Oonagh B. Breen*

Regulating European Philanthropy: Lessons from the Scholarly Legacy of Evelyn Brody

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Abstract: Throughout her long and distinguished academic career, spanning more than three decades, as a Professor of Law at Chicago-Kent University, Evelyn Brody's work has interrogated three broad themes that underpin and drive charity law – the tax treatment of charities; the governance framework applicable to charities, its application, monitoring and enforcement; and the evolution of charitable structures over time, whether from an economic convergence perspective, a constitutional right of association perspective or from a public/private benefit perspective. This article reviews Brody's contribution in these key areas. It explores the resonance of her work outside of the United States and its relevance for EU non-profit scholars before looking to Brody's research legacy for future nonprofit scholars on both sides of the Atlantic.

Keywords: charity regulation, tax treatment, nonprofit governance, legal structures, United States, European philanthropy

1 Introduction

> As a result of the way broad law reform arises, a true unified "charities law" in statutory form is unlikely to emerge in the United States. … First, the law is a relatively weak force in influencing the behavior of nonprofits and their fiduciaries. Often the better answer is not new law, but rather enforcement of existing laws, or, better yet, improved voluntary practices. Second, the concept of "the non-profit sector" for the last 40 years has clearly been a successful organizing device, for scholars as well as for practitioners … [Yet we] might find future law reform to be postsectoral, focusing less on organizational form and more on specific activities (Brody 2012A, p. 554).

Throughout her long and distinguished academic career, spanning more than three decades, Evelyn Brody's work has interrogated three broad themes that

***Corresponding author: Oonagh B. Breen**, Sutherland School of Law, University College Dublin, Belfield, Dublin 4, Ireland, E-mail: oonagh.breen@ucd.ie. https://orcid.org/0000-0002-3947-1315

underpin and drive charity law – the tax treatment of charities; the governance framework applicable to charities, its application, monitoring and enforcement; and the evolution of charitable structures over time, whether from an economic convergence perspective, a constitutional right of association perspective or from a public/private benefit perspective. The issues identified by Brody in her work resonate not only within the United States but also further afield. On the occasion of her retirement, an opportunity arises to reflect on Brody's enduring contribution to our understanding of the legal regulation of charitable institutions and the impact of her scholarship outside the United States.

In reflecting on Brody's scholarship, one is struck by the emerging opportunities to apply her wisdom to the resolution of emerging issues in the legal regulation of European philanthropy. In January 2017, the European Foundation Centre (EFC) in conjunction with the Donors and Foundations Network in Europe (DAFNE) commissioned the preparation of a horizon scanning report on the space for philanthropy in Europe to recommend the steps needed not only to protect this space but to further enlarge it (Breen 2018). The impetus for this research came at a time when there was a certain shared sense of despondency, amongst DAFNE and EFC members, amongst others, about the capacity of the EU to deliver a single market for philanthropy along the lines already achieved for for-profit entities. This was triggered by the European Commission's withdrawal of the proposal for a European Foundation Statute ("EFS") in late 2014, following its failure to achieve the necessary unanimous support from Member States at European Council level (Alliance 2014A).[1] The EFS was one of 80 proposals that the Commission decided to withdraw from the EU legislative agenda in crafting its 2015 "better regulation" agenda under the then new Juncker Commission.[2] Speaking at the time of this announcement, the CEO of the EFC, Gerry Salole commented:

1 Eight Member States (Austria, Denmark, Estonia, Germany, the Netherlands, Portugal, Slovakia and the UK) rejected the EFS proposal, which had been tabled by the Italian Presidency at the European Council meeting in November 2014.

2 The Juncker Commission was the European Commission in office from 1 November 2014 to 30 November 2019. Its president was Jean-Claude Juncker (former Prime Minister of Luxembourg), who presided over 27 other commissioners (one from each of the states composing the European Union, except Luxembourg, which is Juncker's state). Juncker's priorities during his tenure included the creation of a digital single market, the development of an EU Energy Union, the negotiation of the Transatlantic Trade Agreement, the continued reform of the Economic and Monetary Union of the European Union—with the social dimension in mind, a "targeted fiscal capacity" for the Eurozone, and the 2015-16 British EU membership renegotiations. Over the course of the Juncker Commission, a total of 142 legislative proposals were withdrawn in the name of better regulation. See Juncker Commission, Key figures for the EU 2014-2019 (October 2019).

> This decision sends a signal that goes completely against the concept of building a citizen-led Europe. If EU institutions together cannot uphold a Regulation which aims to facilitate public interest work by and for the citizens, they will have to find other avenues, with the sector, to address the issue. Foundations will continue to hold the European Commission to account in finding solutions to serving the public interest across borders (Alliance 2014B).

The subsequent report, *Enlarging the Space for European Philanthropy* (Breen 2018) identified the existing philanthropic landscape in Europe along with current and emerging challenges that impede philanthropic activity across the EU. The report also signposted possible future avenues of development worth exploring in our quest to create a more robust legal philanthropic environment.

This article attempts to unpack some of these emerging legal challenges in European cross-border philanthropy by providing some context for the status quo and exploring the possible EU and national avenues to facilitate the provision of a legally enabling environment for European philanthropy even in the face of new and emerging national restrictions. In elaborating on the findings of the report, the paper draws on the themes explored by Brody's body of work across three headings – tax treatment of charities; the need for the development of good legal structures for philanthropic activity; and the inherent importance of good governance regardless of the legal structure actually chosen – to demonstrate the broader point that many of the problems faced in creating a legally enabled space for philanthropic activity are generic in nature and not necessarily delimited by jurisdictional borders, particularly if approached on a macro-policy level. There is therefore much merit in learning from the wisdom of our peers no matter on which side of the Atlantic they are situated.

