From Charity To Civil Society: Sketching Steps To An Alternate Architecture For The Common Law

Matthew Turnour and Myles McGregor-Lowndes

Abstract
Charitable purpose trusts now comprise only a small percentage of the total number of civil society organisations in common-law countries. The concept of a charitable purpose remains though, the organising idea, central to the definition of civil society organisations in the context of the common law. It is widely conceded that English charity law jurisprudence is flawed and inadequate because of the ‘technical’ meaning given to charitable purpose. A more expansive jurisprudence which includes all civil society organisations is needed and this paper begins to sketch such jurisprudential architecture.

Introduction
The common law principles developed around the notion of the charitable trust can no longer serve as an adequate set of organising principles for defining and facilitating associations of persons outside government, business or family structures. Such associations not part of government, business or family sectors are now conceptualised as part of ‘civil society’ and this paradigm is the dominant discourse in disciplines ranging from public policy and sociology to economics. Since the Second World War in jurisdictions that operate closest to the 1601 Preamble, such as England, Canada, Australia and New Zealand there has been more than twenty law reform commissions and inquiries in response to the pressures upon the underlying principles. Appendix A lists these inquiries and reports.

As a result some jurisdictions are in the process of implementing legislative extensions (England, Wales, Scotland, Ireland, Singapore and New Zealand) and others are still considering their options or have merely tinkered at the margins (Australia, Canada). All appear headed towards the extended schema of an American 501(c)(3) classification. Even the European Union jurisprudence which does not accommodate charitable trusts is presently seeking substantial reforms to its nonprofit laws (Hopt et al., 2006). However, we contend that even the most substantive reforms such as that enacted in England and Wales will only give brief respite, as they do not address the underlying conceptual difficulties nor offer alignment with increasingly influential notions of civil society driving public policy debates.

Even America with its extended statutory definition is seeking an internally consistent jurisprudence with the ALI reporter noting at the outset, “[i]n the end, I believe it is of overriding importance for the Institute to produce a self-contained guide for charity fiduciaries, advisers, regulators, courts, and legislators that addresses the primary group of nonprofit entities in which the law and the public have an interest” (Council to the Members

---

1 PhD Student and Director respectively, The Australian Centre for Philanthropy & Nonprofit Studies, Queensland University of Technology. Correspondence Address: Matthew Turnour at The Australian Centre for Philanthropy & Nonprofit Studies, QUT, GPO Box 2434, Brisbane, Qld 4001, Australia. Presented at the ARNOVA 2007 Conference in Atlanta, Thursday 15 November Session D10.
of The American Law Institute, 2006, p. xxviii). We agree with Professor Brody’s assessment that, “Most challenging, there is no single ‘law of nonprofit organisations’ ” (Council to the Members of The American Law Institute, 2006, p. 244). This is also the assessment on the other side of the Atlantic with many joining Freeland in calling for a ‘coherent basis for the law for civil society in general’ (Freedland, 2000, p. 123).

A jurisprudence for civil society as a whole in common law countries might seem a ‘holy grail’ but we contend that there are unifying principles which can be drawn upon to inform ‘an appropriate framework for modern philanthropy’ capable of serving the ‘some 70 nations’ that share Charity law infrastructure’ (O’Halloran, 2007, p. 1). This paper contributes to this debate by outlining an architecture within which the common law might be developed independent of statutory reform. The argument is put forward in seven theses. The seven theses for which we contend are addressed in the order set out below:

1. Charity law has passed its ‘use by’ date.
2. A jurisprudence for civil society is needed.
3. A jurisprudence for civil society has only two dimensions - enabling and preferring.
4. A jurisprudence for civil society maps the space enabled with reference to a concept of charitable purpose which is not defined with reference to an ancient statute and differentiates that space from charities’ others.
5. A jurisprudence for civil society includes a justification for preferring civil society organisations based on voluntary contributions of goods and services.
6. A jurisprudence for civil society is a more powerful framework than the present charity law jurisprudence in at least eight ways.
7. A jurisprudence for civil society stands between, but is different from private law and public law and warrants its own ‘third’ space in legal theory.

**Thesis one: Charity law has passed its ‘use by’ date.**

The inquiries and reports into the reform of charity law has failed to adequately facilitate the burgeoning growth and interest in the space known as civil society. While the detailed reasons for this require a paper in its own right, (Turnour and McGregor-Lowndes, 2006) it is sufficient for our purposes to merely identify some of the problems. At the heart of the difficulties are three issues:

1. Charity law was conceived in a time of markedly different social institutions and has never been reconceptualised to take account of social developments such as the emergence of corporations not controlled by the state and associations that are not religious,
2. Charitable trusts are in decline and the application of the concept of charity purpose to non-trust entities without the equity law framework is problematic.
3. The casuist method of the common law has not been followed appropriately in the four hundred year development of the jurisprudence in this branch of the law resulting in a functionally inadequate framework.

First, at the time charity law was conceived, the Church and the Crown were the dominant institutions emerging from a feudal society. Business was mostly conducted within the context of the family and both were integrated in a complex web of obligatory relationships which ultimately referenced authority from the Sovereign. Associations (both for profit and nonprofit) were only permitted by the grace and
favour of the Sovereign and all others were suppressed as treasonous (Fletcher, 1986, p. 14-6). Associations (both corporate and unincorporated) did not exist outside the spheres of church or family. Society in the twenty first century is conceptualised quite differently and the place of the third sector in civil society has emerged and been recognised.

