6

CHARITABLE ENDS (PERHAPS) BY POLITICAL MEANS

What are governments regulating?

Calum M. Carmichael

1 Introduction

As documented by the OECD (2020), many governments award fiscal privileges to the organisations they have granted “charitable” or “public-benefit” status.¹ To be eligible for this status and these privileges, the organisations must pursue certain purposes and undertake or forgo certain activities.² In defining those activities, governments typically distinguish charitable from political ones and require the organisations to forgo forms or levels of the latter. Such requirements raise questions not only about why governments consider some political activities incompatible with charitable status and its fiscal privileges but also about what they intend to accomplish by restricting them. Do they intend to regulate the definition of charitable purposes and the types of activities that may advance them and hence take an approach specific to charitable organisations? Or do they intend to regulate the donations of individuals, groups and corporations that privately finance political activities and hence take a more general approach that is consistent across both the political entities and charitable organisations performing them?

This chapter addresses these questions of why and what. The answers are particularly relevant to governments intending to pursue the second task – that of comprehensively regulating the use of private monies to finance politics. The importance of that task has received international attention given the challenges to democracy that could arise, particularly in an era of increasing income inequality (OECD 2016). To date, however, that attention has focused on the private financing of political entities – parties, candidates or independent political outfits – rather than the private financing of political activities as performed across a broader range of organisations, including charitable ones. The problems of such a narrow focus can be inferred from the “hydraulics” of political monies as described by Issacharoff and Karlan (1999) – a phenomenon that can turn regulatory reform into “a graveyard of well-intentioned plans gone awry . . . [where] reforms could exacerbate the very political pathologies they are designed to combat. Far from making politics more accountable to democratic control, they may make it less so” (1705–07) – for reasons akin to the laws of physics. In their judgement:

It doesn’t take an Einstein to discern a First Law of Political Thermodynamics – the desire for political power cannot be destroyed, but at most, channeled into different forms – nor a Newton to identify a Third Law of Political Motion – every reform

effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it. . . . Our account, then, is “hydraulic” in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there *requires thinking about the system as a whole*.

(1705, italics added)

As described here, that broader system comprises not only political entities but charitable organisations as well.

This chapter proceeds as follows. Part 2 structures and summarises the debates in the charity finance literature on whether charitable organisations receiving fiscal privileges and relying on private donations should forgo at least some political activities. Part 3 structures and summarises the debates in the campaign finance/political finance literature on whether political entities should forgo at least some private donations. Part 4 identifies in each literature the same opposing pairs of political ideologies and models of democracy – egalitarianism and deliberative democracy versus libertarianism and pluralism – of which the first pair supports more restrictions on both the political activities of charitable organisations and the private donations to political entities, and the second pair supports fewer restrictions. To see whether governments take similarly restrictive or permissive stances toward regulating the private financing of political activities by charitable organisations and political entities, Part 5 categorises and compares the approaches of 16 countries. In some countries (e.g., Canada, Italy, Singapore), the stances appear similar, as would be the case with governments regulating not charitable organisations and political entities specifically and separately but rather the private financing of politics generally and comprehensively. However, in other countries (e.g., India, United States) the stances appear very different. For the rest, various degrees of difference hold, suggesting that most of the sampled governments interpret and respond differently to the use of private monies to finance political activities depending on the organisation or entity performing them – and thus either fail or do not intend to regulate that use comprehensively and consistently. Part 6 offers several explanations for why such differences might exist and draws inferences for governments intending to be comprehensive.

2 Framing the debate in the charity finance literature: are political activities incompatible with charitable status?³

The legal literature on charity finance literature focuses on the regulation and resourcing of organisations officially recognised as charitable. The central debate within that literature considers whether such organisations, which receive fiscal privileges and rely on private donations, should forgo political activities. It can be framed according to whether charitable and political purposes are incompatible, either because charitable purposes and activities are inherently different from political ones, or because political activities performed by charitable organisations would harm charitable or political purposes. Here, charitable *purposes* are interpreted as being to improve societal wellbeing by providing persons in need or society in general with certain publicly beneficial goods and services otherwise not available from government or the for-profit sector. Charitable *activities* are limited to the direct provision of those goods and services. Political *purposes* are interpreted systemically as being to establish, uphold and operate the principles and institutions that compose the official processes whereby legitimate collective decisions are made. Political *activities* are limited to the ones potentially available to charitable organisations.

They include attempts to affect the formation of governments by influencing the outlook and actions of potential voters and volunteers in elections (electioneering). And they include attempts to affect the decisions of governments by influencing either the outlook and actions of the community at large (advocacy) or the outlook and actions of elected and government officials (lobbying).

The debate over inherent incompatibilities

Some scholars and practitioners argue that political activities are inherently different from charitable ones. Under common law, political purposes and activities have traditionally been deemed non-charitable for reason that courts could not or should not determine whether any prescribed change in law or government would be for the public benefit (Chisolm 1990, 344–346; Brunson 2011, 140; Colinaux 2012, 702–703). In those terms, prohibiting charitable organisations from performing political activities constitutes a form of “border control” to distinguish the organisations that deserve fiscal privileges from those that do not (Carroll 1992, 253–254; Simon, Dale and Chisolm 2006, 284–288; Tobin 2007, 1330; Colinaux 2012, 704, 709–712). Charitable activities are publicly beneficial and capable of generating “positive externalities” which benefit individuals and groups broadly. In comparison, political activities are only of private benefit and capable of generating “negative externalities” which harm the individuals or groups aligned with opposing causes (Buckles 2007, 1086, 1091–1092; Tobin 2007, 1336). Charitable activities are noble and ennobling, whereas political activities are sullied and sully (Houck 2003, 85–86; Colinaux 2012, 706–707, 756; Crimm and Winer 2013, 106). If undertaken, they would debase charitable organisations – whether actually or in the public eye – as well as compromising and corrupting their executives and board (Dessingue 2001, 925–926; Tobin 2007, 1319–1323, 1329–1330, 1337, 1341–1342). Just as politicians and governments should not “do politics and government” through charities, charities should not “do charity” through politics and government (Parachin 2016, 1075–1077).

There are arguments that counter these. The observation that political *purposes* are not legally charitable does not prevent political *activities* from being instrumental to charitable purposes (Chisolm 1990, 346–347; Carroll 1992, 252–253; Houck 2003, 4–8; Buckles 2007, 1090; Brunson 2011, 141–142). Moreover, political activities might generate public benefits through legitimising collective decisions, fostering citizenship and social capital or facilitating peaceful transitions of power. On the other hand, charitable activities – say, in areas of religion, reproductive health, human rights or the environment – might be as rivalrous as political activities, such that one cause’s gain imposes another’s loss (Chisolm 1990, 350–355; Buckles 2008, 1111–1112). Both the charitable and political sectors focus on the definition and promotion of the common good – concepts of which might differ as much within each sector as between them (Dunn 1999, 306–307). Besides, separating the two sectors would undercut the strength that each could draw from their interdependence and sharing of means (Salamon and Toepler 2015).

The debate over the harm to charitable purposes caused by charitable organisations performing political activities

Some argue that political activities performed by charitable organisations would harm societal wellbeing. The benefits of such activities are uncertain, whereas the administrative and resource costs are immediate and concrete (Buckles 2008, 1087; Galle 2013, 1561, 1576–1580). Politically motivated and monied donors increase the risk of political capture that would narrow the organisation’s priorities, making it partisan and thus less able to collaborate with others

in pursuing a common purpose – say, the relief of poverty (Tobin 2007, 1329–1330; Buckles 2008, 1110; Colinviaux 2012, 754; Galle 2013, 1610; Wolpe 2017). By steering a transformation toward greater political involvement, the organisation's executive could benefit professionally, gaining notoriety and opportunities for advancement (Buckles 2008, 1098–1106; Galle 2013, 1604–1607). Hence, the decision of whether to undertake political activities should not be left to their discretion and abilities to persuade the board but rather constrained by regulation.

There are arguments that counter these. The executive and board, not the government, are best able to judge the mix of activities that would best allow the organisation to advance its charitable purpose (Clark 1960, 465–466; Buckles 2008, 1087, 1099–1101; Brunson 2011, 142). By their nature, charitable purposes involve ideas that are controversial and disputable (Sacks 1960, 528–533). Pursuing them requires entering those controversies, publicly endorsing what is good and admonishing what is bad (Klapach 1999, 506, 538; Colinviaux 2012, 699–700). As to the encroachment of monied interests or the risk of capture: such challenges confront all charitable organisations, regardless of their political involvement. Instead, that involvement might help deflect one form of co-optation: the silence preferred by government (Garnett 2001, 797–798; Buckles 2008, 1091–1094; Brunson 2011, 149).

