

## LEGAL REGULATION AND REGISTRATION OF CHARITIES: A COMPARATIVE STUDY

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**Abstract.** The present article is dedicated to a comparative study of main practical and theoretical problems of charities legal regulation (including its definition, taxation, tax exempts, charity status recognition, etc.). The study is based mainly on legislation of the United Kingdom of Great Britain and Northern Ireland, Russian Federation, United States of America, People's Republic of China, Ethiopia, Turkmenistan, but also certain legal acts of Australia, Kuwait, Poland, Finland, Egypt, Zambia, Zimbabwe, Uganda, India, United Arab Emirates, Belgium, Canada, Hungary, Romania, Jordan, etc. in some aspects are addressed.

**Key words:** charity, charitable activity, charitable organization, legislation on charities in various countries, taxation and charities, tax exempts, not-for-profit organization, non-governmental organization, charities registration, charities funding, regulation of charities.

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### I. Short Introductory Notes

Charitable activity and charitable organizations are known since early periods of emerging and development of States and cities<sup>1</sup>. Historically charitable activity was regulated by customs and traditions. In old times it was widespread that a great part of charitable activity was concentrated within religious organizations, which was common for Christians, Muslims and other confessions. Gradually charitable activity has crossed frames of religious groups and has spread much broader than a religious doings sphere: for example, charities became active in laic education and public health. Meanwhile, even after certain secularization of charitable activity it was still for a long period of time regulated by customs and traditions. One of the earliest laws on charities is Charitable Uses Act of 1601<sup>2</sup>, known also as the Statute of Elizabeth I. Although it was practically repealed in 1888 (by Mortmain and Charitable Uses Act adoption), a list of purposes or activities contained in its preamble “has nevertheless formed the foundation of the modern definition of

charitable purposes, which has developed entirely through case law”<sup>3</sup>. Later, in the 20th century laws, devoted directly to the regulation of charities, were adopted in many countries. Thus, in the United Kingdom of Great Britain and North Ireland (UK) Charities Acts and amendments to them for England and Wales were approved several times, the most significant of them in 1992, 1993, 2006 and 2011, the Charity Act for Northern Ireland in 2008, Acts regulating charities in Scotland in 1990, 2003 and 2012. In Russia the Federal Law on Charitable Organizations and Charitable Activity<sup>4</sup> dated back to 1995 and amended later intensively. In Australia the Charities Bill appeared in 2003 and the Extension of Charitable Purpose Act in 2004. In some countries charities regulation is integrated into laws, which are not dedicated exclusively to charitable activity and organizations. For instance, in the United States of America (USA) rules on charities are incorporated into Internal Revenue Code of 1986 with later amendments, while charities and other nonprofit organizations are registered in accordance with State laws dealing with legal entities at large. Of course, in the end of the

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<sup>1</sup> See: The Palgrave Handbook of Volunteering, Civic Participation, and Nonprofit Associations / ed. D.H. Smith, R.A. Stebbins, J. Grotz. Vol. 1 (part on History of Associations and Volunteering). NY, 2016. P. 23–45.

<sup>2</sup> See: 43 Eliz I, p. 4.

<sup>3</sup> URL: <https://publications.parliament.uk/pa/cm200506/cmbills/083/en/06083x-.htm> (accessed: 25.07.2019).

<sup>4</sup> See: URL: [www.consultant.ru/document/cons\\_doc\\_LAW\\_7495/](http://www.consultant.ru/document/cons_doc_LAW_7495/) (accessed: 27.07.2019).

20th century and in the beginning of the 21st century new laws on charities have been enacted and laws on charities in force have been amended.

From the point of view of unification or diversification of legal regulation of charities all countries might be clustered in three groups.

(A). Certain countries prefer to have a single Law on Charities (as mentioned above the UK and Russian Federation, or China with its Charities Bill<sup>5</sup> adopted into Law in 2016<sup>6</sup>).

(B). Some countries have a complex law, which includes provisions for both charities and other not-for-profit organizations: for example, the Ethiopian Charities and Societies Proclamation No. 621/2009 repealed and substituted by the Ethiopian Organization of Civil Societies Proclamation No. 1113/2019<sup>7</sup> along with the Ethiopian Registration and Administration of Charities and Societies Regulation No. 168/2009<sup>8</sup>.

(C). In many countries (USA, for example) rules on charities are dispersed among various legal acts, none of which is devoted specifically to charities.

However, even in countries with a single specific law on charities certain provisions regulating this or that aspects of charities functioning might be introduced in other laws: tax laws may contain rules on charities' taxation, license legislation provides for permissions and licenses obtaining for prescribed types of activity by all organizations, including charities, etc.

## **II. Definitional Issues**

### **II.1. Fundamental Definition: the Non-distribution Rule**

The main feature of any not-for-profit organization (to whom charities belong, but who are not limited by charities only) in any country is a non-distribution in any form (for instance, in the form or any of dividends or any other form) among its members or participants of income, received by an organization from any source, as well as a non-distribution of its profits for the benefits of its directors or officers. There are legislative constraints in certain countries to prevent a latent distribution of profits for the benefit of directors and officers in the form of salary or compensation. For example, the Russian Federal

Law on Charitable Organizations and Charitable Activity prescribes that a portion of a budget of a charity allotted for salaries and compensations to the staff (including directors, if they are paid) must not exceed 20%, while not less than 80% of charity's budget must be used for its programs and projects funding. In the USA the Internal Revenue Service evaluates compensation of directors of any not-for-profit organization, while considering its application for granting or keeping a non-profit status for tax exemption purposes, and such compensation paid to directors and/or officers must be deemed "reasonable" by the Internal Revenue Service.

Members leaving a not-for-profit organization, as a rule, have no right to being paid back their fees and contributions, except for specific contributions to organizations set up in certain forms in some countries.

