

**Charity Law Review and Civil Society:
Paving the Way from Alienation to Social Inclusion in
Northern Ireland;
the resonance with experience in
Australia**

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Introduction

This paper considers the opportunity, presented by the forthcoming charity law review in Northern Ireland, for adjusting the charity law framework so as to focus charitable activity on the circumstances typical of societies in conflict or experiencing transition. This opportunity is one for broadening the definition of 'charitable purpose' to include activities directed towards forestalling alienation and facilitating social inclusion. It would include rehabilitating the victims of social confrontation and developing related services of advocacy, mediation and reconciliation. It argues that a creative response to this opportunity could address the current social inclusion agenda and thereby contribute to the consolidation of civil society in this jurisdiction. It suggests that the experience in Northern Ireland, as an exemplar of a society in transition, has a resonance with the experience in Australia. It further suggests that it could also have a relevance for approaching the management of tensions within or between nations where people may otherwise come to perceive themselves as alienated.

This paper is in four parts. Part 1 explains the importance of charities in Northern Ireland and outlines the related legal framework within which they currently function. It provides some statistical information profiling the size, type and durability of charities and measuring the current significance of the charitable sector. It identifies the key issues that should arise for consideration in the imminent charity law review. Part 2 considers the meaning and relevance of 'civil society' in the conflict context of Northern Ireland and discusses some accompanying paradoxes. Part 3 deals with social inclusion and alienation in Northern Ireland. Part 4 concludes with a focus on the opportunity presented by the charity law review in Northern Ireland for an approach that could strategically pave the way from alienation to social inclusion. It draws from the recent charity law review in Australia, together with the experience of asylum seekers and indigenous people, to suggest that there are areas of resonance between the two jurisdictions. It

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further suggests that this analysis may offer useful lessons for nations and communities experiencing conflict or in transition where the consolidation of civil society is a primary objective.

Part 1

Charities and the Law in Northern Ireland

In this jurisdiction, information on the socio-economic contribution of charities is available in *The State of the Sector* a report compiled and published by the Northern Ireland Council for Voluntary Action (NICVA)². Information on the legal framework governing charities and their activities can be found in recent publications by the present writer³.

1.1 Charities and their activities

The voluntary and community sector makes an important contribution to the socio-economic fabric of life in Northern Ireland. The nature and extent of this contribution has been profiled by the Northern Ireland Voluntary and Community Sector (NICVA) in three successive editions of its almanac *The State of the Sector*, published in 1996, 1998 and in 2002.

The latest edition estimates that the sector comprises a total of 4,500 - 5,000 organisations, of which 27% are charities and only 15% of which are controlled by a parent body located outside the jurisdiction. It is difficult to estimate the part played by charities but it may not be overstating their significance to suggest that they constitute the cutting edge of the voluntary sector in this jurisdiction. The sector provides employment for almost 30,000 people or 4.5% of the total workforce in the jurisdiction. Collectively there are more people engaged in this sector than are employed in manufacturing, agriculture, finance or local government and it attracts the involvement of approximately 73,000 volunteers.

The report presents an interesting picture of the sector's finances. It suggests that at present the total asset base is valued at £750 million with liabilities standing at £207 million. It estimates that in 2000 - 2001 the total gross income for the sector was approximately £657 million while total expenditure reached £641 million. It notes that the organisations generating the highest income, in excess of £1 million, are mostly charities and that 55% of the sector's income is generated by 7% of the organisations. The largest source of income is government funding, in various forms, which accounts for a total of 37% of all income generated by the sector compared with 29% for the UK as a whole. Of that government sourced income, the most important form remains the direct

² See, also, *Future Funding for the Voluntary and Community Sector* (the 'Harbinson Report') and the Voluntary Activity Unit *Partners for Change: Government's Strategy for Support of the Voluntary and Community Sector 2001 - 04*, Belfast, Dept for Social Development, 2000.

³ See, for example, O'Halloran, K., & Cormacain, R., (2001), *Charity Law in Northern Ireland*, Dublin, Round Hall Sweet & Maxwell, hb, pp 680, ISBN 1-8500-212-5 and Cormacain, R., O'Halloran, K., & Williamson, A., (2001), *Charity Law Matters*, Belfast, Stationary Office, pb, pp 260, ISBN 0337 084998.

government grant but this has decreased in real terms by 25% since 1998. By way of contrast, the internally generated income of the sector accounts for only 4% of the total as opposed to the 23% self-generated by the UK sector as a whole. It is clear that the total of £97 million in earned income, particularly from the sale of goods and services, is now underpinning stability in the sector. This area of rapid growth now exceeds the income of £85million in grants paid by non-departmental/statutory agencies and the £75 million given in grants by charitable trusts.

The report also makes some interesting observations in relation to charitable giving. It notes that almost 80% of respondents gave regularly to charities; 11% more than the rest of the UK. Most of this, as elsewhere in the UK, goes to medical charities (39%) and to children and young people's charities (16%). Corporate giving, though growing in significance, accounts for a considerably smaller proportion of the sector's income (2%) than in the UK generally (5%).

