

## Charity without Politics? Examining the Limits of 'Politics' in the Law of Charity

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As a former British colony, the legal framework for charity operation in Hong Kong is greatly influenced by that in England. However, despite England took steps to modernise its charity law some 30 years ago (culminating to the enactment of the Charities Act 2006), charity law in Hong Kong has remained static for decades. Recently in June 2011, the Law Reform Commission of Hong Kong proposed to reform charities in Hong Kong. While the Commission agrees with a clear statutory definition of what constitutes a charitable purpose, it leaves open the question of whether, and if so, the extent to which, political purposes / activities are permissible.

Not surprisingly, this has sparked a renewed interest in the relationship between charity and politics, and more specifically, the limits on the pursuit of political purposes by charities. It is well-established in English law is that the purpose of a charity must be exclusively charitable, which means that it must not have political purposes: *Bowman v Secular Society Ltd* [1917] AC 406. Under such a rule, not only is a charity forbidden from involving in party-politics, it is also prohibited from having as its purpose advocacy for change in the laws or policies of a government, even if the change involves poverty relief, religion or education: *McGovern v AG* [1982] Ch 321.

However, recently, the High Court of Australia decision in *Aid/Watch v Commissioner of Taxation* [2010] HCA 42 held that there is no rule against political purposes. Rather, in that case, the generation by lawful means of public debate as to how poverty is best relieved is held charitable under the fourth head in *Commissioners for Special Purposes of Income Tax v Pemsel* ([1891] AC 531) for publicly beneficial purposes. The court held that the generation of such public debate enhances communication between the electorate and the government and hence is publicly beneficial in contributing to an indispensable process in the operation of the Australian constitution.

This paper aims to explore the implications of *Aid/Watch* in the context of the reform endeavours by the Hong Kong Law Reform Commission. First, it argues that the legal justifications offered so far fail to defend a blanket rule against political purposes (see, e.g., Parachin (2008); Burt (1998)). The rule has also produced disproportionate impact on small charities who do not have the political experience or resources to challenge the law, and who may self-censor their campaigning activities lest they lose their charitable status. Secondly, this paper examines the implications of *Aid/Watch*. For example, while it is possible to pursue lobbying activities that are themselves within one of the recognized heads of charity under *Pemsel*, it is unclear is whether generating public debate in relation to government activities generally, and hence the formation of an organization to pursue solely political purposes, will also be considered charitable (see, e.g., Harding (2011)).

Thirdly, after delineating the limits of *Aid/Watch*, the paper will suggest that while the blanket rule against political purposes should not be maintained, political purposes should not, in itself, be considered sufficiently charitable. Given that charities and their donors receive public subsidy in the form of tax reliefs, this paper attempts to define the boundaries between charity and politics by balancing a charity's legitimate political expression against the pursuit of private interest in the name of charity (Buckles (2007); c.f. Harding (2009); Dunn (2008)). It will then attempt to show how this balance can be put into practice through statutory provisions and operational guidelines. For example, political purposes / activities that advocate or oppose a change in the law should be regarded as legitimate (because they enhance the process of public debate indispensable to a system of representative democracy) only if there is also no room for private interest in the organization's advocacy. This paper will also show how the proposed reforms will ensure a more sensible scope of permissible political purposes that give countenance to socio-political developments in Hong Kong, but without compromising the legitimacy of the charity law regime.

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