### **II.2. State Definitional Approaches:**

#### **II.2.a. Public Benefit versus Mutual Benefit**

Legislation of the majority countries distinguishes between organization of public benefit and organizations of mutual benefit, however, concepts of a public benefit may vary from country to country. For example, in Russia (Law on Non-Commercial Organizations, Article 2[2]<sup>9</sup>) and Turkmenistan (Türkmenistanyň Kanuny Jemgyýetçilik birleşikleri hakynda, Article 6[2]<sup>10</sup>) non-governmental organizations, in accordance with legislation, are created to achieve socially useful purposes and it means that all they are, to this or that extent, publicly beneficial. That is why a significant part of Russian non-governmental organizations and all Turkmenistan's non-governmental organizations have a status of public associations. Trade unions and clubs, for instance, are among public associations. It is considered that pursuing or defending common interests collectively makes a contribution to the growth of public benefit. Meanwhile, in Russia charitable organizations may be registered as such. Certain non-governmental organizations since amendments to the Federal Law on Non-Commercial Organizations (Articles 31.1–31.4) having been effectuated in April 2010 may acquire a status of socially oriented organizations and are potentially eligible for governmental support. Socially oriented organizations in Russia engage in a broad range of activities, including traditional charitable work, the provision of free-of-charge legal aid and the protection of human rights. The current Turkmen legislation does not define a "charitable" status for any organization. However, in Turkmenistan public organizations that provide assistance to disabled persons and conduct educational activities are exempt from income tax and value added tax. In Poland the Cabinet composes a list of organizations of the "highest public benefit" on the

<sup>5</sup> See: URL: [http://english.www.gov.cn/news/top\\_news/2016/03/09/content\\_281475304306862.htm](http://english.www.gov.cn/news/top_news/2016/03/09/content_281475304306862.htm) (accessed: 11.08.2019).

<sup>6</sup> See: URL: <https://www.loc.gov/law/foreign-news/article/china-charity-law-adopted/> (accessed: 11.08.2019).

<sup>7</sup> See: ፌዴራል ነጋሪት ጋዜጣ፡፡ 25 ኛ ዓመት ፡፡ ቁጥር 33. አዲስ አበባ-መጋቢት 12 ቀን 2019 / Federal Negarit Gazette. 25th Year. No. 33. Addis-Ababa, 12th of March 2019, p. 11006–11057 [Electronic resource]. – Access mode. URL: [https://lawethiopia.com/images/federal\\_proclamation/proclamations\\_by\\_number/1113.pdf](https://lawethiopia.com/images/federal_proclamation/proclamations_by_number/1113.pdf) (accessed: 10.08.2019).

<sup>8</sup> See: URL: <https://lawethiopia.com/index.php/legislation/federal-legislation/civil-societies-charities> (accessed: 10.08.2019).

<sup>9</sup> See: URL: [www.consultant.ru/document/cons\\_doc\\_LAW\\_8824/87a16eb8a9431fff64d0d78eb84f86accc003448/](http://www.consultant.ru/document/cons_doc_LAW_8824/87a16eb8a9431fff64d0d78eb84f86accc003448/) (accessed: 03.08.2019).

<sup>10</sup> See: URL: [www.minjust.gov.tm/ru/mmerkezi/doc\\_view.php?doc\\_id=15017](http://www.minjust.gov.tm/ru/mmerkezi/doc_view.php?doc_id=15017) (accessed: 03.08.2019).

basis of their previous and current activities, and a situation in the mentioned list results in certain preferences for these organizations.

### *II.2.b. Unincorporated Associations, Charitable Trusts, Nonprofit Corporations*

To obtain a status of a legal entity a not-for-profit organization needs to be registered. Meantime, any non-profit organization exists before registration, and in some countries it is lawful for civil society organizations to conduct their activities without obtaining a legal entity status. For example, in the USA, Australia, Canada such organizations are called unincorporated associations, in Belgium they are named factual associations (“*feitelijke vereniging*” in Flemish and “*association de fait*” in French), in Russia they are known as non-registered public associations, in Poland they are ordinary associations (“*stowarzyszenia zwykłe*” in Polish).

Non-governmental organizations, which have no legal entity status, have no rights to possess property, enter into deals or make transactions, but they may conduct their activities under their proper names, using volunteer efforts of their members and participants. But it does not mean that unregistered associations have no formalization at all. For example, in England and Wales, where unregistered associations are believed to be one of the most common forms of organization within the voluntary sector<sup>11</sup>, an unincorporated association normally has as its governing document, a constitution or set of rules, which will deal with such matters as the appointment of office bearers, and the rules governing membership. In Russia, in accordance with the Federal Law on Public Associations (Article 18)<sup>12</sup> an unregistered association is recognized to be created after adoption of its charter and election of its officers.

Non-governmental organizations are registered usually by an administrative or judicial body, empowered by specific country's pieces of legislation. In federal countries a registration of non-governmental organizations (including charities) might be effectuated at a federal level (Russia), at a state (constituent unit) level (USA), or both at federal and constituent unit (provincial) levels (Canada). A legal entity status is acquired by a registration. For registration purposes charities usually meet stricter criteria in comparison with major part of other types of non-governmental organizations.

In certain countries official registration of non-governmental organizations is mandatory. For instance, Ethiopia's 2019 Organization of Civil Societies Proclamation requires civil society organization, including charitable endowment (የበጎ አንድዉመንት ድርጅት) and charitable trust (የበጎ አድራጎት እምነት), to be registered with the Agency for

Civil Society Organizations within three months of formation. The 2009 Non-Governmental Organizations' Act of Zambia<sup>13</sup> criminalizes unregistered organizations. Anyone operating an unregistered NGO is subject to a fine and/or imprisonment up to three years. Uganda's 2016 Non-Governmental Organizations Registration Act (Part X, Section 1)<sup>14</sup> criminalizes unregistered activity. “[A]n organization which... carries out any activity without a valid... certificate of incorporation commits an offense” and the director or officer responsible is liable for “a fine not exceeding twenty currency points or imprisonment not exceeding six months or both”. In Zimbabwe, “no private voluntary organization shall commence or continue to carry on its activities or seek financial assistance from any source unless it has been registered in respect of a particular object or objects in furtherance of which it is being conducted” (Private Voluntary Organizations Act, Article 6.1“a” and “b”<sup>15</sup>). Registration is mandatory as well in Jordan, Kuwait, Sudan and the United Arab Emirates.

