# FRAMEWORKS FOR THE LEGISLATIVE REGULATION OF CHARITIES AND THEIR TAXATION IN THE CONTEMPORARY WORLD

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*Abstract.* The article is devoted to a comparative study of the legal regulation of charitable organizations and their taxation in such countries as the United States, Russia, China, Brazil, Australia, the United Arab Emirates, Denmark and other countries. The article examines the legislation adopted both at the level of the national government and at the regional level. The problems of coordination of legislation at different levels in the sphere of charity regulation and related taxation, the constitutional basis for taxation of charitable organizations, and non-mandatory rules and recommendations as a substitute for legislation are in the focus of the present study.

*Key words:* legislative regulation of charity, taxation of charities, taxation of non-profits, national and regional legislation, non-mandatory norms, recommendations as substitute for legislation.

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I. Coordination between Levels of Regulation of Charities and Non-profits, Including Their Taxation and Fundraising

The growing importance in federal countries of federal statutes, regulations and court rulings in shaping the conduct of constituent entities and municipalities does not mean that all nations have become centralized. Even in unitary countries the central government cannot cope with regulation of all issues. For example, in China the most recent laws adopted at the all-national level are: the Law on Charities, whose official title is 中华人民共和国慈善法<sup>1</sup>, which entered into force on the 1<sup>st</sup> of September of 2016, and the Law on the Management of the Activities of Overseas NGOs within Mainland China, whose official title is 中华人民共和 国境外非政府组织境内活动管理法<sup>2</sup>, which took effect on the 1<sup>st</sup> of January of 2017, while at the level of provinces and other territorial subdivisions with their local government bodies its own regulation (of course, in consistency with laws and other acts adopted at the National level) of philanthropy and social activity is developing intensively. Thus, in province of Jangsu its Interim Regulations on the Supervision and Management of Local Foundations adoption dated back to October 2007. In July 2009 the Ministry of Civil Affairs concluded with the local authorities of Shenzhen (the major city in the Guangdong province and a free economic zone) a cooperation agreement, according to which organizations registered in Shenzhen may work nationally. The Yunnan Province Interim Regulations Standardizing International Non-Governmental Organizations Activities was issued in December 2009. In November of 2011, the Guangdong Civil Affairs director announced that the province would be making it easier for several different categories of non-governmental organizations (social services organizations, charitable organizations, etc.) to register by doing away with the professional supervising agency requirement<sup>3</sup>. So, such local legal acts have had effect first of all in a field of regulation and support of philanthropic organizations, relating to their

<sup>&</sup>lt;sup>1</sup> A bilingual (Chinese and English) text of the Law is available: URL: http://www.chinadevelopmentbrief.cn/wp-content/ uploads/2016/04/Charity-Law-CDB-Translation.pdf (accessed: 20.01.2020).

<sup>&</sup>lt;sup>2</sup> A bilingual (Chinese and English) text of the Law is available on: URL: http://www.chinadevelopmentbrief.cn/wp-content/ uploads/2016/05/Law-on-Management-of-Activities-of-Overseas-NGOs-CDB-Translation-.pdf (accessed: 20.01.2020).

<sup>&</sup>lt;sup>3</sup> See more in: *Simon K.W.* The Regulation of Civil Society Organizations in China // International Journal of Civil Society Law. Vol. IX. 2011. Issue I.P. 55–84.

functioning and fundraising and touching upon the taxation issue partially and indirectly.