The debate over the harm to political purposes caused by charitable organisations performing political activities

Some argue that political activities performed by charitable organisations would harm the democratic processes whereby collective decisions are made. Those processes rely on a conceptual framework that all citizens can endorse: the common ground offered by secular (as opposed to irreligious) public reason (Audi 1993, 687–697; Rawls 2005). And they benefit from terms of deliberation that are dispassionate, allowing differences to be aired and understood without foreclosing compromise or agreement (Galle 2013, 1584–1585). The political involvement of charitable organisations – particularly those that are dedicatedly religious or single issue – threatens that common ground and those terms. It could make public dialogue more fragmented and inflammatory, the decision-making processes more deadlocked, politics more sectarian and policies less coherent – fostering political disengagement among citizens (Galston 1993, 1315–1317; Tobin 2007, 1326–1329; Trotter 2012, 21; Cafardi, 2005, 538–542; Galle 2013, 1583–1585). By avoiding political involvement, charitable organisations are better able to cultivate an educated and discerning electorate. Within their areas of expertise, they would serve as independent and trusted clearing houses of political information and interpretation, relied upon to highlight important issues and outline alternative positions and their implications – without taking sides (Tobin 2007, 1337; Galle 2013, 1628–1629). Again, however, the organisation's executive could benefit professionally from undertaking political activities. Thus, to protect and promote systemic political purposes, the decision of whether to undertake them should be constrained by regulation.

There are arguments that counter these. Liberal democracies rely upon public debate that does not suppress from the outset certain convictions or world views – including ones rooted in religious or single-issue perspectives (Habermas 2006, 6–12; Dworkin 2016, 63–66). Those perspectives might morally inform and enrich the debate, as well as be informed and broadened by it (Dessingue 2001, 923–925; Garnett 2001, 798–801; Habermas 2006, 18–20; Totten 2007, 310–313). Religious convictions are no more prone to making debate more fractious and intolerant than are certain secular ones (McConnell 1999, 648–656). Rather than contributing to political disengagement, the political involvement of charitable organisations might forestall it by recruiting an otherwise disaffected citizenry (Dunn 2008). It could balance the presence of

business organisations or bring to the fore otherwise overlooked problems that are longer term or affect the disadvantaged (Chisolm 1990, 348–349; Houck 2003, 84; Buckles 2008, 1108–1109; Colinvaux 2012, 705; Galston 1993, 1318–1322, 1335–1353; Parachin 2016, 1070–1071). Moreover, regulations limiting the types and levels of political activity available to charitable organisations could contravene constitutional rights by encumbering freedom of speech or religion (Chisolm 1990, 320–337; Carroll 1992, 254–259; Klapach 1999, 513–519; Guinane, 2007; Leff 2009, 685–696; Brunson 2011, 145–147; Galston 2011, 903–911, 918–928; Weitzel 2011, 157–158; Fresco 2012, 3026–3045; for a retort, see Tobin 2007, 1342–1349).

3 Framing the debate in the political finance literature: are private donations compatible with democratic principles?

The legal literature on political finance focuses on the regulation and resourcing of electioneering by political parties and candidates. The central debate within that literature considers whether the protection of liberty or equality should determine how the private donations to such entities are regulated. The scholars and practitioners who uphold political liberty argue that the donations of natural and legal persons constitute speech, enabling them to express their support for a political entity and signal its intensity (BeVier 1994, 1277; Sullivan 1997, 671–675; Redish 2001, 125–128; Smith 2001, 109–121; Samples 2006, 31–40). Moreover, unlimited campaign spending allows political parties and candidates to deal with more issues, handle them at greater depth and reach wider audiences. Constraining who spends and the amounts spent would leave the electorate less informed and introduce arbitrary judgements over what types and amounts of information are excessive (*ibid*, 1266–1267, 675–678, 135–136, 41–45, 175–179). Thus, to protect the freedom of speech and the benefits of unrestrained information, those who uphold liberty recommend a “liberalising agenda” for the regulation of political finance (Samples 2006, 266–297): one that would allow natural and legal persons to give and political entities to spend whatever they wish and one that would reduce or remove public funding, thereby neither imposing this burden on taxpayers nor compelling them to support candidates apart from those of their choosing.

There are arguments that counter these. Money is a form of property that purchases things other than speech; hence, giving and spending are acts tied to property rights that can be regulated without regulating speech *per se* (Wright 1976; Hellman 2011). In the context of electioneering, the purpose of free speech is not to create an unregulated “marketplace of ideas” easily dominated by those with greater resources but to support a public discourse among political equals, each having the same opportunity to speak and be heard (Sunstein 1993, 244–250; Fiss 1996, 15–16). More information does not make the electorate more informed. The communications and causes backed by greater resources will “drown out” the others, thereby narrowing the range of issues that occupies the electorate’s attention (Rawls 1971, 225; Wright 1982, 624–625).

The scholars and practitioners who uphold political equality argue that it is threatened by income inequality – echoing the concerns of the OECD (2016). Income conveys influence, encouraging or enabling individuals to be more politically active, whether by donating, volunteering, communicating with peers or candidates, voting or running for office (Raskin and Bonifaz 1994, 1174–1183; Overton 2004, 85–104; de Figueiredo and Garrett 2005, 627–634). Natural or legal persons make campaign donations either for the “consumption” purpose of endorsing the image projected and the policy platform put forward or for the “investment” purpose of altering that platform to serve their interests (Ansolahehere, de Figueiredo and Snyder 2003). Candidates and parties that rely on donations could adjust their platforms to attract

the support of those most able and willing to give (Hasen 1996, 8–35; Garrett and Smith 2005, 296–299; Issacharoff 2010, 126–130). Greater donations enable them to mount campaigns that could broaden their appeal by shifting political messaging away from platforms that ignore the poor and toward the symbols and personal qualities that promote their own image or demean that of their opponents (Mazo 2014, 284; Fowler, Franz and Ridout, 2016, 141–147). Such strategies would be reinforced by sections of the electorate being politically alienated and apathetic or malleable and credulous (Dworkin 1996; Ortiz 1998; Hardin 2004; Achen and Bartels 2016). Thus, to prevent income inequality from skewing political participation, platforms and powers of persuasion, those who uphold equality recommend regulations that would provide greater public funding for party and candidate campaigns, as well as measures to increase the number of individuals donating, level up or level down the amounts they donate, cap or prohibit the donations or expenditures of corporations and independent political outfits and encourage or require limits on campaign spending (Foley 1994; Hasen 1996; Briffault 1999; Ackerman and Ayers 2002; Cmar 2005; Sarbanes and O’Mara 2016).

Again, there are arguments that counter these. As a source of influence, income is not unique, somehow illegitimate or necessarily skewed across the political spectrum; besides, efforts to neutralise its effects would simply enhance the relative effects of other unevenly distributed sources (BeVier 1994, 1266–1269; Sullivan 1997, 680; Redish 2001, 9; Smith 2001, 45–48, 79–83, 201–213; Samples 2006, 131–134, 140–145). There are no clear standards to measure the extent to which platforms and persuasive powers favour the wealthy. And even if they were, there is no clear evidence of this being attributable to private donations (*ibid*, 1268–1269, 675–685, 48–63, 121–136, 213–215, 88–106).

4 Linking the political and charity finance debates

The central debates of the charity finance and political finance literatures have been conducted in relative isolation. And yet in each one, can recognise the same opposing pairs of political philosophies and models of democracy: libertarianism and classical pluralism versus egalitarianism and deliberative democracy.⁴ Libertarianism and classic pluralism underlie not only the political finance arguments that uphold liberty but also the charity finance arguments countering the claims that the political activities of charitable organisations would harm political purposes. Both sets of arguments place importance on freedom of speech and conscience for natural and legal persons and thus oppose limits to that freedom apart from ones needed to prevent violating the rights of others (Mill 2003, 139; Vallier 2018, 402).⁵ Such freedom extends to persons being able to give to charitable organisations and political entities and to those organisations and entities being able to perform political activities and spend on them. Both sets of arguments envisage those organisations and entities joining other groups and associations, each working with distinct priorities and specialised information, striving to promote its cause and frustrate the causes of others and adding to the array of competing interests and demands that ultimately needs to be adjudicated either by the electorate to form a government or by the government to formulate policy (Dahl 1956, 131–135; Held 2006, 158–169).⁶ Such competition and bargaining across groups can operate alongside the “passive acquiescence or indifference of a majority of adults or voters” (*ibid*, 133; 166).