The report identifies the main activities of the organisations comprising the sector as: education and training, 17%; economic/community development/employment, 11%; and advice/advocacy/information, 10%. The main beneficiaries are listed as: children/young people, 18%; older people, 12%; and people with disabilities/special needs, 12%. In the main the organisations chose the legal form either of an unincorporated association, 45% or a company limited by guarantee, 43%.

In short, this information paints a healthy and vibrant socio-economic picture of the voluntary and community sector in Northern Ireland; albeit one with a pronounced dependency on external financing, with a particular reliance upon government funding. To appreciate the relative significance of a thriving third sector it must be remembered that it this is occurring in the context of a failing private sector and a public sector which is disproportionately large compared with other UK jurisdictions. Thirty years of violence have witnessed the erosion of the traditional industrial and manufacturing foundations of the economy in Northern Ireland leaving it with the highest UK levels of poverty, poor housing and unemployment. Against that background the vitality of the third sector is important and the contribution made by charities, because of their size, assets and longevity, now constitute the engine that drives the sector.

1.2 The Charity law framework

Charity law is of crucial significance in its capacity to focus and facilitate charitable activity. Given the socio-economic importance of charities in this jurisdiction, as detailed above, the law is thereby also capable of framing the conditions for developing the sector and contributing to the sustained stability, cohesion and well-being of society as a whole. However, in this as in other societies if the legal framework is to have such an influence then it must at least relate to if not purposefully address the prevailing socio-economic determinants. After all the inward investment of resources and people necessary for economic growth is dependant upon the society concerned first being perceived as offering a safe and attractive environment for any such investment.

1.2.1 The Law

The statutory roots of charity law in Northern Ireland lie in the twin pieces of early 17th century legislation the Statute of Charitable Purposes 1601⁴ and its Irish counterpart the Statute of Pious Uses 1634⁵. The current statutory charity law framework is to be found in the Recreational Charities Act (NI) 1958, the Charities Act (NI) 1964 and the Charities (NI) Order 1987. Whereas all other jurisdictions in the UK have updated their charity law legislation, in Northern Ireland the main body of law remains as initially formulated from the template of the English Charities Act 1960. This is of particular significance as the law in Northern Ireland therefore predates the onset of the current period of civil unrest. It now neither relates to its own current and distinctive social context nor to the modernising developments of neighbouring UK jurisdictions that have brought the law there more closely into synch with contemporary social circumstances.

There is no true definition of 'charity' in any of the statutes that constitute the charity law framework in Northern Ireland. It has been left to the judiciary to provide the common law clarification and classification of charitable purposes. In particular Macnaghten LJ in the *Pemsel* case⁶ classified charitable purposes as being for either: the relief of poverty; the advancement of education; the advancement of religion; and certain other purposes which could not be accommodated within the first three. To be considered charitable in law a trust must fall into one of these four separate but not necessarily mutually exclusive categories.

In practice the question of whether the activities of an organisation can be defined as charitable will arise formally when it seeks exemption from liability to pay either taxes or rates on the grounds that it is a charity. Applications for the former are determined by the Inland Revenue in England and for the latter by the Valuation and Lands Agency in Northern Ireland.

The issue of whether an organisation is charitable can also arise informally. This may occur when it chooses to contact the Charities Branch for advice as to how to become constituted as a charity. All three government bodies act quite separately and independently of each other, unassisted by statutory definitions.

1.2.2 Issues for the Charity Law Review

The charity law framework identifies and gives effect to charitable purposes. These are derived from the *Pemsel* classification and have become established in the charity law of Northern Ireland in much the same way as in other common law jurisdictions. However, their appropriateness to the prevailing social circumstances of this jurisdiction is open to question. Some purposes currently denied recognition may be viewed as meriting charitable status e.g. lobbying for political change, generating community development, promoting self-help. Others now recognised as charitable should perhaps be denied that status viz. the presumption that gifts for the advancement of religion constitute a charitable purpose under the fourth *Pemsel* head. In fact this presumption may serve to harden underlying divisions in a society struggling to cope with a legacy of religious turmoil. Arguably, a more rigorous and objective application of the public benefit test to all gifts made under this head would be conducive to minimising social divisions and maximising the opportunities for establishing civil society.

⁴ 43 Eliz. 1 cap. 4.

⁵ 10 Car. 1 sess. 3 cap. 1.

⁶ See, *Income Tax Special Commissioners v Pemsel* [1891] AC 531.

As a charitable purpose has never been strictly defined in law, the courts in Northern Ireland in keeping with those of other common law jurisdictions have sought to interpret it in accordance with contemporary social conditions. However, Northern Ireland has been disadvantaged by the fact that the twin agencies for determining what constitutes a contemporary charitable purpose are based in England. In deciding such matters the Inland Revenue takes its lead from the rulings of the Charity Commission which are then transferred by proxy to determine similar issues in Northern Ireland. Because the Commission's writ does not run in Northern Ireland it has had no opportunity to consider the distinctive characteristics of contemporary social conditions in this jurisdiction. It can only take its lead from issues of social need that emerge in England and Wales. Therefore, purposes such as promoting peace and reconciliation and facilitating cross-community initiatives have never arisen for consideration by the Commission, cannot be recognised by the Inland Revenue and remain non-charitable.