### II.3. Religious Groups

Religious groups in all countries are considered to be not-for-profit organizations, but of specific nature. An organization to be considered religious is required to consist of persons appears to truly and sincerely hold the values and beliefs espoused by the religion. The problem is how to find out the truth and to evaluate a level of sincerity of founder(s) and leader(s) of a religious organization. Unfortunately, in different countries there are examples of setting up organizations, whose title contains the word “religious”, but aim and reason of creation of such organizations differ from really confessional motivation for people's assembly and founding an organization. Legislation of various countries has specific provisions to prevent such a situation. For instance, legislation of major part of USA States provides for special requirements to the founders of any new religious organization. The Russian Federal Law on the Freedom of Consciousness and on Religious Organizations stipulates that all religious organizations, which have been existing as legal entities prior to entering into force of the mentioned Federal Law in 1997, have a possibility of re-registration as legal entities, while any new assembly or association of persons, claiming that they are setting up a new religious cult, may exist as unincorporated religious group and may acquire a status of a legal entity, if desires, only after 15 years of its existence (Article 11(5)). Such a religious group may profess its region, organize and conduct religious services, disseminate knowledge about their religion, recruit new members, but may not possess any property. Such a prohibition was introduced

<sup>11</sup> See for instance: URL: [https://www.ngo-monitor.org/funder/united\\_kingdom/](https://www.ngo-monitor.org/funder/united_kingdom/) (accessed: 08.08.2019).

<sup>12</sup> See: URL: [www.consultant.ru/document/cons\\_doc\\_LAW\\_6693/0101677b22341b646d81d19a7697b54c05768a84/](http://www.consultant.ru/document/cons_doc_LAW_6693/0101677b22341b646d81d19a7697b54c05768a84/) (accessed: 09.08.2019).

<sup>13</sup> See: URL: [www.parliament.gov.zm/sites/default/files/documents/acts/Non-Governmental%20Organisations%27%20Act.PDF](http://www.parliament.gov.zm/sites/default/files/documents/acts/Non-Governmental%20Organisations%27%20Act.PDF) (accessed 12.08.2019).

<sup>14</sup> See: URL: <https://ulii.org/ug/legislation/act/2016/1> (accessed: 11.08.2019).

<sup>15</sup> See: UR: L<https://zimlil.org/zw/legislation/act/1967/63> (accessed: 11.08.2019).



into the Federal Law bearing in mind the previous experience, when quite a number of new religious organizations' leaders in Russia in the 1990-s persuaded members to transfer their property to religious organizations; some religious leaders disappeared after this with all assets of their organizations.

It is necessary to point out that in certain countries (in the UK, for instance) the advancement of religion is recognized to be one of the fields of charitable activity, while in other countries (in India, for example) a purpose that relates exclusively to religious teaching or worship is not considered as charitable.

## II.4. Federal Definitional Approaches

### *II.4.a. Mutual Benefits versus Charities*

The USA Internal Revenue Service looks at an organization's primary source of financial support to determine if it qualifies as a public charity or a private foundation. In general, if an organization derives its support from a relatively few number of people, the USA Internal Revenue Service will classify the organization as a private foundation. If the organization's source of support is large and varied enough, the Internal Revenue Service will usually classify the foundation as a public charity.

Tax exemptions under section 501(c)(3) of the USA Internal Revenue Code<sup>16</sup> apply to corporations, and any community chest organization, fund, cooperating association or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, to foster national or international amateur sports competition, to promote the arts, or for the prevention of cruelty to children or animals. There are also supporting organizations which are often referred to in shorthand form as "Friends of" organizations.

As B.R. Hopkins wrote on charitable organizations, "the narrow definition: Those organizations that are "charitable" in the sense of that term as used in the context of tax exemption. That is, section 501(c)(3) of the Internal Revenue Code describes eight different categories of organizations and the "charitable" organization is one of them. <...> The broader definition: Those organizations that are eligible to attract contributions that are deductible for federal income, estate, and gift tax purposes as charitable gifts"<sup>17</sup>, according to Section 170(c) of the Internal Revenue Code.

Legislation of certain countries does not distinguish flagrantly between charities and mutual benefit organizations. For example, in Turkmenistan public organizations are the only active legal form of non-governmental organizations, and they are permitted to pursue both public benefit and mutual benefit purposes. The Turkmenistan Law on Public Associations (Türkmenistanyň Kanuny

Jemgyýetçilik birleşikleri hakynda) refers to "common aims" or "common interests" that members can pursue collectively. The current Turkmenistan legislation does not, however, define a "public benefit" or "charitable" status for non-governmental organizations. Meanwhile, according to the Turkmen legislation, public organizations, which provide assistance to disabled persons and conduct educational activities, are exempt from income tax and value added tax.

### *II.4.b. Public Charity and Private Foundation*

In the USA major part of those, who form a not-for-profit organization, prefer to set up a public charity in conformity with the section 501(c)(3) of the USA Internal Revenue Code, because the opportunities for public donations are far higher. Private donors to a 501(c)(3) "public charity" may donate up to 50% of their adjusted gross income. Donors to a "private foundation" can only donate up to 30% of their adjusted gross income.

Another provision, § 170 of the USA Internal Revenue Code, prescribes a deduction, for federal income tax purposes, for some donors who make charitable contributions to most types of 501(c)(3) organizations, among others. Regulations specify which such deductions must be verifiable to be allowed (e.g., receipts for donations over 250 dollars). Due to the tax deductions associated with donations, loss of 501(c)(3) status can be highly challenging to a charity's continued operation, as many foundations and corporate matching programs do not grant funds to a charity without such status, and individual donors often do not donate to such a charity due to the unavailability of the deduction.

Testing for public safety is described under section 509(a)(4) of the USA Internal Revenue Code, which makes the organization a public charity and not a private foundation, but contributions to 509(a)(4) organizations are not deductible by the donor for federal income, estate, or gift tax purposes.

The two exempt classifications of 501(c)(3) organizations are as follows.

**First.** A public charity, identified by the USA Internal Revenue Service as "not a private foundation", normally receives a substantial part of its income, directly or indirectly, from the general public or from the government. The public support must be fairly broad, not limited to a few individuals or families. Public charities are defined in the Internal Revenue Code under sections 509(a)(1) through 509(a)(4).

