NPOs in Pakistan – Legal and Fiscal Rules

Written by IJCSL's Staff and Consultants, this paper has been produced as part of a partnership between ICCSL and the Aga Khan Foundation (in particular AKF-Pakistan and AKF-US) to help facilitate giving by the Pakistani diaspora and other interested individuals and companies to aid Pakistan in its current rebuilding efforts. The importance of this information in the wake of the horrific floods (which began in northern Pakistan in July 2010) is obvious. While this paper is couched in general terms, it is clearly aimed at giving to relief NGOs, in particular ones that are of Pakistani origin. To that end, ICCSL is also partnering with the Pakistan Centre for Philanthropy (PCP) and is involved with their efforts to assist the flood-ravaged regions (for more information, click on <http://www.pcp.org.pk>).

The article surveys the current legal complexity in Pakistan (which is a federal state, meaning that it has both national and provincial laws), and it looks to the potential problems that may face outside donors in making gifts to Pakistani NGOs. Our partner at AKF-P, Gulnajam Jamy, helped us a good deal with the article. The first draft was written by our consultant, Nasira Razvi, a Pakistani lawyer.

Administrative and Cy-pres Judicial Schememaking: The Fate of These Applications in Canada

This impressive article by Duncan Waters, Q.C., an esteemed Canadian lawyer and a retired law professor, is a real tour de force. After describing both judicial and administrative *cy pres* scheme-making (and the effect of such schemes on testators' wishes), Mr. Waters analyzes developments in many other common law jurisdictions, including several states in Australia, where different approaches have been taken. He addresses the 2006 Charities Act in England and how it (and previous legislation) might affect *cy pres*. His final discussion concerns whether there is a need for legislation in Canada (like Australia a federal state), where "Canadians today find themselves reliant for reference on English case precedents that constitute the pre-1960 law in England and Wales."

In the end he opts for a legislative solution to Canada's dilemma, and he gives not only several cogent reasons for such a solution, but also describes how the legislation might look. This is a very thoughtful approach, and we hope that legislators in Canada will take the time to read Mr. Waters' piece. We are grateful not only to the author but also to Terrance Carter, our editor for Canada, who kindly permitted us to reproduce a paper that had been included in the Carter firm's *Charity Law Bulletin*.

Assessing Developments in the Regulatory Environments for Nonprofit Organizations in Japan and England & Wales

This excellent paper is, like the previous one, comparative, and what it compares is quite interesting – the legal situation facing the not-for-profit community in England and Japan. The reason why this is so interesting is that Japan is the only civil law country that has followed the lead of England and Wales in setting up something similar to the Charity Commission. While the Public Benefit Commission in Japan is not exactly the same as the Charity Commission for England and Wales (E&W), it is based on the Charity Commission and the actual workings are adjusted to meet the requirements of the Japanese legal system. Dr. Chris Mason, of Liverpool John Moores University, has contributed the section on E&W, and Dr. Rosario Laratta, of the University of Tokyo, wrote the section on Japan.

While we have published several articles on the new system in Japan, we have never before had the opportunity to publish an article that quite successfully compares the way in which each of the commissions works and the benefits and draw-backs in each system. Our hope is that this paper will be widely read and that a good debate will ensue about models of oversight of public benefit organizations.

Case Note: Summary of Judgment in Cape High Court against the National Lotteries Board (NAB)

The scheme in South Africa for awarding monies from the National Lottery to charities operating there has come under much criticism, not only in the press, but also in academic circles. This case note, written by Piroshaw Camay, a distinguished NPO practitioner in Durban, has written an insightful analysis of the first case brought to challenge the decision-making process regarding distributions by the NAB. While the final chapter in this case has not been written, it is clear that the South African courts will hold the NAB for a high standard of due process in making their awards. We are grateful to Ricardo Wyngaard, one of our editors from South Africa, for allowing us to republish this paper in IJCSL; it originally appeared in his newsletter on NPO Legal Issues in South Africa (see www.npolawyer.co.za). .

We hope you enjoy this issue and have a great read!

As always,

Karla

Karla W. Simon
Editor-in-Chief

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IJCSL EDITORIAL POLICY

October 2010

Dear Reader,

CONTENT – The IJCSL publishes articles on a variety of topics, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed herein do not necessarily reflect the views of the IJCSL or its editorial staff.

STYLE – The IJCSL publishes articles by contributors from around the world. Therefore, the IJCSL uses a flexible editorial policy regarding questions of style. Articles submitted by persons for whom the English language is native are edited based on the author’s original syntax and spelling. Articles submitted by persons for whom the English language is not native are edited according to American English style.

Occasionally, the IJCSL publishes articles in languages other than English. In those instances, articles are published as submitted and the IJCSL provides an English-language summary.

QUESTIONS & COMMENTS – The IJCSL welcomes readers’ questions and comments on items it publishes. If you have a question or comment, please contact:

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THE IJCSL RETAINS FINAL EDITORIAL CONTROL of all aspects of publication and will share copyright with the authors of the works published.

We look forward to hearing from you, and thank you for your interest in the IJCSL.

Sincerely,

The IJCSL Editorial Staff and Editorial Board

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8 INT’L J. CIV. SOC. L. 2 at http://www.iccsl.org/pubs/10_04_IJCSL.pd

MAKING GIFTS TO NPOs IN PAKISTAN

LEGAL AND FISCAL RULES

BY

ICCSL STAFF AND CONSULTANTS¹

This paper is produced as part of a partnership between ICCSL and the Aga Khan Foundation (in particular AKF-Pakistan and AKF-US) to help facilitate giving by the Pakistani diaspora and other interested individuals and companies to aid Pakistan in its current rebuilding efforts. The importance of this information in the wake of the horrific floods (which began in northern Pakistan in July 2010) is obvious. While this paper is couched in general terms, it is clearly aimed at giving to relief NGOs, in particular ones that are of Pakistani origin. To that end, ICCSL is also partnering with the Pakistan Centre for Philanthropy (PCP) and is involved with their efforts to assist the flood-ravaed regions (for more information, click on <http://www.pcp.org.pk>).

I. OVERVIEW

In Pakistan, there are several rules and regulations under which nonprofits may form and register themselves. Some of these Laws and Acts were prepared before the independence of Pakistan by the then British government. Despite the fact that there are nearly 22 laws which, by and large, impact the existence, registration, and operation of not-for-profit organizations (NPOs)², there is lack of legal definition of term ‘NGO’, ‘charity’, ‘philanthropy’, ‘charitable purpose’, or ‘public benefit’. Generally, the terms ‘charity’ and ‘philanthropy’ are used interchangeably. Terms ‘nonprofit organization’ and ‘charitable purpose’ are addressed in Income Tax Ordinance, 2001. The definition and concept of a ‘charity’ is dealt with to some extent in the ‘Charities - Taxpayers’ Facilitation Guide’ published by the Central Board of Revenue (the Central Board of Revenue was reconstituted as the Federal Board of Revenue in 2007) in February 2006³. This definition⁴ introduces the concept of ‘humanitarian purposes’ (which is much broader than mere

¹ ICCSL is particularly grateful to Nasira Razvi, a Pakistani lawyer, who did research for this article and prepared an initial draft.

² Zafar Hameed Ismail and Qadeer Baig; page 315 “*Philanthropy and Law in Pakistan*” chapter in PHILANTHROPY AND THE LAW IN SOUTH ASIA, Asia Pacific Philanthropy Consortium, 2004. (at page 252 it is mentioned that there are 18 federal acts)

³ Available at the official website of the Federal Board of Revenue official website at <http://www.cbr.gov.pk/tpef/Brochure7.pdf#search='pakistan%20Charities%20%20Taxpayers%20Facilitation%20Guide>. This has apparently not been updated since the FBR was set up.

⁴ For the purposes of Income Tax Ordinance, 2001

acts of charity). In relevant part, it provides that a charity is an organization established and operated for humanitarian purposes. The humanitarian purposes set out in the guide are fairly broad covering from mere acts of piety and charity to the development of aviation and industries.

An NPO is normally considered to be an organization not affiliated with the government that works for the welfare, benefit, or development of society or certain sections of the society. Each entity can draw up its own constitution, article, rules, by-laws, provided they comply with the law of the land. If the entity is registered under any Act or Ordinance, it is expected to follow the provisions of that particular Act or Ordinance. Article 17 of the Constitution of the Islamic Republic of Pakistan recognizes freedom of association as a fundamental right, guaranteed by the State and enforceable through judicial intervention⁵. This freedom is, however, subject to reasonable restrictions imposed by law in the interests of "sovereignty or integrity of Pakistan, public order or morality".

A. TYPES OF ORGANIZATIONS THAT QUALIFY AS NPOs IN PAKISTAN

Based on their activity areas, there are approximately 45000 organizations categorized according to the ICNPO classifications⁶. The nonprofit organizations are either unregistered⁷ or registered as Societies⁸, Social Welfare Agencies⁹, Trusts¹⁰, and Nonprofit Companies¹¹. Some are also recognized as Waqfs. One more concept is that of Citizens' Community Board (CCB) which is envisioned under the Local Government Ordinance 2001¹².

B. TAX LAWS AFFECTING NPOs IN PAKISTAN

⁵ Text available at the official web site of the Government of Pakistan Ministry of Law, Justice & Human Rights at http://www.pakistan.gov.pk/law-division/publications/constitution_of_pakistan.htm.

⁶ Pasha, Jamal and Iqbal; SPDC working paper No. 1 "Dimensions of the nonprofit sector in Pakistan" 2002.

⁷ 34% are unregistered, 4.1% applied for registration.

(Registration for NGO is not mandatory in Pakistan to carry out the charitable, development, and welfare activities. Registration gives certain advantages which unregistered would not have. For instance it gives them a legal status, can open a bank account, can sue and be sued in their own name, own property, and most importantly they become eligible for financial assistance from government agencies, national and international funding agencies. Also, certain type of activities can be carried out only by registered NGOs) "A Study of NGOs - Pakistan" Asian Development Bank report 1999 available at <http://www.adb.org/NGOs/docs/NGOPakistan.pdf>

⁸ 40.5%.

⁹ 15.2%.

¹⁰ 5.8%.

¹¹ 0.3%.

¹² A part of governments' decentralization process initiated in 2001. Current or future prospects of CCBs, however, are unclear.

Special tax preferences, exemptions, concessions are available to NPOs and donors¹³. There are considerable tax incentives for charitable giving. The relevant provisions having an impact on taxation of NPOs and donors are included in:

Income Tax Ordinance 1979

Income Tax Ordinance 2001

Income Tax Rules 2002

Sales Tax Act, 1990

Urban Immovable Property Tax Act, 1958

Pakistan Customs Tariff

Customs Act, 1969

II. APPLICABLE LAWS

The Constitution of the Islamic Republic of Pakistan, 1973

The Societies Registration Act, 1860

The Trusts Act, 1882

The Voluntary Social Welfare Agencies (Registration and Control Ordinance), 1961

The Companies Ordinance, 1984

Religious Endowment Act, 1863

The Charitable Endowments Act, 1890

The Mussalman Wakf Validating Act, 1913; and Mussalman Wakf Validating Act, 1930

The Mussalman Wakf Act, 1923

The Charitable and Religious Trusts Act, 1920

The Income Tax Ordinance, 1979

The Income Tax Ordinance, 2001

The Cooperative Societies Act, 1925

The Industrial Relations (Trade Unions) Ordinance, 1969

The Registration Act, 1908

The Charitable Funds (Registration of Collection) Act, 1953

Minimum Wages Ordinance, 1961

Employees' Social Security Ordinance, 1965

The West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968

The West Pakistan Shops and Establishments Ordinance, 1969

Employees' Old Age Benefits Act, 1976

Local Government Ordinance, 2001

III. ANALYSIS OF REGISTRATION USING VARIOUS LEGAL FORMS

A. GENERAL LEGAL FORMS

• Societies

¹³ Individuals and corporate bodies may contribute.

A ‘charitable society’¹⁴ or a society established for a ‘charitable purpose’¹⁵ can be registered under the Societies Registration Act, 1860¹⁶. This is the oldest registration law that dates back to late 1800s (in pre-partition British India) and continues as a major source of registration for charitable, educational and social organizations. Though, it is an Act for the registration of literary, scientific and charitable societies, neither the term ‘charitable society’ nor ‘charitable purpose’ is specifically defined in the Act. Nevertheless, purposes for which a society can be established under the Act are numerous and broad and include almost all purposes that could possibly be charitable¹⁷. The registration procedure is fairly simple. Persons¹⁸ wishing to form a society¹⁹ under this Act may do so by signing a memorandum of association²⁰ and filing the same with the Registrar of Joint-stock companies along with a copy of the rules and regulations of the society and nominal amount of registration fee of PKR 50²¹ (equivalent to USD 0.842). Societies, associations, clubs, trusts, and even waqfs usually register under this Act.

• Trusts

A “trust” is an obligation annexed to the ownership of property, and rising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. A trust may be created for any lawful purpose. The Trusts Act 1882 is an Act to define and amend the law relating to *Private Trusts and Trustees*. It provides legal protection to private acts of public charity. Though, very few active NGOs are trusts, the Act empowers the makers of the trust with vast authority, rights, control and flexibility. Trust could be of immovable or movable property. When the trust is of immovable property declared by a non-testamentary instrument in writing, it is required to be registered²².

¹⁴ Article 20 of The Societies Registration Act, 1860.

¹⁵ Article 1 of The Societies Registration Act, 1860.

¹⁶ Available at <http://punjablaws.gov.pk/laws/1.html>.

¹⁷ Purposes such as: promotion of science, literature, fine arts; dissemination of useful knowledge or political education; the foundation or maintenance of libraries or reading rooms for general use among the members or open to public; public museums and galleries; collection of natural history, mechanical and philosophical inventions, instruments or designs (Sec. 1 and 20 of the Societies Registration Act, 1860) are included.

¹⁸ These must be at least seven in number.

¹⁹ It may be charitable or non-charitable.

²⁰ This must the name of the society, objectives of the society, name and addresses and occupations of those who are entrusted with the management affairs of the society (Sec. 2 of the Societies Registration Act, 1860). A list of managing body is required to be submitted to the Registrar annually (sec. 4).

²¹ Section 3 of The Societies Registration Act, 1860 (provincial government may decrease this amount)

²² Sec.5 of The Trusts Act 1882 <http://www.pcp.org.pk/pdf/The%20Trusts%20Act%201882%20.doc>

The trust deed through which a trust is created is not open to public scrutiny²³. Under section 57 of the Act, the beneficiary has a right to inspect and take copies of the instrument of trust accounts, the documents of title relating solely to the trust-property, the accounts of the trust-property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty²⁴. There is no specific legislation covering the Public Charitable Trusts, but the provisions of some Acts such as the Charitable and Religious Trusts Act 1920, the Religious Endowment Act 1863, the Charitable Endowments Act 1890 recognize the foundation of Public charitable trusts for the benefit of the public at large²⁵. The provisions of the Trusts Act 1882 can also be applied. For a public charitable trust, an intention to declare a binding trust must exist and the property bound by the trust needs to be certain. As long as the charitable intent can be inferred, the failure to clearly identify the objectives of the trust does not fail the public charitable trust²⁶. Trusts are generally registered under the societies registration Act 1860²⁷.

• “Voluntary Social Welfare Agencies”

A Voluntary Social Welfare Agency (VSWA) is an organization, association, or undertaking established by persons of their own free will for the purpose of rendering welfare services in any one or more of the fields mentioned below and depends for its resources on public subscriptions, donations or Government aid²⁸. A VSWA is registered under the Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961. The Ordinance prohibits the establishment or continuation of voluntary Social welfare agency without registration. The fields enumerated in the schedule²⁹ are: child welfare; youth welfare; women’s welfare; welfare of the physically and mentally handicapped; family planning; recreational programs intended to keep people away from anti-social activities; social education of adults aimed to develop the sense of civic responsibility, welfare and rehabilitation of released prisoners; welfare of juvenile delinquents; welfare of the socially handicapped; welfare of the beggars and destitute; welfare

²³ “A study of NGOs - Pakistan” Asian Development Bank report 1999 available at <http://www.adb.org/NGOs/docs/NGOPakistan.pdf>

²⁴ Sec. 57 of The Trusts Act 1882 <http://www.pcp.org.pk/pdf/The%20Trusts%20Act%201882%20.doc>

²⁵ PHILANTHROPY AND THE LAW IN SOUTH ASIA, Asia Pacific Philanthropy Consortium, 2004.

²⁶ Zafar H. Ismail; Legal Framework of the nonprofit sector in Pakistan <http://www.pide.org.pk/pdf/psde%2018AGM/The%20Legal%20Framework%20Of%20The%20Nonprofit%20Sector.pdf>.

²⁷ PHILANTHROPY AND THE LAW IN SOUTH ASIA, Asia Pacific Philanthropy Consortium, 2004.

²⁸ section 2(f) of the Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961 <http://www.pcp.org.pk/pdf/1961%20Voluntary%20S.W%20agencies%20Ordinance%20.doc>.

²⁹ Under Sec. 16 of the Ordinance, the Provincial Government has the power to amend the schedule from time to time.

and rehabilitation of patients; welfare of the aged and infirm; training in social work; and coordination of social welfare agencies.

Registration with the Social Welfare Departments of the provincial government is mandatory for any such organizations that is engaged in any of the above welfare activity and depends for its resources on public subscriptions, donations or Government aid. The Ordinance requires the registered agencies to: maintain audited accounts and other records such as members' book, Minutes book, inspection book; publish Annual Report and audited accounts to the Registration Authority and publish the same at the close of each financial year for general information³⁰. Contravention of any of the provisions of the Ordinance may cause imprisonment up to six months and/or fine up to PKR 2000³¹ (equivalent to USD 23).

The Ordinance gives wide powers to the Registration Authority including the following:

- amendments to the constitution of the registered agency can be made only with the approval of the Registration Authority³²; no voluntary dissolution of registered agencies is permitted, unless approved by the Provincial Government³³;
- suspension or dissolution of governing bodies of registered agencies (an order of dissolution can be appealed only to the Provincial Government and its decision on appeal shall be final and cannot be questioned in any court of law³⁴);
- No court of law can take cognizance of an offense under this Ordinance except upon complaint in writing made by the Registration Authority³⁵;
- The widest power is through Section 17 which provides that the Provincial Government may exempt any agency or class of agencies from the operation of all or any of the provisions of this ordinance³⁶.

• Waqf

As the title demonstrates, the Mussalman Waqf Validating Act 1913 and 1930 endorse the system of "Waqfs". 'Waqf' means the *permanent* endowment by a Muslim of any of his property for a purpose recognized by the Muslim Law as 'religious, pious, or charitable'. This is equivalent in Muslim law to a trust under the common law. Personal property is endowed in a *waqf* for religious, educational, or any other benevolent purpose under specific terms and conditions. "Waqf can be created for personal benefit, or for the benefit of the descendants and

³⁰The Voluntary Social Welfare Agencies (Registration and Control) Rules, 1962.

³¹The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961; Sec.14 (1).

³²The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961; Sec. 8.

³³The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961; Sec. 11.

³⁴The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961; Sec.9 (4).

³⁵The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961; Sec.14.

³⁶<http://www.pcp.org.pk/pdf/1961%20Voluntary%20S.W%20agencies%20Ordinance%20.doc>.

eventually or specifically for charitable purposes³⁷”. Generally, it is a permanent arrangement, and cannot be done for a certain period; it becomes immediately effective, and cannot be kept in abeyance; is an irrevocable legal contract; *waqf* property is not subject to confiscation but in some circumstances government may take over the control of the property³⁸. The person who administers the waqf is called ‘mutawalli’. The Mussalman Waqf Act 1923 and provincial Waqf Properties Ordinances 1979 provide for the management and administration of waqf properties³⁹. The Act also requires that Waqf properties be registered⁴⁰. Under the 1923 Act mutawalli is required to file with the court a statement describing the waqf property, audited statement of the income and expenditures, payable taxes and rents.

• Nonprofit Companies

The Companies Ordinance, 1984 provides a special regime for establishment of non-profit companies for promoting commerce, art, science, religion, sports, social services, charity or any other useful object. Such a company must apply its profits, if any, or other income in promoting its objects, and should prohibit the payment of any dividend to its members. Although the companies incorporated under section 42 are limited liability companies, they are allowed to dispense with the use of the words "Limited", "Private Limited" or "Guarantee Limited" with their names. This essentially means that such companies do operate as limited liability companies and its members avail the benefit of the concept of limited liability. The advantage of having a non-profit company is that such associations are better managed as they must comply with the corporate regime established under the Ordinance. The tax laws of the country also recognize these companies for exemption of their income from the income tax subject to certain conditions to be incorporated in their constituent documents (Memorandum and Articles of Association). The conditions, if any, contained in the license granted by the SECP under section 42 of the Ordinance govern the activities of the company and these conditions are normally required to be incorporated in the constituent documents of the company. Non compliance with the conditions in the license may lead to its cancellation. All the provisions of the Ordinance concerning the management and even winding up apply to such companies subject to the general

³⁷ Zafar Hameed Ismail and Qadeer Baig; “Philanthropy and Law in Pakistan” chapter in PHILANTHROPY AND THE LAW IN SOUTH ASIA ASIA Pacific Philanthropy Consortium, 2004.