Second, the charitable trust and its accompanying equitable principles once so central to charity law is waning in most jurisdictions and no longer legal form of choice for civil society organisations. The United States has about only 5% of charitable trusts making up IRS tax exempt entities (Gronbjerg and Paarlberg, 2002). Australia has 4,846 endorsed income tax exempt funds (charity trusts) which is 10% of all tax endorsed charitable entities (CPNS, 2006). Trying to gauge the proportion of charitable trusts in other jurisdictions is difficult because of poor records, but in Canada about 16% of registered charitable tax entities are unincorporated, many probably being trusts (Hall et al., 2005). In England and Wales it appear that companies limited by guarantee are rapidly becoming more popular than the pure charitable trust even though they lack any type of incorporated association entity. The charitable trust jurisprudence with its particular issues of formation, conduct and dissolution is becoming less relevant as the charitable trust falls away in popularity and as it is diluted in its application to various nonprofit corporate forms.

Further, those organisations which are classified as having charitable purposes (not just the charitable trust form) are only a part of the wider group of civil society organisations. In Australia it is estimated that there are between 500,000 – 700,000 nonprofit organisations (Lyons, 2001) of which about 48,000 or (6.8%-9.6%) are charitable institutions or funds (CPNS, 2006). It is estimated that there are about 380,000 incorporated entities and about 12.6 % have charitable purposes (Lyons, 2001). Canada has a very similar taxation definition of charitable organisation to Australia which has not included amateur sport and the like as charitable. In Canada, of the 161,000 incorporated nonprofit organisations about 56% of nonprofit organisations are registered with Revenue Canada as charitable organisations (Hall et al., 2005). There are an unknown number of unincorporated grassroots organisations (Day and Devlin, 1997). In England and Wales there are 190,000 registered charitable organisation with an annual income over 5,000 pounds. There are a further 110,000 ‘exempt from registration’ charitable organisations, 25,000 of which are religious organisations (Charity Commission, 2006). It is estimated that there are a further 180,000 non-charity organisations (UK Government, 2002).

The United States has thirty-two categories of tax-exemption in its Internal Revenue Code and those which fall closest to the Pemsel categorisation of charitable purpose are contained in section 501(c)(3). They are commonly referred to as “charities” but include not only those “operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes” but also amateur sports organisations. These organisations number about 1.48m (61.2%) of the total IRS register of 501(c) organisations (National Center for Charitable Statistics, 2007) and exclude an unknown number of small organisations under $US25,000 in annual receipts and religious groups (Fremont-Smith, 2004). What percentage these charitable organisations are of all civil society organisations is difficult to ascertain. One would have to include religious organisations and those under the tax reporting threshold. Smith estimated that 90% of all US nonprofit organisations are small
grassroots organisations (Smith, 1997a, Smith, 1997b). Gronbjerg & Paarlberg, (2002) found all IRS registered organisations accounted for only 60% of their nonprofit count in one US State and charitable 501(c)(3) organisations were 30% of the identified list of nonprofit organisations (Gronbjerg and Paarlberg, 2002, p. 574).

The point is that the evidence such as it is, indicates that the original equitable framework around the charitable trust applies to only to a small section of the population of nonprofit organisations and even those outside the trust realm with some form of charitable purposes included in a corporate form are but a part of the wider ken of civil society organisations. The charity law jurisprudence no longer covers the field of nonprofit organisations and its translation to cover not only trusts but corporate form is problematic.

The reports from the common law countries with the more traditional charity law jurisprudence (England, Wales, Scotland, Ireland, Australia and New Zealand) and the surrounding voluminous literature is testament to multitudinous difficulties, due in part to the way the common law’s casuist method of development of principles from precedent has been applied in this area of the law.

At common law charitable purposes are purposes that are within the ‘spirit and intendment’ of the preamble to a 1601 English statute (Charitable Uses 1601 43 Eliz 1 c 4) often called the Statute of Elizabeth. For convenience we refer to that preamble as the Preamble throughout this paper and the statute as the Statute of Elizabeth. The long list of charitable purposes set out in the Preamble was categorized in an English House of Lords case in 1891 which has become known as Pemsel’s Case (Commissioners for Special Purposes of the Income Tax v Pemsel [1891] AC 531). In Pemsel’s Case it was held by Lord Macnaghten that the law of charity was comprised of ‘four principle divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads’. These categories have taken on such significance that they have become known as the ‘four heads’ of charity. Unless a purpose can be shown to be within or analogous to one of these categories and for the public benefit it is not at law a charitable purpose. So, at law, charity has developed a technical meaning which can be distinct from notions which a lay person might consider charitable. The addition by statute of other charitable purposes to the four heads is an endeavor to ameliorate some of the consequent injustice. This body of law, centred on charitable purposes, including, so far as is relevant, statutory extensions to the four heads, we will refer to as Charity law.