**Second.** A private foundation, sometimes called a non-operating foundation, receives most of its income from investments and endowments. This income is used to make grants to other organizations, rather than being disbursed directly for charitable activities. Private foundations are defined in the USA Internal Revenue Code under section 509(a) as 501(c)(3) organizations, which do not qualify as public charities.

<sup>16</sup> See: URL: <https://www.law.cornell.edu/uscode/text/26> (accessed: 10.08.2019).

<sup>17</sup> Hopkins B.R. Charity, Advocacy and Law. NY, 1992. P. 7.

In other countries public benefit status is acquired in a different way, than in the USA. Thus, in Russia not-for-profit organizations, which are called there non-commercial organizations, may register themselves as a charity pursuant to the Federal Law on Charitable Organizations and Charitable Activity. This Federal Law, however, does not provide any benefits that are particular to registered charities. Although legislation at the federal, regional and local levels offers tax benefits to charities, they do not necessarily require the organization to be registered as a charity. Tax benefits under Russian law are primarily tied to the support or performance of particular activities specified in the Federal Tax Code. Registration of a non-commercial organization as a charity pursuant to the Federal Charities Law provides the organization with a particular status and subjects the organization to heightened scrutiny, but this status does not in itself provide any unique tax benefits.

Amendments enacted in April 2010 to the Russian Federal Law on Non-Commercial Organizations (originally dated back to 1996), as mentioned earlier, introduced the status of “socially oriented organizations”. Under the new law, “socially oriented organizations” are potentially eligible for governmental support. “Socially oriented organizations” engage in a broad range of activities, including traditional charitable work, the provision of free-of-charge legal aid and the protection of human rights.

### **III. Structural Issues**

#### **III.1. Permissible Forms of Organization**

A diversity of forms of non-governmental organizations in the World is tremendous. Each country has its own set of forms of organizations provided for by the domestic law, but in all countries religious organizations are considered as a separate form of organizations, which distinct from all other forms of non-profit organizations, and are registered in accordance with laws, specially devoted to religious organizations. Making such a note, I won't refer to religious organizations while considering permissible forms of organizations. For example, in Poland associations which may act without registration and, therefore, without a status of a legal entity are called ordinary associations (“stowarzyszenia zwykłe” in Polish), and those, who prefer to acquire a legal entity status, exist in a form of registered associations (“stowarzyszenia zarejestrowane” in Polish), however there is the Law on Foundations as well. In Finland a registered association is named “rekisteröity yhdistys” in Finnish.

In Turkmenistan the Civil Code of 1998 (with later amendments)<sup>18</sup> provides for two primary legal forms available for non-entrepreneurial legal entities: social organizations and foundations. The Turkmenistan Law on Public Associations (Türkmenistanyň Kanuny Jemgyýetçilik birleşikleri hakynda) establishes 4 forms of public associations: (i) a social organization (a membership-based

public association that is created on the basis of joint activities for the protection of common interests and achievement of the constitutive goals of the members); (ii) a social movement (a mass non-membership public association that pursues social, political and other socially useful goals, and which consists of participants supporting those goals); (iii) a public foundation (a non-commercial, non-membership public association that seeks to generate income through voluntary contributions and other donations not prohibited by law, and to use this property for socially useful goals); and (iv) a body of social initiative (a non-membership public association that aims to address, on a participatory basis, various social problems arising at the neighborhood or workplace of citizens). 99 social organizations have been registered in Turkmenistan by the middle of 2012. No other form of non-governmental organizations has been used in Turkmenistan.

In China the full range of legally-registered non-governmental organizations are called generically “social associations” or “social formations” (“shehui zu-zhi”, 社会组织 in Chinese). Social associations might be created in three major forms: “social organizations” (“shehui tuanti”, 社会团体 in Chinese), which are the equivalent of membership associations and include many trade and professional associations; “civil non-enterprise institutions” (“minban fei qiye danwei”, 民办非企业 in Chinese), which are the equivalent of non-profit service providers; and “foundations” (“jijinhui”, 基金会 in Chinese).

In India non-governmental organizations are registered in three forms: trusts in accordance with Public Trusts Acts of various states (in the absence of a Trusts Act in any particular state or territory the general principles of the 1882 Indian Trusts Act are applied); societies in conformity with the 1860 Societies Registration Act; Section-25 companies according to the 1956 Indian Companies Act, Section 25. In addition to registration, a non-governmental organization engaged in certain activities might also require special license/permission.

In the USA forms of non-governmental organizations are stipulated by states' laws. Usually, non-governmental organizations are created as associations, foundations, trusts, not-profit corporations, cooperatives. Some non-profit organizations can broadly be described as “charities”. Some are strictly for the private benefit of the members – like country clubs, or condominium associations. Others fall somewhere in between – like labor unions, chambers of commerce, or cooperative manufacturing or trading companies.

In Russia the Civil Code was significantly revised in early 2013 and in 2019. Amendments to the Civil Code of Russian Federation deal also with forms of so called non-commercial (i.e. not-for-profit) organizations. According to § 6 and 7 of the Chapter of the Russian Civil Code as

<sup>18</sup> See: URL: [www.minjust.gov.tm/ru/mmerkezi/doc\\_book\\_det.php?book\\_id=2](http://www.minjust.gov.tm/ru/mmerkezi/doc_book_det.php?book_id=2) (accessed: 10.08.2019).

amended<sup>19</sup> all forms of non-commercial organizations are divided into two groups: corporative non-commercial organizations and unitary non-commercial organizations. Non-commercial corporations include such forms as consumers' cooperatives, housing cooperatives, condominium organizations, gardeners' partnerships, mutual credit societies, social organizations (including political parties and labor unions), associations, chambers of commerce and industry, notaries' chambers, lawyers' chambers, indigenous peoples' communities, etc. Unitary non-commercial organizations encompass such forms as foundations, public, municipal and private institutions, companies based on public law, autonomous non-commercial organizations, etc. In compliance with the Federal Law on Charitable Organizations and Charitable Activity charities may exist only in the forms of a foundation, a social organization or an institution set up by a charitable organization.

### III.2. Level of Regulation – Federal or National, Constituent Unit, Local

In unitary countries the main level of non-governmental organizations regulation is a national one. In federal countries non-governmental organizations regulation usually is divided between federal and constituent unit (state, provincial, regional) levels. Specific distribution of powers regarding non-governmental organizations regulation between federal and constituent unit levels in each federal country depends upon general constitutional order of such country. Non-governmental organizations regulation usually limits to certain taxation, which is within powers of local government, and to regulation of interaction between non-governmental organizations and local government bodies.