To this end, Part II considers the tax treatment of charitable giving through a European lens, Part III reviews the challenges of creating legal structures that are fit for purpose, while Part IV picks up on some of perennial governance issues common to both the United States and Europe. The paper concludes that while respectful of the different legal traditions within which both the United States and the European Union work, nevertheless we share generic problems when it comes to both the regulation and the facilitation of philanthropic giving. In resolving these generic yet complex issues, much can be learnt from the clarity and thoughtfulness of Brody's articulation and examination of the underlying legal values and principles that inform these areas of law.

A word of terminology is required to preface the discussion that follows below. The concept of "charity" is a very much a common law concept and is not one found in civil law jurisdictions, where it is more usual to refer to public benefit organizations or simply foundations. All of these forms are considered philanthropic in nature and form a subset of the broader nonprofit sector as distinct from

being part of the state or part of the market. Throughout this article, for ease of reading, the word "charity" is commonly used to refer to these philanthropic institutions regardless of their location, except where a quoted source specifically uses a particular term such as "nonprofit" or "foundation".

2 Taxation Treatment of all Things Charitable

> "[A]ssuming we know what charities do, and assuming we want to encourage them to do more of it, are these tax rules the best approach, both from an efficiency and a political-process perspective (Brody 1999)?"

Brody posed this question more than 20 years ago in an article dealing with the US treatment of non-profit tax law. This was not a new theme in her work. A year earlier, Brody (1998A) had railed that:

> [p]olicy makers at all levels of government have consistently failed to satisfactorily explain why they grant tax exemptions to charities. Nor do the existing schemes of exemption and exceptions form a principled framework.

In an effort to bring order where she found none, Brody engaged in her own mapping project throughout the first decade of the new millennium in a series of studies that she undertook in the area of US State property tax exemptions for charities (Brody 2002A, 2007A, 2010). Her 2010 paper, published in the New England Law Review, included a 51-page appendix that set out a fifty-one-jurisdiction review of state constitutions, statutes, and high-court decisions relating to property-tax exemption for charities. Brody's work demonstrated that while the details of the charity exemption from property tax varied from state to state, the regimes were generally more similar than not.

When it comes to charitable tax-exemption in EU Member States, it is fair to say that most Member States provide an exemption regime of some description for charities active within their jurisdiction provided that the local revenue requirements are met and the vast majority of Member States are broadly supportive of the purpose of philanthropy and the use of private goods for the greater public benefit. At the same time, the different philanthropic traditions that co-exist across the 27 Member States mean that there is no single accepted definition of philanthropy, or shared legal or reporting structure. Moreover, differences in history and culture, economic and political conditions, and taxation rules between not only common law and civil law Member States but also between states of the same legal tradition make the promulgation of non-profit regulation extremely complex and challenging in the absence of a more enabling legal basis than is currently provided by the European Treaties (Breen 2014; ECNL 2009; EFC/TGE 2017).

European Member States remain sovereign in the area of taxation. For the most part, national tax regimes may be internally consistent in their treatment of domestic philanthropy, but the same clarity of principle does not always follow in these States' tax treatment of cross border philanthropy. The free movement of philanthropic funds between Member States and its treatment under European Law raises issues relating to whether philanthropic funds (and their owners) enjoy the same rights under the Treaty-guaranteed free movement of capital as for-profit entities do. More specifically, in the context of tax law, the European Court of Justice ("ECJ") has considered the application of the principle of non-discrimination on the grounds of nationality in the context of philanthropic giving and to this end, the ECJ's developing jurisprudence in this area has begun to clarify the application of European law in this area but, as we will see, its implementation in Member States remains a work in progress that is often slow to give full effect to these principles.

So, how do these instances arise in practice? Imagine you are a donor in one Member State who wishes to support a charity in another Member State – should your charitable donation enjoy the same tax incentives as a donor who gives to a domestic charity in your Member State? And should Member States be able to discriminate in their tax treatment of foreign based charities that generate income in the host Member State? Or should there be parity of treatment when it comes to gift and inheritance tax on legacies or inheritances not made to domestic charities but made to a cross-border charity in another Member State? These questions have come before the ECJ in a series of decisions over the past decade, which are reviewed briefly below.

2.1 The Stauffer Case

The Stauffer Centre is an Italian charitable foundation, established in Italy, which awards scholarships to Swiss youths to pursue music studies. Stauffer owned a building in Germany, managed by a German property management company on its behalf from which it obtained rental income. German tax law exempted domestic charities from corporate income tax on this kind of rental income but did not apply this exemption to foreign-based charities, such as Stauffer, even if they fulfilled all the requirements outlined under German tax law (which Stauffer did). Stauffer challenged the validity of the tax law under European Law.

In a seminal judgment, the ECJ held that rental income was protected under the free movement of capital.[3] According to settled case law, restrictions on the fundamental freedoms are only permissible if they satisfied four conditions:

3 Case C-386/04, *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* [2009] 2 C.M.L.R. 31.

1. they are applied in a non-discriminatory way;
2. they are justified by overriding reasons in the public interest;
3. they are an appropriate means to achieve the objective that they pursue; and
4. they do not go beyond what is necessary and reasonable to achieve this objective.

