

Discussion seminar: charitable initiatives for journalism and media – summary

Date/Time: Monday 23 June, 14.15-17.15

Location: Boardroom in University of Westminster's main Regent Street building, 309 Regent Street, W1B 2HW

Organisers: University of Westminster's AHRC research project on "Plurality and Media Power" and the Centre for Law, Justice and Journalism, City University London

The event took place under Chatham House rules. What follows is a summary of the key points discussed, with a few clarifying details added afterwards.

Background to event and issues

The event is part of a wider AHRC fellowship project on media plurality and power, designed to give space for new policy ideas and thinking. In the UK, the "plurality" debate (policy initiatives for preserving - and even increasing - a diversity of media voices and views) tends to be dominated by concerns around media concentration; recently, the spotlight has again fallen on Rupert Murdoch following the phone hacking verdicts in criminal proceedings against former News International employees. Policy efforts to ensure that too much power is not concentrated in the hands of one owner or organisation might be described as the "top-down" approach to plurality. The project is also interested in a "bottom-up" approach, often overlooked, i.e. what kind of policy interventions might be encouraged to meet the democratic needs of society, and assist sustainable media initiatives?

Within this "bottom-up" discussion the project has looked at the specific issue of charitable funding for journalistic activity, following recommendations made by the House of Lords Communications Committee in 2012 in its report on Investigative Journalism and discussions with a member of the Charity Law Association working party which reported to the HL inquiry on this topic, Tom Murdoch of Stone King LLP. In December 2013, a number of specialists gathered at University of Westminster to discuss how it could be taken further.

This meeting (23 June 2014) is an outcome of that process: an opportunity to discuss the current law and policy regime surrounding charity law and the ways in which it might support public interest journalism. In the United States, the Inland Revenue Service (IRS) has granted the equivalent of charitable status to a number of non-profit news organisations with an educational remit; in the UK no such model exists and the Charity Commission remains cautious about the legal basis for journalistic organisations as charities (the president of the non-profit journalism organisation ProPublica, Richard Tofel, described the benefits of such a system at a University of Westminster event earlier in the year).

The particular challenge in the UK is a crisis in the funding of journalism; driven by broken business models in which advertising, especially classified, is migrating to online. Newspapers are closing. There are towns of a sizeable area left with very little, or no, means of knowing what is going on in their area leaving a democratic deficit which is getting worse. In a paper for Ofcom in 2009 Barnett set out four democratic functions of media at local level: information, representation, campaigning and interrogation/investigation. The removal of organisations

performing these functions is particularly acute at the local level. How might such activity be enabled?

We want to encourage debate about the potential for charitably funded local and national level journalism and think about what the obstacles might be and what further dialogue might be needed between the Charity Commission and policymakers to ease the path.

Background to charity law framework

Journalism is not a charitable purpose in its own right, but could fall under other purposes, such as the advancement of education of citizenship, or community development. To be charitable under the Charities Act 2011 it must also fulfil and demonstrate the public benefit requirement.

The framework around charity law is progressive: what can be a charity changes and develops in the economic and social context. It can march in time with society, and the values of society.

While a charity's activities are important, they are only a guide to the purposes which are fundamental. There are 12 descriptions of purposes which may be charitable in the Charities Act 2006 (now replaced by the Charities Act 2011, which consolidated various pieces of charity law legislation), determined by what the government at the time thought reflected the popular view.

There is also a thirteenth residual category for any purpose which is considered charitable within the spirit of the legislation: "Other purposes currently recognised as charitable and any new charitable purposes which are similar to another charitable purpose". In addition, a charity must exist for demonstrable "public benefit".

These descriptions bring some clarity. Investigative journalism is not specifically included within them, and it is quite difficult to see exactly where it would fit.

The Commission currently decides on individual case, with a role for the appeal Tribunal which was established in 2006 to give some accountability to CC decisions (and, some might argue, has led to the CC becoming more cautious). This process does not require legal representation for participants (and the Commission would not put up counsel against any person). In that way, the law can be developed and extended through progressive development of the law via tribunal rather than court negotiation.