Meantime, in some countries municipal bodies at a certain level of local government may have broader powers in non-governmental organizations regulation than usually under certain circumstances. For instance, in China lately there have been important local policy experiments in the civil society organizations sector, mostly at the provincial level<sup>20</sup>. Thus, in October 2007 Jiangsu<sup>21</sup> (a China's province as one of local territorial subdivisions) led the way in the provincial regulation of philanthropy with the first sub-national regulations on foundations, the Jiangsu Province Interim Regulations on the Supervision and Management of Local Foundations, which have been implemented by provincial measures for approving, inspecting and requiring annual reports from foundations in addition to the national rules on these matters. In July 2009 the Ministry of Civil Affairs announced a Cooperative Agreement on Advancing Integrated Reforms in Civil Affairs with the

municipal government of Shenzhen, a major economic area in the southern province of Guangdong and China's original special economic zone. Under this Cooperative Agreement, Shenzhen will serve as an "experimental site" for reforms in a wide range of civil affairs for assessment by the Ministry of Civil Affairs and other government agencies. Direct local regulation of non-governmental organizations in addition to national regulation is also starting in other areas of China. Thus, Yunnan (a China's province) has also been experimenting with regulations governing the registration and management of international non-governmental organizations in the province. The Yunnan Province Interim Regulations Standardizing International Non-Governmental Organizations Activities, issued in December 2009, provides international non-governmental organizations with a way of gaining legal status in the province through a registration process known as *bei'an* or depositing their file on record with the provincial Civil Affairs Department. In November of 2011, the Guangdong (a China's province) Civil Affairs director announced that the province would be making it easier for several different categories of non-governmental organizations (social services organizations, charitable organizations, etc.) to register by doing away with the professional supervising agency requirement.

## **IV. Purposes of Regulation**

### IV.1. Protecting charitable assets

Charitable assets of registered organizations are protected under property rights law. Unregistered organizations have no legal personality, and that is why unregistered organizations cannot possess assets. Specific regulation exists for protection of charitable assets, which are in a disposal of charitable trusts.

Thus, in England and Wales, a trust is essentially a relationship between three parties, the donor of some assets, the trustees who hold the assets and the beneficiaries (those people who are eligible to benefit from the charity). When the trust has charitable purposes, and is a charity, the trust is known as a charitable trust. Charitable trusts, as with other trusts, are administered by trustees, but there is no relationship between the trustees and the beneficiaries. This results in two things; firstly, the trustees of a charitable trust are far freer to act than other trustees and secondly, beneficiaries cannot bring a court case against the trustees. Rather, the beneficiaries are represented by the Attorney General for England and Wales, who appears on the part of the Crown.

The Charity Commission for England and Wales is tasked with regulating and promoting charitable trusts, as well as providing advice and opinions to trustees on administrative matters. Where the Charity Commission feels there has been mismanagement or maladministration, it can sanction the trustees, removing them, appointing new ones or temporarily taking the trust property itself to prevent harm being done. Where there are flaws with a charity, the High Court of Justice can administer schemes

<sup>19</sup> See: URL: [www.consultant.ru/document/cons\\_doc\\_LAW\\_5142/](http://www.consultant.ru/document/cons_doc_LAW_5142/) (accessed: 10.08.2019).

<sup>20</sup> See: *Simon K.W.* The Regulation of Civil Society Organizations in China // *International Journal of Civil Society Law*. 2011. Vol. IX. Issue I.P. 55–84.

<sup>21</sup> See: URL: [www.en.jiangsu.gov.cn/](http://www.en.jiangsu.gov.cn/) (accessed: 10.08.2019).



directing the function of the charity, or even change the purpose of the charity or gift altogether.

Charitable trusts function in certain other countries. For example, in India a public charitable trust is usually floated when there is a property involved, especially in terms of land and building. Trusts exist also in the USA, Canada, Australia, etc.

#### IV.2. Protection of Public

One of the problems which the charity law is challenged and is expected to solve has to do with the procedures and grounds for granting an organization charitable status, which involves tax advantages, avoiding at the same time excessive bureaucratic difficulties and obstacles for freedom of civil society organizations. There are two main ways to solve this problem. Some people believe that it is quite sufficient for any organization without any prove or further monitoring to proclaim itself charitable in order to acquire a preferential status in regard to taxation. It is here that the problems arise. It may turn out after some period of time that the granting of charitable status has been unwarranted. Preferential taxation, even for a year, provides substantial competitive advantages and the opportunity for a commercial organization which has improperly received charitable status to realize artificially inflated profits. So, an absence of monitoring and control may attract unfair businessmen to gain money in an inappropriate way. Such a situation will inevitably provoke distrust in charitable activity in general, and it will be difficult for genuine charitable organizations to operate under these conditions.

In addition, the very appellation "charitable" sounds attractive, and certain commercial organizations or individual businessmen may use (and even used before the laws on charities entering into force) it purely for advertising purposes. No doubt, commercial organizations and businessmen can perform charitable acts and allocate funds to charity, and they have the right to expect that their activities in this regard will receive extensive publicity and enhance their prestige in the eyes of the public. Charity, naturally, should be associated with certain tax advantages in proportion to the funds spent on it. But entrepreneurship, i.e., making a profit and distributing it among the participants, is and will remain the basic purpose of such an organization. There is nothing wrong and nothing to be ashamed of in that, but it is by no means charity. The confusion of entrepreneurship and charity gives rise to a skeptical attitude toward charity in general. A confirmed distaste in several countries for organizations which call themselves charitable has already ripened among a segment of the population as a result of such confusion.

Legal entities and natural persons who wish to transfer funds to a charity and who have not identified a specific recipient (a hospital, school or needy individual) must be sure that the organization actually spends the funds for charitable purposes.

Providing a regulating governmental agency with all necessary documentation and information, a charitable organization receives an appropriate registration and a certificate affirming its status, the effect of which is extended automatically on the basis of a periodic comprehensive examination of its work. A respective regulator should both render organizational and methodological support for charities and monitor their activities, as well as concern themselves with the specific sanctions that should be imposed against an organization which has operated as a charity for some period of time and abused its charitable status.