The less favorable treatment of foreign EU-based charities was not, in the view of the ECJ, justifiable according to these criteria. In the words of the Court,

> where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, which it is a matter for the national authorities of that other State, including its courts, to determine, the authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory.[4]

Although the need for Member States to be able to exercise adequate fiscal supervision constituted an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty, the principle of proportionality applied. A presumption of abuse, based only on the foreign connection and generally excluding all foreign foundations from the tax advantage, was clearly to be regarded as disproportionate. The Court ruled that the taxpayer had to be given the opportunity to bring forward supporting documents and evidence to enable the necessary checks on their having fulfilled the respective requirements to be carried out. In particular, a restriction on tax incentives could not be justified on the grounds that the organization concerned had its registered seat in another Member State and that this hindered the clarification of the facts of the case and the application of the necessary procedures. In such a case, the EU Directive on Mutual Assistance would provide adequate protection to the Member State (European Council 1977). Furthermore, the risks of loss of tax revenues and of foreign EU-based charities engaging in money laundering for terrorist financing purposes did not justify a restriction of tax incentives.

2.2 The Persche Case

Mr. Persche, a German resident, sought a special deduction in his personal income tax declaration in 2003 for an in-kind donation of bed and bath linen,

4 Ibid, at [40].

walking frames, and other equipment that he had made to a Portuguese charity providing elderly nursing home care in Portugal. German tax law, at the time, provided for a deduction for a donation made to a domestic charity but the tax incentive was not applied for donations to foreign EU-based charities, even when the recipient charity in question met all the requirements set out in the German tax law. The German tax authority rejected Persche's tax deduction request.

The ECJ ruled that donations (including in-kind donations) are protected under the free movement of capital.[5] The discrimination in this case was not justifiable and the German tax law provisions to this effect were invalid. The Court held that a denial of tax incentives would be permissible only in the concrete case that the Portuguese organization was not (notwithstanding its place of establishment) comparable to a German charity. In this case, the tax authority had not carried out the necessary comparability test to reach that conclusion. It is interesting to note two particular findings of the ECJ in this regard with regards to comparability. In applying a comparability test, the ECJ acknowledged that "if it proves difficult to verify the information provided by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, nothing prevents the tax authorities concerned refusing the deduction applied for if the evidence that they consider they need to effect a correct assessment of the tax is not supplied."[6] This acknowledgement in many ways has created the legitimate cover for the administrative obstacles experienced by charities in reclaiming disputed tax payments under the various comparability tests used by host Member States.

The second point of note in *Persche* is the jurisdictional limitations to cross-border philanthropic free movement. In the words of the ECJ, "As regards charitable bodies in a non-member country, it must be added that it is, as a rule, legitimate for the Member State of taxation to refuse to grant such a tax advantage if, in particular, because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country."[7] The ramifications of this statement with the departure of the UK from the EU remain to be teased out in light of Brexit and the likelihood of any future levels of cooperation between the EU and the UK particularly in an area as sensitive as taxation.

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5 C-318/07 *Hein Persche v Finanzamt Lüdenscheid* [2009] ECR I-359.

6 *Persche*, n.iv above at [69].

7 *Persche*, n.iv above at [70].

2.3 The Missionwerk Case

Mrs. Renardie, a Belgian citizen, died in 2004 in Belgium (having lived there her entire life) and appointed Missionswerk as her heir. Missionswerk is a charity with its registered seat in Germany. The Belgian regional tax authority applied inheritance tax at a rate of 80%, amounting to over €60,000 of tax on the inheritance Missionswerk was to receive. Missionswerk sought a reduction of this rate from 80% to the 7% rate that the tax authority normally applied to legacies to domestic charities, but the tax authority refused this request on the grounds that the rate was only available to foreign EU-based charities in cases where the testator had lived or worked in the country in which the foreign organization was based.

The ECJ ruled that legacies are protected under the free movement of capital and the discrimination in *Missionswerk* was not justifiable.[8] Relying on its earlier judgments in both *Stauffer* and *Persche*, the Court held that the Belgian tax rule was invalid. A restriction on tax incentives would be permissible only in the concrete case that the German charity was not (notwithstanding its place of establishment) comparable to a Belgian charity. Again, as in *Persche*, the tax authority had not carried out the necessary comparability test to reach this conclusion.

With such clear judgments laid down by the Court of Justice, the challenge in recent years has been for tax authorities to apply the necessary comparability test when a domestic donor donates to a foreign based EU-charity or where a foreign EU established charity seeks equivalent treatment to that granted to a domestic charity by a host Member State. Studies undertaken to review Member States' efforts to adapt their legislation and tax scrutiny practices provide some insight into attempts to remove discriminatory treatment against "comparable" foreign EU based charities and their donors. One such 2014 study considered the performance of the comparability test across 27 Member States before concluding:

> In the majority of Member States, no formal or uniform approach to the comparability test is foreseen: Usually it is the competent tax authority which decides on a case by case basis whether a foreign [charity] is considered comparable to a domestic one. In around 10 Member States, however, at least in certain cases we find formal procedures which set out the binding framework for determining whether a foreign [charity] is comparable to a domestic one (EFC and TGE 2014, p. 5).