1.2.2(i) Reform of Charitable Purposes

In order for a purpose to be legally construed as charitable it must demonstrably satisfy several distinct tests. In Northern Ireland this can be problematic.

(a) Exclusively Charitable

The rule that for a trust to be charitable its purposes must be confined exclusively to charitable purposes still applies to some extent in Northern Ireland. If a donor's gift includes both charitable and non-charitable purposes, and allows for the possibility of trustees using some or all of the gift for non-charitable purposes, then the courts will refuse to recognise it as charitable⁷. Legislative intervention, in the form of the Charitable Trusts (Validation Act) 1954 and s. 24 of the Charities Act (NI) 1964, attempted but failed to fully correct this judicial approach.

(b) Independent

A legal requirement, binding on all charities, is the obligation to preserve the integrity of their objects and maintain independent governance. This is becoming increasingly difficult as charities are forced to adapt to the 'contract culture' and compete for survival in the marketplace. In Northern Ireland there is a higher degree of government funding for charities than in the rest of the UK. This may be accompanied by a greater perceived restriction on the freedom of charities to criticise government policies.

(c) Non-Governmental

In Northern Ireland, the convergence between some large public service bodies and some traditional charities can be seen in their funding arrangements, activities, use of salaried professional staff etc. It is not always clear where public service ends and charitable activity begins. In some cases this has become fused as charities act to all intents and

⁷ See, for example, *Trustees of Cookstown Roman Catholic Church v. Commissioners of Inland Revenue* (1953) 34 TC 350 where a trust was created for the purposes of 'religious, educational and other parochial requirements' of Roman Catholics in Cookstown. Sheil J then noted that had the words 'and other parochial' been omitted it would have been possible to construe the uses as charitable. However, since 'parochial' purposes could be non-charitable, the entire trust was not a charitable trust. See, also, *Trustees of the Londonderry Presbyterian Church House v. Commissioners of Inland Revenue* (1946) NI 178 which dealt with the 'religious, moral, social and recreative life' of Presbyterians in Londonderry. It was held by the Court of Appeal that social and recreative life meant that the purposes were not exclusively charitable, and therefore it was not a charitable trust.

purposes as agents of government bodies undertaking service delivery roles shed by the latter.

(d) Non-Profit Distributing

The rule regarding non-profit distribution by a charity is broadly the same in Northern Ireland as elsewhere. There is no prohibition against making a profit provided the surplus proceeds are re-invested to further the charity's purposes⁸.

(e) Non-Political

As in other common law jurisdictions, the restraint on political activity by charities is a feature of charity law in Northern Ireland. An embargo on party political campaigning by charities, particularly in a jurisdiction where party politics canacerbate social division and violence, is clearly justifiable. However, because of the essentially polarised and polarising nature of politics in this jurisdiction, dominated as it is by the main religious groupings, a case can be made for permitting charities to act as advocates for the 'political' interests of those minority groups (the disabled, non-white racial groups, gay and lesbian groups etc) whose voice would otherwise not be readily heard. Arguably, the advantages in permitting charities, particularly those dedicated to serving the interests of socially excluded groups, to campaign, lobby or otherwise engage in political activities on their behalf may outweigh the disadvantages.

1.2.2(ii) Reform of Registration and Regulatory Systems

There are no formal systems in place to provide for the registration and regulatory control of charities in Northern Ireland as there is no legal requirement for such. Only if a charity has assumed the legal form of a registered company limited by guarantee will it then have to subscribe to a form of supervision and then only in relation to its functioning as a company not as a charity. The application of the SORP requirements require a degree of financial accountability from charitable companies, to which many unincorporated charities voluntarily subscribe, but these may otherwise be ignored by charities.

1.2.2(iii) Reform of Legal Criteria for Differentiating Charities from other NGOs

Many of the traditional distinctions between friendly societies, mutual benefit societies, co-operatives, charities, and others have become fudged. The authenticity, autonomy and appropriateness of these legal forms for not for profit bodies (nfps) in relation to the current activities of their respective organisations can no longer be assumed. The public benefit characteristic of charities is becoming increasingly difficult to distinguish from that of public service government bodies and is not always readily distinguished from the mutual benefit orientation of an Industrial and Provident Society or a Friendly Society; all of which may acquire charitable status. It may well be that new legislative provisions could now be usefully introduced to sharpen up the legal distinction between charities and other nfps and place all within a new coherent legal framework.

1.2.2(iv) Reform of Legal Structures for Charities

The form best suited to the functions of any charity depends very much on its particular blend of funding sources, charitable purposes and its ethos. In Northern Ireland the usual range of structures are available: government bodies, religious organisations and foundations as well as the more traditional trusts, unincorporated associations and incorporated charities are in evidence. Industrial and Provident Societies, Friendly Societies and corporations may also, though infrequently, provide structures for

⁸ See, for example, *Valuation Commissioner for Northern Ireland v. Lurgan Borough Council*[1968] NI 104, CA which concerned the levying of admission fees to the council's indoor swimming pool.

charitable activity. This range of legal vehicles is perhaps not best suited to facilitate the activities of modern charities. The difficulties tend to be in the area of legal personality: how best to ensure limited liability for trustees while also equipping the charity to enter into contractual relations with third parties? The present means of coping with this is to opt for incorporation, with the full burden of administrative and regulatory requirements and accompanying cost overheads, appropriate to commercial companies. A good case can be made for considering legislative provisions to introduce new vehicles such as Charitable Incorporated Organisations and/or to facilitate the use of foundations.