In comparison, egalitarianism and deliberative democracy underlie not only the political finance arguments that uphold equality but also the charity finance arguments that support the claims that by performing political activities charitable organisations would harm political purposes. Both sets of arguments envisage all citizens having equal opportunities to follow and participate in processes of reasoned and reflective public discourse and decision-making. Although

such processes would not necessarily eliminate differences in priority or outlook, they could accommodate them and lead to decisions and actions that could be understood by and justified to all (Rawls 1971, 221–234, 239 n 23; Held 2006, 231–255).⁷ In spite of these common elements, each set of arguments has a different focus. That from political finance recommends regulations to restrict the giving to and spending of political entities in order to counter the threats that income poses to political equality.⁸ In contrast, the set from charity finance recommends regulations to restrict the political activities available to charitable organisations in order to counter threats to public reason, dispassionate discourse and citizen discernment.⁹

5 Categorising and comparing international approaches to regulating privately financed political activities

How can one characterise international approaches to regulating the private financing of political activities? To address that question, this part categorises and compares the approaches taken by a sample of countries to regulate the political activities that charitable organisations may perform and the private donations that political entities may receive. The sample comprises 16 democracies from Europe, Africa, the Americas and Asia-Pacific; half are common-law jurisdictions (Australia, Canada, England-Wales, India, Kenya, Nigeria, Singapore and the United States) and half civil-law (Brazil, France, Germany, Italy, Japan, Mexico, Portugal and Sweden); four are middle income (Brazil, India, Kenya and Nigeria) and the rest high income. All 16 countries provide charitable organisations and political entities with fiscal privileges that include exempting their income from taxation. And, as presented in Table 6.1, all 16 permit private donations from individuals and corporations to charitable organisations, and indeed encourage them by offering at least some donors tax credits, deductions or matching grants. For these organisations, regulating their use of private monies to finance political activities involves restricting the types and levels of activities they may perform. All of the countries also permit private donations from individuals to political entities. Some permit donations from corporations. And some encourage certain donations again by offering donors tax credits or deductions. For these entities, regulating their use of private monies to finance political activities involves restricting the levels and sources of donations they may receive. As outlined in the following, the regulatory approaches taken by each country in limiting both the activities of charitable organisations and the donations to political entities can be characterised by stances that are either more permissive, in keeping with libertarianism and pluralism, or more restrictive, in keeping with egalitarianism and deliberative democracy. To be sure, these stances are based on actions or indicators that are stated in legislation or regulatory guidelines rather than on what is necessarily enforced or followed. And inevitably the job of assigning them requires discretionary judgement. Nevertheless, patterns emerge across what are at least practices *de jure*.

Regulating the political activities of charitable organisations

Table 6.2 describes the regulatory treatment of electioneering, advocacy and lobbying by charitable organisations as being either prohibited, restricted, permitted conditionally or permitted with no formal limitations. In general, the limitations placed on electioneering are at least as great as those on advocacy and lobbying. They are greatest – amounting to prohibition – in Canada, Germany, India, Mexico and the United States. They are lowest in Italy, Portugal, Singapore and Sweden: registered nonprofit third sector entities in Italy may donate to political parties but are subject to transparency requirements if the amounts exceed €5,000; associations and foundations in Portugal may engage with political parties but must stop short of

Table 6.1 Fiscal treatment of donations from individuals and corporations to charitable organisations and political entities

Country	Donations from individuals to:				Donations from corporations to:			
	Charitable organisations		Political entities		Charitable organisations		Political entities	
	Subsidy	Cap	Permitted	Limit	Subsidy	Cap	Permitted	Limit
Australia	Deduction	None	Yes	None	Deduction	None	Yes	None
Brazil	Credit	8% ¹	Yes	10% ²	Credit	1–4% ³	No	NA
Canada	Credit	75% ⁴	Yes	\$1,625 ⁵	Deduction	75% ⁴	No	NA
England	Grant ⁶	None	Yes	None	Deduction	None	Yes	None
France	Credit	20% ⁷	Yes	€7,500	Credit	.5% ⁸	No	NA
Germany	Deduction	20% ⁷	Yes	None	Deduction	20% ⁷	Yes	None
India	Deduction	10% ⁹	Yes	None	Deduction	10% ⁹	Yes	None
Italy	Credit	€30,000	Yes	€100,000	Deduction	10% ⁹	Yes	€100,000
Japan	Deduction	40% ⁷	Yes	¥20M	Deduction	40% ⁷	Yes	¥30M ¹¹
Kenya	Deduction	None	Yes	5% ¹²	Deduction	3.125% ¹⁰	Yes	5% ¹²
Mexico	Deduction	7% ⁷	Yes	.5% ¹³	Deduction	7% ⁷	No	NA
Nigeria	None	NA	Yes	¥1M	Deduction	10% ¹⁴	Yes	¥1M
Portugal	Credit	15% ¹⁵	Yes	€11,000 ¹⁶	Deduction	6–8% ¹⁷	No	NA
Singapore	Deduction	None	Yes	None	Deduction	None	Yes	None
Sweden	Deduction	1,500kr	Yes	None	None	NA	Yes	None
U.S.	Deduction	50% ¹⁸	Yes	None ¹⁹	Deduction	10% ⁷	Yes ²⁰	None

1 Cumulative, calculated on total tax liability.

2 Calculated on gross income earned over year before election.

3 Varies by project or program, calculated on operating profit.

4 Calculated on net income.

5 Circa 2020.

6 Combined with credit for individuals paying more than the basic tax rate.

7 Calculated on taxable income.

8 Calculated on annual turnover.

9 Calculated on gross income.

10 Calculated on taxable income, plus 1875% of stated capital and capital surplus.

11 Lower limits for corporations with capital below ¥5B.

12 Calculated on party's expenditure.

13 Calculated on ceiling for total party spending in preceding election. Applies to total donations.

14 Calculated on total profits.

15 Calculated on taxes paid.

16 Approximate limit for 2020, calculated as 25 times the annually adjusted "social support index" used to set social security benefits.

17 Calculated on revenues.

18 For donations to public charities, calculated adjusted gross income.

19 Applies to aggregate donations.

20 Applies to donations to independent-expenditure political action committees.

Table 6.2 Regulatory treatment of political activities performed by charitable organisations

Country	← More egalitarian/deliberative restrictive		More libertarian/pluralist permissive →	
	Prohibited	Restricted	Conditionally permitted	Permitted or no formal limitations
Australia			Electioneering, advocacy, lobbying ¹	
Brazil		Electioneering ²		Advocacy, lobbying ³
Canada	Electioneering ⁴		Advocacy, lobbying ⁵	
England			Electioneering, advocacy, lobbying ⁶	
France			Electioneering, advocacy, lobbying ⁷	
Germany	Electioneering ⁸		Advocacy, lobbying ⁹	
India	Electioneering, advocacy ¹⁰		Lobbying ¹¹	
Italy				Electioneering, advocacy, lobbying ¹²
Japan		Electioneering ¹³	Advocacy, lobbying	
Kenya	Electioneering ¹⁴		Advocacy, lobbying ¹⁵	Electioneering ¹⁶
Mexico	Electioneering ¹⁷		Advocacy, lobbying ¹⁸	
Nigeria		Electioneering ¹⁹	Advocacy, lobbying ²⁰	
Portugal				Electioneering, advocacy, lobbying ²¹
Singapore				Electioneering, advocacy, lobbying ²²
Sweden				Electioneering, advocacy, lobbying ²³
U.S.	Electioneering ²⁴	Advocacy, lobbying ²⁵		

1 Advocacy and lobbying are charitable if undertaken by a charity to further its charitable purpose (*Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42). The Australian Charities and Not-for-Profits Commission recognises “campaigning” as a legitimate way of furthering a charity’s charitable purpose. This includes supporting the stance of a political party or candidate on an issue without promoting or opposing a particular party or candidate *per se* (ACNC, *Charities, elections and advocacy* April 2016). Charities making “electoral expenditures” above tiered thresholds must disclose them at different levels of detail to the Australian Electoral Commission (Commonwealth Electoral Act 1918).

2 Public Interest Civil Society Organisations (PISCOs) may not participate in political campaigns or support political parties or politicians (Law 9.790/99 Article 16). Corporate donations to any PICSO cannot be deducted from taxable income (Law 13.019/2014 Art. 16–C).

3 Brazilian law generally imposes no restrictions on – or protections of – the ability of civil society organisations to lobby or advocate (International Centre for Non-for-Profit Law. Civic Freedom Monitor – Brazil, July 2020: <https://www.icnl.org/resources/civic-freedom-monitor/brazil#glance> accessed 20 September 2020).

4 Charities may not devote any of their resources to the direct or indirect support of, or opposition to, any political party or candidate for public office [Income Tax Act Section 149.1 (6.1), (6.2)].

