
Book Review: Debates in Charity Law

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Debates in Charity Law, ed. John Picton and Jennifer Sigafoos. Hart Publishing, Oxford, England, 2020, pp 288. ISBN 978-1-50992-683-1

Over the summer of 2020, concerns surfaced in the media and in public debate about the relationship between the WE Charity and the federal government. These concerns refuelled ongoing discussion about the value of charities and non-profit organizations, their status, and their importance as instruments of public policy.

This collection of polished essays makes a timely contribution to this discussion and highlights a number of significant issues of public policy and charity law. Though most of the book is based on examples and scenarios from the United Kingdom, the essays are international in scope, with chapters about China and Ireland, as well as contributions from Canadian scholars. In any case, the material touches on issues that will be familiar ground to anyone who has an interest in the place of charitable and non-profit organizations as social actors.

Two themes link the essays. The first is the tension for charitable organizations of reflecting the original terms and rationale for their establishment, while at the same time staying flexible enough to align with social change. With obligations to respect the cherished purposes of their founders and funders, charities are apt to have a conservative foundation that remains an influence on the scope of their activities. At the same time, they must adapt to social change to avoid marginalization and irrelevance.

The second theme is the role of government regulation. Given charities are responsible for allocating significant resources, including some solicited from members of the public, it is not

surprising that governments feel justified in asserting regulatory authority over their activities. What the nature and scope of this regulation should be, however, remains the subject of much debate.

In the stimulating essay that opens the book, Matthew Harding argues in support of according a high degree of independence to charities, on the grounds that such autonomy is necessary to release the dynamics of individual volunteerism and altruism that are the distinctive assets allowing charities to distinctly contribute to creating public goods. Though some readers will disagree with the liberal premises underlying his analysis, his distinction between the roles of government, private enterprise, and charities to a society's welfare is instructive. He argues that charities, defined and driven as they are by the voluntary spirit of individual citizens – and not constrained by economic or political imperatives – offer a unique site for social innovation and experimentation. While he accepts that we need criteria to ensure organizations meet acceptable public standards, his concern is that over-assertive regulation will undermine the attributes that allow charities to play their specialized role in society.

Another essay focuses on the mismatch between the basic elements of regulation of charities and their core work. In it, Adam Parachin notes that the terms of charitable purposes – a framework that has not altered much since the early regulation of charities – no longer fit with the actual preoccupation of politicians and the public, which is with charitable activities. Subtitled “Square Peg Meets Round Hole,” his essay argues that the formal requirements for the regulation of charities, which have guided the development of legal principles in this area, disguise the more common disputes about the day-to-day activities of charities. These include activities that can be characterized as “political” or “commercial.”

Another interesting essay by Oonagh Breen uses the establishment of a new regulatory authority for charities in Ireland as a basis for looking at the architecture and mandates of regulatory authorities in several Commonwealth countries. She gives examples of how some governments have deployed taxation systems to regulate charities – and Canada is, of course, one example. Elsewhere, ministries have sometimes operated as vehicles for regulation. Finally, in some jurisdictions, dedicated regulatory authorities, starting with the venerable Charity Commissioners in England, have provided oversight.

In an era of government retrenchment and public skepticism about the welfare state, governments have increasingly outsourced the provision of various public services to charities and non-profit organizations, through grants and contracts. In her insightful analysis, Debra Morris discusses the perils for charities linked to the development of “contract culture” in this relationship. In contrast to grants, which give charities some flexibility about how they allocate the funding, many contracts make funding dependent on performance measures and objectives that governments, rather than the non-profit sector itself, define. Indeed, in many cases, governments will not release some, or all, of their funding until organizations meet these performance objectives.

Morris identifies the rationale for this: that it is incumbent on governments to be careful stewards of public money. But she observes that these performance measures are often a questionable fit with the way charities actually operate. Morris argues that these types of contracts are particularly hard on smaller charities that may not be able to survive if their funding is withheld while they try and achieve questionably relevant performance targets,

Other sections of the book include contributions on the justification for charitable status for independent schools in Scotland; the potential of digital currency as a new funding avenue for charities; the troubled path of social housing; the restrictions placed on foreign charities wishing to operate in China; and the possibility of developing an approach to bankruptcy law that would allow financially-troubled charities to continue meeting their charitable purposes. These chapters reveal much about the legal and political environments in which charities must conduct their activities, for better or for worse.

There is also a chapter examining the limited statistical information available to gauge public views of charities and government regulation. Other parts of the book deal with the contentious issue of whether charities should be allowed to discriminate as well as the implications of permitting donors to leave their personal stamp on particular charitable activity in perpetuity.

There is much that is provocative in this collection. Some of the messages in the essays may seem disheartening. For example, the observation that much of the current framework of legal principles goes back to the time of *Oliver Twist*, or the descriptions of unsympathetic currents of political or public opinion that regularly unsettle the work of charitable organizations. On the other hand, much of the content is a reminder of the potential of these organizations to make dynamic and significant contributions to society, and of their importance as a vehicle for harnessing the goodwill of citizens.