Justifying Public Advocacy by Charities: When Does Political Activity Become Charitable?

Lusina Ho, Faculty of Law, The University of Hong Kong; Joseph C.W. Chan, University of Hong Kong

In common law jurisdictions, it has been a well-entrenched rule that charitable organizations must not substantially engage in political activities. Apart from party politics, these include, in American law, "attempt[s] to influence legislation" and in English law, the even broader formulation of "advocacy to change law or policy".

Unfortunately, some grounds offered by the judiciary to justify such restrictions do not stand up to rigorous examination, such as that judges must deem existing law satisfactory, and are ill-equipped to (and in any event should not) decide whether a particular change of law is publicly beneficial. Another ground, eloquently stated by Judge Learned Hand in Slee v Commissioner, 42 F 2d 184 (2d Cir 1930), that political agitations are controversial and must be conducted without public subvention, is too broad-brush to help distinguish between political activities that deserve charitable tax subsidy and those that do not. Nor does it explain why political agitations must be controversial and why controversies are fatal to tax subsidy. In any event, these justifications fail to catch up with the modern role of charities to build a rigorous civil society (see Report of the Advisory Group on Campaigning and the Voluntary Sector (London: Advisory Group, 2007); A Dunn, IJNL (2008) vol 11, no 1, p 51; D Reiser (2011) 86 Notre Dame L Rev 1).

While existing justifications are inadequate, it is not the intention of the present paper to argue for a radical, wholesale lifting of the restrictions on public advocacy. Rather, its aim is to examine existing justifications, and articulate an appropriate justification for charitable tax subsidy of such activities. In particular, it argues that the key to distinguishing between acceptable and non-acceptable public advocacy lies in whether they are obviously beneficial to the public, and hence deserve the same extent of tax subsidy as charitable activities. For this purpose, advocacy for changes of law is not obviously beneficial to the public, because such changes typically involve redistributing resources (in the widest sense of the term, including rights and freedoms) in society in a zero-sum manner, and hence produce negative impact on certain groups in society. It is in this sense that Judge Hand's remark about the controversial nature of political agitation can best be understood. In contrast, a particular activity that may be hotly contested but does not involve a change of law (such as providing help to sex workers or advice on abortion to pregnant teenagers) is still charitable, as long as it falls within the recognised categories of publicly beneficial (or charitable) activities. This is because they do not redistribute resources in society through a change of law or policy.

Once the importance of public benefit in distinguishing acceptable and non-acceptable public advocacy is recognised, the paper further argues that public advocacy that involves a fair exposition of the facts and reasons on both sides of the issue should enjoy charitable tax subsidy, for the following reason. Even when a proposed change of law is controversial and not obviously beneficial to the public, if the viewpoint is advanced upon a fair exposition of the facts and reasons on both sides of the issue, such an endeavor is of obvious benefit to the public. Like free speech, it allows members of the public to hear the pros and cons of the debate, and promotes public deliberation. It should be distinguished from public advocacy that does not such expositions, but instead merely contacting or encouraging others to contact legislative or executive personnel to urge them to change the law. The latter does not carry the public benefit of promoting and enhancing public deliberation.

On this basis, the following significant but measured relaxations of the existing law are in order. First, the current ban (in the UK) on charities from having political purposes and restrictions (in USA, Canada, and the UK) that public advocacy be insubstantial or in furtherance to their charitable purpose(s) should be lifted, as long as the lobbying is conducted upon a fair exposition of the relevant facts and reasons. Secondly, charitable subsidy should not be limited, as is in the present law, to activities that raise public awareness, provide unbiased education, and promote the law to be observed. Put another way, even organizations with the exclusive purpose of publicly advocating for a change of law or policy (crucially) upon fair exposition of reasons and facts should be regarded as charitable.

Such a proposal represents a measured step towards a more progressive legal framework. Most importantly, the present paper offers a sound explanation to distinguish public advocacy activities that should enjoy charitable tax subsidy from those that should not. It represents a significant and principled step towards aligning the rules restricting public advocacy with the rationale and justifications behind them.

References

Clark, E (1960). The Limitation on Political Activities: A Discordant Note in the Law of Charities. 46 Virginia L Rev 439

Buckles, J R (2007). Not Even a Peep? The Regulation of Political Campaign Activity By Charities Through Federal

Tax Law. University of Cincinnati Law Review, Vol. 75, 1071

Advisory Group on Campaigning and the Voluntary Sector (2007). Report. Available at http://www.ncvo-vol.org.uk/.

Dunn, A (2008). Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers. The International Journal of Not-for-Profit Law, Vol. 11, Issue 1, 51.

Reiser, D (2011) Charity Law's Essentials. 86 Notre Dame L Rev 1