Promotion of democracy is enshrined in the descriptions and purposes of charity law: there are many activities which can support democracy in a wider sense, although promotion of democracy is not a purpose as such.

The HL Select Committee inquiry on Investigative Journalism asked the Charity Commission to provide greater clarity on the issue of charitable funding of investigative journalism in 2012. In response, the government said that it is not minded to change the law, or clarify the descriptions and purposes. If journalism is to be a charitable purpose, it has to be done under the existing framework.

Any initiative must meet the public benefit requirement, and be non-political – it has to start from a position of neutrality. Mere facts and opinions cannot be charitable, facts must be verified by a non-partisan independent source. Information has to be

capable of advancing knowledge and skill. There is a high test for factual investigation.

There are difficulties in the area of supporting journalism through a charity – the pursuit of a journalist's investigation cannot be charitable. If an established charity is thinking of supporting journalistic endeavour, it is difficult for them to justify that and show how it upholds its own purposes.

However, there have been successful registrations connected to journalism: the Centre for Investigative Journalism (providing training, resources), BBC Media Action, the Media Standards Trust, the Media Trust.

Could a community newspaper be charitable, campaigning on issues? Possibly: pursuing social justice is acceptable as long as it does not follow a political perspective. It must be politically neutral.

Practicalities – and the difference between public benefit and public interest

There is a difference between public benefit and public interest

[This section is informed by notes and ideas shared by Tom Murdoch – a full public paper will be written in due course].

Charitably funded journalism is a very challenging area of law; like charitable think tanks it can be a controversial issue. There is a diverse range of recognised purposes and a diverse range of potential benefits. The question is whether an appropriate purpose can be found – by analogy or otherwise. It is also difficult for trustees and difficult to manage in practice: if charitable status were given to a newspaper, there would be a burden on the trustees to check that it continues to fulfil its charitable purpose and does not compromise its articles.

Obviously, there are a variety of journalism types – from local to national, some merely informational while others are more investigative. Some are clearly not charitable while others are unclear; some are potentially charitable, some are pulled into journalistic activities as a means of fulfilling their charitable purpose.

Journalistic activity could fall under education; citizenship/community development; art, culture, science; any other analogous purposes, e.g. research into and dissemination of useful information; upholding the law/standards of public life; promoting human rights.

There hasn't been enough attempt to understand the overlap between public benefit and public interest. Public benefit is not defined by Parliament, it is left with case law to reflect society. Benefit must be identifiable and, in principle, capable of being proved by evidence... but intangible benefit may suffice in certain circumstances.

Any detriment must not "outweigh" the benefit. Charity Commission will take detriment into account where it is reasonable to expect it will result from an organisation's purpose. There must be evidence, not a personal view.

This contrasts with the Public Interest, which is not the same as public benefit. There must be rationale for journalistic endeavour, investigation. It is not defined in law and has various meanings in various contexts. Nevertheless, it is a framework against which journalism is already assessed; not irrelevant, clearly some overlap. It is also a legal device (like public benefit) for balancing exercises. It is used defensively to

justify acts and the courts are required to balance competing rights in Article 10 of the European Convention on Human Rights, protecting freedom of expression.

However, it can be used as a rationale to produce material as well, in a wider sense, e.g. for public service journalism. In the BBC Editorial Guidelines, there are number of ways that set out the way that the public interest is served (eg. by exposing or detecting crime); and in the ways that Barnett described journalism meeting democratic needs.

The public interest is relevant in both its narrow and wider sense. Narrowly, because individual activities must be justified: guidelines are required to ensure balance in favour of public interest served. But also in its wider sense because the public interest framework can help explain the overlap between the concepts of public interest and public benefit. The balancing exercise in editorial decisions on public interest is akin to the role of charitable trustees. The public interest concept may therefore assist with the balancing exercise required for charitable status.