It is clear that in federal states constituent entities of the Federation have a broader scope of regulation than local governments. There are the division of subject matters and the separation of powers between the federal government and the governments of constituent entities: though the federal government is supreme in its spheres, the governments of constituent entities are supreme in theirs, and these two spheres should and could be kept separately although in a harmony. There are spheres that reserved for local governments both in federal and unitary countries. Meantime, in reality there are spheres, with which governments of all levels deal, and, therefore, powers of governments of all levels are concurrent, while sometimes competitive. In the latter case a hierarchy of regulative powers exists. The national government has certain supreme mandates. Most mandates concern, for example, human rights and environmental protection. For instance, constituent entities and municipalities may not discriminate in the operation of their programmes, no matter who pays for them. Initially the antidiscrimination rules applied chiefly to distinctions based upon sex, age race, and ethnicity, but of late they have been broadened to include physical disabilities. Various pollution-control laws require the sub-national units to comply with national standards regarding clean air, pure drinking water, and sewage treatment. In many cases the multilevel governmental system would work better if endless conflicts between national and sub-national governments over the hundreds of programmes for which they are jointly responsible were reduced by sorting out in a more rational manner the functions performed by governments of different levels. Institutionally in all countries coordinating bodies, permanent or periodically convoked, have been created. These bodies do their best to elaborate common policies in different fields, including non-governmental organizations activities regulation.

Thus, in Australia charities, in order to publicly raise money, are required to achieve registration under the State jurisdiction within which they intend to raise funds and must be registered in each and any State within which they intend to publicly raise funds. So, charities with the aim to raise funds in the remaining seven Australian States and Territories would need to register in each State or Territory individually<sup>4</sup>. And, of course, tax exemption status of charities depends upon their compliance with requirements set forth in federal and each State's legislation respectively. In the USA registration of an organization is produced at the level of a state and it is enough to be incorporated or to acquire status of formally recognized entity in other way with the authorities of one state and then it may work within

the whole territory of the USA and abroad; meanwhile, at the federal level and in each state, where such organization claims to have a tax exempted status it must meet requirements of federal or respective state tax legislation. For example, at the federal level the requirements for tax exemption are exposed in Section 501(c) of the Internal Revenue Code  $(IRC)^5$  of the USA. In states usually charities are registered as legal entities by a secretary of state and are licensed by an attorney general of a respective State. Each state has its own administrative structure, and in certain states a competence to oversee charities is entrusted to the State's attorney general, whose office may have a separate department (division or bureau) dealing with charities exclusively or house the charities oversight unit within the consumer protection division, while in 23 states the authority to regulate public fundraising campaigns by and on behalf of charities is shared by the attorney general and another state-level office, usually the office of the secretary of state, whose authority is conferred by state charitable solicitation statutes<sup>6</sup>. Laws of some states may exempt those or that charities from registration and submission of annual financial reports with competent state bodies. Such laws vary state to state. Usually exemptions are applied to religious organizations, educational institutions, and hospitals. Certain organizations may be exempt from registration for specific purposes but are required to register for others. For instance in the State of New York, registration is required for organizations, which hold charitable assets in this very State or solicit charitable contributions in it. Not all organizations fall into both categories: hospitals are only required to be registered in New York if they collect contributions (even if they hold charitable assets in the mentioned State), and educational institutions are required to be registered to gather contributions in New York unless they file annual reports with New York State's Department of Education. Even if a state may not require registration, this state attorney general's oversight authority takes place over the charitable assets the entity holds'.

In Brazil status and functioning of non-profit nongovernmental organizations are regulated only at the federal level by the Brazilian Civil Code<sup>8</sup>. But powers to levy specific taxes, to establish rates of respective taxes and to give exemption benefits belong to the federal and to the state and the Federal District authorities (as well as to the local authorities). Within their powers bodies

<sup>&</sup>lt;sup>4</sup> See: URL: https://www.acnc.gov.au/for-charities/start-charity/before-you-start-charity (accessed: 25.01.2020).

<sup>&</sup>lt;sup>5</sup> In the present article the USA Internal Revenue Code is cited from: URL: https://www.law.cornell.edu/uscode/text/26 (accessed: 18.01.2020).

<sup>&</sup>lt;sup>6</sup> See: State Regulation and Enforcement in the Charitable Sector. Washington, 2016. P. 5–7.

<sup>&</sup>lt;sup>7</sup> See: ibid. P. 18.

