Discriminatory Charity

Adam Parachin
Faculty of Law
University of Western Ontario
aparachi@uwo.ca

The Dynamic Nature of “Charity”

- “charity” is a dynamic and continually evolving institution

- we normally think about this in terms of “charity” **expanding** to include new purposes

- but evolution simply connotes a shifting boundary

- “charity” can expand…**and** **contract**

  – ebbs and flows (not just flows)

The Dynamic Nature of "Charity"

National Anti-Vivisection v. *IRC* [1948] 1 A.C. 31

- Lord Simonds famously observed:

> "…purpose regarded in one age as charitable may in another be regarded differently."

Research Question:

What role, if any, should public law equality norms play in shaping the evolving boundaries of legal charity?

Should constitutional equality jurisprudence limit not only state action but also the range of institutions that can qualify (or continue to qualify) as charities?

Why This Topic?

- Existing case law implies that public law is relevant to identifying the boundaries of legal charity

Canada Trust Co. v. OHRC

(1990) 69 D.L.R. (4th) 321 (Ont. C.A.)

- 1923 inter vivos scholarship fund with overtly discriminatory provisions

  > WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:

- Scholarship eligibility defined as follows:

  > [A] student or pupil to be eligible for a Scholarship shall be a **British subject** of the **White Race** and of the **Christian Religion** in its **Protestant** form…who, **without financial assistance**, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned.

- no more than 25% of annual scholarships could be awarded to females

Canada Trust Co. v. OHRC

(1990) 69 D.L.R. (4th) 321 (Ont. C.A.)

- Ont C.A. struck the discriminatory provisions:

  > Clearly this is a charitable trust which is void on the ground of public policy to the extent that it discriminates on grounds of race (colour, nationality, ethnic origin), religion and sex.

- Sources cited by Ont C.A.:
  - Constitutional law
  - Human rights legislation
  - International human rights treaties
  - Etc

Bob Jones University v. United States

461 U.S. 574 (1983)

- U.S.S.C. held against charitability of schools with racially discriminatory admissions policies
- Racial discrimination is against public policy and thus non-charitable
- Sources cited by U.S.S.C.:
  - Constitutional protections against discrimination
  - Civil rights legislation
  - Etc

Income Tax Reform:

Subsection 149.1(6.21)

- *Civil Marriage Act* enacted an amendment to the *Income Tax Act*

- Subs. 149.1(6.21): religious charity's exercise of freedom of religion in relation to same-sex marriage is not a basis on which charitable registration may be revoked

My Point:

- My claim is not that discriminatory charity should be unregulated

- My claim is simply that the problem is more difficult than it is sometimes made out to be

The Historical Approach

- Concerns over discriminatory charity evident in early cases
- BUT → Courts avoided squarely addressing the problem
- Discriminatory provisions struck on other grounds

The Historical Approach

Re Lysaght [1966] Ch. 191

- Medical scholarships restricted to male students not of Jewish or Roman Catholic faith
- Named trustee – College of Surgeons – refused to administer fund due to exclusion of Jews and Roman Catholics
- Court characterized refusal as an “impossibility”
- *Cy-prés* jurisdiction used to remove religious restrictions

The Historical Approach

Re Dominion Students Trust [1947] 1 Ch. 183.

- student hostel for male students “of European origin”
- Court concluded the ethnic restriction rendered the fund impracticable
- *Cy-prés* jurisdiction used to remove religious restrictions

More Recently…

Ramsden Estate [1996] P.E.I.J. No. 96

- upheld a scholarship fund for Protestants

University of Victoria v. British Columbia (A.G.) [2000] B.C.J. No. 520

- upheld a scholarship fund for Roman Catholics

More Recently…

Kay v South Eastern Sydney Area Health Service [2003] NSWSC 292

- upheld a medical fund for the treatment of "White babies" on two grounds:

    1. Charitable trusts are expressly excluded from anti-discrimination legislation

    2. Things will even up

        "…the receipt of a fund to benefit white babies would just mean that more of the general funds of the hospital would be available to treat non-white babies so that, in due course, despite the testatrix's intention things will even up."

More Recently…

Catholic Care – Charity Commission Decision (21July2010)

- Charity Commission concluded that a Catholic adoption agency could not restrict adoption services to heterosexual couples
- Differential treatment is charitable only if it amounts to a proportionate means of achieving a legitimate aim
- Religious basis for the differential treatment is not a legitimate reason to exclude given the public nature of adoption services

Objections to Discriminatory Charity

(1) Direction Application of Constitutional Law

- Are charities “government”?
- Are tax expenditures state action subject to constitutional scrutiny?

(2) Property Rights are Constrained by Public Policy

(3) Discrimination is Incompatible with Charity

Property Rights and Public Policy

What do property rights have to do with it?

- Settlement of charitable trust is an exercise of property rights
- If discriminatory exercises of property rights are invalid, then so too may be discriminatory charitable trusts

Property Rights and Public Policy

Does property law disallow discriminatory trust provisions?

- In a word – "No"

- Discriminatory conditions in trusts have repeatedly been upheld:

  "Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has *private* selection yet become a matter of *public* policy." (*Blathwayt v Lord Cawley* **[1976] 1 A.C. 397 (H.L.))**

Property Rights and Public Policy

Does property law disallow discriminatory trust provisions?

- Some authorities suggest trust law may be embracing a more restrictive position

- But these authorities remain few / distinguishable

Property Rights and Public Policy

Murley Estate v Murley [1995] N.J. No. 177

- Struck a religious condition with essentially no analysis

Fox v. Fox Estate (1996) O.J. No. 375 (Ont. C.A.)