An annex to this report provided practical field studies of comparability in action, including a case-study of the UK Wellcome Trust, a charitable trust in the UK (then a Member State of the EU) which holds 50% of its endowment in a global portfolio of listed shares. Many of these shares and investments, like in *Stauffer*, were held in

8 C-25/10 *Missionswerk Werner Heukelbach eV v Belgian State* [2011] ECR I-497.

other EU member states and Wellcome had paid tax on its investments abroad until the *Stauffer* case alerted it to the possibility of filing reclaims in any EU state where the rate paid by Wellcome exceeded the rate paid by a comparable domestic charity. Wellcome filed refund claims in 9 Member States and by 2014 four countries (Austria, Netherlands, Sweden and Norway) settled its claims in full while the others either totally or partially rejected its claims or had not at the time of the report yet addressed the merits of the claim. In outlining the reclaim process, a number of difficulties manifested themselves. Firstly, the burdensome nature of the process caused by the ad hoc procedures adopted by each country. In the words of Wellcome:

> [N]o two countries have the same procedure. The supporting documents that are required may include certificates of tax residence, withholding tax vouchers, audited accounts, governing documents (constitution, statutes, articles, etc.), evidence of receipt of income and its application to public benefit activities - with translation and notarisation where appropriate (EFC and TGE 2014, p. 23).

It is worth noting that the challenges experienced by the Wellcome trust in this regard are challenges that many US charities experience when they seek to operate in multiple – or all – US states, as the principal body of statutory and case law affecting US nonprofits, charities, and foundations is found at the state, and not the national or federal level.

Secondly, the burden of proving comparability rests firmly on the foreign charity and this is, at times a prolonged and costly process, which forces charities to carry out a cost benefit analysis of whether it is ultimately worthwhile to pursue a reclaim. According to Wellcome ((EFC and TGE 2014, p. 45):

> States that impose withholding tax in breach of EU law will not voluntarily refund the tax to foreign charities and the European Commission cannot require them to do so. It is up to each foundation to prove its case under the relevant national law procedure . . . The total costs to date incurred by Wellcome for filing claims, comparability analysis, claim validation, appeals and litigation costs in the ten countries concerned total around £900,000. This compares favourably with total refunds to date of over €8 million from the four states that have settled our claims in full and the prospect of further refunds from the other countries that continue to dispute our claims.

Not every charity's tax claim, however, will be on the scale of those of Wellcome and there is no accurate estimate of the value of tax reclaims currently not pursued and thus lost to philanthropy across Europe.

What might be a possible way forward leading to practical and pragmatic application of the comparability test? Following Brody's footsteps in the mapping of State practices, a subsequent European Foundation Centre (EFC) and Transnational Giving Europe (TGE) study sought out best practices amongst Member

State tax authorities in an effort to prompt other Member States to review their comparability test practices (EFC and TGE 2017). One of the most user-friendly models is the Luxembourg approach which involves two steps. Firstly, the Luxembourg resident donor must state in her tax declaration that the EU/EEA-based charity, which received the donation, fulfils Luxembourg tax law requirements. This requires proof that EU/EEA-based organization is recognized by its state of residence as a public-benefit body and as such is entitled to receive tax-deductible donations from residents of its state and is also exempt from income and wealth tax. The second step is that the recipient charity must sign a model certificate, which meets four requirements:

1. It sets out the legal date of establishment of the organization and the relevant state laws under which established.
2. It certifies that the organization directly and exclusively pursues one or more of the following nine purposes: Art, Education, Philanthropy, Worship/Religion, Science, Social issues, Sports, Tourism or Development cooperation.
3. It states that according to the laws of the state of establishment, these selfless aims are recognized as being of general interest and fiscally favored.
4. It affirms that the organization is exempt from income and wealth tax in its country of establishment for the year of the received donation and that such donations are fiscally deductible by donors residing in its country of establishment.

While the Luxembourg tax authority retains the right to ask for additional translated documents such as a receipt for the donation, the governing instruments of the foundation and the financial report of the recipient organization, it can also decide to grant comparable tax status simply on the basis of the model certificate (EFC and TGE 2017, p. 16).

In its review of the cross-border tax treatment of philanthropy in Europe, the *Enlarging the Space for European Philanthropy Report* (Breen 2018) took cognizance of the best practices prevalent in Luxembourg and in the Netherlands when it came to efficient comparability test models and while commending consideration of them for wider scale adoption by EU Member States, it also recommended that philanthropic organizations consider assisting in resolving the information asymmetries that exist when it comes to unpacking the different national tax reclaim procedures for donors and recipient organizations in the various EU Member States. It noted that the creation of a website resource and the pooling of national knowledge and knowhow, providing details on existing or emerging Member State tax authority procedures, coupled with the explanatory guidance or links to the relevant application forms necessary for both donors and recipient charities to begin the tax refund/exemption process would be a valuable step

forward for many EU-based charities. It also proposed the identification of a tax official contact in each jurisdiction well versed in issues relating to charitable tax equivalency.

Brody's canon of work reveals her to be a steadfast, longitudinal thinker whose methodical approach to understanding the operation of US charities at both a state (Brody 2007A, 2010) and federal level (Brody 1998A, 1999, 2004) has enabled her to survey the field in a comprehensive and yet careful manner. On the basis of her work, it becomes possible – even feasible – for coordination between states and regulators to occur (Brody 2004, p. 14). As Part II demonstrates, there is a similar need for mapping the charity field in the EU, work that is now ongoing, making Brody's insights ever more resonant for those grappling with these issues outside the US.