1.2.2(v) Reform of Fundraising Legislation

In Northern Ireland there is no specific legislative framework designed to govern fundraising for charitable purposes. Such statute law as exists is dated, addresses fundraising for charitable and other purposes and is mostly concerned to outline the authorising procedures rather than to identify and proscribe abuses. The law is to be found in a number of different statutes each dealing with fundraising in a particular setting. So, for example, house-to-house collections, street collections and small-scale local lotteries continue to be successful methods of fundraising and are each the subject of separate statutes. The legislative framework in Northern Ireland is now wholly insufficient and inappropriate to govern modern fundraising for charitable purposes; there is currently no legislation to address professional fundraising nor to regulate the relationship between charities and fundraisers, or between fundraisers and the public.

1.2.2(vi) Other Areas for Reform

The list of matters requiring reform is extensive. In addition to those mentioned above the following are also likely to arise for consideration: harmonisation of grounds for charitable exemption from tax and from rates; financial thresholds for cy-pres; trading; and the rules regarding disposal of assets on liquidation etc.

To briefly summarise, in Northern Ireland the charity law framework has proved to be demonstrably irrelevant to the manifestation of social need most urgently requiring charitable activity. There has been a marked lack of fit between charity law and the causes and effects of community violence. The imminent charity law review, therefore, will need to not only modernise the existing disparate body of law by correcting the technical defects listed above and long since remedied in the law of other UK jurisdictions, it will also have to specifically address matters relating to this lack of fit.

Part 2 Civil Society & Conflict in Northern Ireland

All law must relate to its contemporary social context. For charity law a major challenge is to ensure that the four *Pemsel* heads of charity (relief of poverty, advancement of religion, advancement of education and 'other' purposes not included within the first three) continue to address contemporary social circumstances in an effective, appropriate and sufficient manner. Arguably, to meet this challenge is also to put in place the core components of civil society. The *Pemsel* heads, insofar as they also address the distinctive social characteristics of Northern Ireland, can therefore be seen as outlining an agenda for promoting civil society in that jurisdiction.

2.1 Civil Society

For at least the last century, the concept of 'civil society' has been generating a burgeoning body of work. The varying interpretations placed upon it and its potential application to the problems facing governments in a range of different societies from eastern Europe to the US cannot be done justice in the present context⁹.

This hallmark of democracy is characterised by the free association of people in the pursuit of aims that complement the public benefit efforts of the State and result in a more coherent and engaged body politic. It is most usually envisaged as being channeled through a myriad of non-governmental bodies to influence, supplement or counter-balance the institutional infrastructure of the state. However, in addition to being seen in this tangible way as separate and distinct from state bodies, it also can be viewed as being represented by principles such as 'public benefit' and 'social inclusion'. These, when legitimated by law and embedded in policy, may then be infused through the institutional framework of society. Charity law has the capacity to contribute to the building of civil society by both means.

2.1.1 Charity Law as a Facilitative Framework for Civil Society

The central and distinguishing concern of charity law is to achieve 'public benefit' in the context of the four *Pemsel* heads of charity. Because charitable status is at all times dependent upon an ability to satisfy the 'public benefit' test, charities unlike other not-for-profit organisations are constantly engaged in activity which contributes to the general well-being of society. The distinctive underpinning principles of charity require charitable bodies to strive with a 'moral mission' to improve the circumstances of the socially disadvantaged¹⁰, to maintain their independence and to avoid accruing private profits in the process. By addressing issues of poverty, education, religion and matters such as health and social care, by shaping the law so that it more accurately fits modern social circumstances and facilitates related charitable activity, charities are closely involved in promoting civil society. In particular, the last and largest of the four *Pemsel* heads accommodates many of the more important hallmarks of a mature, caring and stable society such as hospitals, universities, museums and concert halls.

The rich diversity of organisational form allows charity the flexibility to permeate and grow within the socio-economic fabric of society. Charity also helps to sustain that fabric. It contributes to the alleviation of poverty and to the articulation of grievance and by so doing it reduces social tensions. It reinforces the standing of religion and education, provides the means for both to become more generally pervasive and to build their

⁹ See, for example: Cohen, L. and Arato, A. (1992), *Civil Society and Political Theory*, MIT Press Cambridge; Seligman, A.B. (1992), *The Idea of Civil Society*, Princeton, NJ, Princeton University Press. Halfpenny, P., (2000); and Trust, Charity and Civil Society, in F. Tonkiss, A. Passey, N. Fenton and L.C.Hems (eds.), *Trust and Civil Society*, Macmillan Press, London.

¹⁰ See, for example, Gardner, J., (2000), *The Virtue of Charity and its Foils* and Stevens, D., *Rescuing Charity*, both in Mitchell, C. and Moody, S.R. (eds.), *Foundations of Charity*, Hart Publishing, Oxford.

institutional infrastructures. As an employer, manager of assets and generator of income it fuels a significant sector of the economy. By mediating at such interfaces, charities contribute towards maintaining balance and equanimity in society¹¹. In short, a charitable activity is by definition a civil society activity.