5 Advocacy and lobbying constitute “public policy dialogue and development activities” that are charitable if undertaken by a charity to further its charitable purpose (Canada Revenue Agency, Guidance Reference number CG-027, 21 January 2019).

6 The Charity Commission for England and Wales recognises advocacy and lobbying as ways a charity may further its charitable purpose and permits charities to focus most of their resources on those activities for a finite period (Campaigning and Political Activity Guidance for Charities, publication CC9). To further its charitable purpose, a charity may engage with political parties and candidates and endorse or oppose their policies but cannot endorse or oppose them categorically.

(Continued)

Table 6.2 (Continued)

- 7 General interest associations may engage in political activities, whereas public utility associations and foundations may not primarily engage in them (State Council Opinion No. 322894, 13 June 1978). These organisations cannot directly fund the campaign activities of parties or candidates (Article 11.4, Law No. 88–227 of 11 March 1988; Electoral Code L.52–8).
- 8 Tax-privileged organisations may not use their assets for the direct or indirect benefit of political parties (General Fiscal Law Article 55–1).
- 9 Tax-privileged organisations may comment publicly on and communicate with legislators about policies related to their tax-privileged purposes (General Fiscal Law Articles 52, 55–1).
- 10 The governing documents of institutions established for charitable purposes must prohibit the use of assets for purposes other than charitable ones [Income Tax Act Section 80G 5(ii)]. Indian courts hold political purposes or activities not to be charitable [e.g., CIT v. All India Hindu Mahasabha [1983] 140 ITR 748 (Delhi)].
- 11 Institutions established for charitable purposes are not prohibited from communicating with legislators on issues tied to their purpose or to “general public utility”, provided such activities remain incidental to achieving their charitable objects.
- 12 There are no formal limits to registered nonprofit third sector entities performing political activities to further the general interest they serve (Legislative Decree No. 117 of 3 July 2017). However, such entities are subject to the same transparency requirements as political parties (i.e., submitting their budget to the relevant parliamentary committee) if they donate in cash or kind more than €5,000 to political parties, political movements or to persons holding a position in government or elected office (Legislative Decree No. 34 of 28 June 2019).
- 13 Special Nonprofit Corporations are prohibited from “promoting, supporting, or opposing a political principle” and from “recommending, supporting, or opposing a candidate for public office, a person holding a public office, or a political party” [Law to Promote Specified Nonprofit Activities 25 March 1998 Article 2–2(ii b,c)]. Otherwise, nonprofit organisations may engage in political activities as means to pursue their authorised purposes.
- 14 The yet-to-be enacted Public Benefits Organisations Act 2013 defines a registered organisation as “autonomous, nonpartisan, non-profit making” [Sect. 5(1)] that “may not engage in fundraising or campaigning to support or oppose any political party or candidate for appointive or elective public office, nor may it propose or register candidates for elective public office” [Sect. 66(3)].
- 15 The yet-to-be-repealed Non-Governmental Organisations Co-Ordination Act 1990 does not prohibit advocacy or lobbying, whereas the pending Public Benefits Organisations Act 2013 explicitly endorses them, defining “public benefit activity” as “an activity that supports or promotes public benefit by enhancing or promoting the economic, environmental, social or cultural development or protecting the environment or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a category of individuals or organisations” [Section 2(1)].
- 16 In contrast with the PBO Act 2013, the NGO Act 1990 prohibits a registered organisation from affiliating with political entities established outside Kenya (Section 21–1b) but does not prohibit affiliations with domestic entities or political activities “for the benefit of the public at large and for the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services” (Section 2).
- 17 Nonprofit organisations authorised to receive deductible donations must fulfil “their social object, without being able to intervene in political campaigns or get involved in activities of propaganda” [Income Tax Act 2013 Article 82(II)].
- 18 Such organisations “may carry out activities designed to influence legislation, provided that such activities are not remunerated and are not carried out for of persons or sectors who have made donations to them” [Ibid., Article 82(III)].
- 19 The Companies and Allied Matters Act 2020 Section 38(2) prohibits companies limited by guarantee from making “a donation or gift of any of its property or funds to a political party or political association, or for any political purpose” but does not prohibit other forms of nonprofit organisations from endorsing political parties or candidates.
- 20 Institutions or bodies authorised to receive deductible donations are not formally prohibited from advocacy or lobbying; however, certain subjects are or could be excluded. The Constitution of Nigeria Sections 39, 40 guarantee rights to receive and impart information and to assemble freely and associate, but Section 45(1) permits restricting these rights “in the interest of defence, public safety, public order, public morality or public health”. The Criminal Code Act 1916 Section 62 declares unlawful any society for “interfering with, or resisting, or encouraging interference with or resistance to the administration of the law”. More specifically, the Same Sex Marriage Act 2014 Section 5(3) makes it an offence for a person or group to support “the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings”.
- 21 There are no formal limits to private institutions of social solidarity or public utility associations and foundations engaging in political activities to further their purposes of social interest. Associations and foundations may engage with political parties but not elaborate a political program or run candidates for election (Decree Law no. 594/74 Article 12).

- 22 There are no formal limits to Institutions of a Public Character engaging in political activities to further their charitable purposes.
- 23 There are no formal limits to nonprofit organisations engaging in political activities.
- 24 Public charities and private foundations cannot participate in any campaign for elective or appointive public office [Internal Revenue Code [1986] §501(c)(3)].
- 25 Churches and foundations cannot make lobbying or advocacy expenditures to influence legislation; other organisations can make “insubstantial” expenditures calculated as percentages of “exempt purpose expenditures” up to a maximum of USD 1M [Internal Revenue Code [1986] §501(h)].

presenting a political platform or running candidates; both Institutions of a Public Character in Singapore and registered nonprofit organisations in Sweden face no formal limitations on political activities related to their charitable purposes. The treatment of electioneering in the other seven countries appears intermediate. In Brazil, Japan and Nigeria, it is restricted in that any prohibitions apply only to specified organisations: Public Interest Civil Society Organisations in Brazil, Special Nonprofit Corporations in Japan and companies limited by guarantee in Nigeria. In Australia, England and France, organisations may campaign to support or oppose the policies or positions of parties and candidates on condition that this furthers their charitable purposes or general interests and that their support or opposition does not apply to the parties or candidates *per se*. For Kenya, the status of electioneering is uncertain: under the non-repealed 1990 Non-Governmental Organisations Co-ordination Act (Section 21(1b)), they must only avoid affiliations with “political entities established outside Kenya”, whereas under the not-yet-ratified 2013 Public Benefits Organisations Act (Section 66(3)), registered organisations “may not engage in fundraising or campaigning to support or oppose any political party or candidate”—raising concerns that the proposed legislation seeks to silence the charitable sector on issues related to the International Criminal Court or politicians’ salaries (Churchill 2013).

With respect to advocacy, the limitations are at least as great as those on lobbying. They are greatest in India and to a lesser degree in the United States: Indian courts prohibit advocacy, considering it non-charitable for reason that they could not or should not decide if a change in law would be for the public benefit; American religious institutions and foundations can make no expenditures to influence legislation, and other charitable organisations can only make “insubstantial” expenditures. In Australia, Canada, England, France, Germany, Japan, Kenya, Mexico and Nigeria, advocacy is permitted on condition that it further the charitable, tax-privileged, authorised or general-interest purposes of registered organisations. That said: in England and France, there are limits to the share of resources that can be so devoted; in Mexico, advocacy cannot be at the behest of donors; and in Nigeria, certain areas of policy (e.g., those related to sexual orientation) are ruled out by law. There are no formal prohibitions or conditions on advocacy in Brazil, Italy, Portugal, Singapore and Sweden. In general, the treatment of lobbying follows that of advocacy, India being the exception. There, although advocacy is prohibited, lobbying is permitted on condition that the issues be tied to the organisations’ charitable purpose and that the activity remain incidental.