³⁸ Section 7 of the provincial Waqf property ordinances of 1979 the government (govt. appointed chief administrator) may take over and assume the administration, control, management, and maintenance of any waqf property after the life time of person creating the waqf. The exercise of this power is not the confiscation of property but is merely an eviction of the Mutawallee from managing the affairs of the waqf.
<http://punjablaws.gov.pk/laws/336.html>.

³⁹ Under the Provincial Waqf Property Ordinances 1979 ‘Waqf property’ is a property of any kind permanently dedicated by a person professing Islam for any purpose recognized by Islam as religious, pious or charitable, but does not include property of any such waqf as is described in section 3 of the Mussalman Waqf Validating Act, 1913 (VI of 1913), under which any benefit is for the time being claimable for himself by the person by whom the waqf was created or by any member of his family or descendants.

⁴⁰ Waqf property ordinances of 1979 (section 6).

condition that upon winding up its surplus assets if any would be transferred to a company with similar objectives and nothing goes back to the members.

• Citizen Community Board (CCB)

A Citizen Community Board (CCB) is a nonprofit organization conceived to be set up under chapter X of the Local Government Ordinance 2001⁴¹. The law provides legal cover to the formation of CCBs to enable citizens to actively participate in the development and non-development activities of the local government/council affairs⁴². Under the law the CCBs are empowered to prioritize investments for up to certain percent of the local development budget for basic infrastructure and services⁴³.

B. RELATIONSHIP OF ISLAM TO THE CONCEPT OF CHARITY AND HUMANITARIAN PURPOSES

The term ‘public benefit’ is not explicitly used or addressed in the legislation covering the nonprofit sector of Pakistan. Unlike other jurisdictions such as US, Canada, or the UK (after the 2006 legislation), charities or NPOs in Pakistan are not explicitly required to meet a “public benefit” test. All major laws through which nonprofit institutions become legally recognized, however, provide several purposes including ‘charitable’ ‘social welfare’ and ‘religious’ purposes for which such institutions may be established. However, the inspiration for charity and social welfare is deeply rooted in Islam. The concept of social welfare is based on the Islamic doctrines of “*Adl-o-Ehsan*⁴⁴ and *Haqooq-ul-Ibad*⁴⁵”, making the state and society together responsible for the welfare of the people⁴⁶.” The religion recognizes generosity and charity as admirable qualities. For instance, the concept of *Zakat*⁴⁷ (mandatory almsgiving or charity) makes it a religious duty of the wealthy to donate part of their possessions for public welfare to satisfy the needs of the poor, destitute, deprived, and less fortunate sections of the community. It endorses the belief that “a society can flourish only when its members do not spend all their

⁴¹ The text of the Ordinance is available at http://www.lahore.gov.pk/The_Local_Government_Ordinance_2001-Promulgated_by_Provinces.doc.

⁴² Zubair Bhatti; ‘Governance, Organizational Effectiveness and the Nonprofit Sector’ APPC Conference September 5-7, 2003 Pakistan background paper; National Reconstruction Bureau “Guidelines for Citizens Community Boards” provide good and comprehensive detail on CCB. available at http://www.nrb.gov.pk/publications/guidelines_citizen_community_boards.pdf.

⁴³ This condition was waived during early years of the Ordinance.

⁴⁴ ‘Adl-o-Ehsan’ means ‘justice and favor’

⁴⁴ ‘Haqooq-ul-Ibad’ means ‘rights of other human beings’

⁴⁶ Social Welfare Department of the Government of the Islamic Republic of Pakistan http://www.punjab.gov.pk/socialwelfare/home_introduction.htm

⁴⁷ one of the mandatory tenet/pillar of Islam

wealth on the satisfaction of their own desires but reserve a portion of it for parents, relatives neighbors, the poor and the incapacitated.⁴⁸” Similar are the concepts of *Sadaqah* and *Khairaat* (voluntary almsgiving).

IV. ISSUES FOR DONORS FROM THE U.S.

A. INUREMENT

Usually, the income of nonprofit institutions must be devoted to activities that advance the purposes for which it is established. The Societies Registration Act 1860⁴⁹ provide that in the case of dissolution of a society the property is not distributed among the members but is given to some other society determined by members or, in default, by the court. But the law does not prohibit the inurement of any earnings of a society to any private shareholder or individual, unless the governing documents of the society include such a prohibition. This may make donations to Pakistani charities formed as societies difficult. In that case donations to U.S. charities providing relief in Pakistan would be preferred. For example, the Aga Khan Foundation USA has a special giving vehicle for U.S. donors called Focus (see <http://www.akdn.org/focus>). On the other hand, any organization that qualifies for tax exempt status must provide for no inurement of private benefit in its founding documents. See discussion of tax laws below.

In the case of nonprofit companies⁵⁰ their profits, if any, are not allowed to be distributed among the members and all incomes are required to be utilized for the promotion of their objectives. Under the Ordinance there is a general condition that even upon winding up its surplus assets, if any, would be transferred to a company with similar objectives and nothing goes back to the members. A *waqf* property or any income there from is used for the purpose for which it was dedicated or has been used, or for any purpose recognized by Islam as religious, pious or charitable⁵¹, as the Chief Administrator (the government appointed officer) may deem fit⁵². The income and assets of CCB's must be used to be used solely for the attainment of its objectives, and no portion of the income can be paid by way of dividend, profit or bonus to any of its members or contributors⁵³. In case of a public charitable trust the benefit should go to the public at large or at least sufficient segment of the society. Except for the Companies Ordinance

⁴⁸ Maulana Wahiduddin Khan; 'The Concept of Charity in Islam'

⁴⁹ Under which 40.5% of the nonprofit organizations are registered.

⁵⁰ Formed under the Companies Ordinance 1984.

⁵¹ Relief of the poor and the orphan, education, worship, medical relief, maintenance of shrines or the advancement of any other object of charitable, religious or pious nature or of general public utility are deemed charitable purposes. The Punjab Waqf Properties Ordinance 1979 (section 2).

⁵² The Punjab Waqf Properties Ordinance 1979 (section 17).

⁵³ Section 101 (1) Local Government Ordinance 2001.

1984, the other relevant laws do not explicitly address the issues such as self dealing, conflict of interest, or personal benefit.

B. SPECIFIC RULES ON DISSOLUTION

Assent of at least three-fifth of the members is required for dissolution of a Society registered under the Societies Registration Act, 1860⁵⁴. If any government is a member, contributor, or otherwise interested in any society registered under the Societies Registration Act, 1860 such society can not be dissolved without the consent of the province of registration⁵⁵. Disposal and settlement of the property of the society is made according to the rules of the society. If no such rules are in place, then they may be distributed as the governing body finds expedient. If any dispute arises among governing body or members of the society the adjustment of the affairs is referred to the principal court of original civil jurisdiction of the district where chief building of the society is situated⁵⁶. Upon dissolution, after the satisfaction of debt and liabilities of the society, the remaining property (if any) may not be distributed or paid to the members of the society. Any such remaining property is given to some other society determined by votes of at least three fifth members of the society. If the members fail to determine, then this is decided by such court as aforementioned⁵⁷. The “no member to receive profit’ clause does not apply to any society founded or established by the contributions of share holders in the nature of a joint stock company⁵⁸. The provincial government of registration has the authority to dissolve and reconstitute the governing body of any society registered under the Societies Registration Act⁵⁹. When proposed by the governing body and after the assent of three fifth members, the society can be amalgamated either wholly or partially with any other society⁶⁰.

In case of dissolution or de-registration of a CCB, its assets, where a local government has contributed towards creation of any assets or funds, pass on to such local government. The assets, however, continue to be used for community welfare by the local government through any of its agencies or any other Citizen Community Board⁶¹.

Trusts are not dissolved, they become extinct. A trust is extinguished when the purpose for which it is created is completely fulfilled, when its purpose becomes unlawful, when the

⁵⁴ The Societies Registration Act, 1860 (Sec. 13).

⁵⁵ The Societies Registration Act, 1860 (Sec. 13).

⁵⁶ The Societies Registration Act, 1860 (Sec. 13).

⁵⁷ The Societies Registration Act, 1860 (Sec. 14).

⁵⁸ The Societies Registration Act, 1860 (Sec. 14).

⁵⁹ The Societies Registration Act, 1860 (Sec. 16A).

⁶⁰ The Societies Registration Act, 1860 (Sec. 12).

⁶¹ Section 101(2) Local Government Ordinance 2001.

fulfillment of its purpose becomes impossible by destruction of trust property or otherwise, or when the revocable trust is expressly revoked.

Waqfs are also not dissolved. But, under the Waqf Provincial Ordinances 1979, which deals with the management and administration of waqf properties, the government (govt. appointed chief administrator) may take over and assume the administration, control, management, and maintenance of any waqf property after the life time of person creating the waqf. When the government has taken over the property and the gross annual income from which exceeds certain threshold⁶² may, settle a scheme for the administration and development of such waqf property⁶³. The wishes of the person dedicating the waqf property are taken into consideration. The government can also dispose of the property under certain circumstances and invest the proceeds in accordance with its directions⁶⁴. The sale-proceeds are first applied for satisfying the main purpose of the waqf. A waqf property or any income therefrom is used for the purpose for which it was dedicated or has been used, or for any purpose recognized by Islam as religious, pious or charitable, as the Chief Administrator may deem fit⁶⁵.

The Provincial Government may dissolve the Social Welfare Agency (registered under the VSWA Ordinance 1961). It may do so upon the receipt of a report from the Registration Authority⁶⁶ (RA) that such agency is contravening its constitution, or the provisions of the VSWA Ordinance 1961 or the Rules thereunder, or is acting in a manner prejudicial to the interest of the public⁶⁷.

No voluntary dissolution of registered VSWAs is permitted, unless approved by the Provincial Government⁶⁸. Registration of the agency stands cancelled upon dissolution. The government may⁶⁹ require the financial institution or other persons holding money or assets on behalf of the agency not to apportion, distribute or dispense with such assets without prior written permission of the Provincial Government. The government may also appoint a person to wind up the affairs of the agency. After satisfaction of all debts and liabilities of the agency the assets, money or securities of the society are generally paid or transferred to such other agency having similar objectives as those of the dissolved agency⁷⁰. The RA is also empowered to

⁶² PKR 5000; The Punjab Waqf Properties Ordinance 1979 (section 15).

⁶³ The Punjab Waqf Properties Ordinance 1979 (section 15).

⁶⁴ The Punjab Waqf Properties Ordinance 1979 (section 16).

⁶⁵ The Punjab Waqf Properties Ordinance 1979 (section 17).

⁶⁶ The registration authority may make such report upon reasonable belief of such acts of contravention. It must give the Agency must hold a hearing opportunity before issuing such report.

⁶⁷ The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961 (Section 10).

⁶⁸ The Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961 (Section 11).

⁶⁹ This does not mean 'shall.'

⁷⁰ Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961 (Section 12).

suspend or dissolve the governing body of any registered agency on the grounds of financial irregularities, mal-administration, or contravention of the provisions of the Ordinance. Upon such suspension the RA appoints an administrator or caretaker with the powers of governing authority. Where such an order of suspension is confirmed by the Provincial Government there lies no appeal against such order in any court of law⁷¹.

C. WHAT ACTIVITIES MAY NPOS ENGAGE IN AND HOW MIGHT THEY AFFECT CHARITABLE DONATIONS FROM COMMON LAW COUNTRIES?

General activities of societies include charitable activities; promotion of science, literature, fine arts; dissemination of useful knowledge or political education; the foundation or maintenance of libraries, reading rooms for general use among the members or open to public; public museums and galleries; collection of natural history; mechanical and philosophical inventions, instruments or designs. These would generally be counted as charitable purposes under the laws of common law countries

A Social Welfare Agency can engage in activities rendering welfare services⁷² enumerated in the schedule to the Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961. The permitted activities under the schedule are: child welfare, youth welfare, women's welfare, welfare of the physically and mentally handicapped, family planning, recreational programs intended to keep people away from anti-social activities, social education of adults aimed at developing sense of civic responsibility, welfare and rehabilitation of the released prisoners, welfare of juvenile delinquents, welfare and rehabilitation of patients, welfare of the aged and infirm, training in social work, and coordination of social welfare agencies⁷³. These would generally be counted as charitable purposes under the laws of common law countries

Trusts may engage in any lawful activity for instance welfare, religious, charitable and for the benefit of the public. Waqfs may be set up for any purpose recognized by Islam as religious, pious or charitable. Under the provincial Waqf Properties Ordinances 1979⁷⁴ the relief of the poor and the orphan, education, worship, medical relief, maintenance of shrines or the advancement of any other object of charitable, religious or pious nature or of general public utility are deemed to be charitable purposes. Nonprofit Companies can be established for promoting commerce, art, science, religion, sports, social services, charity or any other useful objective. These would generally be counted as charitable purposes under the laws of common law countries

⁷¹ Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961 (Section 9).

⁷² Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961 [Section 2(f)]
Text available at <http://punjablaws.gov.pk/laws/336.html>.

⁷³ The provincial government has the power to amend the schedule (include or exclude any field of social welfare service): Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961 [Section 16].

⁷⁴ The provincial government has the power to amend the schedule (include or exclude any field of social welfare service): Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961 [Section 16].

D. DOES THE LAW PERMITS NPOs TO ENGAGE IN POLITICAL ACTIVITIES (WHICH WOULD HAMPER DONATIONS FROM OTHER COMMON LAW COUNTRIES)?

NPOs in Pakistan are not prohibited from engaging in political activities, except for those registered as Social Welfare Agencies under the Voluntary Social Welfare Agencies (Registration and Control) Ordinance 1961 which restricts the activities of the agencies to the list prescribed in the Ordinance. However, an NPO cannot claim exemption from income tax on the political campaign funds collected. Under the Income Tax Rules 2002, the Income Tax Commissioner may also refuse to approve the institution, fund, trust, society or organization as a nonprofit organization for Income Tax purposes if he is satisfied that such organization has been propagating the view of a particular political party⁷⁵.

E. ARE NPOs PERMITTED TO DISCRIMINATE AMONG BENEFICIARIES FOR REASONS OF RACE, GENDER, RELIGION, ETC.?

The Fundamental Rights and Principles of Policy as enshrined in the Constitution of the Islamic Republic of Pakistan, guarantee the right to peaceful assembly and to 'associate' together and establish associations. Such right is not denied except in the interests of the sovereignty or integrity of Pakistan, public order, or public morality. It is unlikely that Pakistani NPOs would discriminate on the basis of any improper conditions, but there may be some bias in favor of Muslims in some instances, which donors should be aware of. ICCSL's partners in this venture do not permit such discrimination.

F. ACCOUNTABILITY AND TRANSPARENCY

Registered organizations are governed or regulated under the law under which they are registered. The book keeping, accounting, and auditing requirements are generally expected of all entities. Almost every piece of legislation provides that there be a registration authority, and requires that certain documents be submitted by the applicant organization. For societies, it is Registrar of Joint Stock Companies to issue the certificate to a society to the effect of its registration as a society. The Act itself does not seem to provide any power to the registrar to deny any such application provided that it is accompanied by the required documents as prescribed in the Act. The government, however, retains authority to a certain extent on some regulatory and registration aspects of the registered organizations that depend on governmental grants and funds.

The provincial governments have considerable controls and regulatory measures in place for Voluntary Social Welfare Agencies. The Registration Authority (RA) in this case is the officer appointed by the provincial government. The RA can deny any application for registration. There are certain strict conditions required to be complied by the registered agencies⁷⁶. Any amendment in the constitution of the agency can be made only with the approval of the RA. The RA has the power to inspect books, records, and accounts of the agency. The provincial

⁷⁵ Rule 213 (2)(b).

⁷⁶ Section 7 of the Voluntary Social Welfare Agencies (Registration and Control Ordinance), 1961; and section 8 and 9 of the Voluntary Social Welfare Agencies (Registration and Control) Rules, 1962

government has the power to dissolve the agency. Voluntary dissolution of the agency is allowed only with the approval of the provincial government. The activities of the agencies are restricted only to those enumerated by the provincial government. The provincial government, however, does retain the power to consent or not to consent for dissolution of any such society where government is the member or a contributor or otherwise interested in such society⁷⁷.

In case of *Waqfs*, the government can take over the administration and management of the *waqf* property, but the wishes of the donor are taken into consideration as to the purpose for which the *waqf* was created.

G. APPLICABLE TAX LAWS

As noted above, as in many other common law jurisdictions, it is the tax laws that impose the limitations on political activities for NPOs. This section addresses not only that issue but also general issues with respect to qualification for tax privileges for NPOs.

The publication ‘Charities – Taxpayer’s Facilitation Guide’ issued by the Central Board of Revenue in 2006 (and still applicable despite its not having been re-issued as an FBR publication) classifies charities into four categories.

- Informal ones;
- Trusts and other legal obligations;⁷⁸
- Those approved by the commissioner of income tax; and
- Those, approved by the FBR

The applicability of special income tax concessions relating to exemption of certain incomes of the ‘charities’ depends upon the type of the ‘charity’. These are enumerated in the Guide.

Under the Income Tax Rules 2002, for tax purposes a nonprofit organization is an organization approved⁷⁹, by the Central Board of Revenue (CBR) or the Commissioner of Income Tax, as a “nonprofit organization.” Section 2 (36) of the Income Tax Ordinance, 2001⁸⁰ defines a nonprofit organization as any person⁸⁰ other than an individual, which is a) established

⁷⁷ This authority seems to be reasonable.

⁷⁸ This ‘includes Muslim Waqfs, charitable endowments or institutions formed or registered under the Societies Registration Act 1860, Charitable Endowment act 1890, Social Voluntary Agencies Ordinance 1961, or Companies Ordinance 1984’; Charities – Taxpayer’s Facilitation Guide 2006.

⁷⁹ An institution, fund, trust, society or any other organization established in Pakistan for religious or a charitable and community services can apply for such approval. Rules 211 – 214 of the Income Tax Rules, 2002 deals with such approval and also set forth the prerequisites for such approval. Under Rule 213 of the Income Tax Rules 2002, the Commissioner may refuse to approve the institution, fund, trust, society or organization if the Commissioner is satisfied that the institution, fund, trust or society a) has been or is being used for personal gain of any particular person or a group of persons; b) has been propagating the view of a particular political party; c) has been or is being managed in a manner calculated to personally benefit its members or their families; or d) has not or will not be able to achieve its declared aims and objects in view of its set up, administrative or otherwise as evaluated and certified by an independent rating agency.

⁸⁰ The definition of ‘person’ under section 80 of the Income Tax Ordinance 2001 includes a company or association of persons incorporated, formed, organized or established in Pakistan or elsewhere; the Federal Government, a foreign government, a political subdivision of a foreign government, or public international organization.

for religious⁸¹, educational, charitable⁸², welfare or development purposes, or for the promotion of an amateur sport; b) formed and registered under any law as a non-profit organization; c) approved by the Commissioner for specified period, on an application made by such person in the prescribed form and manner, accompanied by the prescribed documents and, on requisition, such other documents as may be required by the Commissioner; and none of the assets of such person confers, or may confer, a private benefit to any other person⁸³. Although a nonprofit organization is not prohibited from engaging in a profit making / income generating activities, but it must not distribute any such income, profit or surplus among staff, governing body or general body. It has to be invested back into the organization for the furtherance of same causes for which it was established.

Income Taxes. There are tax concessions available to NPOs once these are approved for this purpose by the Commissioner of Income Tax or the Central Board of Revenue (as the case may be).

- Any income of a religious or charitable institution derived from voluntary contributions applicable solely to religious or charitable purposes of the institution is exempt from tax⁸⁴. Where such institution is a private religious trust it must meet the public benefit test.
- Any income which is derived from investments in securities of the Federal Government, profit on debt from scheduled banks, grants received from Federal Government or Provincial Government or District Governments, foreign grants and house property held under trust or other legal obligations⁸⁵ wholly, or in part only, for religious or charitable

“association of persons” includes a firm, a Hindu undivided family, any artificial juridical person and any body of persons formed under a foreign law. The section also provides the definition of a ‘company’ which includes a body incorporated by or under the law of a country outside Pakistan relating to incorporation of companies; and a foreign association, whether incorporated or not, which the Central Board of Revenue has, by general or special order, declared to be a company for the purposes of this Ordinance.

⁸¹ Advancement of religion is one of the valid humanitarian purposes of a charitable organization as enumerated in the ‘Charities – Taxpayer’s Facilitation Guide’ issued by the Central Board of Revenue in February 2004. Available on the official web site of Central Board Of Revenue (CBR) at <http://www.cbr.gov.pk/tpef/Brochure7.pdf#search='pakistan%20Charities%20%20Taxpayers%20Facilitation%20Guide'>

⁸² Under Section 2 (11A) of the Income Tax Ordinance 2001, a ‘charitable purpose’ include includes relief of the poor, education, medical relief and the advancement of any other object of general public utility. The definition is broad enough. The use of words such as ‘*general public utility*’ is synonymous to the term ‘public benefit’ – as used in countries having developed nonprofit sector such as USA, UK, and Canada.