3 Evolution of Charitable Structures

Writing on the topic of accommodating autonomy in organizational law, Brody sought to examine the relationship between the state and the charitable organization across four dimensions: a) legal differences resulting from the choice of organizational form; b) legal differences (including greater or lesser government oversight) that depend on purpose; c) focuses on membership versus non-membership organizations; and d) whether the organization has outside sources of control (Brody 2008). In the course of her examination of these issues, Brody noted:

> An issue of growing importance is the role of state authorities when the charity forms in one state but operates in another. Typically, the state of operation requires a foreign charity to register if it "does business" or owns assets in the state. Issues relating to a charity's internal affairs generally are governed by the laws of the state of organization. Charity organizers might find the laws of the state of intended operation particularly restrictive or cumbersome, and thus prefer to incorporate in a state other than the one of intended operation (Brody 2008, pp. 350–51).

The problems identified by Brody here are magnified when viewed through an EU lens. It would be fair to say that the EU treaties have made it difficult to date to develop bespoke legal vehicles to advance philanthropy per se on a pan-European basis. Civil law and common law differences matter when it comes to drafting enabling regulation for philanthropy. Although there is EU level consensus and recognition of the substantial contribution made by institutionalized philanthropy to European goals and the important role played by charitable foundations in enhancing and facilitating a more active involvement of citizens and civil society in

the European project (European Commission 2012), harnessing that macro consensus and turning it into unanimous agreement on new legal tools to support philanthropy is difficult. The different philanthropic traditions that co-exist across the 27 EU Member States mean that there is no single accepted definition of philanthropy, or legal or reporting structure. The manifold legal, cultural, political and economic differences between European Member States make the promulgation of non-profit regulation extremely complex and challenging. As a result, charities operating on a pan-European basis incur higher operating costs. As the *Feasibility Study on a European Foundation Statute Final Report* (Centre for Social Investment 2009, p. 1) explained:

> There are legal barriers to cross-border activities of foundations of the Member States both in civil law and in tax law. As in company law, most of the barriers can be overcome, but this leads to compliance costs which will often be higher than they would be in company law, given that the legal and personal environments vary … The calculable cost of barriers against cross-border activities of European foundations ranges from an estimated €90,000,000 to €101,700,000 per year. Additionally, there are incalculable costs (costs of foundation seat transfer, costs of reduplication, psychological costs, costs of failure, etc.) which are certainly higher.

The past 30 years have seen numerous unsuccessful attempts to create new European legal vehicles to facilitate cross border philanthropy. Amongst those failures have been proposals for the European Association, the European Foundation, and the European Mutual Society (twice). In each of these instances, the process of their adoption has either been officially suspended or interrupted. Brody (2012A, p. 540) spoke of the challenges of synthesizing organizational law for nonprofits during her 12-year tenure with the American Law Institute ("ALI") Nonprofit Principles Project, agreeing with Liebman (2008, p. 220) that the "institute's work requires patience and is sometimes excruciatingly slow." During her time as ALI Reporter, Brody defined the project from the outset and authored five chapters on topics ranging from governance, gifts, enforcement, organizational choices and changes, and the relationship between charities and the state. Upon her stepping down as Project Reporter in 2013, ALI Director Lance Liebman publicly acknowledged Brody's immense contribution, stating, "She will continue to be recognized for her extraordinary service as Reporter. … When the project is finished, Evelyn will deserve much of the credit for something challenging and important (ALI 2013)."[9]

The common factor shared by all the European initiatives, which also led in each case to their downfall, has been the reliance on Article 352 TFEU (formerly

9 Tentative Draft No. 3 of Restatement of the Law, Charitable Nonprofit Organizations was approved at the American Law Institute's Annual Meeting in May 2019, bringing the formal project to completion subject to the discussion at the meeting and the usual editorial prerogative. With the approval of the draft, the Reporters are now preparing the Institute's official text for publication.

Article 308 TEC) as the legal basis for their promulgation.[10] Earlier work has analyzed the various points of difference between Member States when it came to the characteristics of the proposed European Foundation Statute ("EFS") on issues as broad-ranging as the definition of "public benefit," the right of any such future entity to automatic tax exemption in each Member State, minimum capital requirements for European foundations and the levels and forms of required regulatory supervision of any such new entity (Breen 2014, 2016). The inability to accommodate these differences in all of these previous attempts at introducing a new legal vehicle by way of Regulation was greatly exacerbated by Art 352's requirement of European Council unanimity, which forced Member States to reach complete agreement on every element essential to the creation of the EFS.

The *Enlarging the Space for European Philanthropy* Report (Breen 2018) explores the possibilities of navigating around the logjam that is Art 352 when it comes to the legal basis for promulgating regulations for European nonprofits. It proposes two possible alternatives – a) using the Enhanced Cooperation Mechanism set out in Article 20 TFEU to adopt the necessary regulation to provide a European legal vehicle to facilitate cross border philanthropic activity; or b) opting for a European Directive instead of a European Regulation when it comes to nonprofit facilitation.