2.2 Civil Society in the Conflict Context of Northern Ireland

Arguably, the failure of the law to address the causes and effects of inter-community violence which have been the determinants of socio-economic performance has not only impeded the more effective use of charitable resources but has also inhibited the development of a coherent civil society in Northern Ireland. Because charity law has been irrelevant to the particular social circumstances of this jurisdiction these have not attracted any sustained ameliorative or mediatory intervention. In fact the type of society most usually associated with this conflict context is the community which is dominated by para-military forces and conflict oriented towards neighbouring communities of a different religion. Because such communities are based on an illegitimate use of power they are clearly outside the civil society frame of reference.

However, over the past thirty years of violent unrest there have probably many different permutations of what, to its participants, may have seemed like civil society. Here are some examples.

2.2.1 Civil and Righteous

A distinct and familiar phenomenon, frequently apparent in the rhetoric of its representatives on our TV screens, has been the community that believes it is in the right, is behaving properly, with humanity and great restraint but by any objective assessment is manifestly subversive of civil society standards. The community may have a strong sense of identity, its citizens may exercise mutual care, share common values and concerns, and a large proportion are often active volunteers demonstrably engaged in the life of that community. It is also, however, likely to be politically polarised and confrontational in relation to neighbouring communities. Such communities, which are often Church oriented, are much more likely to lend assistance to those in need on the other side of the world than to those of a different religion on the other side of the street. Arguably, regardless of their compassionate conduct and their internal moral authority, such communities are fundamentally flawed as an expression of civil society because they are totally member benefit driven and their *raison d'etre* is based on opposition to others.

2.2.2 Civil but Disengaged

Again, there is the civil but inert society where a community operates as an integrated, coherent and caring entity but demonstrates a collective denial and lack of engagement in relation to the cause and effect of the conflict surrounding it. Many middle class communities in Northern Ireland have often and rightly been criticised for continuing to function in their own social bubbles insulated from any association with the problems affecting the larger community. Again such communities cannot claim the status of a

¹¹ This, of course, must be read subject to the caveat that a 'civil' society may not necessarily also be vibrant, creative and politically flexible. Charity can induce social conformity, have an overall anaesthetic effect and stultify the dynamics for social change ie the society will be civil but it may also be inert.

civil society because they are member benefit driven and can only function by denying the needs of their neighbours.

Clearly, then, a conflicted society cannot also be a civil society. However, the concept of civil society does now have a timely relevance for Northern Ireland. In addition to the thirty years of social unrest, the transformation of the economy and the impact of changes to the family are among the many other influences during that period which have done much to shake traditional social mores. In particular, there is now a need to overcome the trauma of decades of violence, re-build a sense of trust and common purpose within and between communities and restore the institutions, structures and processes of representative democracy if civil society is to take root. This will be facilitated by the charity law review if advantage is taken of the opportunity to re-interpret the public benefit principle so as to ensure that the *Pemsel* heads are aligned with the distinctive post-conflict needs of the communities in Northern Ireland.

2.2.3 Civil but Stratified by Interest

Increasingly in many modern western societies there are those who form affiliation groups which crosscut the usual geographical and social divides. In Northern Ireland and in other societies where locality based association is problematic, relationships can be quite satisfactorily initiated and maintained despite intervening distances. Most obviously, this is now frequently achieved through use of email. A rich sub-culture exists of people who do not share the same geographical or even social context but relate through a common interest via the internet. These communities are very real and self-sustaining and have a claim to be considered as legitimate expressions of civil society. A variation of this phenomenon now apparent in Northern Ireland is the dispersed church oriented community that strives to survive by commuting to church every Sunday. Many long established communities have been displaced by violence and the families scattered to different areas; perhaps most noticeably among the Protestant communities of north Belfast. However, such is their loyalty to the community church that they return every Sunday to keep alive the bonds that once constituted their community. Again, despite the strength of mutual allegiances and shared values, this is a hollow and ultimately false version of civil society. It is too attenuated to offer its members the opportunity to build authentic relationships of depth and reciprocity.

To briefly summarise. The concept of 'civil society' has a lot to offer Northern Ireland. At present, however, the reality is that a legacy of thirty years of violence has left this jurisdiction with a fragmented patchwork of polarised inward looking communities. There is some way to go before they can sufficiently overcome defensive self-interest concerns and achieve the reciprocal tolerance and understanding necessary to begin building a coherent and cohesive civil society.

Part 3 Alienation & Social Inclusion in Northern Ireland

Alienation¹² and social inclusion are different points on a continuum that ends with civil society. Only by distinguishing between the two and recognising which most accurately represents current circumstances can we determine whether our direction of travel along the continuum is towards or away from civil society.