⁸³ Except the salary and remuneration offered for professional services.

⁸⁴ Section 60 Second schedule Income Tax ordinance 2001
http://www.pakistanlawyer.com/TAXATION/ITAX/ORD_2001/sch2.htm#s2p1

⁸⁵ The four principal registration Acts

purposes and is actually applied or finally set apart for application to such purposes in Pakistan are exempt from income tax⁸⁶.

- Where the charity is approved by the central board of revenue, income derived from voluntary contributions including donations and subscriptions is exempt from income tax⁸⁷.
- Income of a trust or welfare institution or non-profit organization approved by the Central Board of Revenue from donations, voluntary contributions, subscriptions, house property, investments in the securities of the Federal Government and so much of the income chargeable under the head "Income from business"⁸⁸ as is expended in Pakistan for the purposes of carrying out welfare activities is exempt from income tax. Similar income of a trust⁸⁹ and established in Pakistan exclusively for the purposes of carrying out activities for the benefit and welfare of ex-servicemen and serving personnel, including civilian employees of the Armed Forces, and their dependents; or ex-employees and serving personnel of the Federal Government or a Provincial Government and their dependents is also exempt from income tax⁹⁰.

There are also certain exemptions that are available only to educational institutions. Income of educational institutions, including vocational training institutions, established solely for educational purposes and not for the purposes of profit is exempt from tax⁹¹. Such educational institutions of 'charities' equally qualify under the general exemption. "The words *"established solely for educational purposes and not for the purposes of profit"* do not mean that there should not be any profit or surplus. All it means that the profit or surplus, if any, must be applied for educational purposes and no portion thereof can be distributed, paid or transferred, directly or

⁸⁶ Section 59 Second schedule Income Tax ordinance 2001

http://www.pakistanlawyer.com/TAXATION/ITAX/ORD_2001/sch2.htm#s2p1

⁸⁷ these are institutions (such as those enumerated in section 61 Second schedule Income Tax ordinance 2001) and are engaged in general welfare and charitable activities;

http://www.pakistanlawyer.com/TAXATION/ITAX/ORD_2001/sch2.htm#s2p1

'Charities- Taxpayers' Facilitation Guide 2004' published by CBR in February 2004

⁸⁸ "Provided that in the case of income under the head "Income from business", the exemption in respect of income under the said head shall not exceed an amount which bears to the income under the said head the same proportion as the said amount bears to the aggregate of the incomes from the aforesaid sources of income." Section 58 (1)(3) schedule II of Income Tax Ordinance 2001

http://www.pakistanlawyer.com/TAXATION/ITAX/ORD_2001/sch2.htm#s2p1

⁸⁹ Trust administered under a scheme approved by the Federal Government in this behalf and established in Pakistan

⁹⁰ Section 58 (1)(2) II schedule of the Income Tax Ordinance 2001

⁹¹ Charities – Taxpayer's Facilitation Guide' published by CBR in 2006 available at

<http://www.cbr.gov.pk/tpef/Brochure7.pdf#search='pakistan%20Charities%20%20Taxpayers%20Facilitation%20Guide'>

indirectly, by way of dividend, bonus or otherwise by way of profit or by any other means to the members or trustees or the relative or relatives of a member or members or to any other private person except as bonafide remuneration for services rendered or expenses incurred on behalf of the educational institution⁹² .”

Customs and Sales Taxes. The Pakistan Customs Tariff 2003-2004 chapter 99 sub-chapter III provides zero-rate and/or tax breaks on certain gifts or donations received or imported by charitable, educational, scientific institutions and hospitals⁹³ . Sixth schedule to the Sales Tax Act 1990 provides for certain kind of sales tax exemptions on certain imports and supplies⁹⁴ .

Property Taxes. Under the Urban Immovable Property Tax Act, buildings and lands used exclusively for public worship or public charity including mosques, churches, dharamsalas, gurdwaras, hospitals, dispensaries, orphanages, alms houses, drinking water fountains, infirmaries for the treatment and care of animals and public burial or burning grounds or other places for the disposal of the dead are exempt from property tax⁹⁵ .

Tax deductions for donors

A person is entitled to a tax deduction in respect of any sum paid, or any property given by the person in the tax year as a donation to –

- (a) any board of education or any university in Pakistan established by, or under, a federal or a provincial law;
- (b) any educational institution, hospital or relief fund established or run in Pakistan by Federal Government or a Provincial Government or a local authority; or
- (c) any non-profit organization.

⁹² Charities – Taxpayer’s Facilitation Guide’ published by CBR in 2006.

⁹³ Pakistan Customs Tariff 2003-2004 chapter 99 sub-chapter III; text available at CBR website <http://www.cbr.gov.pk/newcu/tariff/ch-99a.pdf>

⁹⁴ The Sales Tax Act 1990 <http://www.taxonline.com.pk/salestax/stax.htm> sixth schedule <http://www.pakistanlawyer.com/taxation/STAX/ACT-90/sections/THE%20SIXTH%20SCHEDULE.htm> provides ‘Goods imported or supplied under grants-in-aid for which a specific consent has been obtained from the Central Board of Revenue’; ‘import of all such gifts as are received, and such equipment for fighting tuberculosis, leprosy, AIDS and cancer and such equipment and apparatus for the rehabilitation of the deaf, the blind, crippled or mentally retarded as are purchased or otherwise secured, by a charitable non-profit making institution solely for the purpose of advancing declared objectives of such institution, subject to the similar conditions as are envisaged for the purposes of applying zero-rate of customs duty under the Customs Act, 1969 (IV of 1969)’; ‘Import of all goods received, in the event of a natural disaster or other catastrophe.’

⁹⁵ For instance in the province of Punjab, the Punjab Urban Immovable Property Tax Act, 1958 (section 4 (f) provides for such exemptions. <http://punjablaws.gov.pk/laws/79.html> and http://www.punjab.gov.pk/e-t/time_mode_of_payment.htm#EXEMPTIONS:

ADMINISTRATIVE AND *CY-PRES* JUDICIAL SCHEME MAKING: THE FATE OF THESE APPLICATIONS IN CANADA TODAY

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I. INTRODUCTION

One of the distinguishing features between the civil law and the common law is the role played by the courts in each system. In civil law jurisdictions the courts traditionally have determined the legal rights and wrongs between litigants, and only exceptionally responded to a party's request for a 'declaration' as to the state of the law. Since 1945, contrary to centuries-old tradition, statute in all civil law jurisdictions has been employed to add significantly to the local civil code, and statute has broken from tradition in conferring some discretion on the courts. But still the judicial climate is essentially one of interpreting code and statute, in determining disputes - declaring, as it were, as to what the law requires.

In the common law system on the other hand things have been different. The practice of the common law courts – King's Bench, Common Pleas, and Exchequer - was certainly in line with civil law court practice. This was true from the eleventh century to the late nineteenth century when, in England and then throughout the Commonwealth jurisdictions, all courts⁹⁶ were combined in the one centralised court. The 'forms of action' - the formulae in which permission to sue was granted by the administrative office of the Council's 'Chancery' – lent themselves to and maintained a similar approach, with the emphasis in the common law system, on adversarial litigation.

However, the approach of equity courts - the courts that grew out of the Chancery office itself - was always different, and this was so from the fourteenth century when they first appeared. The Lord Chancellor's Court was originated to customize the law it applied, basing its judgments, as well as its procedure, on the particular circumstances of the parties before the Court. So far as charitable trusts are concerned, it was with the growth of secular charitable giving and public (or charitable) trusts in the sixteenth century that the equity courts began positively to facilitate the creation and continuation of such trusts. The trust was solely created 'in equity', and the courts of equity were not restrained by common law court procedure from giving particular remedial relief to trust objects that benefited the public interest. If it was clear that charity was intended by the testator or settlor in his or her creation or attempted creation of such a trust, Chancery courts would advise the parties, design with their participation, and approve a scheme initially presented in outline by the concerned parties for making a trust

⁹⁶ Save in some jurisdictions, like New South Wales which for a century retained an independent Equity Court that was of the same stature, but independent of the new Supreme Court. The considerable reputation of the Equity Court, and of Sydney equity chambers, was recognized throughout the Commonwealth.

effective. In the course of time a body of law concerning so-called administrative schemes and *cy-près* schemes was developed. It was for administrative ends that judicial intervention was invoked when assistance was required in making an attempted trust gift managerially operative, and *cy-près* was relevant when trust purposes, either initially or later in the life of the trust, could not or could no longer be carried out, and new purposes were needed.

Historically schemes would be formulated, and are today formulated, when endowment (sometimes called perpetual) charitable gifts have been created. Such gifts may be made to further one or more of the purposes of a charitable organization, and are familiarly contained in a will or *inter vivos* instrument.

Indeed, in England by the end of the seventeenth century already judicial curative work was a regular part of the Chancery courts' charitable trust jurisdiction, and this inherent jurisdiction of Equity remained of significant importance, frequently invoked, until the last half of the twentieth century.

As part of the reception of English law this remedial curative jurisdiction was taken in the eighteenth and nineteenth centuries to common law Canada, to Australia and New Zealand, to India, to Hong Kong, Malaysia and Singapore, and indeed wherever the English common law tradition was carried. However, while since 1960 the Commonwealth jurisdictions of the United Kingdom and the Republic of Ireland, the states of federal Australia, New Zealand and Singapore have discussed and then legislatively provided for, developed and extended the inherent Chancery court powers, Canadian provincial and territorial jurisdictions of the same common law tradition have done nothing. In Canada in 2010 schemes can only be made under the English Chancery courts' historic inherent jurisdiction, with the uncertainties as to the extent of that jurisdiction that prior to 1960 also existed in the other countries and jurisdictions of the Commonwealth.

With the introduction in the last half of the twentieth century by many common law jurisdictions of state recognition and encouragement of charitable giving by way of tax incentives, the emphasis in giving has largely changed from the individual's testamentary gift for purposes to that same individual's donation of money, or other assets, to the already established charitable incorporated body or trust, with its own purposes.⁹⁷ This is so not only of *inter vivos* gifting, but of testamentary legacies and devises. As today's resident of these 'tax driven' jurisdictions is well aware, the consistent pattern of tax legislation across the common law world is to permit a deductibility of charitable gifts from tax owed by the donor or testator, or at least to allow a credit of some amount, if gifts are made to charitable organizations (corporations, trusts, or accepted unincorporated bodies) that are registered with the state authority. This means that, while the endowed or perpetual gift with a particular purpose or purposes may be in need of a scheme, court involvement has been more concerned with the modernity or responsiveness to contemporary need of institutional purposes.

The founding documentation of these organizations will usually include terms enabling amendment at any time both of purposes and of the administrative machinery of the organization. But for small organizations having limited funds and little access to well-informed legal advice - and places of worship remain the greatest number of these organizations - the historic curative jurisdiction of scheme-making, now updated, can be of considerable value. In Canada, with no charity commissioners anywhere in the country that in foreign jurisdictions are legislatively empowered to assist these organizations, and no attempt anywhere across common

⁹⁷ The gift may be directly for those purposes, or in endowment form for a purpose or purposes that fall within the charitable organization's purposes.

law Canada to update the historic scheme-making remedial jurisdiction of the common law courts, the facility and use of the curative jurisdiction of equity is continually declining. To add to the plight, the inherent jurisdiction extends only to trusts, and therefore is of no assistance when, as is ever more frequently the case in all common law jurisdictions, the 'charity'⁹⁸ is incorporated. On top of that, there is now conflicting case authority in Canada on the scope and applicability of the courts' inherent administrative scheme making power.

Today, while the Charities Acts in England and Wales between 1960 and 2006 have basically overhauled the administration of the law concerning charities, Canadians today find themselves reliant for reference on English case precedents that constitute the pre-1960 law in England and Wales. This therefore is a source of guidance of which there will be no further judicial consideration and to which additions will no longer be made. Moreover, as of fifty years ago those precedents have commenced aging.

It is as curious as unique a situation that the law of charity in common law Canada has been so ignored. Nevertheless, it is something that can be tackled by law reform bodies, and by those who have weight with governments and legislatures. A call for that awakening is what this paper aims to achieve.

II. THE SCOPE OF THE HISTORIC CURATIVE JURISDICTION IN CHARITY LAW

(1) THE COURTS' CLEMENCY TOWARDS CHARITABLE PURPOSES

The scheme making power was only one manifestation of the particular concern of the Equity courts in long ago England that trusts to further public benefit should not fail. During the time of the Reformation in the sixteenth century Equity was already prepared to encourage secular philanthropy. It had ruled that charitable trusts should be upheld and enforced, even though, for instance, *feoffees to uses* and later trustees had not been given valid common law title to the property to be applied to charity, or some other technical or formal rule of law had been breached. The Statute of Charitable Uses in 1601 encouraged Equity to expand its leniency, and in the seventeenth century the Lord Chancellor's Court proved willing to validate charitable *uses* against the claims of the testator's heir asserting common law invalidity, or that the named *feoffee* or trustee had no ability at law to hold title to the entrusted property. This practice often had the support of the judges of the common law courts. Though some common law judges, Coke C.J. being one, who were of a more technical mind, might have entertained some concern over these Equity orders, there is no sign that Equity was belligerently going its own way. No limitation statute, nor laches, could bar the enforcement of a charitable *use*, charitable legacies were granted a preferred payment position in an insolvency situation, and an attempt to avoid a charitable *use* by the wrongful sale of the property in question by any controlling party, even to a bona fide purchaser, was avoided by the setting aside of the sale.⁹⁹

⁹⁸ This word, in professional as well as lay parlance, refers to any organization (or institution, if that term is preferred) that is dedicated to the furtherance of a purpose or purposes that are charitable in law. The organization may be structured in common law jurisdictions as a corporation or a trust, and it may directly dispense services (an operating charitable body) or engage in assembling funds with which an operating charity or charities can further purposes (a foundation). The term 'charity' would also describe in civil law jurisdictions a foundation, which is a personified body solely engaged in charitable activity as 'charity' is defined or understood in the jurisdiction in question.

⁹⁹ For a full account of the Equity courts' upholding of charitable *uses* and trusts, see Gareth Jones, *History of the Law of Charity, 1532-1827*, C.U.P., 1969.

(2) ADMINISTRATIVE SCHEME MAKING

Such a scheme can be short and simple, or lengthy and carefully detailed. But for any charitable trust to fall within the courts' inherent scheme making jurisdiction, there must initially be an evident certainty that the donor/testator intended an exclusively charitable purpose or purposes. Indeed, within the law of charitable trusts the same rules and prohibitions apply as is the case with private trusts. It was in particular with regard to trustee powers that English courts of equity were prepared to go the extra mile in order to make the gift for public benefit both valid and efficacious. Take, for instance, trustee powers. The trust instrument might lack the conferment upon the trustees of the power of sale, of leasing, of mortgage, or of exchange. Equity was prepared to grant the power requested if it could be shown that were it not to do so the delivery of benefit that otherwise would flow to the public would be jeopardised. Although some relaxation took place in 1925 English legislation, it was not until the mid-twentieth century that statute made this generally possible in the case of private trusts.

A feature of the inherent jurisdiction is that it has what the courts themselves have described as ill-defined borders.¹⁰⁰ As was the traditional approach of equity courts in all their proceedings, historically they approached arguments that charitable trusts be exempted from one consequence or another at law very much on an individual case basis. This had much to commend it over the 'forms of action' approach of the common law, but it led to a lack of clarity as to the circumstances in which the courts will refuse to intervene. Though policy favoured a lenient attitude towards charitable giving, how much leniency nevertheless was too much? The probable indecisive reply no doubt generated the humour of the eighteenth century wag who defined equity as the length of the Lord Chancellor's foot.

The undetermined lengths to which the courts could take their benign inherent jurisdiction in favour of charitable trusts is well evidenced by the views of different courts as to whether "the general jurisdiction"¹⁰¹ included trustee requests that equity courts extend the investment powers of charitable trustees. In *Re Royal Society's Charitable Trusts*¹⁰² the Court was of the view the courts did have such a power. And the Court then exercised it. However, in *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society*,¹⁰³ while that Court expressly did not disagree with the earlier view in *Re Royal Society's Charitable Trusts* concerning the administrative jurisdiction of the courts in connection with charitable trusts, it preferred alternatively to employ an available statutory power to extend investment powers. Yet neither court hazarded a statement as to where administrative scheme making does not extend, and why it was the Court in question was confident or hesitant in assuming jurisdiction over investment powers. Certainly the statute in question¹⁰⁴ in each of these cases is explicit in providing for adjustment of an investment power. And in a period like the later 1950s and 1960s, when inflation was high and the value of fixed interest investments was declining annually, it was undoubtedly for the public benefit that charitable trustees applying for court orders be permitted

¹⁰⁰ *Re Royal Society's Charitable Trusts*, [1956] Ch. 87, at p. 91.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* Followed in *Re Royal Naval and Royal Marine Children's Homes Portsmouth; Lloyds Bank Ltd. v. Attorney-General*, [1959] 1 W.L.R. 755.

¹⁰³ [1959] Ch. 220.

¹⁰⁴ Trustee Act, 1925, 15 and 16 Geo. 5, c. 19, s. 57 (Eng.).

to invest in quality equity (or growth) stocks. Courts throughout the Commonwealth recognized this.

Something of the same lack of certainty in discerning the scope of both administrative and *cy-près* schemes exists in determining where the border lay between them. Broadly, *cy-près* is concerned with trusts purposes (or trust objects, of which purposes are a kind) that cannot be put into effect because the purposes cannot be carried out. Something needs to be done to supply purposes that do not have this problem. However, in *Re Robinson*¹⁰⁵ the Court noted that schemes are “not necessarily, or ... generally a scheme for the application of the fund *cy-près*.” There is no need for a *cy-près* scheme, said the Court, when, because the donor has not “described his wishes in clear terms”, “it is necessary to fill up a number of details”. *Cy-près*, it was said, is not relevant where the court is doing no more than “completing the trusts to carry out objects”. Nor is it relevant for administrative scheme making when the stated objects are not clear, but the donor’s intention as to objects is discoverable. In *Re Gott; Glazebrook v. University of Leeds*¹⁰⁶ the Court observed that it had the

“jurisdiction to settle a scheme for administration – I am not referring to *cy-près* schemes – and it is settled practice that these schemes may deal, not only with methods of administration, but also with, and define, the substance of the trust.”

The “substance of the trust” must mean the purposes of the trust. What the court cannot do with an administrative scheme is vary or change the clearly described purposes (or objects) of the charitable trust in question.

When it acts with regard to administration the court seeks with a scheme to complete the half finished design of the donor’s trust. For instance, a gift by way of trust¹⁰⁷ is made to an organization for a particular purpose, and the stated purposes of the organization are general, all its moneys being held in one fund. The scheme will complete the trust by supplying the terms for a separate trust of the intended purpose and the particular fund. Alternatively, the named trustees are the officers of an unincorporated body. The scheme will define the required manner of appointment and retirement of trustees. A further instance exists when a will creates a charitable trust in perpetuity, i.e., an endowment trust, for described objects, but leaves the trustees with no directions as to the distribution of the trust fund. A scheme will spell out how discretion is to be exercised, effectively limiting it by providing directions as to the separate disbursement of income and, where unusual circumstances permit, capital. And when trustees die, or refuse to act, an administrative scheme will provide for the present and the future as to the appointment of new trustees.¹⁰⁸ But there is a line. Where a will leaves property on such charitable purposes, or for such charitable organizations, as X shall appoint, and X fails to appoint, it is arguable that the scheme is either administrative or *cy-près* when the court provides

¹⁰⁵ [1931] 2 Ch. 122, at p. 128.

¹⁰⁶ [1944] Ch. 193, at p. 197.

¹⁰⁷ An outright charitable gift, i.e., not created by way of trust, is not within the courts’ inherent jurisdiction. The Crown, receiving it as *parens patriae*, nevertheless allows the imperfectly designed gift for public benefit to be made operative, and does so historically under the Sign Manual.

¹⁰⁸ When the terms are expressed in general language, e.g., to a church “for the glory of God”, if the gift is not held to be absolute, an administrative scheme will particularize the purposes to be pursued by the church authorities. It may remove defects (ambiguity, or deficiency) in the description of purposes, or provide trustee management arrangements, how the trust monies shall be applied to further the purposes, or even the manner in which previous mismanagement is to be corrected. It may determine what description of persons is intended to benefit from the stated purposes

purposes in the absence of a chosen purpose. This is because there is no supply of new purposes or organizations. Yet in order to make the charitable gift work, the court is designing a modus for determining which purposes are to be advanced.¹⁰⁹

(3) CY-PRÈS SCHEME MAKING

Though less often invoked, the inherent power of the equity courts with regard to *cy-près* is more evidently thematic than administrative scheme making. To describe *cy-près* shortly, it might be said that at the moment when the *inter vivos* or testamentary charitable trust would come into force, there is no way in which the declared purpose or purposes can be carried out, or during the lifetime of the trust there comes a time when the purposes of an endowment trust can no longer be carried out. *Cy-près* is all about supplying trust purposes (or objects) in place of those the donor or testator chose.¹¹⁰

Again, however, it is interesting to see what apparent overlap there is between the respective contents of reported administrative and *cy-près* schemes. At what point does the clarification of stated purposes pale into the imposition of different purposes? Problematic though it is to define each area of scheme making, it is singularly difficult to discover in judgments or the commentators' texts how and where the dividing line is to be drawn. And this is surprising because, as will be seen, the applicant for a *cy-près* scheme must show, if there is a problem before the trust can come into effect, that the donor/testator had a general charitable intent, as opposed to an intent to further the particular chosen purpose only. Such general intent is not needed if the application is for an administrative scheme, and this leads one to think it is the variation of purposes, or the adoption of new purposes, that attracts the general charitable intent doctrine.