A delicate balancing of competing rights (such as invasion of privacy vs freedom of expression) is analogous to the public benefit/detriment balancing exercises which may be required for charitable status. BBC editorial guidelines, National Union of Journalists (NUJ) code and Director of Public Prosecutions (DPP) guidance explore the (sometimes conflicting) public interest justifications in journalism.

Overall, charitably funded journalistic activity is not just difficult for Charity Commission but would also be for trustees of a journalistic charity. Need to balance: public interest (the public benefit provided by the effective advancement of charity purposes), against potential detriment, compromising rights/legitimate expectations of others. Need robust operating guidelines and system of enforcing them. There is perhaps a need for a framework for formalising standards of conduct and the decision making process. This could even be a role for an independent body.

IF all this is in place, there may be a basis for asserting public interest closely coincides with public benefit requirement in law.

Discussion around legal framework and issues

There is an issue that you cannot eliminate the risk that investigative journalism will be seen as political by someone, and that it could risk in someone's harm - given that, can you relate it to the public benefit? It could be that the harm falls within the framework of charity law. Other cases have dealt with harm arising from charitable activity. There may be some sorts of journalism that never attain the sufficiently high status for charitable status. It is not that other charities are without controversy but the processes by which they reach the outcomes are important. They can disagree with government; that may be their role, as long as they are true to their charitable principles and purposes.

A key difficulty is where investigative journalism sits as a purpose: if the activity is a community newspaper and that activity is subject to external regulation, which has been set up in the public interest, that could be sufficient to show whether it is acting within appropriate boundaries. Is there a contradiction? There can be potential detriment and potential controversy, but charities must reach conclusions in a proper way.

There are differences in the US and Australia. In Australia, for example, the existence of constitutional freedoms have meant that the courts have felt that the narrow rules against political activity may not apply: campaigning publicly was deemed a purpose. In UK, it cannot be developed in the same way.

Should we in fact be lobbying to justify the fact that non-political free investigative journalism is a purpose in itself? The problem is that Parliament has spoken recently (2006, with the law consolidated in 2011) that they do not want to re-visit the issue. There is now a tribunal system to deal with appeals etc. and the 2006/2011 descriptions of purposes, with public benefit tied to the old law. To bring out the fullness of the descriptions it will take time, which is the iterative process of the law. As an example, the charity Public Concern at Work took two years to be accepted.

Although there has not been political appetite, there has been progress. There are purposes that address, for example, serving the community. But why is there more sympathy for local journalism? If you look at NGOs like Transparency International they are not very different from what a journalism organisation is trying to do – what is the difference between a group like that and an investigative start-up?

In charity law there is a discussion about ends and means: it could be a question of finding an appropriate organisation with an actual case, with purposes around that – rather than having investigative journalism as a purpose in its own right; in other words, define the end, and then build activities which constitute the means. Community newspapers can be attached to notions of local community development, rather than a broader national community, which can be more problematic.

What about an opportunity for training of journalists? Training and resource provision is a well-trodden path: the leap forward is to establish a community-based newspaper serving a provision of amenities. A recent registration was Wikimedia UK – the descriptions of purpose of that could be the basis for which a community newspaper was accepted. In regards to investigative journalism, there are difficulties as using it as a purpose in its own right but it might be possible, using different terminology to incorporate it as a means to a charitable end.

The views and experiences of journalism organisations

The advantages for a research and journalistic organisation are obvious: without charitable status an organisation is unable to get tax rebate or free software, unable to accept free online advertising; unable to accept donations from those who only give to charities, unable to approach generous funders. Charitable status has very real implications for everyday practice (and sometimes survival), including the ability to accept volunteer labour.

Organisations would need to have systems for avoiding harm and error in their work. Safeguards in place such as declarations of public interest, conflicts of interest, style guides, skills framework for staff. There is a need for systems and processes to minimise risk, and these develop over time (perhaps not from very beginning of a project).