<sup>&</sup>lt;sup>8</sup> See: Código Civil Brasileiro e Legislação Correlata. 2a ed. Brasília, 2008. P. 151, 152 (artigos 53–61 – "Associações"), p. 152, 153 (artigos 62–69 – "Fundações").

of each level of government establish their own requirements for acquiring tax exemptions to promote charitable activities within a territory under their jurisdiction. States actively use their taxation competence, especially a competence in the field of establishing tax rates and giving tax exemption or any other tax benefit, in order to conduct certain policies in attracting or discouraging those or that types of entities with their territories. States may even compete among themselves in attracting or discouraging entities (commercial companies, helping to develop desirable branches of economy, and nonprofit organizations, assisting to fulfill social tasks) as by using taxation policies, and it is called tax competition<sup>9</sup> (competição tributária), taking a close attention of both decision makers and scholars.

In Russia charities are registered in accordance with federal law. Taxes for all levels of government are established by the federal Tax Code. Money collected as federal taxes are divided into three parts: one is going to the federal budget, another part is directed to the budget of the constituent unit, within which territory money has been collected as the federal tax, and the third part is designated to local (means municipal) budgets. Bodies of each constituent unit of Russian Federation can give certain tax benefits within the part of federal taxes assigned to its budget, but not violating the federal Budget Code<sup>10</sup>. Taxes, which are prescribed by the federal Tax Code as taxes of constituent units, are divided into two parts: one is going to a budget of a constituent unit; the other is for local (means municipal) budgets. Each constituent unit has the right to fix rates of taxes of constituent units, though within frames established by the federal Tax Code, taking into account provisions of the federal Budget Code. Fixing tax rates the constituent unit's bodies can stipulate exemptions or other benefits, not violating the federal Tax Code and the federal Budget Code. Both federal and constituent units' authorities, respecting Budget Code provisions, give grants in accordance with their social policy's priorities on a competitive basis to not-for-profit organizations, including charities, supporting non-governmental organizations' social projects and programmes.

In the United Arab Emirates (UAE), along with federal laws (the 1974 Federal Resolution No. 8 concerning Conditions for Licensing Societies for Public Benefit in Collecting Money<sup>11</sup>, the 2003 Federal Law No. 4 concerning the Establishment of the Zakat Fund<sup>12</sup>, the 2008 Federal Law No. 2 concerning the National Societies and Associations of Public Welfare<sup>13</sup>), there are laws and regulations, approved in this or that emirate: for example, Decree No. 9 (2015) regulating Fundraising in the Emirate of Dubai<sup>14</sup>, Law No. 12 of 2017 regulating Civil Societies in the Emirate of Dubai<sup>15</sup>; Emiri Decree No. 1 (1989) concerning the Establishment of the Charity Works Associations in the Emirate of Sharjah<sup>16</sup>, Law No.4 (2011) concerning Waqf in the Emirate of Sharjah<sup>17</sup>; Law No. 999 (1981) of Municipality of the Emirate of Ras-Al-Khaimah<sup>18</sup> (establishes the Committee of Public Benefit and assigns it the duty of regulating the collection of donations from the public for charitable purposes with public benefit), etc.

A Local Government almost everywhere within its taxation and budgetary powers issues regulations giving exemptions or other benefits or/and granting money to non-profits, including charities, for social projects or programmes. One of the examples has been given earlier in the present article, describing Chinese provincial regulations dealing with non-governmental organizations, including charities. The majority of local governments in the USA, for instance, are inter-acting with charities<sup>19</sup>, providing them support and/or giving certain incentives because of non-profits' assistance in resolution of social problems at the municipal level. And in general, practically everywhere (including Russia) many problems are settled at a grass-level while not-for-profit organizations are normally one of the important actors in such a problem solution, which foments issuance of certain local regulations in consistency with legislation based on constitutional and international principles.

<sup>14</sup> The text of the Decree in English language is available on: URL: www.icnl.org/research/library/files/United%20Arab%20 Emirates/9\_UAE\_Decree9\_2015.pdf (accessed: 31.01.2020).