Two basic questions arise with respect to *cy-près* scheme making. First, when will the courts regard purposes as initially incapable, or no longer capable, of being carried out? The second is whether, and if so how far, the choice of the donor or testator as to the preceding purposes is to govern the nature of the substitute purposes that the scheme provides.

The first question is answered by saying the courts will assume *cy-près* jurisdiction where it is impossible to put the purposes into effect. The case of *Attorney-General v. Ironmongers' Company*¹¹¹ is always given as an example. There the testator bequeathed a fund for the redemption of Barbary slaves, but at the time of the testator's death slavery had been abolished on the Barbary Coast. A more familiar instance of impossibility is where there never was an organization that the testator¹¹² attempts to name or he describes in his will, and another instance is where the identified organization existed when the testator executed his will, but it has ceased to exist by the time of his death. The nationalization of formerly private hospitals by the then government in England between 1945 and 1950 caused many charitable trusts to be no longer capable of being carried out.

¹⁰⁹ *Re Willis*, [1921] 1 Ch. 44 (C.A.). The Court of Appeal concluded that, where a general charitable intent is found, the mode of carrying the purpose into effect is not, on the basis of the authorities, part of the gift. In this case, residue having been left to "such charitable institution or society" as a pre-deceased named individual should select, the court in a *cy-près* scheme could make that choice.

¹¹⁰ The roots of the *cy-près* jurisdiction are thought to exist in canon law, and to have been derived by canon law from an interpretation of Roman civil law. It appears in the doctrine applied by the ecclesiastical courts in the mediaeval period, before - probably in the sixteenth century - Chancery courts took over this area of law.

¹¹¹ (1840), 2 Beav. 313; (1844), 10 Cl. & F. 908 (H.L.).

¹¹² Rarely are *inter vivos* donors caught in this situation.

A so-called supervening impossibility (as opposed to an initial impossibility) occurs when the purpose described or the organization that is identified ceases to exist after the instrument of gift, usually a will, has taken effect. An organization may be wound down and closed for lack of support, or for financial reasons. Closure may have occurred because the charitable object has ceased to exist, or for other reason has stopped operating. A charity whose object is to support the XYZ school is in this position when the XYZ school is terminated by the owners; a charity to secure protection of an environmental feature, such as a grove and woodland of old trees, finds ultimately that it is not needed – the public authority has set up a publicly funded commission to perform this task. It may be that the trust object or purpose for which the testamentary gift provides has been met, but surplus monies remain. Further expenditure upon the chosen purpose is impossible.

Impossibility can occur because of changes in public policy. Charitable trusts creating and funding scholarships in educational institutions, restricted, for instance, to white persons or to non-Roman Catholics, would today be held contrary to public policy, and *cy-près* be ordered if the restrictive provisions cannot simply be deleted. In either case it is therefore impossible to apply the funds supplied by the testator to his stipulated object.

There are occasions where the inherent jurisdiction may be taken by the courts to the very limits of ‘impossibility’, and that is where it would be ‘highly impracticable’ to give effect to the instructions of the *inter vivos* donor or the testator. An instance of this would occur if the gift was for the provision of new cribs in the babies’ ward of a children’s hospital, and when the deed of gift or the will takes effect the ward has just been fitted out with new cribs. The other needs of the hospital, and indeed the needs of that same age group of child, may be several, and also costly to put in place. A *cy-près* scheme could be approved by the court in these circumstances.

The second question is answered by saying that times have changed. Seventeenth century judicial considerations were inclined towards the approach that ‘near’ the character of the testator’s chosen purposes was sufficient in recognizing the testator’s intent in describing his purposes. During the following centuries, however, ‘as near as possible’ came to be viewed as more appropriate. As previously noted, the *cy-près* doctrine had been taken by Chancery as a rule of construction from the ecclesiastical courts, so, without any originating ideas of their own about *cy-près*, it was likely that equity courts would have given prime attention to the intent of the particular testator or donor. In any event the result of the preference for ‘as near as possible’ is that it is not only impossible to secure approval of a proposed scheme when purposes are substituted that fall within a different head of charity, e.g., the advancement of religion as opposed to education,¹¹³ the kind of persons who are to be benefited and the manner in which that benefit is to be expressed tend to dominate the formulation of substituted purposes (or the trust objects). Would the testator, having a ‘general charitable intention’, have stood back when he became aware of initial impossibility, and let his mind wander further afield to the needs generally of his fellow man? This question seems never to have been asked in the Equity courts. Perhaps the explanation is that intent scrutinized in a courtroom is perceived through eyes that see the search for meaning as a process involving construction of the words and phrases the maker of the gift has employed. It is a linguistic study.

The need for proof that the testator or donor has an intent to donate to charity to the exclusion of his or her heirs was insisted upon by equity courts. In the inherent jurisdiction ‘general charitable intent’ is the key to the availability of a court approved scheme if the purpose or

¹¹³ The heads of charity are relief of poverty, advancement of education, advancement of religion, and other purposes that are within the spirit of the ideas there apparent and also beneficial to the public.

purposes are impossible to carry out or are highly impractical. If the intent of the gift maker is restricted to the particular charitable institution he has selected, and the gift cannot initially take effect, the assumption is made that the gift maker intends at this point to prefer his heirs over charitable giving. Strangely enough, if the purpose or purposes become impossible to discharge or highly impractical after the endowment gift has taken effect and has been in operation, the equity courts have not taken the same position. At this point it is conceived that the charitable fund in question has already been partly expended upon charitable activity, and the heirs have already been excluded. The dedication to charity is therefore complete. No proof of general charitable intent is required.¹¹⁴

Since the *Statute of Charitable Uses* in 1601, the charitable *cy-près* jurisdiction has been exercised many times over the centuries, and there is a wealth of English case law on the subject, let alone that of other Commonwealth jurisdictions. For the purposes of the present paper there is no particular advantage to be had in examining the various ways in which case law over the centuries has permitted scheme making. Nevertheless, a reading of the case law is well worth while if one is to appreciate this unique historic equity judicial willingness to come forward and assist private giving for the benefit of the public.¹¹⁵

III. REFORMS TO SCHEME MAKING IN ENGLAND, AUSTRALIA AND NEW ZEALAND

(1) ENGLAND AND WALES

In the second half of the nineteenth century those who were interested began to be aware that many charitable trusts in England and Wales, probably running into the thousands, had purposes that were the product of a social and economic past, and not infrequently held funds that inflation over the years had reduced to trifling amounts, quite unable to sustain their obsolescent purposes. Some of these perpetual endowment trusts – for, of course, the perpetuity rule did not apply to charitable trusts – were of considerable antiquity. created by testators in the seventeenth or eighteenth centuries.¹¹⁶ Purposes in existence were frequently of limited utility in meeting public needs, because the particular geographical area known to the testator and the lives of persons in the community at that location had changed, sometimes beyond recognition from the scene the testator had known. Populations had migrated to towns, and, if trusts were for community members, within urban areas the work and educational needs of the migrants were quite different. In some respects conceptions about meeting public needs had also changed. For instance, during the later nineteenth century informed opinion no longer considered it to constitute the relief of poverty for trustees to hand over monies indiscriminately to poor persons, unconcerned as to who acquired the monies, and what they did with it. These were known as

¹¹⁴ The distinction is that general charitable intent is required in the circumstances of *initial impossibility*, but no such intent is required in a situation of *supervening impossibility*.

¹¹⁵ For the inherent jurisdiction older editions of English charity law texts are inevitably more informative than those written after the reforms of the *Charities Act*, 1960, had changed the practice of the *cy-près* scene. Reference may be made to G.W. Keeton and L.A. Sheridan, *The Modern Law of Charities*, 2nd ed., 1971, for the inherent jurisdiction, and articles on the subject there cited.

¹¹⁶ The *Charitable Trusts Act*, 1858, introduced the statutory position of Charity Commissioners, and these Commissioners were given scheme making powers, but only to the extent of the courts' jurisdiction. See Keeton and Sheridan, *ibid.*, at pp. 16-18, on the statutory powers of the Commissioners. Unfortunately, the Commissioners' critical remarks in annual reports throughout the century concerning out of date purposes, and trustee inactivity in seeking change, had little impact on governments and politicians.

‘dole’ charities. Trusteeship itself was a concern, because, though the obligation to ensure trustees were honest was upon the Attorney General, no one was charged to see trustees were active, prudent and thoughtfully informed about their trusteeship. Often trustees had died and no successors had been appointed, or the current trustees of the particular trust could not be traced or were unknown.

It was only with the post-1945 election of a government that was committed to major economic and social reform, and in particular after the Nathan Report on Charity¹¹⁷ appointed in 1950 had reached the public, that the problems just discussed in the administration of charitable trusts were taken seriously. With funds committed to the public benefit, these trusts’ problems were finally recognised as failings that had pressing need of being put right. The most obvious lack was that, since the Chancery courts had always felt their jurisdiction for scheme making could properly not go beyond impossible or highly impractical purposes, obsolescence of purposes was the concern of no one. The Nathan Report recommended considerable expansion of the *cy-près* jurisdiction,¹¹⁸ and in the *Charities Act*, 1960, expansion was introduced. In section 13(1) of the Act a *cy-près* application of charitable funds by the courts was authorized in the following circumstances:

1. when the purposes of the gift, in whole or in part, are “fulfilled” or are incapable of being further carried out in accordance with the directions the testator gave, and in “the spirit of the gift”; or
2. where the purposes provide a use for only part of the fund that has been donated; or
3. where merger of two or more separate gifts dedicated to similar purposes would lead to more effective results, the merged funds being then used “in the [original] spirit of the gift” to further “common purposes”; or
4. where the donor-defined area of the gift is no more, or the class of beneficiaries or the area chosen is no longer “suitable”, given “the spirit of the gift”, or is it practical in terms of its administration; or
5. where the original purposes, in whole or in part, (i) have otherwise been adequately provided for, (ii) are no longer charitable, or (iii) have “ceased in any other way to provide a suitable and effective method of using the [gifted] property ... regard being had to the spirit of the gift.”¹¹⁹

Also, for the first time in England and Wales the Charity Commissioners, as well as the courts, were empowered to approve schemes. On those occasions when the terms of gifts presented complexity, or issues of law were involved, the emphasis was still to remain on judicial scheme making, but now scheme-making was seen for what is - administration.

¹¹⁷ *Report of the Committee on the Law and Practice relating to Charitable Trusts*, H.M.S.O. Cmd. 8710, December, 1952.

¹¹⁸ *Ibid.*, ch 9 ‘The *Cy-près* Doctrine and the Alteration of Trusts’. The need for significant change was clearly detailed by the Committee, but seen in retrospect it is arguable that the nature and scope of the power to be given the courts for the removal of “obsolescence” was not as well developed.

¹¹⁹ Section 14 of the Act dealt with the problem, exemplified by the difficulty in *Re Gillingham Bus Disaster*, [1958] Ch. 300, where a public appeal, supported in large part by unidentified, anonymous donors, resulted in substantial funds being held by the trustee. Because of the availability of road accident liability insurance, significant donated funds were surplus to need, while the fund purposes were not within the definition of charity, and therefore within the inherent jurisdiction. A modus of scheme making was now provided by the Act.

Scheme making by both the courts and the Charity Commissioners was now extended to all “charities”. That is, no longer did it matter what *legal mechanism*, corporation or trust, is adopted in order to further the charitable objects; what matters only is that the objects of the endeavour are indeed ‘charitable’. The entire provisions of this ‘*Charities Act*’ were made applicable to all legal forms of giving to charity and the bringing about of the charitable distribution of assets.

In the further reforming *Charities Act*, 1993, section 13(1) of the 1960 Act was reproduced word for word.¹²⁰

Analysis of the 1960 and 1993 language against the background of pre-1960 *cy-près* case decisions reveals that in large part the five circumstances described in section 13 are confirming what the courts have already established as being *cy-près* opportunities. It was observed shortly after the 1993 Act became law¹²¹ that prior to 1960, if the courts could find no impossibility or high impracticability, it did not matter that carrying out the original purposes would be inexpedient, uneconomic and inefficient. This situation, the observation ran, “was to a certain extent remedied” by the 1960 and 1993 legislation. Other commentators shared this implied criticism that the 1960 Act and then the 1993 Act had been too conservative and hesitant in tackling the task of providing an adequate method for ensuring that charities and charitable donations are responding to contemporary public need. And in *Re Lepton’s Charity*,¹²² heard eleven years after the 1960 Act had come into force, a Chancery court held that “the spirit of the gift”, which appears in 1, 3, 4 and 5 of the above *cy-près* list, meant the basic donative intent underlying the original gift as a whole. This again was the intent that Chancery courts prior to the Act would determine under the inherent jurisdiction.

The difficulty is that ‘updating’ *cy-près* scheme-making can be seen from two different points of view. The classic viewpoint is that taken by the courts, namely, that what should be done is governed by the gift maker’s intent and a close analysis of the language the maker has used. *Cy-près*, as we have seen, has been held to mean ‘as close as possible’ to that original intent. When the donor’s intent was the crucial criterion in making any change, the courts were not going to condone imaginative licence. The counter view - held by many since the Nathan Report¹²³ - is that the emphasis should be placed upon the present day circumstances in which those original purposes are functioning. The search is for what substituted purposes would accommodate the changed community setting and financial environment. In other words, an objective assessment is what is needed; ‘how can the beneficiaries and their need that the donor had in mind, or the public benefit that the charity’s purposes reflect, be most effectively assisted in today’s circumstances with the funds available?’

The *Charities Act*, 2006, was the vehicle for changing the Charity Commissioners,¹²⁴ of mid-nineteenth century origin, into a corporation, the Charity Commission.¹²⁵ Considerable change of statutory emphasis flowed from this introduction of corporate status, and one of the areas

¹²⁰ For a discussion concerning the interpretation of the *Charities Act*, 1993, c.10, s. 13(1), see *Tudor on Charities*, 8th ed., 1995, and now 9th ed., 2003, London, at paras. 11-046 to 11-050. For English thinking prior to the *Charities Act*, 2006, concerning further reform of *cy-près*, see *ibid.*, para. 11-068.

¹²¹ *Ibid.*, at para. 11-045.

¹²² [1972] Ch. 276, 285A; [1971] 1 All E.R. 799.

¹²³ *Supra*, note 22.

¹²⁴ Three in number, of whom two must be qualified lawyers.

¹²⁵ It also broke with the practice of the past four centuries by introducing a statutory descriptive list of old and new heads of charity.

reviewed was scheme-making which was now to be handled almost entirely by the new administrative capabilities of the corporation.

In section 15 the term, “the spirit of the gift”, a term employed hitherto to describe when four of the five listed *cy-près* situations could be invoked,¹²⁶ was replaced by “in appropriate circumstances”, and that in turn, it was provided, means that both “the spirit of the gift” and “the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes” are to be examined by the body with jurisdiction to make changes. It is too early to say whether in practice this duet of required considerations will move the assessments of the future more into the objective sphere. Indeed, the opportunity to consider prevailing circumstances already existed. In *Re Hanbey*¹²⁷, under the inherent jurisdiction, both the founder’s intent and “the social utility” of the charity’s objects were considered. However, the new language is greeted by the Charity Commission with a very helpful pamphlet directed to charities who will be affected by the Commission’s *cy-près* decisions.¹²⁸

In section 18 the 2006 Act adds other considerations that are to be undertaken when *cy-près* schemes are being considered, and these considerations extend to the merger of charities and their funds, and the ability of a living donor to request the return of his original fund if his purposes have “failed”.

(2) NEW ZEALAND

With the *Charitable Trusts Act, 1957*,¹²⁹ as amended, New Zealand embarked on a complete statutory overhaul of the law and practice concerning charities, the administration by charities of their funds, and charitable giving by corporations and individual members of the public. Part III of that Act concerns schemes in general, and Part IV ‘schemes in respect of charitable funds raised by voluntary contribution’.

With regard to public appeals and the occurrence of surplus funds (the substance of section 14 of the *Charities Act, 1960*, in England), as well as the scope of the inherent *cy-près* jurisdiction, the *Charitable Trusts Act* in section 40 extended scheme making to circumstances where it is “inexpedient” to carry out the existing charitable purposes. Schemes are also approved if the fund available is inadequate to meet the purpose, the purpose has already been provided for, or the purpose is illegal or useless or uncertain. In all of this, the ‘expediency’ of change was the departure from previous inherent jurisdiction practice. And there was another distinctly new note. Proof of ‘general charitable intent’ is no longer required.

In support of the section 40 provision it is confirmed¹³⁰ that the manner in which the trust is being administered may be prescribed or varied. And charitable corporations are covered by the Part IV provisions. Where monies have been assembled from members of the public for a particular purpose, as in an appeal, contributors are entitled to know of any application for a change of purpose, and to have meetings called when the proposals can be discussed., and a

¹²⁶ *Supra*, note 27.

¹²⁷ [1956] Ch. 264.

¹²⁸ See the website of ‘The Charity Commission for England and Wales’, and the *Operational Guidance: Application of Property Cy-près: the Law and How it should be Applied*, reference OG 2 A1 – 18 March 2008. A second Operational Guidance (OG 2 B2 – 18 March 2008) deals with *The Use of the Cy-près Doctrine where there are Secondary Trusts*.

¹²⁹ No. 18.

¹³⁰ In section 41.

scheme be agreed upon. This is also something for which the English legislation provides in detail.

(3) AUSTRALIA (QUEENSLAND)

Under the *Charitable Funds Act*, 1958,¹³¹ as amended, the state of Queensland deals with public appeals where for one reason or another monies collected from both identified and anonymous contributors remain unexpended on the object of the appeal. Section 5 adopts as one of seven circumstances for the “alteration” of purposes, those purposes that have become “inexpedient”. Otherwise it follows the English legislation by making express reference to inadequate property to carry out the purposes; to purposes otherwise taken care of; to surplus funds remaining after the carrying out of purposes; to purposes that have ceased to exist; to purposes that are uncertain, unidentifiable or insufficiently defined;¹³² and to purposes that are illegal. The word, ‘inexpedient’, is the element that goes beyond the inherent jurisdiction, but it must be said that, as with the New Zealand legislation, the Act offers nothing as to what is intended by this word and in particular how far ‘inexpediency’ may be carried. ‘Inexpediency’ in the Concise Oxford Dictionary is given the meaning non-advantageous or unsuitable.¹³³

With regard to ‘occasions for applying property *cy-près*’, in its *Trusts Act*, 1973,¹³⁴ s. 105, Queensland adopts, almost word for word, section 13 of each of the *Charities Act*, 1960, reproduced in the *Charities Act*, 1993. To be noted, however, is section 105(2) which by contrast with New Zealand retains general charitable intent. Initial failure of the purposes of the gift cannot be rectified, therefore, without proof of such an intent.

(4) AUSTRALIA (WESTERN AUSTRALIA)

In the *Charitable Trusts Act* of 1962,¹³⁵ as amended by the *Charitable Trusts Amendment Act*, 1998,¹³⁶ the state of Western Australia largely followed in its section 7 the earlier legislation of Queensland and New Zealand with regard to when schemes may be proposed. As in New Zealand, however, ‘general charitable intent’ is expressly stated to be no longer a requirement. And in the amending Act of 1998 the *Act* provides that small trusts may be terminated, and the property of two or more charitable gifts may be combined for expenditure upon similar purposes. The Attorney General has a clear, mandated role with regard to schemes, which by the 1998 *Amendment Act* was extended to final approval powers. The 1998 changes to the 1962 *Act* (Part III) have given Western Australia an overall well organized structure for scheme making and approval.

¹³¹ No. 56.

¹³² This is the traditional area of administrative scheme making.

¹³³ Lacking a charity commissioner, Queensland in this Act adopts the idea of the appointment “from time to time” of “a certifying officer” whose duty it is to examine each proposed scheme before it comes before the court.

¹³⁴ No. 24.

¹³⁵ No. 82.

¹³⁶ No. 7.

(5) AUSTRALIA (VICTORIA)

In Victoria the *Charities Act*, 1978,¹³⁷ amended by several Acts until the latest of 2005, devotes its Part I to ‘The Application of the Cy Près Doctrine to Charities’. This State, like Queensland, chose to adopt in its 1978 legislation, section 2(1), the circumstances for *cy-près* – named as such in this *Act* – that were adopted by the 1960 Act in England. There is silence as to general charitable intent. So, again like Queensland, it retains that inherent jurisdiction requirement.