3.1 Enhanced Cooperation under Article 20

The advantage of the enhanced cooperation mechanism is that it overcomes the need for European Council unanimity otherwise required by Art 352. Measures adopted under the enhanced cooperation framework apply only in the territory of the participating Member States – so one trades off universal application (and the need for unanimity in Council) for more limited territorial reach (with the option of other Member States joining after the fact) based on unanimity amongst only those participating Member States. To be feasible, there must be at least nine Member States that support the regulation in question. To authorize the use of enhanced cooperation, it must be politically supported by the European Commission, approved by a majority vote in the European Parliament and a qualified majority vote in Council. An additional procedural requirement of Art 20.2 is that the Council's adoption of the authorization decision must be one of last resort when the Council "has established that the objectives cannot be attained within a

10 Article 352(1) of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26.10. 2012, p.196, formerly Art 308 of the Treaty establishing the European Community (TEC), OJ 2002/C 325/01, p.153. On the importance of the correct legal basis, see Case C-436/03 *European Parliament v Council of the European Union* [2006] ECR I-03733.

reasonable period by the Union as a whole (Hanf 2011, pp. 21–36).” Given the poor record of legislative adoption around philanthropic facilitation, it might be safely said that this latter condition would be met to allow authorization of the Art 20 procedure. The actual implementation of the subsequent substantive regulation would still be enacted on the basis of Art 352 TFEU, but the requirement of unanimity would only extend to a Council decision by the participating Member States.

3.2 Switching to Directives instead of Regulations when engaged in Nonprofit Regulation and Facilitation

When seeking to legislate for new European-wide legal vehicles for non-profits, another, perhaps more flexible, legislative alternative to an EU Regulation would be to use an EU Directive. Going down the Directive route would provide Member States with greater flexibility as to the means to achieve the agreed ends, mitigating the looming threat of an EU Council veto that exists whenever Art 352 TFEU forms the legal basis. To this end, the potential for an EU Directive that would create a new legal form for institutional philanthropy at national level with a minimum common denominator in all EU countries, thereby facilitating cross border recognition, could be explored. Instead of creating a new European legal form, the Directive would ask Member States to recognize in their national law a philanthropic organization with a number of harmonized main requirements under one common name shared throughout Member States. The Directive could allow Member States the freedom to decide how to introduce such a legal form at national level, whether by way of an additional instrument or an instrument replacing currently existing foundation forms. Although not a risk-free legislative avenue given the legal treaty basis difficulties into which the proposed directive for single-member private limited liability companies (“Societas Unius Personae” or “SUP”, as they are known) itself has run,[11] it may nevertheless be worth further exploration from a philanthropic perspective.

Brody’s new millennium research speaks to the problems caused by lack of state coordination when it comes to both the facilitation and regulation of charities. Her in-

11 The EESC Opinion on the Directive (EESC-2014-02794-00-00-AC-TRA (DE)) in September 2014 challenged the Commission’s choice of Article 50 TFEU as the legal basis for the SUP Directive and questioned whether it was compatible with the subsidiarity principle, arguing that the legal basis should more properly be Art 352 TFEU. In its opinion to the European Parliament’s Committee on Legal Affairs, the EP Committee on Employment and Social Affairs proposed the rejection of the Commission proposal (COM (2014)0212–C7-0145/2014–2014/0120 (COD)) in June 2015. Within the lead committee, opinions are deeply divided on this subject, and majority agreement is so unlikely that the rapporteur has diplomatically refrained from tabling a draft report to date.

depth consideration of the role of organizational autonomy within the broader web of state charity regulation (Brody 2008) was a theme that she returned to in 2012 when she examined state and federal approaches to charity regulation and disclosure (Brody 2012B). Moreover, her ability to synthesize and compare competing and complementary US non-profit law reform models in that same year (Brody 2012A), drew on her earlier work and earlier warnings to guard against laws that try to "force the variety and types of non-profit organizations into a single mold (Brody 2007B, p. 522)." In focusing on the burdens endured by US non-profits operating in a federal system, Brody has created a very useful mirror through which to view the problems a similar lack of coordination creates in the EU.

4 Perennial Governance Issues Common to Both Sides of the Atlantic

In "The Limits of Charity Fiduciary Law", Brody (1998B, pp. 1405–1501) noted:

> Looking to the law for a guarantee of a well-run charitable sector invites disappointment. Our legal structure excels at establishing or requiring processes in which individuals may make substantive decisions, but it falters at dictating results … [T]here are limits to the law. As a result, the charitable sector must improve its own efforts to educate and review the behavior of fiduciaries in order to retain the confidence of the donating public and the independence so cherished by all charities.

This was a theme repeated in Brody's later work which, informed by her ALI project research, led to her increasing mindfulness of:

> the distinction between legal dictates and "best" practices. Good corporate governance often requires more than satisfying the legal threshold. The admitted gaps between the legal requirements and sound business practices do not, however, necessarily mean that formal laws should be expanded or reformed to mandate those practices. Charity management is located in the private sector precisely because society prefers reasonable discretion exercised by different participants under different conditions to the uniformity of government-directed action (Brody 2004, p. 4).

4.1 The Search for Good Governance Mechanisms

Similar realizations are emerging on the far side of the Atlantic about the push–pull relationship between statutory and non-statutory regulation of nonprofits (Breen et al. 2017). In particular, there is a noticeable movement towards codes of good practice in the areas of governance and fundraising regulation, which seek to marry grassroots knowledge of the charity sector in code development with state endorsement or recognition of these codes through a co-regulation or hybrid regulation approach. In so doing, these new attempts at regulation are aimed at

encouraging sectoral buy-in and compliance by attempting to move beyond the typical "no teeth" approach of self-regulation.