It is widely accepted that the problems with Charity law are rooted in the Preamble and the way the cases have developed following the Pemsel’s case categorisation (Chesterman, 1979, Moody, 2000, Freedland, 2000, O'Halloran, 2007, Dunn, 2000). The legislative patches applied to fix the problems have extended the definition of ‘charitable purpose’ but have not addressed the root methodology problems that gave rise to the definitional difficulties. They have perpetuated the problem by leaving in place reference to the Preamble and the Pemsel’s case categorisations in the method of definition.
What are the methodology problems? There are three basic, well-known principles, used in the development of the common law, which have been ignored or misapplied in the development of Charity law. Had these three rules, usually applied in common law development, not been ignored or suppressed, the definitional problems would not have arisen. The three legal rules not followed were:

1. That the preamble to an act of parliament sets out the context (only) and, unless the operative part of the Act otherwise declares, does not contain the definition (of anything) (Winckel, 1999, *Wacando v Commonwealth* (1981) 37 ALR 317, *A-G v Prince Augustus of Hanover* [1957] AC 436);
2. That a definition defines something and a good definition, at least in the classical sense, sets out the genus and differentia ensuring that all sub-categories are mutually exclusive and collectively exhaustive (*No 20 Cannons St Ltd v Singer & Friedlander Ltd* [1974] 1 Ch 229); and
3. In the reading of a case, where there is reference to underlying jurisprudence, that jurisprudence should be accepted as part of the *ratio decidendi* of the case and not be abandoned in favour of a convenient classification (Stone, 1959).

It is the failure to follow these three rules in the context of Charity law that led to problems. Charity law has ossified because of these method problems and consequently, Charity law as presently framed has passed its ‘use by’ date. No amount of extension of its ‘heads’ can resolve these root dilemmas. The answer must be found by going beyond the ‘four heads’ and the technical definition. That can be done by building from the inadequate ‘heads’ to more general categories.

All these issues lead to the question: how can the common law be developed beyond charity to a jurisprudence for civil society? It is to that question, and the proposal of an answer to that question, that this paper turns.

**Thesis two: A jurisprudence for civil society is needed.**

A fresh theoretical start must be made to find a jurisprudence that identifies and encompasses entirely the relevant subject. What though is the relevant subject? By extending the definition of charitable purpose by legislative fiat those common-law countries have extended the scope of charity jurisprudence to include the purposes of more civil society organisations. What is needed, though, is a legal framework that applies to all civil society organisations whether the organisation’s purposes are ‘technically’ charitable purposes or not. A framework that extends to the boundaries of civil society is needed. The reports of the Inquiries frequently acknowledged this need for extended borders and often looked outside of law as a discipline for insights on where to draw new boundaries (Stevens, 2000, Ontario Law Reform Commission, 1996) but none recommended a whole-of-sector jurisprudence for civil society (Scottish Council for Voluntary Organisations, 1997, Sheppard et al., 2001). It is only academic writing that has pressed that far. Mark Freedland (2000, p. 123) has called for the emergence of a ‘coherent basis for the law for civil society in general’. The American Law Institute is undertaking a codification of the laws applying to nonprofit organisations (Council to the Members of The American Law Institute, 2006). Dal Pont (2002) has expressed the view that the time has come to ‘encourage parliament’ to carefully define the scope of statutory privileges and to make the regulation of collections independent of the Charitable Monkier. There has been a limited but

To date no one has put forward architecture developed from the common law and capable of broader application to the whole space known as civil society. This paper sketches the framework for such an architecture.

A beginning is made by developing the analogy of a ‘universe’ used by both Dobkin Hall (2000, p. 8) and Brody (2002, p. 258 note 1). If the presently recognized four common law heads of charitable purpose are planets, then they must, belong to a particular universe that is capable of a unique label or identifier. The great puzzle for lawmakers has been recognizing what purposes belong to this legal ‘universe’. Under the common law only religion, poverty relief and education have had a secure place through their ‘deemed’ charitable status (Pemsel’s Case). Now, by legislative fiat, certain other purposes have secured a place. On 8 November 2006 the UK Parliament extended the umbrella of charity to a wider group. Twelve Charitable purposes are included in the Charities Act 2006 (UK). Importantly, for reasons to which we will come later, that legislation explicitly includes as charitable purposes advancement of citizenship or community development; the advancement of human rights and conflict resolution or reconciliation (Charities Act 2006 (UK)). These are purposes that strengthen the bonds that hold society together but might not be considered by a lay person to be ‘charitable’. In Australia, since 1 July 2004 certain childcare, self-help groups and closed and contemplative religious orders also enjoy that status (Extension of Charitable Purposes Act 2004 (Cth)). In New Zealand, the concept of charity has been clarified as requiring proof of public benefit and a Commission has been established (Charities Act 2005 (NZ)). What, though, is the underlying rationale for these additions, and the differences between jurisdictions? What has led the UK, Australian and New Zealand governments to make these (different) changes to the class of purposes recognised as charitable? It is impossible to determine from within the present analytical framework.

Explaining the technical meaning of charitable purpose at law (plus or minus some statutory-added heads) is like explaining the solar system in pre-Copernican terms. It is possible; but is becoming progressively more difficult. A simpler paradigm that more completely explains this ‘legal universe’ is required. So just as Copernicus urged upon his readers the acceptance of ‘that which is easiest to grasp’ (Copernicus, 1542) and pointed out that his ideas were not that radical for they could be found in a pedigree leading back to the early Greeks (Copernicus, 1542) so in this paper we argue for a simpler architecture. We suggest the legal universe revolves around a concept of civil society organisations and that a broader definition of charitable purpose – not one linked to the Preamble and Pemsel’s case is required to define the essence of that universe. We argue that the unique identifiers are voluntary association and voluntary contributions for common good. We contend that whether certain purposes belong to this particular area of law or not should be determined by reference to characteristics – real definable essence and distinguishing features – not the preamble to an ancient statute. Those characteristics, which mark out the legal space, and how they are built from the bedrock of Charity law but go beyond it, are set out in the next three theses.
**Thesis three: A jurisprudence for civil society has only two dimensions - enabling and preferring.**

Within Charity law jurisprudence the *enabling* function of the law is not separated from the *preferring*. For example once a trust is charitable at law it is both enabled as a ‘purpose trust’ and enjoys the privilege of not being required to comply with the rule against perpetuities as a private trust must. The alternate jurisprudence for civil society here proposed begins by separating the enabling function of law from that of preferring.