Cy-près schemes where donors, many anonymously, have contributed to an appeal is dealt with in this *Act*, as in New Zealand, Queensland and Western Australia. The Attorney General of the State of Victoria has the power to approve schemes, and the State Governor in Council is given the power to raise dollar limits that limit the Attorney General’s authority to sanction schemes. The court power continues, of course, and is the senior of the two approval processes.

(6) AUSTRALIA (NEW SOUTH WALES)

The *Charitable Trusts Act* of 1993,¹³⁸ amended in 1999 as to the powers of the Attorney General of the State, covers the same subject-matter as that to be found in the legislation of other States, but has two features that are of especial interest. The first concerns the circumstances in which *cy-près* schemes may be made. It states in section 9(1) that those circumstances – not set out - “include” situations “in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust.”

It seems apparent the State legislature saw no need to confirm seriatim the inherent jurisdiction circumstances found in other Commonwealth legislation, and considered that that provision in the 1960 Act in England, namely, section 13(1)(e)(iii), was the only provision in that list that extended the courts’ *cy-près* powers.

The second concerns ‘general charitable intent’. Section 10 states that the Act does not change the case law, but provides there is a presumption that such an intent exists, unless there is evidence in the trust instrument to the contrary.

As in legislation in other jurisdictions, original purposes include those that have been the subject-matter of later schemes or subsequent regulation.

(7) AUSTRALIA (TASMANIA)

In a novel organization of trusts legislation, Tasmania combines in the *Variation of Trusts Act*, 1994,¹³⁹ the alteration of the terms of both private and charitable trusts. So far as charitable trusts are concerned, section 5(2) provides, like New Zealand, that, if it has become “inexpedient” to carry out original purposes, a scheme variation may be approved by the court or the Attorney General. The grounds for *cy-près* application are those of the *Charities Act*, 1960 and 1993, in England, with the slight word change that Queensland introduces. Section 5(4) expressly retains the requirement under the inherent jurisdiction of a general charitable intent.

¹³⁷ No. 9227.

¹³⁸ No. 10.

¹³⁹ No. 52.

Public appeals that result in property that cannot be expended upon the appeal object are dealt with in section 11.

(8) AUSTRALIA (SOUTH AUSTRALIA)

The *Trustee Act*, 1936,¹⁴⁰ section 69B, as amended in 1996¹⁴¹ and 2003, also adopts the language of section 13 of the *Charities Act*, 1960, and therefore of the *Charities Act*, 1993, in England. This section lists the circumstances in which a scheme may be approved, but subsection 6 adds that the approver must be satisfied that the variation “accords, as far as reasonably practical, with the spirit of the trust; and ... is justified in the particular circumstances of the particular case”. Schemes may be approved by both the court and the Attorney General, the latter having the customary position in Australian legislation of being subject to a monetary limit to the schemes the office may approve. No reference is made to general charitable intent, so this feature of the inherent jurisdiction remains unchanged.

(9) SINGAPORE

Hong Kong is in the active process of rethinking its trust and charity law. Singapore for its part has adopted the now well-known English 1960 reform. Section 21 – ‘Occasions for applying property *cy-près*’ – of the Singapore *Charities Act*, 1995,¹⁴² follows word for word the 1960 English legislation.¹⁴³ Section 22¹⁴⁴ of the same *Charities Act* also follows in the main section 14 of the English *Charities Act*, 1960.¹⁴⁵

A summary of post-1959 statutory intervention in scheme making

In the jurisdictions that have legislated reform the pattern has been to follow England and Wales in reducing to a list the circumstances in which schemes may be approved. New South Wales is the exception in not listing permitted change. They have statutorily organized the discursive case law of the centuries, and extended moderately the *cy-près* jurisdiction. It seems clear that the really significant move in 1960 was to enable schemes to be sought when the original purposes, plus subsequent changes made to them in later schemes, have “ceased ... to provide a suitable and effective method of using the property” in question, “regard being had to the spirit of the gift.” Of all the section 13 language of the 1960 and 1993 English legislation, New South Wales considered this the only language that warranted adoption. The remainder of section 13, it appears to have been thought, simply put case law into statutory form.

The second significant move was taken in 2006 in England and Wales’ *Charities Act* when Parliament at Westminster provided that “the spirit of the gift”, a term considered judicially to refer to the donor’s intent on the creation of the gift,¹⁴⁶ was to be considered by the scheme-making authority with the aid of a new criterion. The new yardstick is, “the social and economic

¹⁴⁰ No. 2270.

¹⁴¹ *Trustee (Variation of Charitable Trusts) Amendment Act*, 1996, No. 50.

¹⁴² No. 37.

¹⁴³ Save for the omission of s. 13(4) of the *Charities Act*, 1960, giving retroactivity to the section.

¹⁴⁴ I.e., application of surplus monies given anonymously, or, with the donor’s disclaimer, following a public appeal.

¹⁴⁵ Subsections (2) and (6) are novel introductions of detail into the 1960 format. In the 1985 Revised Edition of Singapore statutes sections 21 and 22 are numbered 11 and 12.

¹⁴⁶ *Supra*, note 27.

circumstances prevailing at the time of the proposed alteration of the original purposes". This, finally, brings *cy-près* down to the time when the proposed scheme of alteration is being considered.

The deliberate retention of the 'basic intent' of the testator or donor as an element to be considered in any scheme making situation may explain the retention by England and Wales of the need of 'general charitable intent' in instances of initial failure. Four out of six of the reforming States in Australia also retain general charitable intent. Of particular interest is the New South Wales provision that the onus of proof of such intent existing is reversed. That is to say, the burden of showing that the testator or donor had no general intent to donate to charity is upon the party or parties who, on initial purpose failure being established, oppose the making of a *cy-près* scheme.¹⁴⁷ It is curious that of the reform jurisdictions that would retain general charitable intent, either in its original case law form or as a presumption of law, none questions why such an intent should be relevant at the would-be commencement of that period, but irrelevant where purposes become impossible to implement or highly impracticable during the period of the endowment.

None of the reforming jurisdictions has addressed administrative inherent jurisdiction scheme making as such, because – as it would appear – the inherent court power to remedy charitable trust inadequacies is so widespread throughout the compass of charity law that its replacement, where necessary, calls for statutory structuring at different places in the legislation and in different ways.

Scheme making in connection with funds that cannot be expended on previously announced purposes following public appeal has been introduced, first in 1960 in England, and later in three of the Australasian reforming jurisdictions.¹⁴⁸ It is also present in the Singapore legislation. This was a necessary legislative task. However, a concern remains with regard to non-charitable gift giving. Public appeals may be for purposes that do not fall within the definition of 'charity' or are not for the public benefit. Scheme making should clearly be available whether the Good Samaritan is seeking with his resources to relieve the needy individual, whether or not that relief falls within the borders of legal 'charity'.¹⁴⁹

IV. SCHEME MAKING IN CANADA

In Canada, as in Australia, the taxing power is shared by each unit authority¹⁵⁰ and the federal authority, but because the federal power is trans-national and international in its effect taxation is predominantly a federal power. The taxation of charitable gifts and organizations

¹⁴⁷ The B.C. Law Institute has recommended (*A Modern Trustee Act for British Columbia*, 2004, BCLI Report No. 33) that general charitable intent be abolished. It was so persuaded because of the frequent paucity of evidence as to whether the testator (or lifetime donor) on creation of the gift had a particular or general intent. The policy proposal was therefore to mandate a general intent unless a gift over or a reversion is introduced by the testator or lifetime donor on the failure of purposes. See the draft section 65, and commentary thereto.

¹⁴⁸ Queensland, Victoria, and Tasmania. Provision for the situation where surplus monies remain following a public appeal (see, *supra*, note 24) can be found in the draft BCLI *Trustee Act*, *ibid.*, section 66.

¹⁴⁹ For Australia and Australian legislation, see further H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts*, 3rd ed., looseleaf, chapter 20 (Vol. 2), relevant State legislation being reproduced in Vol. 3.

¹⁵⁰ The 'unit' in Canada is the province or territory. In the U.S.A. it is state, in Australia state or the Northern Territory, and in Switzerland canton.

leads to a very active involvement between the Canada Revenue Agency on the one hand and donors, deceaseds' estates, and charitable organizations on the other.

Charity law, however, is sovereign to the unit (province or territory). This means that it is for the province or territory to determine what purposes are charitable, to what extent and in what manner relief shall be given to 'charities' from unit taxation, when, if at all, property taxes shall be born by premises concerned with charitable activity, and what monitoring and remedial provision there shall be vis-à-vis the administration of 'charities' and the failure or obsolescence of their purposes. While local taxation issues have received legislative attention, it has to be said that no interest has been shown by Canadian provincial and territorial jurisdictions in the contemporary law of charity and charitable organizations. Definition of 'charity' for the purposes generally of the law of charity, and also the manner in which 'charities' are to be administered, have been ignored topics. Apart from some now fairly antiquated *Acts*, each of limited scope, in Ontario, and local property tax legislation in most provinces, there is nothing. The Commonwealth activity since 1959 has altogether passed by common law Canada.

As a result the concept of what is charitable in nature is a matter of the traditional case law, and *de facto* falls to be considered by the Tax Courts for the purposes of the *Income Tax Act (Canada)*. Scheme making is not a concern of that *Act*, and therefore the inherent jurisdiction of the old Chancery courts concerning scheme making, received by courts in Canada as part of English law, remains in force, together with a handful of Canadian reported cases, as the only law on the subject that we have.

Neither administrative scheme making, nor *cy-près* scheme making, is a subject that comes more than once in a while before our courts, but, if it does, as with any other matter concerning the inherent jurisdiction, Canadian courts like to go back to pre-1960 English case law. Those cases, as earlier noted, are now seriously aging, and this creates problems. For instance, there is no easy line to be drawn between the two areas of scheme making, but it can matter because, as we have seen, a general charitable intent is needed if there is an initial impossibility in the purposes to be furthered by the gift or the charity. Where is the line to be drawn between construing the charitable purposes that the testator or donor intended but left nebulous, and devising new purposes for an instrument whose existing purposes, though charitable, are wanting? It mattered in *Re Killam Estate*¹⁵¹ in Nova Scotia, and in *Re Stillman Estate*¹⁵² in Ontario. Both cases concerned endowment trusts. And these courts came to different conclusions as to where the line lay.

(1) RE KILLAM ESTATE

In this case the will of the benefactress, Dorothy Killam, who died in 1965, had created a trust of a substantial sum in favour of five major Canadian universities and the Canada Council for the Arts. The trust was perpetual in character; the testatrix made it expressly clear that the beneficiaries were to receive "income only". Income was to be provided on an endowment basis principally for salaries of professorial chairs and other academic employees, plus student scholarships. The trustees made a practice of providing from the trust as regular an annual income stream as possible in order that the beneficiaries might plan ahead with respect to funding salaries and scholarships. The trustees were advised that in the investment climate of the

¹⁵¹ (1999) 185 N.S.R.(2d) 201, 38 E.T.R.(2d) 50.

¹⁵² (2004), 5 E.T.R.(3d) 260.

time – the later 1980s and the 1990s – a 5% return post-inflation was reasonable aim for them to adopt, and this figure plus the steadiness of income return the beneficiaries welcomed.

However, to produce a 5% income return each year the trustees found that high yielding securities were of a fixed interest nature, which caused with inflation the erosion of the trust capital. That is, 5% today, but a gradual decline thereafter in value produced. The trustees had turned at this point to an investment policy of total return – prudent maximization of all avenues of investment without regard to whether the return is in the form of income or capital – with the belief that in a vigorous market they would have a better chance of reaching the desired 5% income return. In fact, they found that, with equity stock experiencing capital growth, but low dividend payments, total return produced an actual income of less than 5%. With the agreement of all the beneficiaries, the trustees now applied to the Nova Scotia court for consent that out of the total return each year a percentage of 5% be paid to the beneficiaries.

This scheme proposal was therefore for a percentage trust (or unitrust, as the U.S. calls it). The endowment feature is retained, but income is fixed at a percentage reflecting the average interest and average dividend return on the market. To avoid volatility, but retain adjustability to the average income return, the percentage is normally reviewed every three years. The proposed Killam scheme in fact gave the beneficiaries the additional right to have the trustees withdraw from the percentage trust, if the beneficiaries so desired. The advantage of such an arrangement is that it divorces trust investment from trust distribution, but income and capital remain as distinctive features of the testator's trust structure. It simply converts the income right from what the fund actually produces each year to a market average income figure over a period of years.¹⁵³

Kennedy C.J.S.C. considered that the first question before him was whether the proposed scheme was concerned with administration or the introduction of new trust purposes. On this question he concluded that the purposes of the trust were not in issue. So that ruled out *cy-près* scheme making. The next question concerned the move from actual income and actual capital growth (or decline) to a market-determined percentage of income from a total return of income and growth. Did that lie within the inherent jurisdiction's administrative scheme making power?

There were no Canadian precedents even remotely on the subject, and therefore the Court turned to the English case law. It was noticed that Wilberforce J., a leading equity judge, had approved in *Re University of London Charitable Trusts*¹⁵⁴ the formation of a common fund out of a number of distinct trust funds. The beneficiary was in each case the University. And investment of a percentage of the common fund was also approved in securities other than those of the then legal list of trustee permitted investments. Kennedy C.J.S.C. noted Wilberforce J.'s observation that the administrative convenience and the saving of costs in having one common fund would be lost if non-legal list investments were not approved.¹⁵⁵

¹⁵³ To cope with a sudden, substantial market downturn, like that of 2008, the trust instrument may include a provision to the effect that the market experience itself triggers an average income reassessment.

¹⁵⁴ [1964] Ch. 282.

¹⁵⁵ No one appears to have considered the width of the respective terms of investment for each fund, now combined as one.

However, it was Peter Gibson J.'s words in *J.W. Laing Trust Stewards' Co. Ltd. v. Attorney-General*¹⁵⁶ that particularly persuaded the Nova Scotia Court that the scope of the inherent jurisdiction was sufficiently broad to allow the Court to approve the proposed Killam administrative scheme. In *Laing Trust* the *inter vivos* trust donor stipulated that the charitable trust was to be terminated 10 years after his death. Income during the trust years had been paid regularly, and, since the size of the trust fund had increased significantly after the death, the trustees asked that the 10 year termination be deleted. The alternative was to pay considerable sums to each of the beneficiaries on the termination date, and nothing at all thereafter. This, they said, was of no benefit to these beneficiaries, and inappropriate. Mr. Justice Gibson agreed, and, noting that the purpose(s) of the trust were not in question, so that the *cy-près* jurisdiction could not be invoked, asked himself the question whether he had administrative scheme making jurisdiction. On that subject he opined that administration is a process that goes "to the mechanics of how the property devoted to charity is to be distributed."¹⁵⁷ And he described the judicial discretion involved in the inherent jurisdiction concerning administrative schemes as "considering whether it is expedient to regulate the administration of the charity".¹⁵⁸ In that regard the court should take into account all the circumstances of the charity before the court.

Kennedy C.J.S.C. then turned to an eminent past High Court Australian judge, Dixon J., for a description of 'expediency' as "expediency in the interests of the beneficiaries",¹⁵⁹ and considered that those interests would be seriously threatened if the broader power was not permitted to the trustees. The Chief Justice concluded that the manner of distribution of trust property, as well as investment authority, "lie within the width of the unlimited inherent administrative scheme of jurisdiction".¹⁶⁰ What the authorities are saying, he observed, is that "the Killam case concerns merely the way in which funds flow to the existing purposes".¹⁶¹ The total return scheme was therefore approved, "although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute 'income only'".¹⁶²

(2) RE STILLMAN ESTATE

A different view was taken in this case¹⁶³ of the relationship between the *cy-près* jurisdiction and the administration jurisdiction, and the possible scope of the latter. In *obiter* remarks Cullity J. of the Ontario Supreme Court explained why he declined to agree with *Re Killam*.

Again this was an application by trustees of an endowment trust for approval of a scheme which would put into effect total return as opposed to the investment powers in place that were aimed distinctively at income return and capital appreciation. The trust, of many years' standing, had not been earning sufficient income to meet the federal *Income Tax Act* disbursement requirements of the time, and the sum needed to meet those requirements had grown to a considerable figure. The penalty consequences of not meeting the disbursement level were dire,

¹⁵⁶ [1984] Ch. 143.

¹⁵⁷ *Ibid.*, at p. 153.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Supra*, note 57, at p. 61 (ETR).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, at p. 63 (ETR).

¹⁶³ *Supra*, note 57.

and, if the trust was to continue to benefit the charitable organization beneficiaries concerned, something had to be done. The trustees, having no power under the terms of the will to encroach on capital, proposed total return as a means on a planned basis of meeting the problem.

The judgment of Cullity J. can be said to contain two notable conclusions. The first is that, though total return investment was not a trust *purpose* and though purposes were not to be varied by the proposed scheme, total return could be approved under the *cy-près* jurisdiction. The second, explained in the *obiter* remarks, is that the administrative scheme making jurisdiction does not extend to approval of a total return scheme when it is the intent of the testator as creator of the trust that income only may be drawn upon.

On the first question of whether a *cy-près* scheme could be made, the Court concluded that the endowment trust terms, which gave no trustee distribution access to capital, were in the circumstances ‘impracticable’. The *cy-près* and administrative scheme jurisdictions were then distinguished, and this was done on the basis of when the administrative jurisdiction of the court alone permits a scheme to be approved.¹⁶⁴ The Court continued: “Where the directions of the donor have become impracticable, as here, I do not think it matters whether they are to be characterized as relating to the purposes of the Trust or merely to the mode by which they are to be achieved. The jurisdiction to substitute other directions will exist in either case.”¹⁶⁵ ‘Impracticability’, it was considered, would ground either a *cy-près* or an administrative scheme. With regard to both schemes, the judgment continued, the courts have sought, in rectifying the problem, to keep as closely as possible to the intent that the testator or settlor had had. And no precedent had been produced for the Court’s examination where, for purposes of an *administrative* scheme, the court had departed from a clear testamentary or donor choice of ‘income only’ in a perpetual or endowment trust.

On the second issue, the Court’s *obiter* observation was that, if there had been no ‘impracticability’ in the instant case, it would have hesitated on grounds of expediency (which the *Killam* court had adopted) or of desirability to approve an administrative scheme that departed from an ‘income only’ intent. It might indeed be that the object of such a variation is the obtaining of greater trust efficiency. However, *J.W. Laing Trust Stewards’ Co. Ltd. v. Attorney General*¹⁶⁶ was not an endowment case; it concerned only the timing of the distribution of capital. The Court continued that there is no precedent for the *Re Killam* decision, and for any court to extend the administrative scheme making judicial power to the point that, where if *cy-près* is not available, nevertheless an administrative scheme can be approved, would be to extend very far the entire scheme making jurisdiction. *Cy-près* applications would be otiose.

Having been able to find ‘impracticability’ in the *Stillman* circumstances, the Court therefore preferred to rely on the *cy-près* jurisdiction to approve a total return scheme.

(3) THE RESULT OF THE TWO DECISIONS

These two decisions are now part of the case law concerning charitable trusts in Canada, pointing in different directions and each carefully and forcefully argued. Outside the borders of

¹⁶⁴ Instead of on the basis of variation of purpose(s) and administrative machinery.

¹⁶⁵ *Supra*, note 57, para. 33.

¹⁶⁶ *Supra*, note 61.

Nova Scotia and Ontario the trustees of a charitable trust who wish to move to total return investment with regard to the charity's own immediately distributable assets or the funds it holds tied up in endowment trusts, and who lack instrumental power to make that change, are in a puzzling position as to how to present their case for scheme approval. In a nutshell, does variation of income from actual annual income return, to an annual percentage reflecting average income return, violate the intent of the testator or lifetime donor who stipulates 'income only'? If 'income only' requires actual annual income return, and the advantage of total return investment is not considered by the court to create 'impracticability' as against traditional income and capital return, there appears from the Ontario decision to be no jurisdiction in the court to approve a total return scheme.

Re Stillman was decided six years ago. The provincial and territorial legislatures remain silent.

V. LEGISLATIVE REFORM IN CANADA

(1) IS THERE A NEED FOR LEGISLATION?

Since the days when the body of charity law was formed, sovereign in Canada to each province, charity has changed from sole concentration on the philanthropic individual's testamentary, and occasionally *inter vivos* gifts, to a dominating concern with charitable organizations, and gifting by individuals and corporations to these, mostly corporate, entities. To put it popularly, charity is all about two things: one, 'charities' obtaining registration status with the Canada Revenue Agency, and keeping within the operational rules set out by the *Act* and the Agency; secondly, the issue of charitable gift receipts by donee registered organizations, so that federally tax determined credit can be had against taxable income by donors or their estates. In order to secure tax credit, gifts are made today to registered organizations, and such organizations will often have been legally advised what provisions should appear in the corporate or trust formative documents to deal with the purposes of organizations or endowment trusts that are no longer of utility. These provisions will deal with the possible cessation of the organization, the variation of obsolescent purposes or objects, and the range of changed circumstances that traditionally has given rise to invocation of the inherent *cy-près* jurisdiction when it was the terms of the gifts of individuals that significantly constituted the law of charity.