In Russia the Ministry of Justice and its territorial departments monitor public associations; taxation bodies audit finances of all non-commercial organizations, including public associations. Russian prosecutors offices are empowered to supervise legality of actions and deeds of natural persons, officials, bodies and organizations, including non-registered. Persons have the right to petition, including filing complaints or suggestions with all governmental bodies.

In the USA before donating to a 501(c)(3) organization, a donor may wish to review the Internal Revenue Service Publication 78, which lists organizations currently exempt under 501(c)(3). Donors may also verify 501(c)(3) organizations on the web-based, searchable Internal Revenue Service list of charitable organizations as well as on lists maintained by the states, typically on states' Departments of Justice websites. Churches, however, have specific requirements to obtain and maintain tax exempt status; these are outlined in USA Internal Revenue Service Publication 1828 entitled "Tax guide for churches and religious organizations". This guide clearly outlines activities allowed and not allowed by churches under the 501(c)(3) designation. A private, nonprofit organization, also provides reputable and detailed results for web-based searching to verify information on 501(c)(3) organizations.

#### IV.3. Curbing Fraud

In the United States, prevention of charitable fraud is mostly a function of state governments, and laws vary widely from state to state. Approximately 45 states have laws regulating charities and require registration before soliciting donations. Meanwhile, at the federal level consumers may file USA Internal Revenue Service Form 13909 with documentation to complain about inappropriate or fraudulent (i.e., fundraising, political campaigning, lobbying) activities by any 501(c)(3) tax-exempt organization.

In the UK there are three bodies, whose regulatory powers are territorially distributed. Charity Commission for England and Wales (the Welsh title is Comisiwn Elusennau Cymru a Lloegr) has powers to conduct a full statutory inquiry into a charity, which may result in certain sanction if irregularities or fraudulent activities are found. The Office of the Scottish Charity Regulator is charged with developing a regulatory framework for Scottish charities, where each charity is clear about its rights

and responsibilities, and this framework should also foster public confidence in charities. The investigations of the Charity Commission for Northern Ireland have concerned a wide spectrum of charities. Many of these investigations have been closed with recommendations being made on simple good governance issues, while other cases are more serious in nature and investigations remain live.

In Russia the (federal) Penal Code contains provisions aimed at punishment of any fraud in general, not specifying charitable fraud as a separate crime. It is considered that actions of federal Ministry of Justice and Taxation Service as well as their regional and local departments may prevent charitable fraud or any irregularity by following the activities of not-for-profit (non-commercial) organizations. Ministry of Justice and its territorial departments have the powers to check if any public association acts in compliance with its charter's purposes and in conformity with law in general, while Taxation Service is empowered to audit taxes paying and legality of funds acquiring and expenditure.

In China the Ministry of Social Affairs along with its provincial departments is the main regulator of non-governmental organizations activities.

## **V. State Regulation**

### **V.1. Officials and Offices Involved – Effectiveness**

In certain countries (in Russia, for instance) charitable status is provided to a non-profit organization by the same body, who is empowered to register this non-profit organization as a legal entity, and at the same very moment, when its registration as a legal entity is realized. So, the legal entities' registration body is the main regulator of charities and other non-profit organizations. In Russia non-commercial organizations are registered by the taxation bodies, but the decision to register a public association is taken by the Ministry of Justice or its territorial department.

In other countries a not-for-profit organization is registered at first as a legal entity and after this it might be registered with another body, and a certain taxes exempt status is granted as a result of the second registration. For example, in the USA the legal personality is acquired by a not-for-profit organization through filing its non-profit articles of incorporation with a body entitled by legislation of each specific state, while federal taxes exempt status is granted by the USA Internal Revenue Service (at the federal level), if such a status is applied by an interested non-profit organization, which meets legal requirements for this status. Section 501(c) of the USA Internal Revenue Code provides that 28 types of nonprofit organizations are exempt from some federal income taxes. Sections 503 through 505 set out the requirements for attaining such exemptions. Many states refer to Section 501(c) for definitions of organizations exempt from state taxation as well.

In the UK a legal entity, who meets legal requirements for the charitable status should apply for a registration to the Charity Commission for England and Wales, the

Office of the Scottish Charity Regulator or the Charity Commission for Northern Ireland respectively.

For instance, in England and Wales, where an organization's income does not exceed 5,000 sterling pounds it is not able to register as a charity with the Charity Commission for England and Wales. It can, however, register as a charity with Her Majesty Revenue & Customs for Tax purposes only. With the rise in mandatory registration level, to 5,000 sterling pounds by the 2006 Charities Act, smaller charities can be reliant upon Her Majesty Revenue & Customs recognition to evidence their charitable purpose and confirm their not-for-profit principles.

### **V.2. Governance Issues**

Not-for-profit organizations face many of the same challenges of corporate governance, which face large, publicly traded corporations. Basically, the challenges arise from the "agency problem" – the fact that the management which controls the non-profit organization is necessarily different from the people who this organization is designed to benefit. In a non-profit organization, the "agency problem" is even more difficult than in the for-profit corporation, because the management of a non-profit organization is not even theoretically subject to removal by the organization's beneficiaries. The board of directors of most not-for-profit organizations is self-perpetuating, with new members chosen by vote of the existing members.

In the USA the majority of states require in their legislation that three directors should be appointed. Some states only require one: California, Colorado, Delaware, Georgia, Iowa, Kansas, Michigan, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Virginia, and Washington. Different states have different requirements for officers, but generally a non-profit corporation should have a president, treasurer and secretary. In some states, one person can hold every office. In others, one person can hold up to two offices, but cannot be both the president and the secretary. The states where one person may hold every office include Arkansas, Delaware, Florida, Georgia, Iowa, Illinois, Hawaii, Kansas, Kentucky, Main, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, Wyoming.

In Russia issues of governance are regulated by federal legislation. The Russian federal laws do not prescribe a specific quantity of governing bodies or number of members of these bodies, but establish democratic principles of governance. Thus, they stipulate that the supreme body of a membership organization shall be the assembly of all members or a conference or a convention representing all members, that an internal auditor or members of internal auditing commission cannot be members of an executive body or cannot be elected as a president of the non-commercial organization. It is provided for that a council of trustees shall



be created in each foundation, but without prescriptions regarding the role and powers of such a council.