An interesting example of this phenomenon is the new Irish Charities Governance Code (Charities Regulatory Authority 2018). The introduction of the Code follows an extensive engagement process which was undertaken in 2017. The Charities Regulator established a Consultative Panel on the Governance of Charitable Organisations in March 2017 which undertook research and public consultation. In its report, published in May 2018, the panel proposed that a code should be issued by the Charities Regulator and that it should be principles-based and proportionate. The Code itself was developed by a working group convened by the Regulator which drew its members from a wide variety of nonprofit bodies,[12] ensuring that, as adopted, the Code not alone builds upon the Consultative Panel's Recommendations and the public consultation feedback but also upon the lived experiences of the charity sector. The Irish Code is principles-based, setting out six principles of governance. These are: advancing charitable purpose; behaving with integrity; leading people; exercising control; working effectively; being accountable and transparent. From these six principles are further developed 32 core standards that all charities should meet when putting the principles into action. The Code also contains 17 additional standards that reflect best practice for charities with high levels of income and/or complex organizational and funding structures and/or significant numbers of employees.

The Charities Governance Code, which came into full effect in 2020 (after a year of learning for charities in 2019), requires charities to self-assess and report on their compliance with the Code in their annual reports to the CRA in 2021. The Charities Regulator has stated that it will monitor code compliance, with charities expected to comply or explain why they are not complying. Charities must keep compliance record forms on file, which the Charities Regulator may request to see at any time. In the coming years, the Register of Charities will indicate whether or not each charity complies with the code in its register entry. So, a Regulator-led code developed in consultation with the sector and implemented by the sector subject to ultimate Regulator oversight very much speaks to the issues raised by Brody (2004): the location of charity management within the private sphere but overseen from a principles compliance base from the public sphere to ensure delivery of promises.

12 Twelve representatives from both umbrella bodies and sectoral interests worked with the Charities Regulatory Authority to develop the code. The representatives came from Boardmatch Ireland, the Carmichael Centre, Charities Institute Ireland, Children's Rights Alliance, the Irish Catholic Bishops' Conference, the National Youth Council of Ireland, Philanthropy Ireland, the Institute of Directors, the Wheel, Volunteer Ireland and the Representative Church Body of the Church of Ireland.

A second example of the recognition of the importance of self-regulation in the area of governance is the re-issue of the UK's Charity Governance Code in 2017. Originally introduced by the charity sector itself in 2005, a steering group of six umbrella bodies representing cross-collaboration across the charity sector[13] were charged with the revision of the Code in 2016 and undertook a public consultation to this end. The revised Code, issued in 2017, comprises seven principles and is implemented on an "apply and explain" basis. According to the Steering Group, "all trustees are encouraged to meet the principles and outcomes of the Code by either applying the recommended practice or explaining what they have done instead or why they have not applied it. We have not used the phrase 'comply or explain', which is used by some other governance Codes, because meeting all the recommended practice in this Code is not a regulatory requirement (UK Charity Governance Code 2017."

Charities that adopt the Code are encouraged to publish a brief statement in their annual report explaining their use of the Code. This statement is intended to be a short narrative rather than a lengthy "audit" of policies and procedures. In support of the revised Code, the Charity Commission for England and Wales ('CCEW') withdrew its own "Hallmarks of an Effective Charity" Guidance (CCEW 2008) in July 2017 and now directs charities to follow the Charity Governance Code instead (CCEW 2017, p. 3). Commenting on this decision, the CCEW noted:

> We recognise, however, that this is the sector's Code. The Commission does not aspire to own or enforce it or pronounce on what it should say. We intend to continue to endorse and promote it as the standard of good governance practice to which all charities should aspire (unless some other code takes precedence) … We will consider further how we can take account of charities' consideration and application of the Code in our regulatory interactions with them and in the requirements and expectations for reporting (CCEW 2017).

The comments of the CCEW in this regard strike a note of resonance with Brody's understandings of the difficulties of regulatory action in a space populated by volunteer board members serving without financial reward:

> Nonprofits are more likely to be better run when the regulatory focus endeavors to ensure that fiduciaries are informed of their responsibilities, and when nonprofits are willing to pay for the staff and outside advisers they need to help protect against poor decision making and failures of internal control. … While I support a greater level of activism by charity regulators and the courts in crafting nonfinancial remedies to wayward fiduciary behavior, I appreciate that the enforcement has to be appropriate to the role of the state with respect to the nonprofit sector (Brody 2007B, pp. 565–66).

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13 The steering group's members are: ACEVO: Charity Leaders Network; the Association of Chairs; ICSA: The Governance Institute; NCVO: National Council for Voluntary Organizations; the Small Charities Coalition and the WCVA: Wales Council for Voluntary Action. The Charity Commission for England and Wales enjoys observer status on the Code steering group.