This means that of the three areas with which charity law has traditionally been concerned, only the definition of charity retains substantial interest. And even there the federal tax authorities may expressly enumerate in the *Income Tax Act* those 'borderline' activities that will be regarded for tax purposes as valid charities.

Some say the reason why there is no legislation in Canada is that, because federal taxation has 'taken over the subject,' the provinces and territories have no interest in charity law. Other than in connection with local property tax legislation, the provinces and territories have a very limited stake in charity matters. So far as law practitioners are concerned, they rarely have reason to apply or research the traditional charity law that is sovereign to each province and territory. For all charitable organizations the 'action' lies in relations and dealings with the CRA, and the rules there set by the Agency. What else, one is asked, could otherwise explain the enormous gap within the Commonwealth that now exists between its various member jurisdictions? At one end is the United Kingdom charity legislation, and especially the creation

of an independent incorporated Charity Commission monitoring and assisting 'charities', great or small, in every way. Then there is the well-ordered legislation in Singapore, New Zealand and of almost all the States of Australia, with provisions in several states dictating the role of the local Attorney General in lieu of a Commission. At the other end of the spectrum is the situation in any Canadian common law jurisdiction.

A new provincial legislative re-ordering of the inherent scheme making jurisdiction, one is told, can certainly be suggested. But it is really a question of who would be interested. Charity law for the most part has lost relevance; the *Income Tax Act* and administrative tax practice have taken its place.

That's one approach. Though possibly somewhat cynical, it leaves a disconcerting feeling that it may be realistic. Nonetheless, it is difficult to believe that the provinces and territories (the units) of Canadian federalism intend to abandon their sovereignty over charity law. It is also apparent, looking to jurisdictions with charity legislation, that the tax authorities elsewhere in the Commonwealth share with the Canada Revenue Agency an equal concern that the taxation subsidies extended to donors' gifts to charities, and to charities themselves, not be abused.

Permanent or endowment trusts evidently remain possible sources of difficulty requiring a clarified and modern scheme making jurisdiction. Charitable organizations with obsolescent purposes, and no internal remedial empowerment, are another concern.

Charities in Canada are mostly organized as corporations under Corporation Acts, or as charitable or non-profit organizations incorporated under legislation like the Society Act of British Columbia. Some will be organized as trusts, but there seems an increasing tendency for these to be the smaller organizations of some antiquity, frequently associated with particular church communities in the advancement of religion or social welfare endeavours associated with religious belief. Others will be organized as neither, but be unincorporated organizations operated on the basis of contract whose assets are held on trust for those persons identifiable at any time as the acknowledged participants in the organization. Each of these organizational modes will have purposes, and over the course of years purposes may become antiquated in conception or emphasis, no longer reflecting the inclinations and contemporary values of current 'members'. Purposes may be overtaken by later changes in society or the economy, or indeed in the law. Sometimes variation in language is enough, but at the other extreme a total overhaul of objects of the organization may be needed.

It seems clear that the first thing required of legislation is a widening of the inherent judicial jurisdiction so that it can be invoked by all organizations engaged in the discharge of charitable - and also non-profit - objects, whatever the legal nature of the organization.

There will be today a smaller number of charitable and non-profit organizations that lack powers to vary, terminate or recompose their purposes. However, the situation where there is no such power or adequate power is by no means uncommon. This is where equity courts with the inherent jurisdiction traditionally came to the help of charitable gifts in donors' wills, but where in the current age legislation is needed. Universities are well acquainted with testamentary gifts for annual scholarships dedicated to one particular subject matter or another, and religious

organizations with endowment gifts for the physical adornment of the place of worship; such gifts may have come to reflect the interests and values of yesterday. Whatever policy decisions the federal authority may take toward obsolete or obsolescent organizational objects or purposes, it has no sovereignty to consider, draw up, and approve schemes.

(2) WHAT FORM MIGHT LEGISLATIVE CHANGE TAKE?

Should the distinction between administrative schemes, and purpose (*cy-près*) schemes, be abolished? It is evidently controversial whether the proposed scheme concerns the administrative powers and arrangements of the trust, or the objects (or purposes) that the charity is pursuing.¹⁶⁷ Legislation on the scheme making powers seems so often to fail to make it clear whether it is dealing with administrative scheme making at all. Administration is seen rather as an aspect of the requirement of certainty. The fact that the legislation expressly governs *cy-près* schemes does not necessarily assist in answering the question of whether administrative schemes are otherwise governed. For instance, a general reference only to a head of charity may be in issue because it does not spell out purposes that are to be implemented. A gift in a will may say, 'to further public education in my town'. The supply of specific purposes may be included under the *cy-près* provisions of the governing legislation, but such a supply is more in the nature of administrative scheme making. The scheme does not remove the old, and replace with the new, but fills a blank in the will. Nevertheless, while the prevailing practice in the reform jurisdictions is to retain the broad dichotomy of administration and of purposes, it seems this is but a nod to the traditional distinction existing in the inherent jurisdiction. There is no clarification of where one aspect of the former inherent jurisdiction ends and the other begins. In the absence of explanatory governmental speeches in the legislature, the courts are left to cope as best they can.

There will be different opinions, but the more persuasive recommendation is that there should be an abandonment of the terms, administration and purposes, and that the legislation should list the circumstances that are to enable parties to apply for scheme making. This would include the circumstances the courts themselves have recognized, but also include circumstances that occur in modern conditions, such as the merger of charities, the change of legal structuring from trust to corporation, or the provision of contemporary organizational powers. It may be useful to categorize schemes straddling administration and purposes, thus essentially emphasizing the types of schemes for which application can be made.¹⁶⁸

In the absence of a charity commission in any Canadian jurisdiction, thought might be given to defining and mapping out the obligations and powers of the provincial jurisdiction's Attorney General (or Public Trustee as delegate of that jurisdiction). The Australian legislation is well worth consulting in this regard. Should the empowerment of the Attorney General's department or the Public Trustee's office in any province or territory be extended to the conferment upon that department or office of the power, following the hearing of representations and successive

¹⁶⁷ In *Re Stillman Estate*, *supra*, note 57, paras. 32-33, the Court drew attention to the difficulty of allocating problems as between ends and means, but noted that there are specific situations in which it matters whether the problem is one of ends or means.

¹⁶⁸ The legislation might confirm that the approval of a scheme does not prevent parties applying later for one or more revised schemes, if that proves necessary.

consultation, to approve at least less complex scheme applications in *lieu* of the courts? In this way the legislation would assist charities, as elsewhere in the Commonwealth, by cutting costs and avoiding the delays of the court process.

Legislation can usefully structure the procedure of the scheme making process. Who should undertake the application to the court or other approving body? Should there be a monitoring authority which would see that applications that need to be made are being made? Does the designated authority (court or other) approve of a scheme presented to the authority, with such variations, great or small, as the authority thinks appropriate? Or is a scheme outline to be submitted, and the content of the scheme be determined in one or more sessions of discussion with a master of the court or the empowered public officer?

As we have seen, when it is not possible or is wholly impracticable as of the gift taking effect to implement the purposes of the testator or other donor, case law requires the existence of a general charitable intent in the testator or donor before a *cy-près* scheme can be approved. If instead the purposes fail, for one or other legislatively described reason, Once the gift has taken effect and is operative, but purpose failure occurs, those applying for approval of a scheme are not required by the case law to establish the gift maker had a general charitable intent. Reforming Commonwealth jurisdictions are divided on what shall be done with a subsequent failure. The policy principally adopted is to retain the requirement; some jurisdictions have abolished it outright. Recent years have seen the adoption of a more relaxed retentionist position; as we have seen in New South Wales, a presumption is legislatively created that general charitable intent exists, and the burden of proof is thus switched to those who oppose the making of a scheme. This is an interesting attempt to meet the concern about honouring donor intent, as well as handle the problem of a paucity of evidence as to what that is that intent. Yet another innovation, at any time when purposes fail, is to invite the living and capacitated donor to determine whether the value of the gift as of the moment when that gift would have taken effect should be returned to the donor, or be applied *cy-près*.¹⁶⁹

The variety of approaches taken in the legislation to general charitable intent – understandable in itself - may exemplify an indecision throughout the common law jurisdictions as to what it is we are attempting to achieve in the twenty-first century with the character of our law of charity. Is it, as of old, a first concern for the intent of those who give? Or is it today the efficacy of subsidized private sector organizations¹⁷⁰ in the contribution they make to the social and economic structure of the modern Western democratic state? Both are significant concerns.

When clarifying and reforming legislation is on the statute book in such a number of easily referenced Commonwealth jurisdictions, and when what is needed by way of reform is not a demanding policy task, it is difficult to understand why within Canada such a difference of interpretation with regard to the inherent jurisdiction, as the Nova Scotia and Ontario judicial decisions demonstrate, would simply be left where it is. It is worth recalling that the issue in both cases was total return investment by each charitable trust. There is little that is more contemporary than this issue.

¹⁶⁹ Extension of this election to the personal representatives of the deceased donor's estate appears not to have won support.

¹⁷⁰ And the efficacy of tax deductible or tax credited gifts to such organizations.

Any legislative scheme making to rectify failure, obsolescence or inadequacy in a charity's documentation, or in the endowment trusts administered by charities, should be simply and shortly stated, easily invoked, and its design should be mindful of the burden of legal costs to the applying charity, donor or testator's estate. After all, it is worth remembering that we are concerned here with the gift of private resources by community minded persons for the public benefit. Even if 'tax planned', the altruism of such donors is increasingly an indispensable part of the society in which most of us wish to live.

**ASSESSING DEVELOPMENTS IN THE REGULATORY ENVIRONMENTS FOR
NONPROFIT ORGANIZATIONS IN JAPAN AND ENGLAND & WALES**

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ABSTRACT

This paper assesses the regulatory environments for non-profit organizations (NPOs) in Japan and England & Wales (E&W), offering insights into the differences in legislative support for NPO development in both countries. Following a review of recent NPO regulatory developments in Japan and E&W, we outline the major contemporary issues affecting NPOs and focus on the key challenges of: legislative reform, systems of regulation, accountability and third/public sector partnerships. The paper contributes to knowledge by highlighting the disparities in support for NPOs that are culturally-bounded. Also, we contribute to contemporary debate on the ability for NPOs to manage amidst a global climate of change and the possible return to the so-called 'age of austerity'.

INTRODUCTION

The nonprofit sectors in E&W, and Japan have long histories and have significant economic impact. Yet in other respects, especially regarding regulatory environments, the sectors could not be more different. On the one hand, the common law system used in E&W is respected for its flexibility and, in the case of charity law, its support for the protection and development of the sector. For example the Companies (Audit, Investigations and Community Enterprise) Act 2004 provides for the creation of a new legal form for nonprofit organizations (NPOs) established as social enterprises, i.e. the Community Interest Company. On the other hand, the legislative framework for Japanese nonprofits, based on a civil law tradition (Organizations Authorized by Special Laws Arising under Civil Code Article 34), has differed greatly in its treatment of new and existing nonprofit organizations. These variations cover forms of incorporation, tax exemptions, and systems of legal accountability. The rigidity of the civil law tradition in Japan, as well as political intractability, has created an environment where control over qualification for NPO status was highly centralized (Kawashima 2000). For example, Civil Codes in Japan can be thought as one book, made by articles. Under those articles arise some special Laws which, for example, recognize special organizations as Public Interest Legal Persons (PILPs). The

enactment of subsequent Acts is supposed to amend a particular article. In Japan, Article 34 of the Civil Code was the only one to regulate the authorization of nonprofits until recently. The enforcement of the three acts in December 2008 in effect abolished Article 34 of the Civil Code and all PILPs established under Article 34 can maintain their legal status for 5 years, after which time they must obtain legal status as one of the types of organizations recognized by the new laws. Traditionally, power over NPO incorporation and status resided with ministries using strict qualification criteria. The impact of this process has a direct impact on grassroots NPOs, restricted in their ability to compete with local Government agencies in key areas, or outside of their classified remit. This has been debilitating rather than supportive of the NPO sector – compared with E&W legislation that has typically been more accommodating over tax exemptions and with less bureaucracy related to incorporation, reporting and ministerial involvement. The common law framework in E&W has been capable of delivering a more rapid response to amending outdated laws, especially making them more applicable to changing operational conditions for NPOs.

In the last few years, however, Japan has gone through a period of NPO legal transition which partly amended the much-debated 1896 Civil Code that provided a nonprofit's legal basis. Interestingly, these changes in NPO legislation show that Japan emulates parts of the NPO regulatory environment in E&W. One crucial difference between the two sets of legislature concerns the nature of the competent authority that authorizes public interest status to nonprofits. Within the E&W framework, the Charity Commission decides whether a nascent NPO can and will provide public benefit, as well as clarify the terms upon which it can do so. 'Public benefit' is defined by the Charity Commission (2009:9) along two principles: the *identification* of benefits (clarity, related to charitable aims and balanced against 'harm'); and the delivery of benefit to a *defined 'public'* (appropriate to charitable aims, not restricted by geography or ability to pay any fees, not restricted by poverty and inconsequential to private benefits). This is a more certain explanation of the 'public benefit' term, and contrasts against the idea of public interest, which for the purpose of this article is considered as different from public benefit. In the United Kingdom, public interest is an ambiguous term that can be easily confused with public benefit, and charity laws as well as the Charity Commission focus on the latter term. The issue of public interest covers many aspects of public life and policy, and it is sometimes invoked in matters concerned exemption from identified regulations (e.g. The Public Interest Disclosure Act 1988). In other words, the Anglo-centric use of public benefit over public interest is intentional in charity law, simply because it allows for definable principles which alone apply to registered charities. The public interest is a broader matter which can, and also cannot apply to these organizations, and thus is unhelpful in understanding the impact and social benefit produced by charitable organizations.

This test does offer transparency and accountability to political actors and, importantly, the general public, so that registered charities operate in ways consistent with their stated objectives. In Japan, on the contrary, government bureaucrats have historically had the exclusive control in deciding what the public good was and which organizations were allowed to promote it. However, in April 2007, Japan's Cabinet Office established a Public Interest Corporation Commission (PICC), which is modeled on the Charity Commission for E&W (CCEW). Since launching in April, the PICC has been meeting weekly to discuss the various aspects of the new regulatory environment, focusing on how the regulations should be created consistently with the new law, what the requirements should be for public interest status, and how the authorization process will work. Under the new legal system which started in December 2008 Japanese

nonprofit organizations are no longer required to operate on the basis of authorization from the government ministry or agency with jurisdiction over their field of activities. Instead, the previous authorization system was replaced by a system whereby nonprofits seeking incorporation simply register with the Prime Minister's Cabinet Office or their local prefectural government if their activities take place solely within one prefecture. Up to 1998, when the new NPO Law was enforced, legally recognized NPOs in Japan were only of one type: Social Welfare Corporations. These couldn't be incorporated without government approval. The new NPO Law in 1998 was made to allow other types of nonprofits that had been working without legal recognition – and they were really a lot as the 1995 Kobe earthquake showed- to get legal status without facing the legal burden to which social welfare corporations were facing. Up to the NPO Law in 1998 the Japanese Nonprofit sector was regarded very small, almost inexistent compared to other developed countries. In addition to this, social welfare corporations were (and still are) often regarded in Japan to be part of the government sector because they are usually staffed by retired bureaucrats. This brought a sort of misunderstanding that in Japan the nonprofit sector was very small and co-opted by the state. With the enactment of the three laws in 2008, social welfare corporations became a 'transitional form of nonprofit' - they have been given time till 2013 to adjust their legal form. The new laws allow these organizations to be re-registered in the form of incorporated associations (*Ippan Shadan Hojins*) or incorporated foundations (*Ippan Zaidan Hojins*)

This paper contributes to contemporary NPO discourse in three areas. Firstly, it will analyze both regulatory environments in order to understand how both systems have developed and the components of each. Secondly, it will look into the challenges Japan is currently facing in adopting a new NPO regulatory environment modeled on the E&W NPO regulatory environment. Finally, it will attempt to predict the type of issues confronting the new Japanese system, based on experiences in E&W.

NONPROFITS IN ENGLAND AND WALES – THE COMMON LAW PERSPECTIVE

England and Wales are countries subject to common law, which means that “expositions or commentaries upon Statutes are resolutions of judges in courts of justice in judicial courses of proceeding, either related and reported in books or extant in judicial records, or in both, and therefore, being collected together, it is conceived to produce certainty.” (Holmes 1963). Kendall and Knapp (1997: 7) stated that in these two countries “whether or not an organization is deemed charitable in law depends on a huge corpus of accumulated case or judge-made law, and past court decisions”. The nonprofit sector is legally defined in terms of its most common functions and, according to Picarda (1977), the most common type of function attributed to the nonprofit sector is the promotion of what is *variously* termed the *public interest*. Kendall and Knapp (1997) pointed out that what is particular about English and Welsh nonprofits is not the organizational form which dominates the legal position, but their pursuit of charitable purposes which earn charitable status.

This legal tradition dates back to the Poor Laws, “a body of legislation for providing relief for the poor, including care for the aged, the sick, and infants and children, as well as work for the able-bodied through local parishes” (Anheier, 2005: 29). The Poor Laws included also *The 1601 Elizabethan Statute of Charitable Uses*, which provided a clear definition of charity by setting out a variety of purposes for which a charity could have been recognized as an organization involved in promoting the public interest. As noted by Hopkins (1987: 56), the variety of purposes set by the *Elizabethan Statute* included: “the relief of the aged, the disabled

and poor people... the maintenance of sick and maimed soldiers and mariners, schools of learning and scholars in universities... the carrying out of public works, such as the repair of bridges, ports, havens, causeways, churches, sea banks, and highways...relief, stock, or maintenance for houses of correction...marriages of poor maids...support aid and help of young tradesmen, handicraftsmen...relief or redemption of prisoners or captives...aid or ease of any poor inhabitant concerning payment of fifteen shillings, setting out of soldiers, and other taxes". In 1834 the reform of the Poor Laws was enacted, and the status of 'poor' was re-conceptualized as two sub-classes: 'the undeserving poor' (i.e. able-bodied) and 'the deserving poor'. This reform also specified that the State was mainly responsible for the former sub-class, and the charities were mainly responsible for the latter. In 1891, Lord McNaughten in *Commissioners for Special Purposes of the Income Tax v. Pemsel* restated the Preamble to the definition of charitable purposes contained in *The 1601 Elizabethan Statute* by stating that there were four principal types of charitable purposes: the relief of poverty, the advancement of education, the advancement of religion, *and other purposes beneficial to the community not coming under any of the first three kinds*. This was actually the classification which has been the one most accepted in English law for more than one hundred years. However in the 1940s and 1950s, and largely in response to the devastating attacks suffered during the Second World War, heavy reliance on private charity was replaced by a comprehensive system of public welfare services. The distinction between the State's responsibility for the undeserving poor and charities' responsibility for the deserving poor no longer applied. "Official concern was aroused, which was linked to the public desire that after the war things should be different and better. Two official enquires were established: *The Beveridge Committee*, whose recommendations led to the establishment of the National Health Services, a universal social security system, and a welfare service for the old and the handicapped; and *The Curtis Committee*, which reviewed child and family welfare services." (Social Services in Practice: A decade of Action, 1982:3). However, this scenario changed throughout the 1970s and 1980s when certain welfare reforms (which led to the well known New Public Management system) promoted the rolling-back of the State in the provision of social services and the transformation of voluntary organizations and charities into alternative services providers. However, throughout the 1990s a series of reports were issued by the State on the relationship between the government and the voluntary sector, culminating in the Deakin Report (The Deakin Commission 1996). In 2002, under this new climate of collaboration between the two sectors (Plowden 2003), the British Cabinet Office conducted a review on the basis of which the four categories of charitable purposes made in the *1891 Pemsel case* were expanded to thirteen purpose types (further clarified in s.2[2] of the Charities Act 2006):

- the prevention and relief of poverty;
- the advancement of education;
- the advancement of religion;
- the advancement of health (including the prevention and relief of sickness, disease or human suffering);
- social and community advancement (including the care, support, and protection of the aged, people with a disability, children and young people);
- the advancement of culture, arts and heritage;
- the advancement of amateur sport;
- the promotion of human rights, conflict resolution and reconciliation;
- the advancement of environment protection and improvement;
- the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

- the advancement of animal welfare
- the promotion of the efficiency of the armed forces of the Crown or of the police, fire and rescue services or ambulance services;
- other purposes currently recognised as charitable and any new charitable purposes which are similar to another charitable purpose.

These classifications, although more specific than the previous attempt, remain open to refinement. The definition of ‘other purposes currently recognized as charitable’, as with the four purposes listed in the Pemsel case, remains largely unspecified.