This jurisprudence goes further though, and proposes that *enabling* voluntary participation in civil society and *preferring* voluntary contributions to common good also sets the scope of the jurisprudence (Stevens, 2000). The jurisprudence embraces, then, only two types of laws: laws that *enable* and laws that grant *preference*. That is not to say that other laws such as criminal laws do not apply to civil society organisations but rather, that the only laws unique to civil society are those that enable and prefer voluntary altruistic contributions of public benefit. Foundations for this categorisation are to be found in the writings of Chesterman (Chesterman, 1979) who divided the material slightly differently but wrote: ‘The majority of legal rules relating to charities may, however, be safely classified either as conferring some sort of favour or privilege or as imposing some element of supervisory control’ (Chesterman, 1979, p. 103, 397).

The scope of the jurisprudence is determined by the scope of the definition of civil society. In defining civil society we adopt Anheier’s widely used definition of civil society: ‘Civil society is the sphere of institutions, organisations and individuals located between family, the state and the market in which people associate voluntarily to advance common interests’ (Anheier, 2004).

On this basis, taxonomically, the laws applying to civil society are differentiated from the laws that regulate the family, the state and the market. Differentiating the laws applying to civil society on this basis follows accepted cross disciplinary scholarship which frequently divides society into four sectors - business (the first sector), government (the second sector), civil society (the third sector) and family (the fourth sector).

The unique essence of the laws applying to civil society then is that this function is not coercive but rather enabling and preferring voluntary association and contribution. A jurisprudence based on ‘voluntariness’ seems incongruous, as ‘law’ is essentially coercive. Law is not, though, entirely coercive. Some laws simply enable and others prefer. Of laws that enable take as an example the *Uniform Unincorporated Nonprofit Association Act (1997)* or the American Bar Association’s Model Nonprofit Corporation Act adopted in some US States. Perhaps the most famous example of preferring legislation is section 501(c) of the *Internal Revenue Code* of the United States by which organisations which satisfy the definition are exempt from paying income tax. The subject of this jurisprudence of civil society is the laws which enable and prefer voluntary association to advance non-commercial common interest.
**Thesis four: A jurisprudence for civil society defines the space enabled with reference to Charitable purpose and differentiates that space from Charities’ others.**

In this section we focus on only the enabling function of law. In the next section we consider preference.

At the centre of the enabling dimension of the jurisprudence is the formation, conduct and dissolution of civil society organisations including (but not limited to) those, such as purpose trusts, pursuing charitable purposes. It is necessary to define the characteristics of civil society organisations so that it is clear which organisations are within the class of organisations to be enabled (or limited as the case may be) and which are not. It is necessary to go beyond the Preamble and the Pemsel's case categorisations for the definition because the scope is broader than the civil society organisations which also have charitable purposes. In this alternate architecture civil society organisations are those entities which manifest:

- **Altruism**
- **Benefit for the public; and where**
- **Coercion is sufficiently absent for the association to be voluntary.**

For the purposes of this alternate jurisprudence analysis; altruism, benefit of others and absence of coercion are each identified by a combination of two of three factors. The three factors are:

- The otherwise remoteness of the people associating (‘xenos’) for convenience labelled ‘X’),
- The reason for associating is voluntary to benefit others (‘why’ for convenience labelled ‘Y’), and
- The number of person associating (for convenience labelled ‘Z’).

Altruism is assessed by a combination of X and Y. When strangers associate to pursue purposes which benefit persons other than themselves, altruism is present. The more disparate the origins of the persons and the more the purposes are for public benefit, the greater the altruism. A civil society organisation is altruistic.

Benefit is assessed by a combination of X and Z. If a large number of people, who would otherwise be strangers, voluntarily associate then the association is public. If a small number of people associate for private purposes (such as employees of an organisation meeting socially after work) the association is private. A civil society organisation is public.

Coercion’s absence is assessed by a combination of Y and Z. If the association is of a large group of person but the reasons for association is coercion then the fundamental character of voluntariness is missing. Usually coercion is evident in the restriction of, or prohibition of, association. Where an association occurs or is prohibited or controlled, government is evident. A civil society organisation is a voluntary association. Its reason for, and way of associating, is not controlled by government.
These three dimensions – altruism, benefiting the public and absence of coercion are now set out in relationship for the purpose of theory development.

**Altruism**

There are a vast array of organisational forms that manifest altruistic purposes to differing extents not just charitable trusts. There may be more or less altruism evident in the purposes of a civil society organisation (Atkinson, 1990, Rose-Ackerman, 1996). Drawing upon subjective assessments, social science methodologies or even ranking systems already evident in taxation systems, it is possible to rank more altruistic purposes and service organisations over less altruistic purposes (Atkinson, 1990). Once ranking is conceded it is possible to rank altruism on a continuum. The continuum of ranking can be set out diagrammatically in the form below where complete altruism is called charity and its alternate is business which is identified by the pursuit of private gain - self-interest.