Regulating private donations to political entities

Table 6.3 describes the regulatory treatment of private donations to political entities, using indicators that represent either a permissive stance tied to libertarianism and classical pluralism or a restrictive stance tied to egalitarianism and deliberative democracy. The indicators representing a permissive stance are: high or no limits on private donations to political candidates and parties from individuals, corporations and other entities; high or no limits on anonymous donations; high or no limits on third-party election spending; and limited or no public funding for election

Table 6.3 Regulatory treatment of political finance

Country	Egalitarian/deliberative restrictive indicators				Libertarian/pluralist permissive indicators						
	No or limited private donations to parties, candidates or political committees from:		Significant public funding for parties or candidates, based on: votes, seats, flat amount other		Limited or no spending by third parties	Limited or no anonymous donations	Private contributions with high or no limits from:		Limited or no public funding of parties or candidates	High or no limits on third party spending	High or no limits on anonymous donations
							Candi- dates	Individ- uals	Corpora- tions	other entities	
Australia			X ¹				X	X	X	X	X ²
Brazil		X	X	X ³		X ⁴	X	X ⁵		X	X
Canada	X	X ⁶	X ⁶			X ⁸				X ⁹	
England				X ⁷		X ¹⁰	X ¹¹	X ¹¹	X ¹¹	X ¹²	
France	X	X ¹⁴	X ¹⁵	X ¹⁶		X ¹⁷					
Germany			X ¹⁸	X ¹⁹		X ²⁰	X	X ²¹	X ²²	X ²³	
India							X ²⁴	X ²⁵	X ²⁶	X ²⁷	
Italy						X ²⁹	X ³⁰	X ³¹	X ³²	X ³³	X ²⁸
Japan				X ³⁵		X ³⁶	X ³⁷	X ³⁸	X ³⁹	X ⁴⁰	
Kenya				X ⁴¹		X ⁴²	X ⁴³	X ⁴⁴	X ⁴⁴	X ⁴⁵	
Mexico		X ⁴⁷	X ⁴⁸	X ⁴⁹		X ⁵¹	X	X ⁵²	X ⁵³	X ⁵⁴	X ⁵⁵
Nigeria					X ⁵⁰		X	X ⁵³	X ⁵³	X	
Portugal		X ⁵⁶	X ⁵⁶	X ⁵⁷	X ⁵⁸	X ⁵⁸	X	X ⁵⁹			
Singapore	X ⁶⁰					X ⁶⁵	X	X	X	X	X ⁶³
Sweden				X ⁶⁴		X ⁶⁸	X ⁶⁶	X	X	X	X
U.S.		X ⁶⁷	X ⁶⁷				X ⁶⁹	X ⁶⁹	X ⁷⁰	X ⁷¹	X ⁷¹

1 Calculated as the total number of formal first preference votes received times the current electoral rate (set at AUD 2,829 for 2020). Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018.

2 Donations must be disclosed if above annually adjusted threshold (AUD 14,300 for 2020). Donors can avoid disclosure requirement by making multiple donations below the threshold.

3 Campaign Fund established by Law No. 13.487/2017 and Law No. 9.096/2018.

4 Law No. 9.504/1997 Article 28.

5 Limited to 10% of annual income (Law No. 13.165 29 September 2015).

6 Only natural persons who are Canadian citizens or permanent residents may donate to a registered party, a registered association, a nomination contestant, a candidate or a leadership contestant [Canada Elections Act 2000 Section 363(1)]. Annual contributions are limited to an amount that increases by CAD 25 yearly (the limit for 2020 is CAD 1,625). Contributions capped at CAD 1,275 receive a tax credit [Income Tax Act Section 42(2)].

7 Public funding covers 50% of the election expenses incurred by parties and 60% of those by candidates; these expenses otherwise financed by donations from natural persons [Canada Elections Act 2000 Sections 444(1), 477.74(2)].

8 Canada Elections Act 2000 Section 366(2).

- 9 CAD 350,000 overall, of which no more than CAD 3,000 can be spent for or against any candidate (Canada Elections Act 2000 Section 350(1)).
- 10 Parties and candidates must report the identities of donors to confirm they are among those “permissible” [Parties and Referendums Act 2000 Section 54(2)].
- 11 Political Parties and Referendums Act 2000 Article 54.
- 12 Parliament annually distributes £2M across parties for the purpose of policy development (<https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/financial-reporting/donations-and-loans/public-funding-political-parties> accessed 20 September 2020).
- 13 Political Parties and Referendums Act 2000 Article 85.
- 14 Limit is €7,500 for a party, €4,600 for a candidate (Law No. 88.227 11 March 1988 Article 11.4). Contributions receive a tax credit.
- 15 Donations from legal persons, except other political parties, prohibited (Law No. 88.227 11 March 1988 Article 11.4).
- 16 Law No. 88.227 11 March 1988 Article 119.
- 17 Donors must be identified if donation exceeds €150 (Law No. 88.227 11 March 1988 Article 11.4).
- 18 Public benefit, benevolent or church-related nonprofit organisations prohibited (Political Parties Act Section 2).
- 19 Formula depends on number of votes received in last election and the donations up to €3,300 from individuals (Political Parties Act Section 18).
- 20 Donors must be identified if donation exceeds €500 and disclosed if annual total exceeds €10,000 [Political Parties Act Section 25(2,3)].
- 21 There are no limits to the donations from individuals, but the amount eligible for a deduction is capped at €1,650 (Income Tax Act Articles 10b).
- 22 Corporations must be headquartered in the European Union or be more than 50% owned by citizens of the European Union (Political Parties Act Article 2).
- 23 Trade unions not prohibited.
- 24 Contingent upon the candidate’s campaign spending not exceeding prescribed limit [Representation of the People Act Sections 77, 123(6) and Conduct of Election Rules Section 90].
- 25 There is neither a limit to the donations from individuals nor a cap on the amount that can be deducted (Income Tax Act Section 80GGB).
- 26 There is neither a limit to the donations from corporations in existence for more than three years nor a cap on the amount that can be deducted (Companies Act Section 182, Income Tax Act Section 80GGC).
- 27 Trade unions not prohibited.
- 28 Parties and candidates not required to disclose total contributions.
- 29 Donors must be identified if donation exceeds €500 (Law No. 3/2019).
- 30 Candidates’ contributions limited to €100,000, as for individuals’ donations.
- 31 Donations from individuals are limited to €100,000, of which a cap of €30,000 can receive a credit of 26% (Legislative Decree No. 13 of 21 February 2014 Article 10).
- 32 Donations from corporations are limited to €100,000, of which a cap of €30,000 can receive a credit of 26% (Legislative Decree No. 13 of 21 February 2014 Article 11).
- 33 Trade unions or nonprofit organisations not prohibited.
- 34 Legislative Decree No. 149 of 28 December 2013.
- 35 Total funds calculated as ¥250 yen per capita are distributed among parties according to their number of Diet seats and their proportion of the total vote (Political Party Subsidies Act Articles 3, 7, 8).
- 36 Identity of donors must be disclosed for donations exceeding ¥50,000 [Political Funds Control Act 1948 Articles 12, 22(6)].
- 37 Contingent upon candidate’s campaign spending not exceeding prescribed limit (Public Offices Election Act Article 194).
- 38 Donations from individuals are limited to ¥20M, of which a cap of 40% of taxable income exceeding ¥2,000 can be deducted [Political Funds Control Act Article 21–3(2)].
- 39 The limits for corporate donations range from ¥7.5M to ¥30M depending on its capitalisation (Political Funds Control Act Article 21–3).
- 40 The limits for trade union donations range from ¥7.5M to ¥30M depending on its membership (Political Funds Control Act Article 21–3).
- 41 Outside of an election, parties receiving at least 3% of the votes cast in the previous election and having no more than two-thirds of its registered office bearers of the same gender receive annual payments from a Political Parties’ Fund, 80% of which are proportional to the distribution of votes across those parties (Political Parties Act 2011 Section 25).
- 42 Elections Campaign Financing Act 2013 Section 13.
- 43 Contingent upon candidate’s campaign spending not exceeding prescribed limit (Election Campaign Financing Act 2013 Section 18).
- 44 No individual or corporate donor may donate more than 5% of a party’s expenditures as recorded in the audited accounts of the previous year (Political Parties Act 2011, Section 28–2, 3). For an election

(Continued)

Table 6.3 (Continued)