This vagueness of what constitutes *public benefit* goes hand in hand with an idea of flexibility in common law. The Charity Commission clearly stated that:

“The courts recognize that there is a need for a flexible legal framework by which new charitable purposes can be recognized in the light of changing social and economic circumstances...The courts have stressed that the law is not static and that the law must change as ideas about social values change. This has two implications: first, new objects and purposes not previously considered charitable may be held to be so; secondly, objects and purposes previously regarded as charitable may no longer be held to be charitable”

(RR1a-Needs for a flexible legal framework).

This obviously presents advantages and disadvantages: the common law framework in E&W “has a key strength in terms of its adaptability; its case law base means that ‘fossilization’ can be avoided by the creative use of analogies” (Kendall and Knapp, 1997: 7). At the same time, however, this notion of flexibility in common law justifies the claim that the nonprofit sector in these two countries is “not easy to specify with any real precision” (Salamon and Anheier, 1997: 17). Of the nonprofit sector in the United Kingdom, these scholars believe that in legal terms “the nonprofit sector is a bewilderingly confused set of institutions with poorly defined boundaries... there is no commonly accepted concept that captures the basic contours of the sector as a whole, and that spells out the defining components of the organizations which in the aggregate constitute the nonprofit sector.”(ibid: 41). The blurring of organizational boundaries within the NPO sector is compounded by the nascent engagement between Third and public sectors, i.e. procurement of public sector service contracts into NPOs in E&W (Carmel and Harlock 2008). Thus, the legislative body has a clear mandate to provide a more appropriate regulatory environment for NPOs in E&W that accommodates the challenges facing NPOs engaging in new areas of public life (Dunn and Riley 2004).

Within this regulatory environment which includes both elements of vagueness and flexibility, a charity to be legally recognized might assume one of these four juridical forms specified by the common law of E&W (Charities Act 2006): the company limited by guarantee, incorporated *as well as* unincorporated associations, trust, and industrial and provident society. Information about each of these types is given in the table below:

Table 1 : Types of non-governmental organizations with descriptions.

Type of non-governmental	Description
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entity	
Company limited by guarantee	A company limited by guarantee is a membership organization in which the members' liability is limited to some nominal amount such as £1. The membership can be quite large, or it can be limited to the trustees. A company limited by guarantee can be nonprofit in nature. It is a legal person. Companies House registers companies limited by guarantee.
Unincorporated association	An unincorporated association is a membership organization. (Usually, Charities and other NGOs commonly fall in this category, including most community associations, sports clubs, and social clubs). An unincorporated association is not a legal person. Members of the management committee are jointly and severally liable for the organisation's debts; officers or members may also be liable. Unincorporated associations are governed by a body of case law and not by statutes.
Trust	A trust is an entity created to hold and manage assets for the benefit of others. The trust must pursue a charitable purpose and is governed by trustees. A trust ordinarily is not a legal person. Under the Charities Act of 1992, however, the body of trustees can apply to the Charity Commission for a certificate of incorporation (Charities Act 1992, Art. 14 (1)). An incorporated body of trustees is a legal person, but without the usual corporate limitation on liability. Incorporation lets the trust perform particular functions - hold property, enter into contracts, and sue and be sued - in its own name rather than in the names of trustees.
Industrial and provident society	An industrial and provident society is a nonprofit corporate entity. It is a legal person. The structure is widely used for housing associations and cooperatives, as well as for some charitable organisations. Its principal advantage is that its governing law, the Industrial and Provident Act of 1965, is simpler than the law governing companies. Charitable Industrial and Provident societies are called exempt charities and cannot register as a charity with the Charity Commission.

Source: developed from the Charitable Commission's Official Website.

The CCEW is the legally constituted regulator and registrar for charities in E&W. The main role of the CCEW is to ensure that all registered charities conform with legal requirements, and are held accountable in the public interest. In so doing, the CCEW is pivotal to the ongoing efficacy of charities in public life, and is influential in promoting benchmarks for NPO accountability. Every charity must register with the CCEW if it has a permanent endowment (i.e. capital which cannot be spent like income), or if it has an annual gross income over £5000 per year, or if it has ratable occupation of any land or buildings - even if the local authority has agreed not to charge any rates (Charity Commission 2008c). Schedule 2 of the 1993 Act (re-stated in the Charities Act 2006) lists some charities, known as 'exempt charities', which are not required to register (*ibid.*).

Charities must not distribute profits as dividends or otherwise. Under charity law, all expenditure must further the organization's charitable purposes, although paid salaries for staff are an acceptable exclusion from this proviso (the powers to spend capital are covered in s.43 Charities Act 2006). The law does not specify a particular limit, but excessive salaries could lead to sanctions. All charities must report the number of employees whose salaries fall between particular ranges, £50-60,000 and £60-70,000, and so on. Trustees ordinarily cannot receive any benefit from the charity - including payment, services, and other benefits of measurable value - unless the charity's governing documents permit it. If the governing documents do not contain such a provision, the charity must seek authorization from the CCEW or the High Court of E&W to make such a transfer. Furthermore, trustees generally cannot either sell goods to or buy assets from the charity (Charity Commission 2008b).

One of the biggest advantages which a charity gets from registration is exemption from most forms of direct taxation. In E&W, charities do not pay tax on grants, donations, and similar sources of income. Charities are exempt from taxation on donations they receive from both corporations and individuals, including grants from foreign sources. Donations of cash by corporations or individuals to charities qualify for tax relief under the so-called "Gift Aid" scheme. Under this scheme, the charity can claim back the basic rate tax that the donor has paid on the income from which the gift was made. For example, if the charity receives £500, this is treated as having been made out of £600 income from which the donor has already paid £100 in tax. The charity can claim the £100 from the Inland Revenue. In addition, a donor who pays a higher-rate of tax can claim back higher-rate relief from the Inland Revenue, reducing the net cost of making the gift. Each donor must complete a simple Gift Aid Certificate. A single certificate can cover a series of donations. The charity is then able to reclaim the basic tax rate from the relevant Inland Revenue office. Donations of shares and land and buildings also benefit from tax relief. Charities pay no more than twenty percent of normal business rates on the buildings which they use and occupy to further their charitable purposes. In addition, some charitable outlay by businesses (for example, sponsorship payments) can be treated as allowable expenses of the business (if made wholly and exclusively for the purposes of the trade) and deducted when assessing the profits of the business for tax purposes (Charity Commission 2008a).

We can see that there is a well-established regulatory environment for NPOs in place in E&W, developed over a long time period and enhancing the effectiveness of NPOs due in large part to the flexibility of the common law legal system in place in these countries. Despite some of the noted difficulties inherent in this system, we now contrast this case with the systems in place for NPOs in Japan. In particular, we focus on two major discourses: firstly, how concerns

raised by academics and NPO practitioners over the intractability of Japanese NPO law highlight developmental issues for the Japanese NPO sector. Secondly we explain how Japanese legislative changes are being enacted through close transference of the benefits of the approach used in E&W.

THE REGULATORY ENVIRONMENT FOR NONPROFITS IN JAPAN

In contrast to the regulatory environment in E&W, Japan has a system of civil law and changes the way in which the nonprofit sector is understood by the general public. As Schwartz (2002: 212) recognized, typical Anglo-American assumptions about the viability of ‘civil society’ in Japan are often incorrect because “long-term trends are unquestionably positive...Increasing affluence and diversity have enhanced the ability of private groups to organize independent of the state and make demands upon it, resulting in a qualitatively different type of political interaction.” Similar to common law, civil law comprises two kinds of law: private and public law. The former regulates the rights and responsibilities of individuals and private legal persons, while the latter regulates the relations between individuals and the state, public agencies, and public law corporations (Anheier, 2005). This distinction is based on the basic assumption that “the state is a legal actor *sui generis* and in possession of its own legal subjectivity that requires laws and regulations qualitatively different from those addressing private individuals” (ibid:42).

Under Japanese civil law two types of organizations are recognized: *public interest corporations* and *private law associations*. In order to acquire one of those two legal forms, an organization needs to register under certain conditions described by the code. Lack of registration implies that the organization has no legal personality and can only be addressed as a matter of private law (Anheier, 2005). More importantly, as Pekkanen and Simon (2003:78 emphasis added) clarify *with* common law, the lack of legal personality means that unregistered organizations “cannot sign contracts or open bank accounts. This means, for example, that as a group they cannot hire staff, own property, sign lease agreements for office space, undertake joint projects with domestic government bodies, or even, on a mundane level, lease a photocopy machine”.

The Japanese nonprofit sector was first institutionalized with the enactment of the Civil Code of 1898. Its Article 34 defines the ‘legal persons acting in the public interest’ or *koeki hojin* as: “An association or foundation relating to rites, religion, charity, academic activities, arts and crafts, or otherwise relating to the public interest and not having for its object acquisition of profit may be made a legal person subject to the permission of the competent authorities” (Civil Code, art.34). The two classifications in this category are: incorporated foundations or *zaidan hojin*, and incorporated associations or *shadan hojin*. What differentiates these two types of *koeki hojin* is that the latter is formed around a group of members, while the former type is formed around an amount of money and usually does not have members.

Article 34 of the Civil Code concerning *koeki hojin* was the norm for defining non-profit organizations in Japan until 1946 (following the aftermath of the Second World War). Subsequently, Japan was in need of social assistance. New organizations started to flourish around the country, and some others, older ones which were yet to be regulated, began to be very useful. Within this context, the national government was forced to introduce laws which allowed these new, or relatively new, forms of organization to acquire a legal status as *zaidan hojin*. The first two groups that needed to be regulated were ‘religious organizations’ (*shukyo hojin*) and ‘educational corporations’ (*gakko hojin*). These were followed by ‘health care organizations’

(*iryō hojin*) and ‘social welfare corporations’ (*shai fukushi hojin*). They were regulated respectively by the following laws: the Religious Corporation Law, 1946; the Private School Law, 1949; the Medical Law, 1950; and the Social Welfare Services Law, 1951. Each of these prescribes conditions for approval or certification by the competent authorities for setting up a juridical person (see Pekkanen and Simon, 2003).

In 1923, Tokyo experienced the *Great Kanto Earthquake*, which “killed a hundred thousand people and destroyed 60 percent of the buildings in the city” (Hastings, 1995: 46). This precipitated the creation of public charitable trusts which were a kind of intermediate organization in that they had a membership, like *shadan hojin* but were formed around an amount of money (patrimony or endowment), like *zaidan hojin*. These organizations were regulated by the 1923 Trust Law which was expanded in 1977 with the addition of Article 66 allowing public charitable trusts to have a wide variety of public interest purposes and be regulated in the same way that *koeki hojin* were regulated by Article 34 of the Civil Code.

All these forms of organizations comprised what were legally understood as the ‘Legal Persons Acting in the Public Interest’ in Japan. However, according to Pekkanen and Simon (2003), there are certain difficulties with the way in which these organizations are regulated. The first problem encountered in Article 34 of the Civil Code, as well as in the special laws introduced in the post-war period, concerns the definition of *public benefit* (a problem encountered in the English and Welsh legal system and semantically different from public interest). Apart from the brief reference in Article 34 of the Civil Code to ‘organizations relating to rites, religion, charity, academic activities, arts and crafts, or otherwise relating to the public interest’ there is no definition of what ‘public interest’ is.

The state in Japan has been traditionally conceived not only as a legal actor *sui generis* (Anheier, 2005), but, as Knight (1996) said, it is historically understood to be a *moral entity*. This general understanding gives to the statutory bodies “a key role as the legitimator and regulator” of public interest activities (Osborne, 2003: 10). This leads to another problem with the Japanese public interest law, which Pekkanen and Simon (2003) named *administrative discretion*. According to them, the Civil Code “make challenges against denial of approval of an application quite difficult” and it “does not require that the reasons for rejection of the application be specified”. Furthermore, it “sets no limits within which an application must be considered” (81). In addition, for these public interest organizations to become legal entities, they must apply to and receive the approval of the competent minister, so if an organization intends to involve itself in a variety of activities which are related to the public interest, that organization is likely to receive the approval from more than one minister. The final problem associated with Civil Law regarding public interest organizations concerns capital requirement, referred to in the Civil Code as a ‘sound financial base’, which is again at the discretion of the minister(s) who give the approval (Pekkanen and Simon, 2003).

The regulatory environment described so far was the only one that regulated Japanese nonprofit organizations up to December 1998 when a very significant shift in political attitude resulting from the *Great Hanshin-Awaji Earthquake* of 1995, made possible the enactment of the ‘Special Nonprofit Activities Promotion Law’ otherwise known simply as the ‘NPO Law’. As it states in Article 10, the main purpose of the new NPO Law was to alleviate the legal difficulties which were encountered by the *koeki hojin* in the process of obtaining legal status under the previous law and free the registration process from administrative discretion in order to ensure the registration of all qualified organizations. Regarding the latter, according to Amenomori (1997), there were more than one million associations in Japan which, until the implementation

of this new law, were not allowed to attain legal status. Most notable among them were: civic groups (*shimin dantai*) which represent all forms of informal civic activity organizations, including those relating to environmental matters, civil and women's rights, peace initiatives, consumer rights, international exchanges of people, hobbies, mutual help and so on; neighborhood associations (*Chonakai*); children's associations (*kodomo-kai*); and seniors' clubs (*rojin-kai*). The new NPO Law shed light precisely on this segment of the nonprofit sector, known as special nonprofit corporations (SNC) or *tokutei hieiri hojin* as opposed to the *koeki hojin* regulated by Article 34 of the Civil Code. In order to make clear the distinction between these, we reproduce below a table taken from Pekkanen (2003) but with alterations designed to clarify the dates of the 'Governing Laws', which were unclear in the original because it did not differentiate between dates of enactment and dates of promulgation.

Table 2: Categories of legal entities which can be characterized as nonprofit organizations in Japan.

Legal entity	Governing law	Purpose of the entity	Permitting body & standard
<i>Incorporated associations</i>	Civil Code, Article 34 (1898);	Associations with the objective of worship, religion, charity, education, arts and crafts, and other activities in the public interest, and not for profit;	<i>Competent Minister</i> <i>(by permission)</i>
<i>Incorporated corporations</i>	Civil Code, Article 34 (1898);	Foundations with the objective of worship, religion, charity, education, arts and crafts, and other activities in the public interest, and not for profit;	<i>Competent Minister</i> <i>(by permission)</i>
<i>Social welfare corporations</i>	Social Welfare Business Law, Article 22 (1951);	Corporations established under the law with the objective of becoming social welfare businesses;	<i>Minister of Health and Welfare</i> <i>(by approval)</i>
<i>Educational corporations</i>	Private school Law, Article 3 (1949);	Corporations established under the law for the purpose of establishing a private school;	<i>Minister of education</i> <i>(by approval)</i>
<i>Religious corporations</i>	Religious Corporation Law, Article 4 (1946);	Corporations having the purpose of evangelizing, conducting religious rites, and educating and nurturing believers;	<i>Minister of education</i> <i>(by certification)</i>

<i>Medical corporations</i>	Medical Law, Article 39 (1950);	Associations or foundations whose objectives are to establish a hospital or clinic where doctors and dentists are regularly in attendance, or a facility for the health and welfare for the elderly;	<i>Minister of Health and welfare</i> <i>(by approval)</i>
<i>Public charitable trust</i>	Trust Law, Article 66 (1923- applied 1977);	Trusts with the objectives of worship, religion, charity, education, arts and crafts, and other purposes in the public interest;	<i>Competent minister</i> <i>(by permission)</i>
<i>Approved community based organizations</i>	Local Autonomy Law 260 (2) (1991);	Organizations formed by residents of a community;	<i>Mayor or town headperson</i> <i>(by notification)</i>
<i>Special nonprofit activities legal person</i>	Special Nonprofit Activities Promotion Law (1998); (<i>commonly known as NPO Law</i>)	Nonprofit entities whose activities include those in promotion of health, welfare, education, community development, arts, culture, sports, disaster relief, international cooperation, administration of organizations engaging in these activities, etc.	<i>Mayor or town headperson or Economic Planning Agency.</i> <i>(by certification)</i>

Source: Pekkanen, 2000 (reported again in Pekkanen, 2003).

Under the new legislation, power to approve incorporation status for nonprofits, previously reserved for central government ministries, was transferred to local authorities, thereby considerably accelerating the process. Indeed, local governments were now obligated to publicly announce the opening date of applications for nonprofit incorporation at least two months in advance, and to reach a decision with regard to every applicant within two months of the closing date for submissions. Furthermore, there was no requirement in the incorporation process concerning the holding of assets.

However, under the new law a *tokutei hieiri hojin* is also subject to numerous requirements. First of all, when applying for incorporation, the group must provide to the competent agency: 1) its articles of incorporation, 2) a list of officers, 3) a list of ten or more members, 4) a document to verify the purposes of the organization and non-affiliation with criminal organizations, 5) a prospectus, 6) a list of founders, and 7) minutes of a meeting that decided on incorporation, a list of assets, a document indicating the organization's fiscal year, operating plans and budget estimates for the year of incorporation and the following year. (NPO Law, article 2, 10, 28). The new NPO law specifies the activities in which the *tokutei hieiri hojin* can engage, but it also specifies that the nonprofit's main purpose of activities should be neither religious nor political and that the organization cannot make a profit for a certain individual, corporation, or other organization, even though it can engage in profit-making projects as long as the profit is

reinvested in its nonprofit activities (NPO Law, article 2). Every year, the incorporated nonprofit corporation is required to prepare, keep, and submit to the competent agency the following documents: an activities report, an inventory of assets, a balance sheet, a statement of revenue and expenditure, a list of officers, a document stating the names of all officers on the list that received remuneration, and a document stating the names and addresses of ten or more members.

However, there was one point that the NPO law did not address and that was the matter of tax exemption which had constituted a major obstacle for Japanese NPOs. In Japan the NPO process of acquiring legal entity status has always been different from that required to be exempt from tax. The latter requires specific authorization from the National Tax Administration/Ministry of Finance. Aware of such a gap, a little over two years after enactment of the NPO Law, the Japanese Diet passed a second landmark legislation affecting *tokutei hieiri hojin*. March 2001 saw the approval of the law amending in part the *Special Tax Measures Law*, becoming the first legislation to address the eligibility of incorporated nonprofits to receive tax-deductible donations. This brought about a dramatic increase in the number of organizations incorporated as *tokutei hieiri hojin*. In fact, at the end of April 2008 the nonprofits established under the 1998 Law numbered over thirty four-thousand.

Table 3: the main differences in tax treatment among nonprofit legal entities in Japan.

Legal entity	Tax law	Income Tax on revenue	Deduction of contributions
<i>Incorporated associations</i> <i>Incorporated corporations</i>	Corporation Tax Law, Article 4 and 7	The Law specifies 33 for-profit activities. For these activities, incorporated associations and incorporated foundations are taxed at a concessional rate of 27 percent. In addition, they are allowed to deduct up to 20 percent of income from profit-making activities if the funds are used to expand their core public interest activities. Passive income, such as interest, dividends, and investment income, is not subject to income tax if the income is related to the organization's nonprofit activities. They may be exempt from local taxes only if their main purpose is the establishment of a museum or the pursuit of studies.	They can qualify as a 'special public interest promoting corporation' (hereafter SPIPC) and under this status they can deduct : individual donations up to 25% of the annual income, corporation donations up to a ceiling (1,25% of income plus 0.125% of paid -in capital), inheritance taxes are totally deductible.

<p><i>Social welfare corporations</i> <i>Educational corporations</i> <i>Religious corporations</i></p>	<p>Corporation Tax Law, Article 4 and 7, But with some exceptions</p>	<p>They are generally subject to the tax benefits that apply to Incorporated Associations and Foundations but with a few different rules. For example, they can deduct the greater of 50 percent or 2 million yen of income earned from profit-making activities.</p>	<p>Social welfare corporations and Educational corporations are eligible for SPIPC so they can have deduction as the Incorporated Associations and foundations. On the other hand, religious and medical corporations are not eligible for SPIPC.</p>
<p><i>Medical corporations</i></p>	<p>Corporation Tax Law</p>	<p>Medical Corporations, by contrast, are taxed at the full corporate tax rate, except to the extent they receive medical fees as reimbursements from the social insurance system. An exception applies to “Special Medical Corporations” (<i>tokutei iryo hojin</i>), which the Ministry of Finance has certified as being especially in the public interest. They are taxed at 27 percent on profits and receive other minor tax benefits.</p>	
<p><i>Public charitable</i></p>		<p>They must pay corporate income tax on revenue from 33 specified for-profit activities. The tax rate on these activities is a</p>	<p>They used to be ineligible for SPIPC. The 2001 Tax Reforms allowed these organizations to obtain the same status. They must apply to the National Tax</p>

<i>trust</i> <i>Approved community based organizations</i> <i>Special nonprofit activities legal person</i>	They are not exempt	concessional one of 27 percent up to a total revenue of 8 million yen, and 30 percent above that threshold (See Articles 4 and 7 of the Corporation Tax Law). In addition, some of them are allowed to deduct up to 20 percent of income from profit-making activities if the funds are used to expand their core public interest activities.	Administration Office and satisfy a list of requirements, including demonstrating that they receive at least one-fifth of all revenues from qualifying contributions, with various limits on the amounts and sources necessary for contributions to be deemed as qualifying (NPO Law, article 46:2).
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Source: developed from: Pekkanen and Simon (2003), Yoshida (1999), Yamamoto (1998), Amenomori (1997), and Japan Civil Society Monitor issues 5- 6.