In Egypt under Article 34 of the Law No 84 of 2002, it is required that associations submit a list of the names of all candidates for positions on their boards of directors to the Ministry of Social Solidarity at least 60 days prior to the election. The administrative authority may then require an individual to be removed from the list of nominees for “not fulfilling the nomination requirements” – though such “requirements” are not specified anywhere in the law itself. If an individual’s nomination is not withdrawn after an administrative authority request, the government may initiate a judicial proceeding that will prevent any election from taking place until a “competent court” issues a decision on the legality of the nominee – a process that can take months if not years to complete.

### V.3. Finance

In all countries laws on non-profits and charities contain provisions dealing with financial issues. Meanwhile, many laws, which do not devoted exclusively to non-profits’ or charities’ activities, regulate many issue of non-profits’ or charities’ finance. For example, book-keeping of not-for-profit organizations, including charities, is provided for in laws, which are not completely dedicated to non-profit organizations. Laws establish main sources of funding of non-profit organizations.

There are quite peculiar sources of financing of non-profit organizations in certain countries. For instance, in Hungary (since 1996), Slovakia (since 2001), Lithuania, (since 2002), Poland (2003), Romania (2003) a taxpayer has the right to order the taxation bodies to transfer 1% of the amount of taxes paid to non-governmental organizations of public benefit or trade unions (in Lithuania) or state-owned institutions (in Hungary and Lithuania). In all mentioned above countries this right belongs to taxpayers, who are natural persons, but in Slovakia in this case taxpayers might be both natural persons and legal entities. Of course, this is not the only source of financing not-for-profit organizations; many other financial sources are explored in other sections of the present chapter.

### V.4. Taxation – Property Tax Eligibility

In the UK Charitable organizations, including charitable trusts, are eligible for a complex set of reliefs and exemptions from taxation. These include reliefs and exemptions in relation to income tax, capital gains tax, inheritance tax, stamp duty land tax, etc. Tax law also makes special exemptions for charitable trusts. They are free from the income tax paid by individuals and companies, and also the corporation tax paid by incorporated and unincorporated associations. There is no requirement for charitable trusts to pay capital gains tax or council tax, although they are obliged to pay value added tax.

In Russia profit from the economic activities of non-commercial organizations, including charities, is generally taxed in the same manner as for commercial organizations.

Lower tax rates may be offered by regional or local authorities for qualifying non-commercial organizations. Foreign or international organizations wishing to make tax-exempt grants to Russian citizens or non-commercial organizations must be on a list of organizations approved by the Russian Government. Such grants may be made only for purposes specified by Russian Tax Code: for the implementation of specific programs in the sphere of education, art, culture, health care (AIDS, drug addiction, children oncology, including oncohematology, children endocrinology, hepatitis, tuberculosis), environmental protection, protection of human and civil rights, social services of the disadvantaged and vulnerable groups of citizens, as well as for holding specific scientific research.

In June of 2008, the Russian Government adopted a Decree No 485<sup>22</sup>, regarding the Government’s pre-approved list of foreign grantors (hereinafter referred to as the “List”). The Decree No 485 contained a reduced number of approved international organizations and made clear that as of January 1, 2009, only international organizations mentioned in the Decree could remain on the List. Grants from foreign organizations not included on the List are considered taxable income for Russian recipients, unless they otherwise qualify as donations under Russian law. The current regulation is applicable only to grants; donations, including those from foreign organizations to non-commercial organizations are tax exempt. On March 24, 2009, the Head of the Russian Government signed a Decree No 252<sup>23</sup>, amending the Decree No 485. The Decree No 485 empowered the Ministry of Finance to make changes and additions to the List. The Decree No 252 instead authorizes interested ministries – and not solely the Ministry of Finance – to initiate changes and additions to the List.

In the USA due to differing requirements by the states and the federal government, it is possible to be recognized as a non-profit organization by the state, but not by the federal government. Such an organization would be exempt from state taxes, but not from federal taxes. This may actually be desirable in certain limited circumstances. For example, federally tax-exempt organizations are generally prohibited from influencing elections and legislation, whereas the state may or may not prohibit non-profits from that activity.

### V.5. Charitable Solicitation – Mandatory Disclosure and Filing Requirements

In the USA “tax exempt” status does not excuse an organization from maintaining proper records and filing any required annual or special-purpose tax returns. Previously, annual returns were not generally required from an exempt organization accruing less than 25,000 dollars in gross income yearly. However, from 2008 onwards, many such organizations must file a yearly “e-Postcard” known

<sup>22</sup> See: URL: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_78003/](http://www.consultant.ru/document/cons_doc_LAW_78003/) (accessed: 22.01.2020).

<sup>23</sup> See: URL: <https://base.garant.ru/12166042/> (accessed: 22.01.2020).

as Form 990-N<sup>24</sup>, or risk losing their exemption. Form 990-N must be submitted electronically using an authorized IRS e-file provider. Other types of Form 990 may be submitted via mail and some are available electronically through an IRS e-file provider.

Failure to file required returns such as Form 990 (Return of Organization Exempt From Income Tax) may result in monetary fines of up to 250,000 dollars per year. Exempt or political organizations (excluding churches or similar religious entities) must make their returns, reports, notices, and exempt applications available for public inspection. The organization's Form 990 (or similar such public record as the Form 990-EZ or Form 990-PF) is generally available for public inspection and photocopying at the offices of the exempt organization, through a written request and payment for photocopies by mail from the exempt organization, or through a direct Form 4506-A "Request for Public Inspection or Copy of Political Organization IRS Form" request to the IRS of the exempt organization filing of Form 990 for the past three tax years. The Form 4506-A<sup>25</sup> also allows the public inspection and/or photocopying access to Form 1023 "Application for Recognition of Exemption" or Form 1024, Form 8871 "Political Organization Notice of Section 527 Status", and Form 8872 "Political Organization Report of Contribution and Expenditures". Internet access to an organization's 990 and some other forms is available through information services. Failure to file such timely returns and to make other specific information available to the public also is prohibited.