<sup>15</sup> The text of the Law in English language is available on: URL: www.icnl.org/research/library/files/United%20Arab%20Emirates/ Dubai%20Law%20No.%2012%20of%202017%20-%20English%20 version.pdf (accessed: 31.01.2020).

<sup>16</sup> The text of the Decree in English language is available on: URL: www.icnl.org/research/library/files/United%20Arab%20 Emirates/16\_UAE\_Decree1\_1989.pdf (accessed: 31.01.2020).

<sup>17</sup> The text of the Law in Arabic language is available on: URL: https://ec.shj.ae/upload/legislationContainer/114/4.%20نائش 20 ين الش 20%فت الثرك 20%فت 20%فت 20%فت المال 20% المالي 20% المالي 20% المالي 20% المالي 20% المالي 20% المالي 20%

<sup>&</sup>lt;sup>9</sup> See, for instance: *Vieira Martins D. da Gama Vital de Oliveira G.* Competição tributária ou guerra fiscal? Do plano internacional à Lei Complementar No. 160/2017 // Revista Estudos Institucionais. 5 Agosto, 2018.

<sup>&</sup>lt;sup>10</sup> The text of the Budget Code of Russian Federation in Russian language is cited from: URL: http://www.consultant.ru/document/cons\_doc\_LAW\_19702/ (accessed: 31.01.2020).

<sup>&</sup>lt;sup>11</sup> The text of the Act in English language is available on: URL: www.icnl.org/research/library/files/United%20Arab%20Emirates/7\_UAE\_FedRes8\_1974.pdf (accessed: 03.02.2020).

<sup>&</sup>lt;sup>12</sup> The text of the Law in English language is available on: URL: www.icnl.org/research/library/files/United%20Arab%20Emirates/3 UAE FedLaw4 2003.pdf (accessed: 03.02.2020).

<sup>&</sup>lt;sup>13</sup> The text of the Law in English language is available on: URL: www.icnl.org/research/library/files/United%20Arab%20Emirates/ AssoclawUAE.pdf (accessed: 03.02.2020).

<sup>&</sup>lt;sup>18</sup> The text of Law in English language is available on: URL: www.icnl.org/research/library/files/United%20Arab%20Emirates/17\_UAE\_Khaimah\_1981.pdf (accessed: 31.01.2020).

<sup>&</sup>lt;sup>19</sup> For instance, information about charities in the city of New York is available on: www.newyorkcityextra.com/new-york-city-charities.html (accessed: 03.02.2020).

## II. Constitutional Fundamentals for Charities' Taxation and Fundraising Policies Regulation

It is of common knowledge that in the contemporary world a constitution is a foundation of a legal system of each country. That is why, of course, an administrative regulator is restrained by the legislation, while a legislator is constrained by the Constitution. Within the main topic of the present article it is evident to point out that all contemporary Constitutions, on the one hand, have provisions dealing with proclamation of the right of association, free exercise by persons any lawful activity individually or collectively, freedom of religion, etc., and on the other hand, provides for powers (with certain limits though) of taxation and for duties of natural and legal persons to pay taxes. It is enough to cite several Constitutions to illustrate this.

First of all let us review constitutional provisions dealing with fundamentals of non-profits creation and their activity. For instance, Amendment I to the USA Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"<sup>20</sup>. Article 35 of the China's Constitution stipulates that citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration<sup>21</sup> Article 30 of the Russia's Constitution reads: "1. Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. The freedom of activity of public association shall be guaranteed. 2. No one may be compelled to join any association and remain in it,<sup>22</sup>.

So, constitutional provisions in different countries are more or less similar. Meantime, constitutional provisions assure basic rights, which is essentially important, but they are too general to avoid certain limitations while they are detailed and developed in statutes (laws). For example, articles 30, 32, and 33 of the Constitution of the UAE<sup>23</sup> "guarantee, respectively, freedom of opinion and expression, freedom of communication, and freedom of assembly and association. These guarantees are not always upheld in practice, and governmental authorities have been known to arbitrarily restrict the freedom of expression of certain individuals. *Amnesty International Report 2015/16* provides examples of how, in particular, Federal Law No. 2 of 2015 (against discrimination and hatred) and Federal Law No. 5 of 2012, as amended (on combating cyber-crimes) are broad in scope, grant authorities extensive powers to curb association and expression, and allow significant penalties, including imprisonment, to be imposed for violations"<sup>24</sup>. Meantime, the provisions of the UAE Constitution do not differ greatly from similar provisions of other quoted Constitutions. Therefore, for an adequate understanding and assessment of constitutional provisions of any country it is necessary to follow their putting into practice, including their interpretation and application by courts.