- campaign, no single course shall donate more than 20% of total contributions received by a party or candidate (Election Campaign Finance Act 2013 Section 12).
- 45 Trade unions or other organisations can contribute to a candidate or party with their written consent (Election Campaign Financing Act 2013 Section 15).
- 46 Parties or candidates receive no public funding (Election Campaign Financing Act 2013 Section 14).
- 47 General Law on Political Parties 2014 Articles 54.
- 48 Trade unions and religious or social organisations are among those that cannot contribute [Electoral Auditing Rules 2018 Article 401(1)].
- 49 Total funds to support political parties are calculated annually by multiplying the total number of citizens in a federal or local registry times 65% of the minimum wage there. Thirty percent of the total is allocated equally across the parties and 70% in proportion to the distribution of votes in the last election. In an election year, the amount is increased by 50% (Political Constitution of the United Mexican States 2016 Article 41; General Law on Political Parties 2014 Articles 51).
- 50 General Law on Electoral Institutions and Procedures 2020 Article 159.
- 51 General Law on Political Parties 2014 Articles 55, 56; Electoral Auditing Rules 2018 Article 121.
- 52 No individual may annually donate more than .5% of the expenditure ceiling from the previous election, with total contributions from individuals and candidates not exceeding 10% of that ceiling in an election year [General Law on Political Parties 2014 Articles 56(2)].
- 53 Corporations cannot donate to political parties [Companies and Allied Matters Act 2004 Section 38(2)]. Annual donations from individuals and corporations to candidates are limited to ₦1M. Individuals can donate to political parties, which must record their names and addresses if the donation exceeds ₦1M [Electoral Act 2010, Section 91(9), 93(2b)].
- 54 Nonprofit organisations – specifically, companies limited by guarantee – are an exception: they are prohibited from donating to political parties [Companies and Allied Matters Act 1990 Section 38(2)].
- 55 Parties are prohibited from anonymous donations, but not candidates (Electoral Act 2010 Sections 92, 93).
- 56 Donations from legal persons prohibited (Law No. 19/2003 20 June 2003 Article 8).
- 57 Law No. 19/2003 20 June 2003 Articles 5, 16, 17, 18.
- 58 Law No. 19/2003 20 June 2003 Article 8.
- 59 Law No. 19/2003 20 June 2003 Articles 7, 16(4). Donations from individuals are limited to 25 times the annually adjusted “social support index” for a party, or 60 times for an election campaign or a presidential candidate. For 2020, the index was €438.81.
- 60 Candidates can receive donations only from the party for which they are standing (Political Donations Act 2011 Section 2).
- 61 “Permissible donors” comprise individuals who are citizens of Singapore and at least 21 years old, and Singapore-controlled corporations (Political Donations Act 2011 Section 2).
- 62 Trade unions are an exception: political objects are not among those on which they can spend (Trade Unions Act 1992 Section 2).
- 63 Parties and candidates can accept anonymous donations under SD 5,000, allowing multiple donations below threshold (Political Donations Act 2011 Section 2).
- 64 Parties receive a fixed grant for each seat in the Rikstag won in the last two elections to support their secretariats, as well as basic and supplementary support for their Parliamentary activities: the former being a fixed amount for each party receiving at least 4% of the votes cast, the latter a per-seat amount that is higher if the party is not represented in the government (Act on State Support for Political Parties 8 December 1972 Sections 3, 6, 8).
- 65 Anonymous donations are prohibited above 0.05 price base amount (Act on Transparency of Party Financing 15 February 2018 Section 9). For 2020, the annually price-adjusted price base amount was 47,300kr.
- 66 The Act on Transparency of Party Financing 15 March 2018 outlines the reporting of donations but places no limitations on their source or amount.
- 67 Contributions to parties or candidates by corporations or trade unions are prohibited (Title 2 U.S. Code Section 441b).
- 68 Candidates, political parties and political action committees must identify donors for contributions above USD 200 (United States Code Title 2 Paragraph 434b).
- 69 There is no ceiling on the aggregate contributions of a single donor to different candidates, national party committees and independent third parties (*McCutcheon v FEC* [2014] 572 US 185).
- 70 There is no ceiling on the contributions of corporations and trade unions to independent and uncoordinated political action committees (*Citizens United v FEC* [2009] 588 US 310; *SpeechNow.org v FEC* [2010] 599 F3d 686).
- 71 For presidential campaigns: the federal government will match up to USD 250 of an individual’s total contributions to an eligible primary candidate; each major political party receives USD 4M (circa 1974 adjusted for inflation) to finance its national nominating convention, and the candidate for each major party is eligible for USD 20M for campaigning on condition of refusing private contributions – and offer declined in recent history (Title 26 US Code Sections 9001 to 9042).

campaigns. Conversely, the indicators representing a restrictive stance are: no or limited private donations to political candidates and parties from individuals, corporations and other entities; limited or no anonymous donations; limited or no third-party election spending; and significant public funding for election campaigns.

The stances of Canada and France appear egalitarian and restrictive. Corporate and trade union donations are prohibited; donations from individuals receive a tax credit and are limited, albeit at higher level in France; and public funding for campaigns is significant. The only exception is the amount of spending by unaffiliated non-party (i.e., third-party) political outfits: Canada sets a relatively high limit (CAD 350,000), whereas France imposes no limits. In contrast, the stances of England, India, Italy, Nigeria, Singapore and the United States appear libertarian and permissive. Public funding for campaigns is limited or nonexistent, and spending by third parties is unlimited. Individual and corporate donations are permitted, with no limits in England, India, Singapore and the United States (for individuals' aggregate donations and for corporate donations to political action committees) and high limits in Italy and Nigeria (for donations to candidates, not parties). The stances of the other countries appear intermediate. Those of Brazil, Mexico and Portugal tilt toward the egalitarian: although the limits on donations from individuals are high, and there are no limits on third-party spending in Brazil, all three countries prohibit corporate donations and provide significant public funding. In comparison, the stances of Australia, Germany, Japan, Kenya and Sweden tilt toward the libertarian. All five countries provide significant public funding; however, they set high or no limits on the spending of third parties and donations from individuals and corporations.

Comparing regulatory approaches toward charitable organisations and political entities

In regulating the use of private monies to finance political activities, do governments take a similar approach regardless of whether those activities are performed by charitable organisations or political entities? To address that question, Table 6.4 categorises and compares the regulatory stances of each country, inferring these from the assignment of indicators in Table 6.2 and the assignment of gradations in Table 6.3 for which the treatment of electioneering receives greatest weight. The range of stances follows a rough continuum running from a strong to weak restrictive stance and from a weak to strong permissive stance.

Similar approaches appear for Canada, Italy and Singapore. In regulating both political entities and charitable organisations, Canada adopts a relatively strong restrictive stance: it encourages but limits the donations of individuals to political entities, prohibits corporate donations and offers substantial public funding for campaigns; in addition, it prohibits charities from electioneering but permits advocacy and lobbying on condition that they further the organisations' charitable purpose. Italy and Singapore adopt a relatively strong permissive stance in both contexts: they permit and place no limits on the donations of individuals and corporations to political entities and provide no or little public funding for campaigns; in addition, they place slight or no formal limits on the political activities available to registered nonprofit third-sector entities or Institutions of a Public Character. In contrast, very different approaches appear for India and the United States. In regulating political entities, both adopt a relatively strong permissive stance. But in regulating charitable organisations, they adopt a relatively strong restrictive stance: both prohibit electioneering but permit lobbying on condition that it further the organisations' political purpose and remain insubstantial; India prohibits advocacy, whereas the United States permits it conditionally. For the other 11 countries, varying degrees of difference appear between the stances they take toward regulating the use of private monies to finance the political activities of charitable organisations and political entities. Some countries – such as

Table 6.4 Regulatory stance toward privately-financed political activities of political entities (P) and charitable organisations (C)

Country	Regulatory stance			
	Egalitarian /deliberative restrictive		Libertarian /pluralist permissive	
	Strong	Weak	Weak	Strong
Australia		C	P	
Brazil		P	C	
Canada	P C			
England			C	P
France	P		C	
Germany	C		P	
India	C			P
Italy				P C
Japan		C	P	
Kenya	C		P	C
Mexico	C	P		
Nigeria		C		P
Portugal		P		C
Singapore				P C
Sweden			P	C
U.S.	C			P

France and Portugal – take a more permissive stance toward charitable organisations, whereas others – such as Germany and Nigeria – take a more restrictive stance.

6 Implications for the regulation of privately financed political activities

For all but three of the sample countries, the stance toward regulating the political activities performed by charitable organisations differs from the stance toward regulating the private donations received by political entities. Such differences suggest that what matters most to those governments is not the general task of regulating the use of private monies to finance political activities. Accounting for this on a country-by-country basis exceeds the scope of this chapter. However, a range of considerations could conceivably contribute to differences between the regulatory stances – considerations apart from the opposing pairs of political philosophies and models of democracy that, if applied consistently, would result in the stances being similar.

By way of illustration, governments might take a relatively more restrictive stance toward charitable organisations if they interpret charitable purposes and activities as being inherently different from political ones or if they envisage political activities performed by charitable organisations as harming charitable purposes – positions found in the charity finance literature, as outlined in part 2. Alternatively, governments might perceive civil society and the charitable organisations within it as rivalling its own abilities to mobilise and represent the interests and values of citizens. In recent decades, for example, multiple countries have introduced laws and regulations that restrict the operations of civil society and curtail international funding – allegedly to protect and enforce state sovereignty against foreign influence, promote accountability, co-ordinate sources of aid and prevent money laundering (Rutzen 2015). Or it could be that governments perceive the prominence of very rich philanthropists as generating forms of philanthropy that are “disruptive” or plutocratic – ones that

threaten democracy by enabling the rich to have a disproportionate say in which public purposes receive attention and which public programs receive resources (Horvath and Powell 2016; Saunders-Hastings 2018). Such governments might see a need “to craft, through various policies and social norms, a framework that domesticates plutocrats to serve democratic ends” (Reich 2019, 28) – a framework that could include restricting the political activities that charitable organisations perform.