The new NPO Law turned out to be exclusively focused on facilitating the incorporation status for the millions of nonprofits which had sprung up since World War II (i.e. *tokutei hieiri hojin*), without concretely addressing the issue of how to reform the current public interest corporation system (*koeki hojin*) which covered roughly 25,000 of Japan's largest and most established nonprofits. Indeed, according to the White Paper on *koeki hojins* issued by the Ministry of Home Office and the Ministry of Internal Affairs and Communications (MIC), the median of income by *koeki hojins* is ¥59.27 million, 15 times bigger than that of the *tokutei hieiri hojins*, and the mean is 718.48 million, 32 times bigger than that of the *tokutei hieiri hojins*.

However, in June 2006 three new laws aimed at reforming the *koeki hojin* passed the Diet and from December 2008 a new regulatory environment for NPOs was enacted in Japan.

Despite their long history, *koeki hojins* have been often subject to two major criticisms by the general public: first, those organizations are often directed by retired bureaucrats who used to be responsible for supervision and oversight of the same organizations while they were public officials; second, those agencies are the ones who receive most consistent subsidies from the government not to conduct their missions but to pay high salaries to those retired bureaucrats as directors of *koeki hojins*.

Well-publicised reports and enquiries into fraudulent practices of some of these organizations at the turn of the 21st century revealed that the public opinion on *koeki hojins* was partly right. It was found that in some *koeki hojins* resource expenditure on the public good were not commensurate with the tax benefits they were receiving. The arrest in 2000 of a former ruling Liberal Democratic Party (LDP) lawmaker in a bribery scandal involving one of these foundations named KSD caused the loss of public trust in *koeki hojins*.

In March 2002 the Cabinet released the decision on the reform of the public interest corporation system. The real problem was to identify a new "competent authority" that would have authorized public interest status to *koeki hojins*. In 2004, a private sector advisory council convened by the minister of administrative reform recommended the creation of a new, independent entity to play this role, but the law eventually submitted by the government instead mandated the creation of a PICC or *koeki nintei touiinkai* under the jurisdiction of the Cabinet Office to serve as the competent authority. After years of consultation with experts, practitioners

and researchers from the private sector, three new law acts passed the Diet on June 2, 2006 and they were enforced in December 2008. In April 2007, before the new laws were enforced, the Cabinet Office established the PICC, which was modeled on the United Kingdom's Charity Commission. Seven members were appointed by the Prime Minister, upon obtaining the consent of both houses of the Diet, to serve on it, mostly on a part-time basis, and they are experts in diverse fields: law, accounting, business, health and welfare, arts and culture, and the nonprofit sector. The PICC has the following roles: a) judging whether an organization should be granted the status of public interest corporation; b) conducting follow-up checks and supervisions; c) dealing with complaints from public interest corporations; d) providing a detailed list of requirements to which organizations should attain to obtain the status as public interest corporation; e) giving advises and counseling to public interest corporations about their management. In addition to these functions, if the PICC authorizes an organization, it can enjoy full exemption from both corporate and deductible taxes.

The three acts which were enforced in December 2008 are: a) Act on General Incorporated Associations and General Incorporated Foundations; b) Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations; c) Act concerning Special Measures for enforcement of General Incorporated Associations/Foundations Act and Public Interest Incorporated Associations/Foundations. Under these three acts, the status of all *koeki hojins* was revoked and they were forced to re-register as new entities. The new laws allow these organizations to be re-registered in the form of incorporated associations (*Ippan Shadan Hojins*) or incorporated foundations (*Ippan Zaidan Hojins*). The former type can be established if there are at least two members and without any requirement for its financial base - this was a big improvement compared to the previous legislation which required *shadan hojins* at receive least ¥300,000 as annual membership fees. The latter type to be established under the new law needs only a net asset of at least ¥3 million compared to the ¥500 million required under the previous law.

In addition to existing *koeki hojins* re-registered as *Ippan Shadan* or *Ippan Zaidan Hojins*, any organization as long as it can claim not to operate in the pursuit of profit, regardless of whether it has a charitable purpose, is allowed to file for this legal designation and they will be recognized as "public interest incorporated associations" (*koeki shadan hojin*) or "public interest incorporated foundations" (*koeki zaidan hojin*). The government also set out a scheme in which the PICC can determine and judge general *Ippan Shadan* or *Ippan Zaidan Hojins* which satisfy definite requirements to become "public interest association corporations" (PIACs) or "public interest foundation corporations" (PIFCs) and become eligible to receive tax-deductible contributions from corporations and individuals just as some of the current public interest corporations already do. Before the enactment of the 2008 laws, acquiring public benefit status was not a separate procedure under Japanese law. This is no longer the case for associations and foundations. Under the Association and Foundation Law (i.e. Act 1 enforced in 2008), citizens can form an association or foundation even if the organization's activities are not in the public interest. The Law on Recognizing Organizations as Public Interest (i.e. Act 2 enforced in 2008) delineates a range of requirements for associations and foundations to be recognized as those of public interest. And, it is now the PICC which screens applications from organizations and authorizes or rejects the public interest status of each.

NPOs IN JAPAN: MAJOR CHALLENGES

Under new legislation, Japanese NPOs (especially that segment which was known in this country as the traditional partners of the state, i.e. *koeki hojins*) will face three major challenges:

1) The new legislation is giving *koeki hojins* a temporary special status as “special civil code corporations” or *tokurei minpo hojins* until 2013. During the five-year transition period, 2008-2013, *tokurei minpo hojins* have two options: a) to receive authorization under the new system as either PIACs or PIFCs skipping the process of registering first as “general incorporated associations” or “general incorporated foundations”. They can do this in their current form or after a merger with a similar organization; b) to forego preferential tax treatment by simply registering as general incorporated associations or foundations; however, they will then be required to pay out their endowments to other public interest corporations that manage to receive authorization. Organizations whose applications are rejected or that fail to apply will be forced to dissolve and terminate their operations at the end of the transition period: There cannot be authorization for ‘public interest corporation’ without charitable status under the new legislation.

2) The new regulatory environment specifies the types of activities for which organizations are entitled to receive public interest incorporation status. The list put together charitable and non-charitable activities. Under these circumstances, the main question is whether or not nonprofit organizations will face a crisis of legitimacy resulting in the public beginning to question whether they can maintain their historical image of delivering services in a trustworthy and reliable manner. To prevent such a criticism, the law imposes on those organizations new requirements, including those for governance and information disclosure. These new requirements provoked concern among organizations who are wary of the administrative burden of re-registering and restructuring their boards in order to meet those new requirements.

3) The members of the PICC have been carefully selected and include professionals from the business world, academia, and the nonprofit sector, but the secretariat that supports the commission is made up of 30 bureaucrats from different government ministries and agencies and their numbers will eventually rise to 70. Because the secretariat plays a critical role in directing the activities of the commission, compiling and translating the various opinions of the commission members into policy, and, most importantly, reporting to the government, the way that the secretariat is structured troubles some civil society experts. The secretariat plays a critical role in directing the activities of the commission. And the secretariat is made up of 30 bureaucrats from different government ministries and agencies and their numbers will eventually rise to 70. Civil society experts start to feel that it is the state through bureaucrats that will play the big role within the commission. In comparison, the Charity Commission for Charities in England and Wales (CCEW) has a different structure and composition. The Commission comprises eight main commissioners, one chair, and four directors drawn from legal, business, development and third sector backgrounds. The key, stated focus of the CCEW is to ensure legal efficacy and accountability, as well as supporting the public interest in charitable activities. The Commission’s composition, rather like the new Japanese regulator, helps to direct the accomplishment of these aims, in that it seeks to provide a level of cross-sector expertise to support the regulation of the sector and monitor the effectiveness of policy. However, the main difference with the Japanese PICC is the smaller size of the executive and advisory components

of the committee. This is advantageous because it allows for quicker regulatory enforcement and more effective channels of accountability. In principle, the larger PICC will compound some of the main challenges highlighted in this section: the reduction of bureaucracy and more supportive NPO regulation will be counter-acted by an unwieldy Commission, slower decision-making and problems ensuring accountability.

NPOs IN ENGLAND AND WALES: MAJOR CHALLENGES

Amid the background of economic recession, there are several significant challenges that NPOs in E&W face. The Cabinet Office, the department housing the Office of the Third Sector, recognizes the difficult environment for all NPOs in the current climate. As the current Minister for the Third Sector, Angela Smith noted: "It is clear to me that our priority at this time has to be to support the third sector during the recession. The decision does not alter the fact that the Government is committed to enabling campaigning in the third sector." (Plummer, 2009). As such, the importance of effective and supportive regulatory bodies and sector-orientated Government policies is clear. Two dominant issues for NPOs comprise funding and financial viability, and accountability in the public interest.

FUNDING AND FINANCIAL VIABILITY

The problem facing all types of NPOs is how to meet the financial needs of the organization within their legally-constituted boundaries. Many NPOs are strictly precluded from raising revenues through the primary purposes trading (which would disqualify their charitable status), albeit that they can trade as part of raising income towards their charitable aims, as the amended Charities Act (2006:ch.50 p75) states:

"... 'primary purpose trading', in relation to a charitable institution, means any trade carried on by the institution or a company connected with it where — (a) the trade is carried on in the course of the actual carrying out of a primary purpose of the institution; or (b) the work in connection with the trade is mainly carried out by beneficiaries of the institution."

The CCEW ensures this stipulation is upheld for registered charities in E&W, with the exception of social enterprises (SEs), which are often Community Interest Companies (CIC) and therefore not charities and instead regulated by CIC Regulator. SEs are types of NPO that have the ability to trade in goods and services for the purposes of creating social benefit for a defined community. These organizations have become a popular vehicle for individuals, or as spin-offs from existing organizations, to engage in trading activities to create economic as well as social benefit. SEs also side-step the traditional 'non-distribution' constraint placed on charities and non-trading nonprofits: SEs can distribute a proportion of accrued financial surplus to key stakeholders as a dividend. Legal forms for SE include industrial and provident society, companies limited by guarantee, mutual cooperative and CIC. Charities and non-trading NPOs can use SEs as trading-arms to pursue trading activity, which further 'blurs' the boundaries between types of NPO. Importantly, this means that legislation over the trading activities of charities *per se* is more difficult for the CCEW to enforce (Chew 2006; . Consequently, there are legal compliance and accountability issues at play for sector regulators and policy makers alike. This creates a legislative vacuum where *governance* of NPOs is inadequate given divergences

between current legislation and emergent public policy. Public policy needs to address the need for organizations with non-profit distribution constraints to pursue trading opportunities.

ACCOUNTABILITY IN THE PUBLIC INTEREST

The viability of the sector, especially as NPOs become embedded in public sector service delivery, hinges on how well the current interventionist legislative regime resolves conflicts arising from contemporary events (Dunn 2008). Indeed, as third sector organizations are integrated (via procurement) into public sector service delivery, regulation and policy should accommodate the two main of issues arising from this environment. Firstly the embeddedness of NPOs in public policy (especially via the Department of Health) presents regulatory problems, where there is crossover between law governing NPO activities, and legislation governing public sector contractor arrangements. In other words, how are NPOs working in the public sector to be recognized within the law: as third sector organizations, as public service contractors or both? The implications are notable for the contracting NPO because they must know *how* to comply with legislation, and be held accountable in the public interest. This is naturally complicated by the adjudications of the CCEW. As Dunn (2008) noted, greater clarity is required over the legal identities of organizations that straddle the third and public sectors.

Secondly there is the issue of public benefit, specifically whether NPOs continue to provide services which are “public in character” (Harding 2008:159). When NPO mission and objectives become aligned with those of public sector partners (e.g. the NHS), the same test of public benefit applies but under different circumstances (i.e. the public sector providing a new market environment for a NPO). Accordingly, the NPO in question could be subjected to regulatory review to ensure they continue to adhere to guiding principles, such as those set down by the charities or CIC regulators in E&W. The consequence of this is an added administrative burden both on NPOs and the regulator. In order to enhance NPO effectiveness, regulators need to provide a way of working within existing law (especially the Charities Act) the enables NPOs to meet their expected levels of accountability. Yet, NPOs face compliance, competitive pressures pulling and internal pressures pushing them into new market opportunities (i.e. public sector service delivery).

CONCLUSIONS

The legislative environments for NPOs present a number of commonly shared challenges. These common challenges comprise a number of areas related to both regulatory environments, specifically financial sustainability, the evolving nature of third and public sector relationships and tests of public benefit combined with administrative burdens on sector regulators.

NPOs experience on-going pressure to prove their financial stability amid changing market conditions, especially the restrictive conditions imposed on NPO legal forms that disbar them from trading to raise revenue. Organizations thus restricted from pursuing new methods for increasing revenues are at a significant disadvantage compared with other forms of NPO, particularly social enterprises. These organizations are constitutionally permitted to use entrepreneurship to directly benefit their defined social cause, eliminating the need to rely on voluntary donations. Legislative and regulative clarity is required to guide NPOs to better adopt appropriate legal structures to enhance their sustainability, rather than prove to be restrictive. Issues such as difference in emphasis on public *benefit* (in the context of E&W) and public *interest* (in Japan are also raised here). Indeed in both contexts, it remains vague quite what is

meant by NPOs complying with public benefit and/or public interest, and how this can be proven. This situation is not aided by regulatory environments that largely deal with matters such as incorporation, operations and issues like taxation in relation to nonprofits are devised to ensure better governance, rather than prescribing clear enough guidance on public benefit and public interest. The structure, mechanism of purpose compliance and monitoring of adherence to legal provisions are overseen by state machinery. But then, the question arises as to whether legislations can ensure good governance? Do the nonprofits follow the legal provisions both in letter and spirit? Much of the emphasis is on upward accountability (i.e. towards the State, proving public interest), rather than focusing on downward accountability (i.e. to the general public). As Lavoie and Wright made clear (2000, p.20) “A legal system cannot provide the rule of law if there is no generally accepted attitude about justice...The presence of a written Constitution will be of little help if the underlying cultural norms which maintain its legitimacy are dead”. The legislations create a formal framework and create a “bureaucracy, the predominant organizational model of 20th century, (that) favored highly uniform and routine process to deliver public value”. However, for the present complex problems and organizations a shift is needed from governing by hierarchy to governing by network. This should enable a better down flow of accountability to the general public because the act of implementing legislation is brought closer to recipients of NPO activity. Furthermore, forging closer involvement between the general public and NPOs creates a source a legitimating accountability upwards to political actors and regulators. Increasing transparency between sector participants and regulatory level actors is critical in both countries to make clearer the practice of public benefit.

The capability of NPO regulators to foster a culture of steady, progressive change for NPO is central to the reforms in both E&W and Japan. However, we can expect the administrative burden for both the CC and PICC to increase as they try to keep pace with the dynamic interactions between third and public sectors in both countries (problems foreseen in Palmer and Vinten 1998). Considering the current social (and political) prerogative to decrease reliance of State provision in public health and social care, while spinning-out opportunities for third sector collaboration presents new opportunities for NPOs. However, it is unclear how legislation will apply to NPOs engaging in such opportunities, whether they remain a distinctive part of the third sector (hence covered by charity and public interest corporation law), or a *de facto* aspect of the public sector. This grey area between sector boundaries requires greater clarification if the interests of TSOs are to be properly served by legislature: legal conformity and stakeholder legitimacy must converge in NPOs in cross-sector collaboration. In countries such as Japan, the degree of public credibility for NPOs can be raised if they are encouraged to engage more closely with the public sector. Indeed, the state in Japan has been traditionally conceived as moral entity and it is exactly this aspect that gives to the statutory bodies “a key role as the legitimator and regulator” of public activities (Osborne, 2003: 10).

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SUMMARY OF JUDGMENT IN CAPE HIGH COURT AGAINST THE NATIONAL LOTTERIES BOARD

BY PHIROSHAW CAMAY

INTRODUCTION

The applicants in the matter were two NGOs: The South African Education and Environment Project (SAEP) and the Claremont Methodist Church, Social Impact Ministry Sikhula Sonke (Sikhula Sonke). Between 2003 and 2009 SAEP submitted seven applications to the National Lotteries Board (NLB). Sikhula Sonke submitted two applications, one in 2007 and another in 2008. All the applications were not successful. The applicants complained of administrative bungling and sought redress under the Administration Justice Act (PAJA) a reconsideration of their various funding applications. The original application was lodged as urgent. Judge Madima decided in March 2010 that it was not urgent. In May 2010 the matter went before Judge Gamble. The Advocate for the NGOs asked that consideration be given only to 5 of the 9 applications with instructions and directions on how to deal with the applications given the history of alleged “institutional chaos” at the NLB.

THE JUDGMENT

The Court reviewed the statutory framework of the NLB and the Distribution Agencies (DAs). The Court determined that the DAs are committees within the NLB and their members are appointed by the Minister. The Court accepted that the consideration of applications for funding by the NLB and the DA’s constitutes “administrative action” as defined in Sect. 33 of PAJA and therefore the decisions are reviewable.

NLB’S JUSTIFICATION OF ITS CONDUCT

The NLB argued that it had the right to fix guidelines applicable to funding applications and if the applicants do not comply, that is the end of the application. The NLB also argued that in setting guidelines it –

- Required signed audited financial statements
- Required the same name throughout all the documents submitted: the registration certificate, Constitution, Articles and Memorandum of Association or Trust Deed ... The NLB claimed that in the Sikhula Sonke applications, there was a lack of consistency in the use of the names, also a set of unsigned financial statements had been submitted in the ninth application.

STATUS OF THE DA'S GUIDELINES

The Court decided to examine the stance adopted by the NLB that the applicants failed to comply with the criteria set out in the guidelines. The Court found that the DA had no statutory or regulatory power to make binding rules on applicants. The Court also then outlined several applicable principles or rules contained in the legislation which ensure that organisations applying for funds are credible and financially secure. The advocate for the NGOs argued that the guidelines cannot be interpreted as peremptory rules imposed by the DA's which have to be strictly obeyed. The advocate for the NLB argued that any decision made by the NLB would have to be rational and "that is the end of the matter". The Court was of the view that the guidelines issued by the DA are non-legislative "guiding policies" and therefore cannot override, amend or be in conflict with the relevant legislative provisions. The Court also expressed the view that such guidelines set a useful purpose to enable the DA's to apply some measure of uniformity when considering applications for funding. The Court also referred to the fact that the Minister as at that time had not published regulations dealing with the criteria. (**Note:** The Minister has done so subsequently in July 2010.)

CONSIDERATION OF THE UNSUCCESSFUL APPLICATIONS AUDITED FINANCIAL STATEMENTS

The NLB had rejected the seventh application as it had not been "audited". The financial statements had not been signed by an auditor but by a Fellow of the Institute of Management Accountants. The Court found that the NLB had applied this rule inconsistently.

INCONSISTENT NAME

Even the Advocate of the NLB conceded that this refusal was reviewable and the Court found that the NLB had clearly failed to apply its mind to this application.

MEMORANDUM AND ARTICLES OF ASSOCIATION

The applicant did not submit its Memorandum and Articles of Association but its Certificate of Incorporation and argued that the NLB caused confusion by the inarticulate description of the requisite supporting documents. Both the applicant and its legal representative had however submitted the Articles of Association. The NLB wanted to satisfy itself that the organisation actually had charitable purposes. The Court found that the applicant had supplied what was required and found that the NLB had committed three reviewable errors:

- a. an error of law
- b. it was swayed by irrelevant considerations
- c. it failed to consider other documentation filed.

ONLY ONE SET OF FINANCIALS FILED

The applicant claimed that two sets of financials had been submitted. The NLB claimed entirely different reasons for refusal that the financials were not signed by an independent accounting officer, that the name of the auditor was not specified and there was no proof of the accounting

officer's present registration. The Court quotes a judgment that these were second thoughts designed to remedy an otherwise factual error.

INSTITUTIONAL DISARRAY

The Court agreed with the Advocate for the NLB that there is not sufficient material before the court to conclude that institutional disarray exists at the NLB. The Court concluded however that it would fail in its duty if it did not express reservations about the functioning of the NLB. The Court further noted that organisations are being denied the opportunity to deliver social services, and it is unacceptable that they should wait long periods to access needy funds. The Court conceded that the NLB had to ensure that there were no fraudulent applications. But the Court failed to understand why in an era of transparency where fair and administrative action is entrenched why NGOs had to partake in a "game of administrative snakes and ladders".

THE ORDER

1. The Court set aside the NLB's refusal to fund three of the applications made to it.
2. Ordered the NLB to reconsider the three applications and make decisions within 60 days of the order.
3. That if the NLB declines to grant any of the applications, it should provide the unsuccessful application(s) with reasons for the refusal in the communication of its decision.
4. The NLB should bear the costs of this suit.
5. Leave to file an appeal has been granted by the High Court.

Postscript: The NLB filed papers on Friday 17 September 2010 to appeal the High Court's decision.