The great role belongs to courts in retaining the essential meaning of constitutional provisions and protection of basic rights. Courts construe constitutional provisions and check if laws comply with such provisions. There are different systems of guaranteeing the constitutionality of laws: for example, in the USA or Mexico it is the respective Supreme Court, who adopts the final decision, recognizing constitutionality or unconstitutionality of a legislative act, in Russia and Germany the specialized Constitutional Court of each country is functioning, while in France and Kazakhstan the respective Constitutional Council, which is not a judicial body, is empowered to declare a law constitutional or unconstitutional.

Then if we address ourselves to constitutional provisions devoted to taxation powers we find out that in the overwhelming majority of Constitutions such provisions even more vague and general than provisions dedicated to rights of assembly, association, etc. A rare exception to this rule is the Constitution of Brazil, which has a voluminous Title VI "On Taxation and Budget" (Título VI "Da Tributação e Orçamento"), consisted of two chapters or 25 articles<sup>25</sup>, describing in detail gene-ral principles of taxation, limits of power to levy taxes, competence of taxation, assigned to each level of government, etc.

III. Use of Best Practices, Non-Mandatory Norms, and Recommendations as a Substitute for Legal Regulation

It is obvious that that best practices and recommendations cannot affect directly taxes or tax benefits, but they can help non-governmental organizations to increase effectiveness of their work, better organize their fundraising, become more economical, be more efficient in conducting inter-action and cooperation with authorities of all levels of government. Practically in all countries regulating governmental bodies issue recommendations and guidelines, which are not binding, help to organize proper functioning of not-for-profit organizations, as well organizes an exchange of experience of various non-profit organizations and administrative

<sup>&</sup>lt;sup>20</sup> See: Constitution of the United States of America. Washington (DC), 2017. P. 14.

<sup>&</sup>lt;sup>21</sup> See: 中华人民共和国宪法。 北京, 2018年, 第21页。

<sup>&</sup>lt;sup>22</sup> See (in Russian language): Constitution of the Russian Federation. M., 2018. P. 18.

روتس تارام إلى الميبر على المدح تمل. يب طوب، ٢٠١٦، محف س ١٢-١٤. 23 See: . ١٤

<sup>&</sup>lt;sup>24</sup> See: The United Arab Emirates. Philantropy Law Report. Washington, 2018. P. 4.

<sup>&</sup>lt;sup>25</sup> See: Constituição da República Federativa do Brasil. Brasília, 2016. P. 93–108.

bodies. In Russia, for example, the Ministry of Economic Development also promotes best practices of non-commercial organizations and assists the exchange of non-commercial organizations experience<sup>26</sup>, although it is not a regulator in the sphere of non-commercial organizations' activities in general, or charities' activities in particular. Non-governmental and quasinon-governmental organizations play in Russia a very important role in disseminating best practices and educating leaders and militants of various non-commercial organizations at the regional and local levels. These are some examples of non-governmental organizations, working as resource centres at the regional and interregional levels: Siberian Centre for Civic Initiatives Support, Sothern Russian Resource Centre, Moscow Charitable Reserve, Kostroma Centre for Civic Initiatives Support. Moscow Centre of Social Partnership serves as an example of resource centre, which began to function as a quasi-non-governmental organization (for five years since 1998 it worked as a joint project of the Moscow Government and the United Nations Development Programme, then for several years it worked as a noncommercial organization, among founders of which was the Moscow Government) and which later (in 2002)<sup>2</sup> was transformed into non-governmental organization.