![Altruism Continuum](image)

Different people may draw upon different factors to determine how much or how little altruism is necessary for an entity to be called a civil society organisation or distinct from a business. Under the Charity law framework, that boundary is limited to charities determined by reference to the Preamble and its spirit and intendment but other disciplines look for more direct evidence of altruism. Atkinson (1990) has referred to altruism as the continental divide which segments the nonprofit sector from business. One Australian High Court justice has called for abandonment of reference to the Preamble (Central Bayside General Practice Association Limited v Commissioner of State Revenue 228 CLR 168) and the adoption of direct references to altruism: in particular, evidence of altruistic purpose underpinning voluntary associations.

To the simple idea of a continuum of altruism will now be added two more continua to build a more comprehensive and compelling framework. The next step is to stand this continuum alongside that of ‘benefit’ then add to that the continuum of ‘coercion’.

**Benefit**

The Charity law cases and the more recent statutory additions require manifestations of public benefit for a purpose to qualify as charitable (Gilmour v Coats [1949] AC 426, Leahy v Attorney General (NSW) [1959] AC 457). Scholarship over the last 30 years has theorised public benefit, refining it significantly beyond the general proposition set out in the Charity law cases. As with altruism, the concepts of a continuum of benefit between public and private is evident in the literature of publicness traceable to Weisbrod’s (1977) ‘collectiveness index’. At one extreme is the most public of charitable trusts. At the other there are small private clubs. This
continuum between these we label the “Benefit continuum” and it may be diagrammatically represented as follows on the basis that charity represents the paragon of publicness and family the paragon of privateness:

![Figure 2: Benefit Continuum](image)

Again, different people may draw upon different factors to inform how much or how little public benefit is necessary for an entity to be classified a civil society organisation and not family.

**Coercion**

Charitable trusts, and more generally charitable organisations, are recognized by the voluntariness of involvement and of the voluntary provision of goods. These organisations are distinguishable from government because when the organisation is a government body, the participation in community is compellable by law and the transfer of assets is coerced through taxation (Colombo and Hall, 1995).

As with the recognition of altruism and public benefit in civil society organisations, it was noted that coercion is not either-or. There is a continuum of coercion. At one extreme is the religious Charitable trust where the common law protects the right to voluntary involvement in the pursuit of religious objects (Dal Pont, 2000). At the other, civil society organisations over which government exercises substantial control through setting of purposes by statute, control of who is appointed to the board and funding. Examples of the latter include some professional bodies and quasi government organisations such as ambulance and mine rescue service providers (*Mines Rescue Board of New South Wales v Commissioner of Taxation* (2000) 101 FCR 91, *Ambulance Service of New South Wales v Commissioner of Taxation* (2003) 130 FCR 477). The continuum between these extremes again can be illustrated as set out on a continuum as follows:

![Figure 3: Coercion Continuum](image)

Different people may draw upon different factors to inform them of how much or how little communities should be allowed to self organise through civil society organisations as distinct from a business. Different factors may be taken into account or differently weighed in deciding the extent to which such freely chosen organisation must be for common good to be allowed to occur. There is, though, a continuum of coercion between the religious freedom...
protected at common law enjoyed by some entities and the complete control exercised by
government over other organisations.

**Charity and civil society space**
Redefined as altruistic, public benefiting, voluntary associations without reference to
the *Preamble*, the legal space for Charity law could become coterminous with the
definition of civil society set out above. All of the continua have charity as a starting
point and charity is differentiated from three others. Those three others are: business
(the first sector), government (the second sector) and family the fourth sector.
(CHARITY and related organisations are included in the third sector). At some point on
these lines, drawn between charity and each of these others, a boundary is crossed
from charity (or, as it is emerging, civil society), to one of these others.

As these three differentia all have charitable purpose at one extreme it is sensible to
draw the diagram in a way that brings the continua into relationship as follows:

![Figure 4: Bringing the continua together](image)

When drawn in this way the overlapping conceptions between charity and civil
society are even more apparent. Civil society is differentiated from business by
altruism, from family by benefits being public not private and from government by its
voluntariness. At a certain point there is insufficient altruism, public benefit or
freedom to call the space civil society. When the concept of a charitable purpose is
expanded in the way proposed here it reaches to the borders of civil society. By
joining the lines, then, a theoretical space is created which is the bounds of this new
jurisprudence for civil society which has charitable purpose - as expanded at its
centre. That space looks, in a theoretical sense, like this:
Introducing dynamic boundaries

Once a definition of the whole of the sector is set out in this way it is apparent that there will be contests over where each of these theoretical boundaries are to be drawn. US tax preference regime centred on 501(c)(3) of the Internal Revenue Code is a stand alone code. The Australian, New Zealand and United Kingdom governments assess differently what is and what is not to be enabled and preferred; with a more direct focus on charitable purpose. A notion of dynamic boundaries is needed to accommodate these differences. The contests though, are reducible to three, so far as is relevant to the development of this jurisprudence, and they are over:

- The extent to which the purpose is altruistic; which is manifest in the contest over where the boundary between the space for civil society should end and the space for business begin; and
- Whether the association is private or public; which is manifest in the contested boundary between civil society on the one hand and small private groups such as family on the other; and
- Over freedom; which is manifest in the contest over the boundary between the space for civil society on the one hand and the extent of government intrusion into that space on the other.