- Relied upon *Canada Trust Co.*, a charitable trust decision
- Emphasized broader dereliction of trustee duties

Re Drummond Wren [1945] 4 D.L.R. 674

- Public policy formed only part of reasoning
- Property law logic heavily emphasized (e.g., certainty, alienability)

Re Noble and Wolf [1951] SCR 64:

- Relied exclusively upon traditional property law logic (e.g., certainty alienability)

Is Discrimination Incompatible with Charity?

Thinking Critically About Recurring Claims:

- Charity is a fundamentally public institution

- Constitutional human rights norms are relevant to charity law

- Discrimination is “intrinsically” incompatible with charity

Charities are Public in Nature

Is Charity a Fundamentally Public Institution?

- Recurring claim in the literature / cases:
    - Charitable trusts are unique owing to their public character
    - Since charities are public, the def'n of charity must conform with public law equality values
- Is the premise sound? Are charities truly public in nature?

Charities are Public in Nature

What are the commonly identified indicia of the public nature of charity?

- state subsidy delivered through tax concessions
- charitable trusts serve public purposes
- charitable trusts must meet a public benefit requirement

Charities are Public in Nature

Is the public nature of legal charity overstated?

- charitable trusts may have more in common with private express trusts than is often thought

The Public Funding Argument:

- some charities are heavily subsidized by the public
  - e.g., hospitals, universities

- but most charities are only subsidized through tax concessions

- tax concessions do not necessarily render charities public:
  - beneficiaries of tax concessions are not normally considered “public”
  - substantial portions of charity wealth derive from private sources

The Public Purposes Argument

- Orthodox trust law analysis contemplates two categorizes express trusts:
  - Trusts for beneficiaries (private express trusts)
  - Trusts for purposes (charitable purpose trusts)

- Taxonomy contributes to understanding of charities as “public”

  e.g., Purposes = Public Purposes = Charities are Public in Nature

- Is this taxonomy flawed?

The Public Purposes Argument

- Charitable trusts arguably have beneficiaries in a somewhat similar way to private express trusts

- Key difference is that settlors of charitable trusts are not allowed to directly name the beneficiaries

- instead, beneficiaries must be more vaguely described

  e.g., “persons of limited means”

The Public Benefit Argument

- phrase “public benefit” analysis reveals how an unfortunate choice of words can distort the underlying concept

- two points to consider:

  (1) “Public” does **not** *per se* mean “the public” must benefit
  - **not** a test of “publicness”
  - **not** a test at dictating who must benefit from the fund
  - rather “public” speaks to **the basis** on which it is determined who benefits
  - to pass the public test a fund must benefit members of the public of emotional and obligational distance to the settlor
  - essentially a stranger requirement

The Public Benefit Argument

(2) Benefit does **not** mean the trust inarguably makes the world a better place

- benefit is simply short form for delivery of a "common good"
  - → poverty relief
  - → education
  - → religion
  - → health care
  - → etc
- common goods are neither immune to controversy nor perfectly aligned with established public policy

The Public Benefit Argument

So what then is a charitable trust?

- private arrangement designed to pursue a common good by providing benefits consistent with these goods to strangers

Relevance of Constitutional Human Rights Norms

- in any event, how do we determine whether trust provisions are discriminatory in the first place?

- constitutional values / jurisprudence have been referenced as a determinant of the public policy against discrimination

- but can we really just transplant constitutional law principles into trust law?

Relevance of Constitutional Human Rights Norms

- What, for example, does the s. 15 same-sex marriage jurisprudence really tell us?

- One view is that these cases establish that the traditional view of marriage is a stigmatized discriminatory view of marriage

  – Hence, the constitutional invalidity of the traditional definition of marriage

- Applied to trust law, this view would mean that trusts committed to the traditional view of marriage may be against public policy

Relevance of Constitutional Human Rights Norms

- But is this the only way to view these cases?
- Perhaps these cases establish a more modest point:
  - There are competing views of “marriage” in society
  - These views all represent tenable views of marriage
  - Since one of the tenable views is more inclusive than the other, the state is constitutionally prohibited from adopting the narrower traditional view
- On this view, the cases say nothing about the propriety of traditional views of marriage for any context that does not involve state action

Intrinsic Incompatibility

Is Discrimination Intrinsically Incompatible with Charity?

- "…any discrimination by a charitable organization is *intrinsically incompatible* with that organization's charitable purpose and mission."
  (Nicholas Mirkay P. 721 "Losing Our Religion" and p. 84 of "Is it Charitable to Discriminate?")

- But look closely at how this conclusion is defended:

Intrinsic Incompatibility

Unpacking the Reasoning:

- "…discrimination is fundamentally inconsistent with *tax-exempt status*" (p. 106)

→ What does this have to do with the *intrinsic* nature of charity?

Intrinsic Incompatibility

Unpacking the Reasoning:

- "…some actions – such as discrimination – do not comport with *society's notion of what constitutes a charity*" (p. 85)

  → Is this determinative?

- Then why does human rights legislation in many jurisdictions give charities greater latitude to discriminate?

  → e.g., ss. 18 / 24 of *Human Rights Code*

Intrinsic Incompatibility

Unpacking the Reasoning:

- "There should be an exception for churches from the proposed nondiscrimination requirement…" (p. 100)

  → Is this an exception that disproves the rule?

So What To Do?

- A few thoughts on moving forward:
  - Rethink “public benefit”
  - Recognize the limits of constitutional jurisprudence
  - Avoid a “one-size-fits-all” approach
  - Use normative resources embedded in charity law
    - e.g., means versus ends distinction