On the other hand, governments might take a relatively more permissive stance toward charitable organisations if they perceive them as advancing democracy. Theorists of civil society typically present it as playing two broad roles: that of producing and delivering goods and services which complement those of the market and state and that of assembling and expressing the collective priorities and interests of individuals, groups and communities which compose society (Rathgeb Smith and Grønbjerg 2006, 223–238). Those who focus on the latter role typically refer to Tocqueville’s 19th-century portrayal of American voluntary associations encouraging and enabling individual citizens to find common cause, as well as joint opportunities for them to promote the social good (Clemens 2006, 207–217). Thus, governments might take a more permissive stance toward charitable organisations if they perceive them as facilitating democracy – a role that could be strengthened by giving them a greater voice in the processes by which collective decisions are structured, debated and made.

Finally, it might be that governments are simply unwilling or unable to define clear policy goals and act on them comprehensively – whether such goals are to promote particular pairs of political philosophies and models of democracy, respond to certain incompatibilities between charitable organisations and political activities, suppress the abilities of charitable organisations to undercut state authority or strengthen their abilities to engage citizens in democratic processes. The individuals who set the policy agenda, or design and implement regulations, might variously seek to please certain stakeholders, pursue personal advantage or resist change. Their information and knowledge might be incomplete or inaccurate. And their administrative capabilities might be limited, such that any reforms are piecemeal, patching new elements onto previous regimens or stretching existing instruments and procedures to handle goals or conditions for which they were not meant. In other words, governments might exercise a low level of policy design (Howlett and Mukerjee 2014). If so, then they might be inconsistent in how they approach regulating the use of private monies to finance the political activities of charitable organisations and political entities simply because they have neither the incentives, knowledge nor capabilities to do otherwise.

As noted in the introduction, the use of private monies to finance political activities has received international attention given the possible risks to democracy (OECD 2016). Regulating that use effectively and comprehensively is made more complex by the wide range of entities and organisations that compose the broader system able to perform political activities and finance them privately (Issacharoff and Karlan 1999). Several of the 16 countries included in this chapter evidently seek to restrict the use of private monies to finance political entities by prohibiting donations from legal persons, limiting those from natural persons and providing public funding. For Canada and to some extent Mexico, their restrictive stances toward political entities are matched by those toward charitable organisations, suggesting that their regulatory approach applies consistently across the broader political system. But this is not the case for France, Portugal and to some extent Brazil: although their stances toward political entities are restrictive, those toward charitable organisations are relatively permissive, leaving open a channel for private monies to flow into the broader political system. Several of the countries evidently do not seek to restrict the use of private monies to finance political entities. For Italy, Singapore and to some extent England, their permissive stances toward political entities are matched by those toward charitable organisations, again suggesting consistency in their regulatory approach. However, should any of those countries pursue regulatory reform to restrict the use of private monies to finance politics, then – following the hydraulics arguments of Issacharoff and Karlan – their attentions should extend beyond political entities to include charitable organisations as well.

Notes

- 1 The title of this status varies across countries. For the sake of brevity, I refer to the organisations and their purposes and activities as “charitable” – despite this term having legal meaning only in common law jurisdictions.
- 2 For a comparison of practices across eight countries circa 2012, see Carmichael (2016).
- 3 Parts 2 and 3 draw from the more detailed account in Carmichael (2020).
- 4 The contending philosophies – egalitarianism and libertarianism – distinguish the Supreme Courts of Canada and of the United States in their decisions over the constitutionality of political finance regulations (Carmichael 2020, n 110).
- 5 Within the political finance literature, see BeVier 1994, 1277; Sullivan 1997, 671–675; Redish 2001, 125–128; Smith 2001, 109–121; Samples 2006, 31–40. Within the charity finance literature, see Chisolm 1990, 320–337; Carroll 1992, 254–259; Klapach 1999, 513–519; Guinane, 2007; Leff 2009, 685–696; Brunson 2011, 145–147; Galston 2011, 903–911, 918–928; Weitzel 2011, 157–158; Fresco 2012, 3026–3045.
- 6 Within the political finance literature, see BeVier 1994, 1274–1275; Sullivan 1997, 681–682; Wright 1976, 1015–1017. Within the charity finance literature, see those cited previously who counter the argument that charitable organisations harm political purposes by performing political activities.
- 7 Within the political finance literature, see Wright 1976, 1017–1021; Sunstein 1993, 241–252.
- 8 Within the political finance literature, see those cited previously who hold political equality paramount.
- 9 Within the charity finance literature, see those cited previously who support the argument that charitable organisations harm political purposes by performing political activities.

References

- Achen, C.H. and Bartels, L.M. (2016). *Democracy for Realists: Why Elections Do Not Produce Responsive Government*. Princeton: Princeton University Press.
- Ackerman, B. and Ayers, I. (2002). *Voting with Dollars: A New Paradigm for Campaign Finance*. New Haven: Yale University Press.
- Ansola-behere, S., de Figueiredo, S.M. and Snyder, Jr., J.M. (2003). Why is there so little money in U.S. politics? *The Journal of Economic Perspectives* 17, 105–130.
- Audi, R. (1993). The place of religious argument in a free and democratic society. *San Diego Law Review* 30, 677–702.
- BeVier, L.R. (1994). Campaign finance reform: specious arguments, intractable dilemmas. *Columbia Law Review* 94, 1258–1280.
- Briffault, R. (1999). Public funding and democratic elections. *University of Pennsylvania Law Review* 148, 563–590.
- Brunson, S.D. (2011). Reigning in charities: using an intermediate penalty to enforce the campaigning prohibition. *Pittsburgh Tax Review* 8, 125–170.
- Buckles, J.R. (2007). Not even a peep? The regulation of political campaign activity by charities through federal tax law. *University of Cincinnati Law Review* 75, 1071–1111.
- Buckles, J.R. (2008). Is the ban on participation in political campaigns by charities essential to their vitality and democracy? A reply to Professor Tobin. *University of Richmond Law Review* 42, 1057–1127.
- Cafardi, N.P. (2005). Saving the preachers: the tax code’s prohibition on church electioneering. *Duquesne Law Review* 50, 503–544.
- Carmichael, C.M. (2016). The fiscal treatment of philanthropy from a comparative perspective. In: T. Jung, S.D. Phillips and J. Harrow, eds. *The Routledge Companion to Philanthropy*. London: Routledge, 244–259.
- Carmichael, C.M. (2020). We should talk: framing and connecting the legal literatures on charity finance and campaign finance. *King’s Law Journal* 31, 402–425.
- Carroll, A.B. (1992). Religion, politics and the IRS: defining the limits of tax law controls on political expression by churches. *Marquette Law Review* 76, 217–263.
- Chisolm, L.B. (1990). Politics and charity: a proposal for peaceful coexistence. *The George Washington Law Review* 58, 308–367.
- Churchill, S. (12 June 2013). Why NGOs are jittery over public benefits organizations act. *Pambazuka News* <<https://www.pambazuka.org/governance/why-ngos-are-jittery-over-public-benefits-organizations-act>> retrieved 20 September 2020.
- Clark, E. (1960). The limitation on political activities: a discordant note in the law of charities. *Virginia Law Review* 46, 439–466.