Diagrammatically, the space for civil society is then, better described in the more complex way below with charitable purposes as the essence. On the three continua of altruism, benefit and coercion there is a contested point where the space for civil society ceases and its other begins. That is the point of differentiation.
Figure 6: Defining boundaries creates a space for civil society

The theoretical space will change shape according to the society. In the context of, say, a small government state where voluntary philanthropic organisations are constrained by that compared to business and family, but carry a larger share of responsibility for the supply of public goods, the space would be diagrammatically expressed as follows:

Figure 7: Defining boundaries a space for civil society with small government

In a society where the government, business and family dominate, the space would be contracted on all sides and might be expressed as follows.
Charity law is though, more than just a law enabling association in particular ways: principally through trusts. It also involves a basis for entitlement to preferential treatment. This dimension; of preferring, is introduced in Thesis five.

Thesis five: A jurisprudence for civil society includes a justification for preferring civil society organisations based on voluntary contributions of goods and services

In Thesis four we focused on the enabling function of law. In this section we turn to the second dimension of this jurisprudence for civil society which is that it sets out a framework for analysing entitlement to preference. Preferences are enjoyed by individuals and civil society organisations when they voluntarily transfer, or are the vehicle for the voluntary transfer, of goods and services - be they private, public or quasi-public. For convenience we call these Common goods. This dimension of the jurisprudence is developed by reclassifying the charity cases according to the form of common good provided. Each class is built from, but goes beyond, the four heads of charity set out in Pemsel’s Case. We argue that the cases can be re-categorised into three classes, those that:

- **Deal with Disadvantage** and thus advance equality,
- **Encourage Edification** and thus advance fraternity, and
- **Facilitating Freedom** and thus advance liberty.
The charity cases make it clear that different levels of public benefit are required in each case to establish that a good or service supplied is in fact a Common good. The level of public benefit required in each case is now discussed.

When Dealing with Disadvantage even the supply of private goods to individual persons at a disadvantage may be a supply of Common goods. Relief of poverty is the head of Charity law from which this category is developed. The framework goes beyond relief of poverty, though, to the supply of the goods that enable those at a disadvantage to enjoy equally with other citizens the basic rights and obligations of citizenship in society. The charity law cases relating to poor relations and poor employees suggest that as the law presently stands, when dealing with disadvantage, the goods supplied may be private goods and the transferee could be a relative or an employee (Dal Pont, 2000). It is for the public benefit for private goods, such as bread to be supplied to a starving person, whether or not they are a relative. When dealing with disadvantage to bring equality a Common good can be a private good supplied to an individual person.

To be classified as a Common good that Encourages Edification and thus advances fraternity greater publicity in either the goods supplied or the class of recipient for the good or service is required. Advancement of education and the more general category of other purposes beneficial to the community is the head of Charity law from which this category is developed. The framework goes beyond advancement of education and other purposes beneficial to the public, though, to the supply of (quasi) public goods that encourage the edification of communities - or at least subsections of communities which are sufficiently large to be considered public. The provision of social goods such as the arts and other cultural activities, are examples of this kind of Common good; as is the provision of physical infrastructure like bridges, sea banks, public libraries and museums. The Charity law cases relating to public benefit suggest that as the law presently stands; a greater level of publicity is required when encouraging edification than when dealing with disadvantage. To be entitled to preferential treatment under this head, as the law presently stands, a civil society organisation is likely to be required to supply at least quasi-public goods and the benefit should be enjoyed by many people. In the case of this class of Encouraging Edification, the quasi public good may be enjoyed by the rich as well as poor (as the object is advancement of fraternity not equality). In economic terms, arguably to be a Common good that encourages edification, the good or service supplied must be both non-rivalrous and non-excludable. When Enabling Edification, a Common good must be for people not just a person.

Facilitating Freedom is the basis for preferential treatment for the broadest class of contributions to common good. This basis for preference is founded upon, but goes beyond, the preference granted at common law to charitable trusts for the advancement of religion. Advancement of religion is, though, really a subset of freedom of religion, for religion can only be advanced to the extent that it is enabled.

In a jurisdiction such as the US where the separation of the church from the state is constitutionally demarked, the preference tends to take the form of exemption from compliance. In other jurisdictions it often takes a more direct form such as government grants. The charity cases make it clear that religion is to be preferred and different jurisdictions may debate the form of this preference – that is whether it is
only an exemption or whether it is in fact a direct benefit (Neville Estate Ltd v Madden [1962] Ch 832). In the much more homogenous social context in which charity law jurisprudence developed: the foundations of religious teaching were accepted as the exhortation to love God and ones neighbour (Matthew 22:36-40), the common good in the advancement of religion was self evident. But that does not mean only religion should now be preferred at common law.

The recent extension of charitable purpose by statute in England and Wales to include advancement of citizenship or community development, the advancement of human rights and conflict resolution or reconciliation points toward the need for development of a jurisprudence to accommodate this extension. Such a development can be built linguistically and conceptually from the Roman root meaning of ‘religion’ as that which binds together (Simpson and Weiner, 1989). It extends though, in the way the language has, to link that binding to the piety and other-centeredness taught by (the Christian) religion. On this basis one society might chose to prefer all organisations that are vehicles by which society is strengthened. Another society might chose to limit preference to only organisations that advance religion, as is the case at common law now. Others might require both religion and explicit proof of other-centeredness and public benefit by that ostensibly religion advancing organisation. The extent to which organisations by which the freedom of society is facilitated are preferred will manifest the extent to which a society values religious freedom and more generally, freedom of association. Our task is not to offer normative comment.