In Russia public associations, such as social organizations and public foundations (including charitable), by definition can be created only by natural persons collectively or jointly by natural persons and existing public associations, who have a status of a legal entity. By comparison, legal persons, including commercial entities, may found all other forms of non-commercial organizations. Charities in Russia are registered in accordance with the same rules as other non-commercial organizations.

Articles 29 and 38 of the Russian Federal Law on Public Associations impose reporting requirements on public associations, by requiring them to submit information about the funding and property they receive from all sources, including foreign and international organizations and foreign persons to the registration authority. Article 32 of the Russian Federal Law on Non-Commercial Organizations imposes reporting requirements for non-commercial organizations and requires them to report on their use of funds and other assets received from both foreign and local sources. Repeated failure on the part of a public association or an non-commercial organization to provide the information required in a timely fashion is grounds for the

registration authority to bring a claim in court requesting a ruling that the organization terminate its activities as a legal entity, which then leads to its exclusion from the Unified State Register of Legal Entities. More recently, new electronic reporting forms for non-commercial organizations, prepared by the Ministry of Justice, have substantially simplified the reporting process.

#### V.6. Fiduciary Restraints – Duties of Care, Loyalty and Obedience

Different jurisdictions regard fiduciary duties in different lights. Canadian law, for example, has developed a more expansive view of fiduciary obligation than US law, while Australian law and UK law have developed more conservative approaches than either the USA or Canada. The law expressed here follows the general body of elementary fiduciary law found in most common law jurisdictions; for in-depth analysis of particular jurisdictional idiosyncrasies please consult primary authorities within the relevant jurisdiction. This is especially true in the area of Labor and Employment law. In Canada a fiduciary has obligations to the employer even after the employment relationship is terminated, whereas in the U.S. the employment and fiduciary relationships terminate together.

In civil law countries and in Islamic law countries there are also prescriptions to avoid conflict of interest and to meet fiduciary duties requirements, however, specific regulation vary from country to country.

In common law countries the most common circumstance where a fiduciary duty will arise is between a trustee, whether real or juristic, and a beneficiary. The trustee to whom property is legally committed is the legal – i.e., common law – owner of all such property. The beneficiary, at law, has no legal title to the trust; however, the trustee is bound by equity to suppress his own interests and administer the property only for the benefit of the beneficiary. In this way, the beneficiary obtains the use of property without being its technical owner.

In civil law countries trusts are not traditionally as widespread as in common law countries, and even more, trust as a form of organization has been introduced into legal systems only in certain civil law countries and only recently. Meanwhile, fiduciary management of assets, which is close, in its essence, to trusts, exists in civil law countries. In Russia, for example, fiduciary management of assets is regulated by the Civil Code, but has never been used for charitable purposes.

In Islamic law countries there is a waqf (فَقْو or فَوَق) in Arabic, in plural (فَقَواً)<sup>26</sup>, which is, under the context of "sadaqah", an inalienable religious endowment, typically donating a building or plot of land or even cash for Muslim religious or charitable purposes. The donated assets are held by an institution similar to a charitable trust.

<sup>24</sup> See: URL: <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard> (accessed: 21.01.2020).

<sup>25</sup> See: URL: <https://www.irs.gov/instructions/i4506a> (accessed: 28.01.2020).

<sup>26</sup> A definition in Arabic see: URL: <https://www.almaany.com/ar/dict/ar-ar/فَقَو/> (accessed: 28.01.2020).

The founder makes arrangements beforehand by appointing an administrator (called *nāzir* or *mutawallī* or *kayyim*) and lays down the rules for appointing successive administrators. The founder may himself choose to administer the waqf during his lifetime. The administrator, like other persons of responsibility under Islamic law, must have capacity to act and contract. In addition, trustworthiness and administration skills are required. So, in Islamic law countries administrators of waqf should meet fiduciary requirements.

In all countries corporate directors of charitable organizations may be held to a fiduciary duty similar in some respects to that of a trustee. This happens when, for example, a guardian is a trustee of his ward's property. Directors are responsible for the management and operation of a non-profit corporation. Nonprofit directors can serve with or without compensation. Directors are under the same constraints of duty and care for a nonprofit corporation as they are for a commercial corporation.

#### V.7. Effectiveness Evaluation

Actually, there is no well elaborated legal regulation of an evaluation of effectiveness of laws dealing with non-profit organizations, including charities. Regulatory impact assessment methodologies are applied in certain countries to laws addressing economic development, but not to laws addressing advancement of philanthropy or social activism. A result based management methodology is used in some countries to evaluate certain specific non-profit organizations, but not evaluate the voluntary sector of this or that country. Besides, the result based management methodology of evaluation of non-profit organizations is not legally mandatory even in those countries, where it is used.

#### VI. Some Conclusions

Legal regulation of charities has a long history, but only in the 20th century such regulation has become more sophisticated, extensive and multidimensional. The trend of complicating, deepening and expanding legislation persists in the 21st century. Currently, these processes are typical for countries located on all inhabited continents, representing a variety of legal systems and cultures. This is due to the development of civil society, to the ever wider involvement of various civil society institutions in solving

the social problems of our time, to the increasing role of mentioned institutions in public life. Naturally, in these circumstances the state could not help paying attention to such important actors in resolution of social problems as charities. It is essential to set up lawful conditions for good functioning of charities, including legally established financial incentives and taxation exemptions. Availability of such incentives and exemptions as well as an attractive image motivate certain people to found organizations under a false label of a charity. It induces states to introduce into laws special clauses stipulating key characteristics of a charity, special conditions and procedures for charity status recognition, supervision over charitable activities and organizations. In turn, it requires the strengthening of legislation relating to charitable activity and charitable organizations in various branches of law.

At the same time, this study also confirmed the hypothesis expressed at the beginning, according to which in the modern world, from the point of view of the organization of legislation on charitable organizations, there are three groups of countries: those with a single act on charities, those with specific provisions on charities included into broader act devoted to non-profit organizations in general and not only to charities, and, finally, those with rules on charities dispersing among several acts none of which regulating exclusively charities.

So, legislation on charitable organizations makes part of the general array of legislation on non-profit organizations, but occupies a special place in this array.

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