In Russia there are federal and regional civic chambers, who are composed of representatives of the civil society, and who are organizing interaction between governmental bodies and non-governmental organizations and are monitoring and promoting the civil society development. The Federal Law on the Civic Chamber of Russian Federation was adopted in 2002<sup>28</sup>, and the Civic Chamber began its activities in 2003.

In the UK four Compacts between the Government and civil society organizations (in England<sup>29</sup>, Wales<sup>30</sup>, Scotland<sup>31</sup> and Northern Ireland<sup>32</sup>) were concluded in 1998 (in 2010 it was renewed<sup>33</sup>) to promote best practices and formalize to an extent cooperation between the governmental bodies and the civil society (the Compact is not considered as a binding legal act, however, its application is being monitored and is evaluated annually). Later compacts at the local level were concluded<sup>34</sup>, and in 2001 Local Compact Guidelines<sup>35</sup> were issued. Later the Guidelines were re-edited.

In Denmark the Danish Charter of Interaction (det Danske Interaktionspagt) was adopted by the Government<sup>36</sup> after intensive public consultations between the governmental bodies and civil society organizations, having been drafted under the aegis of the Ministry of Social Affairs and Ministry of Culture by a working group composed of representatives of five ministries and local governments and representatives of numerous non-governmental organizations.

Non-governmental organizations may borrow and use best practices of other non-governmental organization from abroad too, but not only within their country's frontiers. For example, so called telecottages<sup>37</sup>, which actually serve as telecommunication, educational and resource centres for dwellers of remote settlements and are maintained by non-profit organizations, appeared in Sweden in 1985. But shortly telecottages were created in several other countries, and now non-governmental organizations of more than seventy five countries are involved in the telecottages' movement.

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<sup>&</sup>lt;sup>26</sup> See materials, including archives on: URL: https://www.economy.gov.ru/minec/main (accessed: 03.02.2020).

<sup>&</sup>lt;sup>27</sup> See (in Russian language): URL: https://pandia.ru/ text/78/266/38891.php (accessed: 01.02.2020).

<sup>&</sup>lt;sup>28</sup> The text of the Federal Law in Russian language is available on: URL: www.consultant.ru/document/cons\_doc\_LAW\_52651/ (accessed: 01.02.2020).

<sup>&</sup>lt;sup>29</sup> See: URL: https://www.homeoffice.gov.uk/acu/compact.pdf (accessed: 01.02.2020).

<sup>&</sup>lt;sup>30</sup> See: URL: https://www.official-documents.co.uk/document/ cm41/4107.htm (accessed: 01.02.2020).

<sup>&</sup>lt;sup>31</sup> See: URL: https://www.scotland.gov.uk/library/documents-w3/comp-00.htm (accessed: 01.02.2020).

<sup>&</sup>lt;sup>32</sup> See: URL: https://www.nicva.org/compact.htm (retrieved 01.02.2020).

<sup>&</sup>lt;sup>33</sup> See: URL: https://www.gov.uk/government/news/government-and-voluntary-sector-agree-new-compact (accessed: 01.09.2019).

<sup>&</sup>lt;sup>34</sup> As an example see: Kent Partners Compact. An Agreement for Mutual Benefit between the Voluntary & Community Sector and the Public Sector in Kent (Final 15.01.09). Available on: URL: https://www.dover.gov.uk/Community/Community-Groups/PDF/ Kent-Partners-Compact.pdf (accessed: 01.02.2020).

<sup>&</sup>lt;sup>35</sup> See: URL: https://www.ncvo-vol.org.uk/main/gateway/com-pact.html#4 (accessed: 01.02.2020).

<sup>&</sup>lt;sup>36</sup> See (in Danish language): URL: https://www.regeringen.dk/ (accessed: 01.02.2020).

<sup>&</sup>lt;sup>37</sup> See: URL: https://web.archive.org/web/19961104071334/ http://www.eto.org.uk/faq/faqtcvtc.htm (accessed: 01.02.2020).

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