What we argue is that on the basis of the cases and more recent legislative developments in England and Wales it is appropriate for legal theory to extend the head of charitable purpose known as advancement of religion, to a more general concept that can include religious, ethical and political organisations that strengthen the bonds of community. In such a case the basis for preference is the strengthening of the polis. The Common good supplied is a fortification or facilitation of the fundamental freedom that underpins common law democracies. Freedom of religion and association might be readily identified as central. Even if less readily identified we contend that advancement of citizenship, community development, the advancement of human rights and conflict resolution or reconciliation - which were categories added by the Charities Act 2006 (UK) - are all other examples even exemplars of this form of Common good. We use polis in this context, as the notion of the city-state engages the image of larger numbers of people subject to one legal system but, preserves the concept of a community. The strengthening of peoples’ voluntary contributions to common good reduces the need for government to coerce such contributions and this advances liberty. The polis is a larger group than people.

In summary, then within the framework of this jurisprudence; preferential treatment is afforded to civil society organisations that voluntarily provide goods that advance equality, fraternity or liberty. The good of the polis is the basis for preferring civil society organisations with purposes that facilitate freedom. The benefitting of people is the basis for Encouraging Edification in civil society organisations. When Dealing with Disadvantage is the basis for preferring a civil society organisation, it is enough that the common good supplied is to a person who is at a disadvantage.

Just as the characteristics of civil society organisations, namely; altruism, benefit for the public and absence of coercion are contested concepts in common-law countries,
so the concepts around which entitlement to preference is based - equality fraternity and liberty - are also contested. Some communities will require more and other less of each of these characteristics for civil society organisations supplying common goods to enjoy preference. So within this jurisprudence these concepts are also treated as dynamic and the entitlement to preference will move with the values of the particular society along a continuum of preference (if all are aggregated) or continua of equality, fraternity and liberty (if each are treated separately). By also laying each of these concepts out on a continuum or continua, rather than confining the discourse to the fixed categories of charity, the architecture for a more expansive discussion is set out.

As the preferencing dimension is distinct from, but constructed upon, the foundation space it is appropriate to express it diagrammatically as a third dimension in the form set out below.

![Figure 9: A three dimensional space for civil society with preference included](image)

**Thesis six: A jurisprudence for civil society is a more powerful analytical tool than the Charity law framework in at least eight ways.**

The civil society jurisprudence proposed is superior to the present charity framework in at least eight ways. These are now set out.

First, the civil society jurisprudence proposed here goes beyond the Charity law framework and begins to set out a way of bringing all of the laws applying to civil society into a coherent framework. Taking the common law foundations in Charity law as the starting point we argue that all laws specific to civil society either regulate or enable association, that is, they are laws shaping freedom of association; or they are laws granting preference. The preference may be only exemption from compliance with other laws (as arguably is the case in the US) but nevertheless at a practical level it amounts to an exemption. This is a clearer framework than that of the current charity law.
Second, the Charity law framework was plagued by problems of method, but this jurisprudence for civil society provides a way of breaking free from the ‘spirit and intendment’ of the Preamble. It elucidates from and goes beyond Pemsel’s case to other categories that embrace the statutory extensions. As that development is linked into three major themes of philosophy – equality, fraternity and liberty, a gateway is provided for wider philosophic discourse to inform legal development for this sector of society.

Third, being constructed out of the foundational essence of Charity law and by adopting the accepted differentiations from civil society namely; business, government and family it expands and yet marries the space of Charitable purpose with civil society in a way that enables and encourages law to be informed by and accommodate cross disciplinary analysis and debate.

Fourth, the jurisprudence accommodates diversity of worldviews through dynamic boundaries. This is in contrast with the Charity law framework which is fixed and excludes or suppresses diverse voices. In the philosophically, politically and religiously diverse, multicultural circumstances of most common-law countries at the beginning of the twenty-first century, it is necessary for the common law to provide a framework which can accommodate this diversity as a matter of granting access to justice.

Fifth, the jurisprudential framework proposed provides categories that cover the field and subsequently allows development by going beyond:

1. Poverty relief to Dealing with Disadvantage,
2. Advancement of education and the more general class of public benefit to Encouraging Edification; and
3. Advancement of religion to Facilitating Freedom.

Sixth, the proposed jurisprudence provides a more just foundation for all civil society by going beyond advancement of religion to Freedom of association and links this to voluntary contributions to common good.

Seventh, once continua are established it is possible to go beyond the ‘nominal’ measurement of charity-or-not, to ordinal measurement of both enabling and preferring. It may even be possible to go beyond ordinal ranking to interval measurement or ratio measurement. Once each of the variables; altruism, benefit, coercion, Dealing with Disadvantage, Enabling Edification and Facilitating Freedom can be ranked on a continuum there are methods utilized in social science theory for ranking preferences which could be applied. Some variables such as time and money are capable of immediate numeric measurement. At the most general level, though, the ranking could simply be notional according to the values of the relevant community.