The Bureau of Investigative Journalism has unsuccessfully tried to get charitable status on two occasions. The first was on the basis that its objects were the advancement of citizenship. Although the name of the Bureau may have been a problem, by including the word “journalism” – which is not a charitable object – it could not solve the problem just by changing the name. The substantive issue is that it cannot prove that its activities would produce the promised result, and therefore

fulfil its charitable purpose. The Charity Commission said the application had “not presented any evidence to show that the company’s input to investigative journalism translates into participation/engagement either in terms of decision making or participation in democratic processes.” It was clear that it was not enough to show that journalism has an effect, it was necessary to show that “the outcome results from engagement or participation or better informed decision making of citizens arising from the company’s [i.e the Bureau’s] activities.” So having impact was not enough – impact was not evidence of citizenship participation. (ProPublica’s Richard Tofel has highlighted the difficulties in measuring the mechanism by which impact is achieved.)

The Bureau’s second application was based on educational objects but this also failed because the Commission felt that its subject matter was not sufficiently precise. The Bureau has considered a third application, based on the “advancement of the education of the public in the governance of public, private and charitable organisations”. But for the time being the application is on hold until it can be more confident of success, as a third failed application would damage some of its fund raising potential. The Bureau feels it needs clearer guidance from the commission on the evidence they need to prove the connection between journalism and active citizenship.

Evaluation and Monitoring is important in capturing what projects are doing; how charitable funding can be used effectively, and to help shape the policy environment. The Carnegie UK Trust Neighbourhood News project has been improving the “wellbeing” of people through supporting local news initiatives in pilot projects. It hopes its experiences will encourage other people into this area.

Charitable funding can lead to various problems: first, avoiding positive censorship – that content follows funders, in the same way businesses follow advertising. Second, there is a difficulty in measuring success which is a key and fundamental part of being charitable. It is very difficult to do from the civic perspective and raises difficult questions.

In terms of sustainability, there is an issue of persuading funders to socially invest in this area – who like funding projects rather than organisations.

Further discussion

Charitably funded media could lead to a more informed populus and citizenship – on a much wider basis. This could happen quite gradually, with a few players, and other trusts coming on board. It would not happen overnight. Foundations are competitive and like to be first to an area. There would be a wider and more diverse range of voices in journalism, enabling very interesting new entrants. It might encourage wealthy individuals without a history of activity in this area coming in.

Some of these issues are tied to UK culture, and interests: some organisations have found it a lot easier to raise funds outside the UK. This cultural change could take a number of years to happen – this re-positioning of civic function, needs to be thought about dynamically rather than mechanically.

In terms of political momentum, how should pressure be applied? One key issue is that by asking organisations to be so specific (in the purposes and public benefit, and demonstration/evidence of fulfilment and direct impact) there will be a loss of diversity – it will take time. Something might have to come from Parliament. But the

case law is clear that where you can't measure impact it doesn't mean there isn't benefit – you can establish rational, conceptual outcomes.

In terms of developing the case law, a registration of a media organisation is not precedent setting, but clearly if it breaks new ground others will come forward. Where the line is moved, it does not just move for one organisation, it moves across the piste.

Summary thoughts, based on discussion and wider consultation

- Questions raised over whether it is necessary to introduce investigative journalism as a standalone purpose; may be more fruitful to explore options through existing legal framework
- A community local news provider *could* be well-positioned to seek charitable status, particularly if part of a recognised regulator; there might be more obstacles at the national level
- Numerous difficulties in showing the 'impact' of public benefit
- There would be a number of obvious benefits to research and journalism organisations seeking charitable status (particularly in terms of funding and status) but there are drawbacks and constraints that need to be remembered as well (ie. obligations on trustees)
- Important to note the distinction between 'public benefit' and 'public interest' definitions
- Need robust operating guidelines and a system of enforcing them. There could be a need for formalising standards of conduct and decision making process, ie through an independent body. If this type of structure were in place there may be a basis for asserting public interest served closely coincides with public benefit requirement in law.