3.1 Alienation: the Experience in Northern Ireland

This jurisdiction comprises a patchwork of communities in each of which two sets of people of different and frequently opposing religious/cultural affiliations have traditionally competed for social advantage in terms of opportunities for accessing best jobs, housing, schools etc. In some communities - most notably the Falls road and the Shankill road areas in Belfast - the competition was resolved by the success of one group (Catholic and Protestant, respectively) to the virtual total exclusion of the other. Ultimately, the civil unrest in this jurisdiction can be traced back to the absence of any social inclusion policy capable of arresting the growing estrangement of minority groups from effective representation within their immediate social infrastructure together with the weakening of links with their respective traditional cultural supports. As a growing proportion in each minority felt itself becoming increasingly marginalised, that minority then came to perceive itself as alienated from and by the institutions of the State. Once the situation had deteriorated to the point where conflict had broken out then intervention by security forces rather than by charities became inevitable. However, this paper argues that before or after such a breakdown, there is room for a mediatory role for charities.

3.1.1 The Catholic Minority and the Challenge of Nationalism

For some in the Catholic minority in Northern Ireland, the governing UK political framework is a redundant colonial legacy and they have nationalist aspirations to see the island re-united as an Irish 32 county republic ruled from Dublin. Many, perhaps most Catholics, either do not share this aspiration or have simply lost interest in the issue. Nevertheless by the early 1960s, most Catholics shared a common sense of social exclusion due to blatant discrimination by Protestant controlled local government bodies in their management of such matters as access to public housing, employment opportunities and in the organising of electoral wards.

The role of institutions such as the police and the army, usually regarded as inspiring community confidence and security in other countries, were viewed with distrust and often treated with open hostility by many Catholics in Northern Ireland. Further, decades of submissive hopelessness may have served to distance parts of the Catholic community from the formal institutions which play an important role in any society, particularly one where unemployment and associated poverty have an enduring hold. Access, for example, to state social welfare, housing and health agencies required a psychological concession to the State apparatus which many may have felt unable to make. The role of

¹² See, further, O'Halloran, K., 'Charity law and alienation in Northern Ireland: the findings of a research project; and the resonance between events in New York and Belfast', *International Journal of Not-for-Profit Law*, ICNL, Washington, USA, vol. 4, issue 2/3, pp 1 - 24, (2002).
<http://www.icnl.org/journal/vol4iss23/ohalloran/htm>

the Churches, which attract a presumption of charitable status, and which control the resources, activities and orientation of a large proportion of Northern Ireland's charities, in practice tends to provide for member benefit rather than cross-community benefit and thereby accentuates community divisions. In short, those institutions, regarded as contributing to civic cohesion and community security in other societies, have here been treated with resentment or suspicion by a large proportion of the Catholic minority. This minority group was alienated from the State at least in the sense that they felt that its institutions did not "belong to them", did not represent their interests, did not employ them and did not respond to their needs¹³. For some this bred a sense of oppression that they were subject to a State infrastructure, run for the benefit of others, which treated them as "outsiders"; this was bitterly resented.

In the absence of a swift and radical political redress of legitimate grievance, a small minority of Catholics subscribed to a nationalist agenda and to supporting the use of violence to challenge the authority of the State. As the pattern of violence became established, followed by political initiatives considered too weak and too late, a situation developed where a growing proportion of the Catholic minority gave its allegiance to the nationalist agenda. That agenda was underpinned by community based self-help networks which, as they grew stronger, more independent and more confidently self-reliant, also became more assertive with regard to their perception of rights, justice and equality.

3.1.2 The Protestant Majority and Coping with Change

More recently, the pattern of violence has come to be associated with the Protestant majority and its problems in coping with change. The very real political concessions made to Catholics coupled with demographic trends in their favour and an increase in their social profile left some Protestant communities feeling threatened. This has been particularly the case in parts of north Belfast, in rural Fermanagh and in the city of Derry. In these areas residual pockets of the Protestant population found themselves increasingly isolated and socially displaced by Catholics. Again, the failure by the State to affirm the worth and cultural identity of such communities and to offer a vision of a secure sustainable future allowed them to become steadily more marginalised. Again the experience of social triggered a drift towards alienation accompanied by violence.

3.1.3 The Potential Relevance of Charity Law

Charitable activity, as defined by more relevant charity law provisions, could have a pre-and/or a post-conflict relevance to the social circumstances in Northern Ireland. In either case, the causes of alienation could be addressed by a charity law that, while being effective and appropriate, is also sufficient to accommodate the particular tensions in this society. Such a law would need to be sensitively attuned to the conditions which more generally indicate the need for charitable intervention to prevent or to remedy the effects of alienation: poverty, lack of empowerment, prevalent unemployment, poor or inaccessible housing, health and social care services and a general lack of opportunities. In Northern Ireland, this would also mean, imposing a more rigorous public benefit test

¹³ For a comparable situation, see, *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999) 169 D.I.R. (4th) 34, SC for a case where a minority group established to provide mutual support for immigrant women failed to gain charitable status because their purposes could be construed as permitting political rather than exclusively educational activities.

on all organisations seeking charitable status for activities which might tend towards reinforcing existing community divisions, for example in the areas of education, training and employment; and specifically on gifts to and activities of religious organisations. As a corollary, recognition and additional incentives should be given particularly to purposes which serve to bridge divisions; for example, schemes to provide for integrated schools, mixed housing estates, cross-community schemes for urban regeneration and the alleviation of unemployment. In the latter context, the present definition of charitable purposes needs to be broadened to allow for community based groups, acting in partnership with business interests, to establish training courses offering skill development and job placement opportunities.