4.2 The Need to Protect Fundamental Freedoms of Charitable Organizations

Entering into the constitutional law space, Brody has also called our attention to the importance of protecting the rights to freedom of association, assembly and expression. Writing in 2002, Brody cautioned, "that while we have a social and political obligation to exercise vigilance over how associations form and operate, we must recognize that our fundamental constitutional norms protect the rights of organizational autonomy in governance and functioning (Brody 2002B, p. 825)." Organization autonomy and the rights that flow from such autonomy are to the forefront of concern in Europe at the moment. While we have witnessed the closing of civic space in other jurisdictions through the introduction of foreign agents' legislation in Russia and related restrictive legislation in India, the EU experienced its first taste of the deliberate introduction of such restrictive legislation in Hungary in 2017. The Transparency of Organizations Receiving Support from Abroad Act, passed in June 2017 provides that NGOs in Hungary that receive more than €24,000 in foreign funding in a given year are required to register as a "foreign funded organisation," to display this status on their website and report details of each donor to the registering court. The rationale for the law, according to the Hungarian Government, is the need to ensure national security and sovereignty and to comply with anti-money laundering and counter-terrorist financing measures. This law has been widely criticized for failing to comply with the requirements of both the Financial Action Taskforce (FATF) and European Anti-Money Laundering Directives (AMLD) and failing to respect the rights guaranteed by the European Charter and the European Treaties Free Movement of Capital provisions.[14] The European Commission commenced infringement proceedings against Hungary in

14 See Conference of INGOs of the Council of Europe, Expert Council on NGO Law, Opinion on the Hungarian Draft Act on the Transparency of Organizations Supported from Abroad (April 2017); Council of Europe Commissioner for Human Rights, Letter to the Speaker of the Hungarian Parliament (April 2017); Civil Liberties Union for Europe, ECNL, Hungarian Helsinki Committee, TASZ, Analysis of Hungarian Parliament Bill T/14967 in light of EU rules on anti-money laundering and terrorist financing and free movement of capital (April 25, 2017); Hungarian Helsinki Committee, Hungarian Civil Liberties Union, TASZ, Short Analysis of the Proposed Bill on Foreign Funded NGOs (April 11, 2017); Statement of International Funders Supporting NGOs in Hungary (April 27, 2017, available at https://www.opensocietyfoundations.org/uploads/2478acd1-fb18-48e5-9ad4-06b6f02499d1/ngo_support-2017_05_09b.pdf). Letter from the UN Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression; on the rights to freedom of peaceful assembly and of association; and on the situation of human rights defenders to Hungary OL HUN 2/2017 (May 9, 2017) available at http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-HUN-2-2017.pdf and the Venice Commission Opinions of June 1 and June 19, 2017.

2018[15] and in January 2020, the Opinion of Advocate General Campos Sánchez-Bordona proposed that the ECJ should declare that the Hungarian legislation at issue unduly restricts the free movement of capital, in that it includes provisions which amount to unjustified interference with the fundamental rights of respect for private life, protection of personal data and freedom of association protected by the Charter.[16] Focusing on freedom of association, the AG opined:

> [F]oreign donations, regardless of their economic significance, represent, for donors who are resident abroad, the most direct, if not the only, way of participating in the activities of the associations they support financially. Making it difficult for such persons to make financial contributions amounts to preventing them *de facto* from exercising freedom of association tout court: through financial support for an association, these persons come together with others to collectively pursue certain aims, which is ultimately what the freedom of association entails.[17]

While the AG's Opinion is not binding on the ECJ, the strong opinion of Sanchez-Bordona strengthened the hopes of critics of the Hungarian law that the ECJ would find the law incompatible with EU law, forcing the Hungarian government to repeal it. In its judgment in *Commission v Hungary* (C-78/18), delivered on 18 June 2020, the ECJ upheld the Commission's action against Hungary for failure to fulfil its Treaty and Charter obligations.

5 Conclusion: Whither Forward from Here?

Throughout her academic career, in her research, her publications and her academic contributions, Evelyn Brody has challenged regulators to recognize the important contribution that nonprofits generally and charities more specifically make to society. Citing them as a "powerful third force," distinct from government and business, she has placed them at:

> a critical intersection between the governmental and business sectors of our political, economic, and social system. They are dedicated to serving the public through the pursuit of charitable purposes but are created and operate as private, autonomous organizations (Brody and Tyler 2009, p. 63).

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15 See *European Commission v Hungary* (Case C-78/18), claiming that Hungary's NGO law breaches Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union.

16 Opinion of the Court of Justice, Case C-78/18 *Commission v Hungary* (14 January 2020, Celex No. 62018CV0078).

17 Ibid at [122].

Focusing on the defining characteristic of the autonomy enjoyed by American foundations and other charities, Brody has sought to balance the rights of such entities "to support and pursue differing and even contrary programmatic visions, strategies, methods, and structures provided that they do not stray from their mandate to serve charitable purposes (Brody and Tyler 2009, p. 65)" while nevertheless calling on the IRS to be innovative in its approach to governance oversight and fair in its enforcement of its regulatory powers (Brody 2012B). At the same time, she has not allowed charities to rest on their laurels, challenging them simultaneously to live up to the high fiduciary standards demanded of them (Brody 1998B, p. 1501) and adapt to modern times – "It is foolish to think that a particular institution will endure forever; despite centuries-old fears of the power of compound interest, fortunes decay as well as grow. It is hubris to think that a particular institution should endure forever. It is inefficient to think that there is no better way to spend the money now, and that no other sources of revenue will arise in future generations to finance the institution (Brody 1997, p. 948)."

With Brody's retirement, academics too are called to the front line: much can be learned from her careful and thoughtful articulation of these complex conceptual issues over the past decades.[18] These issues emerge as generic conundrums to more than just a US audience, deserving of careful study on both sides of the Atlantic.

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18 A full list of Evelyn Brody's publications, public submissions and contributions as of March 2019 can be accessed at https://www.kentlaw.iit.edu/sites/ck/files/field_uploads/faculty/cv/brody-evelyn-cv-2019.pdf.

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