- Clemens, E.S. (2006). The constitution of citizens: political theories of nonprofit organisations. In: W.W. Powell and R. Steinberg, eds. *The Nonprofit Sector: A Research Handbook*, 2nd edition. New Haven: Yale University Press, 207–220.
- Cmar, T. (2005). Toward a small donor democracy: the past and future of incentive programs for small political contributions. *Fordham Urban Law Journal* 32, 443–505.
- Colinvaux, R. (2012). The political speech of charities in the face of *Citizens United*: a defense of prohibition. *Case Western Reserve Law Review* 62, 685–756.
- Crimm, N.J. and Winer, L.H. (2013). The law bans on political campaign speech by houses of worship: inappropriate government censorship and intrusion on religion. *Journal of Law, Religion and State* 2, 101–136.
- Dahl, R.A. (1956). *A Preface to Democratic Theory*. Chicago: University of Chicago Press.
- de Figueiredo, J.M. and Garrett, E. (2005). Paying for politics. *Southern California Law Review* 78, 591–667.
- Dessingue, D. (2001). Prohibition in search of a rationale: what the tax code prohibits; why: to what end? *Boston College Law Review* 42, 903–929.
- Dunn, A. (1999). Charity as a political option for the poor. *Northern Ireland Legal Quarterly* 50, 298–317.
- Dunn, A. (2008). Charities and restrictions on political activities: developments by the Charity Commission for England and Wales in determining the regulatory barriers. *International Journal of Not-for-Profit Law* 11, 51–66.
- Dworkin, R. (1996). The curse of American politics. *The New York Review of Books* 43, 19–24.
- Dworkin, R. (2016). *Is Democracy Possible Here? Principles for a New Political Debate*. Princeton: Princeton University Press.
- Fiss, O.M. (1996). *Liberalism Divided*. Boulder: Westview Press.
- Foley, E.B. (1994). Equal-dollars-per-voter: a constitutional principle of campaign finance. *Columbia Law Review* 94, 1204–1257.
- Fowler, E.F., Franz, M.M. and Ridout, T.N. (2016). *Political Advertising in the United States*. Boulder: Westview Press.
- Fresco, M. (2012). Getting to “exempt!”: putting the rubber stamp on section 501(c)(3) political activity prohibition. *Fordham Law Review* 80, 3015–3055.
- Galle, B. (2013). Charities in politics: a reappraisal. *William and Mary Law Review* 541, 1561–1632.
- Galston, M. (1993). Lobbying and the public interest: rethinking the internal revenue code’s treatment of 501(c)(3) legislative activities. *Texas Law Review* 71, 1269–1354.
- Galston, M. (2011). When statutory regimes collide: will *Citizens United* and *Wisconsin Right to Life* make federal tax regulation of 501(c)(3) campaign activity unconstitutional? *Journal of Constitutional Law* 13, 867–930.
- Garnett, R.W. (2001). A quiet faith? Taxes, politics and the privatisation of religion. *Boston College Law Review* 42, 771–803.
- Garrett, E. and Smith, D.A. (2005). Veiled political actors and campaign disclosure laws in direct democracy. *Election Law Journal* 4, 295–328.
- Guinane, K. (2007). Wanted: a bright-line test defining prohibited intervention in elections by 501(c)(3) organisations. *First Amendment Law Review* 6, 142–170.
- Habermas, J. (2006). Religion in the public sphere. *European Journal of Philosophy* 14, 1–25.
- Hardin, R. (2004). Representing ignorance. *Journal of Social Philosophy and Policy* 21, 76–99.
- Hasen, R.L. (1996). Clipping coupons for democracy: an egalitarian/public choice defense of campaign finance vouchers. *California Law Review* 84, 1–59.
- Held, D. (2006). *Models of Democracy*, 3rd edition. Stanford: Stanford University Press.
- Hellman, D. (2011). Money talks but it isn’t speech. *Minnesota Law Review* 95, 935–1002.
- Horvath, A. and Powell, W.W. (2016). Contributory or disruptive: do new forms of philanthropy erode democracy? In: R. Reich, C. Cordelli and L. Bernholz, eds. *Philanthropy in Democratic Societies: History, Institutions, Values*. Chicago: University of Chicago Press, 87–122.
- Houck, O.A. (2003). On the limits of charity: lobbying, litigation, and electoral politics by charitable organisations under the internal revenue code and related laws. *Brooklyn Law Review* 69, 1–89.
- Howlett, M. and Mukerjee, I. (2014). Policy design and non-design: towards a spectrum of policy formulation types. *Politics and Governance* 2, 57–71.
- Issacharoff, S. (2010). On political corruption. *Harvard Law Review* 124, 118–142.
- Issacharoff, S. and Karlan, P.S. (1999). The hydraulics of campaign finance reform. *Texas Law Review* 77, 1705–1738.
- Klapach, J.S. (1999). Thou shalt not politic: a principled approach to section 501(c)(3)’s prohibition of political campaign activity. *Cornell Law Review* 84, 504–542.
- Leff, B.M. (2009). “Sit down and count the cost”: a framework for constitutionally enforcing the 501(c)(3) campaign intervention ban. *Virginia Tax Review* 28, 673–731.

- Mazo, E.D. (2014). The disappearance of corruption and the new path forward for campaign finance. *Duke Journal of Constitutional Law and Public Policy* 9, 259–313.
- McConnell, M.W. (1999). Five reasons to reject the claim that religious arguments should be excluded from democratic deliberation. *Utah Law Review* 639–657.
- Mill, J.S. (2003). *On Liberty*. New Haven: Yale University Press.
- OECD. (2016). *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*. Paris: OECD Publishing.
- OECD. (2020). *Taxation and Philanthropy*. OECD Tax Policy Studies No. 27. Paris: OECD Publishing.
- Ortiz, D.R. (1998). The democratic paradox of campaign finance reform. *Stanford Law Review* 50, 893–914.
- Overton, S. (2004). The donor class: campaign finance, democracy, and participation. *University of Pennsylvania Law Review* 153, 73–118.
- Parachin, A. (2016). Reforming the regulation of political advocacy by charities: from charity under siege to charity under rescue? *Chicago-Kent Law Review* 91, 1047–1078.
- Raskin, J. and Bonifaz, J. (1994). The constitutional imperative and practical superiority of democratically financed elections. *Columbia Law Review* 94, 1160–1203.
- Rathgeb Smith, S. and Grønberg, K.A. (2006). Scope and theory of government-nonprofit relations. In: W.W. Powell and R. Steinberg, eds. *The Nonprofit Sector: A Research Handbook*, 2nd edition. New Haven: Yale University Press, 221–242.
- Rawls, J. (1971). *A Theory of Justice*. Cambridge, MA: Belknap Press.
- Rawls, J. (2005). The idea of public reason revisited. *The University of Chicago Law Review* 64, 765–807.
- Redish, M.H. (2001). *Money Talks: Speech, Economic Power, and the Values of Democracy*. New York: New York University Press.
- Reich, R. (2019). Philanthropy in the service of democracy. *Stanford Social Innovation Review* Winter, 26–33.
- Rutzen, D. (2015). Civil society under assault. *Journal of Democracy* 26, 28–39.
- Sacks, A. (1960). The role of philanthropy: an institutional review. *Virginia Law Review* 46, 516–538.
- Salamon, L.M. and Toepler, S. (2015). Government-nonprofit cooperation: anomaly or necessity? *Voluntas* 26, 2155–2177.
- Samples, J. (2006). *The Fallacy of Campaign Finance Reform*. Chicago: The University of Chicago Press.
- Sarbanes, J.P. and O'Mara III, R. (2016). Power and opportunity: campaign finance reform for the 21st century. *Harvard Journal on Legislation* 53, 1–38.
- Saunders-Hastings, E. (2018). Plutocratic philanthropy. *Journal of Politics* 80, 149–161.
- Simon, J., Dale, H. and Chisolm, L. (2006). The federal tax treatment of charitable organisations. In: W.W. Powell and R. Steinberg, eds. *The Nonprofit Sector: A Research Handbook*, 2nd edition. New Haven: Yale University Press, 267–306.
- Smith, B.A. (2001). *Unfree Speech: the Folly of Campaign Finance Reform*. Princeton: Princeton University Press.
- Sullivan, K.M. (1997). Political money and freedom of speech. *UC Davis Law Review* 30, 663–690.
- Sunstein, C.R. (1993). *Democracy and the Problem of Free Speech*. New York: The Free Press.
- Tobin, D.B. (2007). Political campaigning by churches and charities: hazardous for 501(c)(3)s, dangerous for democracy. *The Georgetown Law Journal* 95, 1313–1363.
- Totten, M. (2007). The politics of faith: rethinking the prohibition on political campaign intervention. *The Stanford Law and Policy Review* 18, 298–323.
- Trotter, R.W. (2012). Lobbying by religious non-profit entities: its impact, theoretical inconsistency, and how to prevent it. *The Dartmouth Law Journal* 10, 12–55.
- Vallier, K. (2018). Religion and politics. In: J. Brennan, B. van der Vossen and D. Schmidtz, eds. *The Routledge Handbook of Libertarianism*. London: Routledge, 390–404.
- Weitzel, P. (2011). Protecting speech from the heart: how *Citizens United* strikes down political speech restrictions on churches and charities. *The Texas Review of Law and Politics* 16, 155–174.
- Wolpe, D. (19 February 2017). A rabbi defends the Johnson amendment. *The Atlantic* <<https://www.theatlantic.com/politics/archive/2017/02/a-rabbi-defends-the-johnson-amendment/516981/>> retrieved 20 September 2020.
- Wright, J.S. (1976). Politics and the constitution: is money speech? *Yale Law Journal* 85, 1001–1021.
- Wright, J.S. (1982). Money and the pollution of politics: is the first amendment an obstacle to political equality? *Columbia Law Review* 82, 609–645.