Eighth, this jurisprudence for civil society redefines the theoretical landscape so that charitable purpose; as it is commonly understood not, as it is technically defined in Pemsel’s case reclaims the central position in jurisprudential thought. This makes the drawing of boundaries between Charitable purposes and their others easier for lay persons to understand.
Thesis seven: A jurisprudence for civil society stands between, but is differentiated from private law and public law and thus warrants its own ‘third’ space in legal theory.

The division of society into four sectors (business, government and third sector and family) which is common in a range of social science discourses, including economics, sociology and politics (Anheier, 2004); has not, to date, flowed into jurisprudence. The time has come, we contend, for this division to inform legal theory development in relation to civil society. In jurisprudence a division between public law which relates to government (second sector) and private law which relates to business and family (first and fourth sectors) can be traced, back into Roman law (Girard, 2000). It significantly informs European law (Samuel, 1988). It is still widely adopted in common law jurisdictions (Farrar, 1977, Harlow, 1980, Deegan, 2001) although it is not as popular in the United States. In the United States this jurisprudential division can be traced into the work of Henry Terry in the 1880s whom Herget describes as ‘the first American author of a significant text on jurisprudence’ (Herget, 1990, p. 357). In the US the division is still ‘not uncommon’ (Farnsworth, 1996, p. 96) and was described by Justice Jackson in 1953 as a ‘handy classification [which] is doubtless valid for some purposes’ (Garner v Teamsters Union, 346 U.S. 485, 494). If this initial division between public and private law is accepted as a starting point there is, in legal theory, a division between the public law which applies to government (the second sector) on the one hand and the other sectors which are all grouped as private. This residual category of private law is capable of further sub-segmentation to isolate the law applying to business (the first sector) and the law applying to family (the fourth sector) but there is not a class for the laws applying to the third sector (Brody, 2002, p. 244). At its simplest, then the difference between the present dominant categorisation of law and the jurisprudence developed in this theory is illustrated as the difference between the two diagrams below. The present dominant categorisation is

![Figure 10: Present Classification](image)

The re-categorisation to include a jurisprudence for civil society is based on segmenting out the applicable law for civil society which, it is argued, is capable of division into two subcategories. Association law is the first subcategory. It is the
umbrella under which is gathered all the laws that enable persons to associate freely 
for the voluntary pursuit of common, non-commercial interests. Preference law is the 
second. It is the subcategory of law that grants preferences to persons when 
associating for the voluntary pursuit of common, non-commercial interests that a 
society wishes to particularly encourage by granting preferences. The following 
diagram illustrates:

```
LAW

Public Law  Civil Society Law  Private Law

Association Law  Charity  Commercial Law  Equity  Estate Law  Family Law
```

Figure 11: Proposed Classification

This jurisprudence for civil society stands between, but is differentiated from, the two 
great dividers of legal theory: private law and public law. It warrants its own space in 
legal theory.

**Conclusion**

A jurisprudence for civil society is, then, a jurisprudence that builds from the common 
law foundations of Charity law an alternate unifying architecture which is expansive 
足够的 to encompass all the laws that enable and prefer voluntary contributions to 
common good. It offers a simpler and more cohesive explanation of this ‘legal 
universe’. Drawn, from and integrated into, current conceptions of civil society it is; 
to repeat Copernicus, ‘that which is easiest to grasp’. This jurisprudence for civil 
society is not that radical, though, for its pedigree leads back through to and is built 
from the concept of charitable purpose classified into four heads in *Pemsel’s case*. 
The jurisprudence begins by separating the *enabling* dimension of law from the 
*preferring* dimension which the *Pemsel’s case* classification did not do and then goes 
beyond the ‘technical meaning’ of charitable purpose to elucidate the three key 
concepts that distinguish charities from their others. The three key concepts are: 
*Altruism*, public *Benefit*, and *Coercion* and the others from which charities are 
distinguished are (respectively) businesses, families and governments. These three 
concepts mark out the space for civil society and do so by an extension of a concept of 
charitable purpose to the boundaries of civil society thus defining that civil society 
space *enabled* by law. As to the preferring dimension the four heads of charitable 
purpose are re-categorised onto three. The first head of poverty relief is expanded to 
*Dealing with Disadvantage* to achieve equality, The second head of advancement of 
education and the more general class of public benefit to *Encouraging Edification* to 
advance *fraternity*; and advancement of religion and other aspects of public benefit 
are expanded to *Facilitating Freedom* to advance *liberty*. The jurisprudence therefore 
offers an alternate architecture for development of the common law in its application 
to civil society. This architecture is capable of expansion beyond the common law to 
include statutory extension to charity. In bringing together all laws that enable and
prefer voluntary participation and voluntary contribution through civil society organisations the framework follows the dominant discourse in disciplines ranging from public policy and sociology to economics in relation to civil society. The framework brings together into one jurisprudence all of the laws applying to trusts and associations not part of government, business or family sectors into a jurisprudence for civil society. A theoretical space in legal theory that stands between, but is different from private law and public law and warrants its own ‘third’ space is identified, a separate jurisprudence for civil society.
APPENDIX A


Great Britain National Audit Office, *'Monitoring and Control of Charities in England and Wales'* (HMSO, 1987).


Voluntary Sector Round Table Panel on Accountability and Governance in the Voluntary Sector, Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector (1999) (Broadbent Report).

BIBLIOGRAPHY