This could be done hand-in-hand with the encouragement of charitable activity that nurtures cross-community respect for cultural heritage. It would also be appropriate to remove the restrictions on assertive advocacy, on lobbying for political change and on the forming of self-help groups as incompatible with charitable status. The more that can be done to assist minority groups to articulate their sense of grievance the greater the likelihood that a drift towards alienation can be forestalled.

To briefly summarise. It is axiomatic that any review designed to improve the fit between charity law and the contemporary and particular patterns of social need in any jurisdiction must thereby also promote the development of civil society. In a jurisdiction such as Northern Ireland, whether at a pre or post conflict phase, such a review must also address those factors which by promoting social inclusion have the capacity to forestall alienation and possible violence.

Part 4

Charity Law and the Route from Alienation to Social Inclusion in Northern Ireland and Australia: the CVAS/CPNS Research Project

Every modern western society is currently struggling to formulate and manage its indigenous social inclusion agenda. For each this priority is compounded by the need to simultaneously respond to the social exclusion agenda of other nations; currently most graphically illustrated in the so-called 'asylum seekers' phenomenon.

Australia and Northern Ireland have in common a growing awareness that their social inclusion agenda must address the fact that their societies contain culturally estranged groups which perceive themselves as threatened and to some degree alienated. Both, to that extent, can be seen as societies in transition with some way to go before they can achieve a coherent, cohesive and sustainable civil society. Both are also now engaged in charity law reviews. Because of this timely pattern of coincidences, the Centre for Voluntary Action Studies in Northern Ireland and the Centre for Philanthropy and Nonprofit Studies in Queensland Australia are about to embark on a joint project to explore similarities in the current lack of fit between charity law and the distinctive social inclusion agenda of both jurisdictions. This project is at a very preliminary stage and will continue through until at least the autumn of 2003.

4.1 The CVAS/CPNS Research Project

Title:

'Philanthropy, the law and social inclusion in Northern Ireland & Australia: a comparative analysis of the current strengths and weaknesses of charity law as a means of promoting social inclusion and forestalling alienation'.

Introduction:

In Northern Ireland, there is now much concern about how best to ensure that a very divided society, in which a significant sector has for decades felt itself alienated from government and the formal institutions of the State, can be induced to build a common reserve of trust and social capital as a prerequisite for engagement in democratic politics. At the same time the UN reports that there has been a rise in the number of those suffering from poverty and a widening of the gap between the rich and the poor. Increasing, also, are reasons to be concerned for the problems suffered by those disadvantaged by a social perception of inadequacy due to disability, race, age, gender etc. There is a growing awareness that those such as the disabled, the travelling community, the gay and lesbian community and other minorities belonging, for example, to non-white racial groups - particularly those who are 'asylum seekers' - are in danger of becoming ever more socially excluded in this jurisdiction. A primary research question, therefore, is - How can charity law be used to generate, promote and channel philanthropic effort so that it addresses the more salient social inclusion issues?

In Australia, there is reason to suspect that the above instances of social exclusion have a current resonance and perhaps provide a prompt for similar research. For example, the poverty and social marginalisation of aboriginals and the position of 'asylum seekers' offer relevant material to explore some interesting parallels between both jurisdictions. In both jurisdictions the philanthropic response does not quite match the nature and extent of the social need. For both it is relevant to ask the question - what sort of adjustments to the law are necessary to facilitate a better fit between philanthropy and the needs of specific socially excluded groups?

Rationale:

In Northern Ireland, the Assembly is preparing to launch a charity law review process intended to lead to legislative reform of the legal framework for charitable activity. This, the first major re-framing of the law since before the outbreak of the present period of civil unrest, will provide a window of opportunity to address the legacy of community alienation and the particular characteristics of social inclusion this jurisdiction. In Australia, a charity law review process has just been concluded and following a period of consultation on its recommendations, a new legislative framework for charities and charitable activity is anticipated. The experience of this jurisdiction in responding to its legacy of community alienation specifically in relation to its treatment of the native aboriginal community and also as regards its efforts to assimilate the very many immigrant groups of different ethnic origins is instructive. How the distinctive characteristics of Australia's social inclusion agenda are addressed in its new charity law framework may offer a useful model for other nations.

A comparative analysis between Australia and Northern Ireland regarding the correlation between charity law and social inclusion provides an opportunity to examine the strengths and weaknesses of charity law as a means of promoting social inclusion and thereby either forestalling alienation or at

least ameliorating its effects. The working hypothesis is that the study will highlight the distinctive significance of a lack of fit between the legal framework and the needs of communities which perceive themselves as alienated from the mainstream institutions of society. It is suggested that the N Ireland experience may carry important lessons for other nations with communities in a pre or post conflict phase or in transition. These lessons may also be applicable between nations on a global scale.

Philanthropy rests on a re-distribution of resources in favour of those in need. The basis for any such differential distribution is of central importance to the growth of philanthropy in any nation. The grounds and means for selection and de-selection, the preferential weighting given to some groups over others, the choice of resource and ease of access to it are all crucial aspects of how philanthropy operates in practice wherever the location.

This project proceeds from the premise that the parameters for a differential distribution in philanthropic resources to those in need is set by the law; not exclusively charity law (equality legislation, for example, is also very influential), but this provides the most directly relevant legal framework. By examining charity law, and related practice, against the needs of specific socially excluded groups we can reveal the points at which the philanthropic effort is being facilitated or impeded by that law. Therefore, this project will identify those socially excluded groups in each jurisdiction which either are already alienated or are in danger of becoming so. It will then examine their needs against the provisions of their respective charity law framework and explore what legislative adjustments could be made to facilitate appropriate philanthropic activity likely to forestall or ameliorate their alienation.

Aims & objectives:

The broad aim of this project is to identify those strengths and weaknesses in the legal framework which determine how philanthropy is addressing specific social inclusion issues. This aim is given effect by the following objectives:

- to identify the relevant legislative provisions and associated case law which determine the differential distribution of philanthropic resources;
- to identify how and why the needs of specific socially excluded groups are not currently being facilitated by the present legal framework; and
- to identify the changes to the law that need to be made to ensure a better fit between philanthropy and the social inclusion agenda.

Methodology:

This project draws from the one completed by CVAS in June 2001 and written up in *Charity Law Matters*. The methodological approach and research instruments developed for the CVAS project provide a template for this one. It may be that time and distance constraints will force a tight and specific focus. For example, the range of possible target group might in practice be restricted to aboriginals. The indices of effective philanthropy might be reduced to examining the use of funds for promoting training for employment, urban/rural regeneration and/or advocacy.

Management:

Responsibility for managing this project through to completion rests with K. O'Halloran who is accountable to the Centre Directors through progress reports at agreed intervals. It may well be that additional resources, such as the availability of a student or research assistant will be necessary to support this project.

Work Plan:

The project consists of five phases: four replicated in each jurisdiction, some of the content of which will run concurrently; and a final phase consisting of a comparative analysis of the findings in each jurisdiction and an evaluation of the broader implications arising for other societies in transition.

Stage 1: The Law

This phase will provide:

- an account of the relevant provisions of the charity law framework;
- an account of significant case law;
- a map of the relevant government bodies with statutory responsibility for administration, regulation and decision-making in relation to philanthropy; and
- an assessment of the law currently governing philanthropy in relation to the socially excluded.

This part of the study will provide a full statement and assessment of the actual legal framework for philanthropy as it relates to the social inclusion agenda.

Stage 2: The Social Inclusion Agenda

This phase will:

- provide a definition and statistical picture of those marginalised groups constituting the social inclusion agenda;
- identify specific group/s providing a representative sample of social inclusion; and
- administer a questionnaire survey to a sample of such groups to establish their perception of how philanthropy is or is not addressing their needs.

In this phase, face-to-face interviews will be undertaken to sample opinion in the targeted marginalised groups. This part of the study will provide both an objective overview of the social inclusion agenda and a subjective view of the relevance of philanthropy as perceived by a sample of the socially excluded.

Stage 3: The Philanthropists

This phase will:

- provide a statistical overview, of the philanthropic bodies with a brief for social inclusion;
- identify a sample of CEOs from such bodies; and
- administer a questionnaire survey to a sample of such CEOs to establish both the nature and extent of the resources they deploy for the benefit of the targeted groups and their perception of how the law assists or obstructs their capacity to do so.

This phase will be conducted using a questionnaire administered either by telephone or by post. It will provide both a factual perspective on how philanthropy is currently addressing the social inclusion agenda and will identify specific legal problems in relation to the targeted groups.

Stage 4: The Fit Between Law, Philanthropy and Social Inclusion

This phase will:

- collate the data;
- identify the most significant findings; and
- evaluate the significance of the findings for the correlation between charity law, philanthropy and the social inclusion agenda.

Stage 5: The Comparative Analysis of Research Findings in Northern Ireland and Australia

This phase will:

- identify and examine the locus standi of similar target groups in each jurisdictions e.g. aboriginals and travellers, 'asylum seekers' and the disabled;

- identify areas of commonality and difference in the ways in which the law provides for certain relevant functions e.g. advocacy, training and the regeneration of communities; and
- identify specific ways in which changes in law could facilitate the type of philanthropic intervention capable of promoting social inclusion and thereby forestalling alienation.

1.1.4 Timescale

The project will run for the 2 year duration of the Meyer Foundation Principal Fellow appointment but with only short periods (6weeks per year) of 'on-site' availability in Australia.

Conclusion

The central argument in this Paper is that the mediatory role of charities, underpinned by their resources and knowledge of their constituency of social disadvantage, facilitated by an appropriate charity law framework, has the potential to address the causes of social exclusion and thereby forestall alienation. In pre-and/or post conflict situations this mediatory role could be crucial in promoting tolerance, understanding and reconciliation. Clearly, social inclusion and alienation can apply both globally to relationships between privileged and disadvantaged societies and locally to the relationships between such groups within any one society. Therefore, an appropriate legal framework has a strategic potential to focus charitable activity so as to further the attainment of civil society not only in relation to societies in transition but also more globally.

It may be the case that by examining and comparing the fit between charity law and the circumstances of socially disadvantaged minority groups in Northern Ireland and Australia we can gain a broader understanding about how the law might be adjusted so as to permit the type of mediatory intervention necessary to prevent the drift from social exclusion to alienation whether this occurs in a regional, national or international context.