

Chapter 2

Religion, Charity and the Law

2.1 Introduction

The essential attributes of a legal charity are, in my opinion, that it shall be *unselfish* – ie for the benefit of persons other than the donor – that it shall be *public*, ie that those to be benefited shall form a class worthy, in numbers of importance, of consideration as a public object of generosity, and that it shall be *philanthropic* or *benevolent* – ie dictated by a desire to do good.

These and other core concepts, principles, precepts and related legal definitions associated with ‘charity’ and ‘religion’ are examined in this chapter. It explores: their shared origins in the ‘pious use’; their positive values such as piety and altruism; and more negative shared attributes such as a tendency to deference, to ameliorate rather than cure, and conservatism. It examines missionary work and proselytism. It considers religion’s subliminal nature and the reductionist tendency to measure its effect in secular terms. It discusses the potential for religious charities to be partisan, thereby emphasising differences and increasing social polarization; for social capital¹ to be of the ‘bonding’ rather than the ‘bridging’ form.

It notes that for centuries the essential components for a religious organization, or for a donation to such an organization, to be legally recognized as charitable, have been broadly the same in all common law nations: a belief in a “supreme being”; and a shared commitment to faith and worship. Further, to be charitable in the same nations, the organization or gift must ‘advance’ religion, meaning “to promote or maintain or practice it and increase belief in the supreme being or entity that is the object or focus of the religion”,² and it must do so for the benefit of the public (except in some jurisdictions where private piety is also deemed charitable). It identifies and analyses those matters held to constitute ‘public benefit’, the core legal

¹ See, Putnam, R. 2000. *Bowling Alone*. New York: Simon & Schuster.

² See, Charity Commission, ‘The Advancement of Religion for the Public Benefit’, December 2008, at para. C3.

concept which was clearly recognised more than a century ago in the above quote³ as lying at the heart of charity, and the centrality of which has now been legislatively restored in this jurisdiction. It examines this concept in the context of religious purposes and considers the relative importance attached to the doctrines, liturgy and tenets of the religion concerned.

2.2 Concepts, Principles and Definitions

England is a multicultural and multifaith society. The rich variety of religions now accommodated within this jurisdiction present a quiet challenge to the settled orthodoxy represented by the established Church of England. Part of the cultural heritage, accompanying the latter into the twenty-first century, is the common law or, more specifically, the law of charity. From their shared origins in the Reformation, the Church, a Protestant monarchy and charity law have co-existed and shaped English culture for the past four centuries. The slow evolution of charity law, untroubled by legislative intervention, has grown by incremental judicial precedents in response to changing patterns of social need. Concepts, principles and definitions that emerged over four centuries of case law are now encoded, and very largely unchanged, in the Charities Act 2011. These, the basic building blocks of contemporary charity law, remain essentially as when first formed and faithfully reflect their cultural context. For the purposes of this book, there is no more important single factor.

2.2.1 Religion

A *sine qua non* of religion is that it requires a belief in matters not amenable to objective proof. This gives rise to legal and other difficulties when it comes to definitions, boundaries and disentangling private from public interests.

2.2.2 Beliefs and Rationality

The subjective commitment to, and experience of, religious belief is clearly private and personal; verifiable, if at all, only within the matrix employed by the individual concerned. It differs from other frames of reference in the importance it attaches to a spiritual dimension. For example, it differs from: philosophy and secularism, the former having an accompanying toolbox of distinct schools of thought each with its own set of logically deduced dialectics, while the latter is adamantly functional and

³ See, *Re Cranston* [1898] IR 431.

objective; from politics, with its structural approach to society, and need for authority to bring order; and from moralists, whose values and ethics may support religious belief but from which they are distanced by an absence of spirituality. As Dillon J explained in *Re South Place Ethical Society*⁴:

Religion, as I see it, is concerned with man's relations with God and ethics are concerned with man's relations with man. The two are not the same and are not made the same by sincere inquiry into the question – what is God? If reason leads people not to accept Christianity or any known religion but they do believe in the excellence of qualities such as truth, beauty, and love, or believe in the platonic concept of the ideal, their belief may be to them the equivalent of a religion but viewed objectively they are not a religion.

The belief, as Dillon J points out, is in god (or gods or a supreme being). In terms of the well-established religions, that belief is accompanied not only by acts of private offerings of prayer and devotion but also by public acts of solidarity with fellow adherents such as attendance at and participation in practices of worship and by other ancillary rituals. The latter collective aspect is most usually supported by tenets, creeds and doctrines, which together constitute the venerated body of material that governs the religious activities of all adherents. So, while the religious experience is personal, being a religious adherent requires a public and shared commitment to a set body of explicit beliefs. In the past this public aspect has enabled the law to recognise and differentiate religions and test the credence of religious adherents. Indeed, in this jurisdiction the established view of the judiciary and regulators has long been that religion, at least in a charity law context, cannot be merely a private matter: prayer is not charitable⁵; to be charitable religious practices cannot be private, or limited to a private class of individuals, or not extend to the public more generally.

2.2.3 Differences in Approach and Their Consequences

Religious beliefs have traditionally been recognised by their theistic orientation and differentiated primarily by their doctrines. The doctrines of transubstantiation, immaculate conception and of 'purgatory', for example, are specific to Roman Catholicism,⁶ the Nicene Creed is a core Christian belief,⁷ while a belief in predestination distinguishes Calvinism. However, many religions share beliefs such as the

⁴ [1980] 1 W.L.R. 1565; (1980) 124 SJ 774; [1980] 3 All E.R. 918. Also, see, *Bowman v. Secular Society* [1917] A.C. 406 (HL).

⁵ See, *Re Warre's Will Trusts* [1953] 1 WLR 725 for the proposition that the law takes no notice of any benefit which might come from prayer.

⁶ The doctrine of purgatory was subsequently denounced in England as an example of 'superstitious uses' and condemned by the 1547 Act. See, further, Ridge, P. 2006. The legal regulation of religious giving. *Law and Justice* 157: 17–28.

⁷ Formulated in AD 325 at the First Council of Nicaea, the Nicene Creed was based on Christian understanding of the Canonical Gospels, the letters of the New Testament and to a lesser extent the Old Testament. Affirmation of this creed, which describes the Trinity, is generally taken as a fundamental test of orthodoxy for most Christian denominations.

doctrine of the immortality of the soul, which is central to the Protestant religion but is also common to other Christian religions and is proclaimed by Buddhists, Jews and Muslims among others. Such beliefs belong only to those of religious faith, they cannot be computed by philosophers, secularists, politicians and moralists. In essence, however, all trade in much the same area of morality. Arguably, the same set of concepts – to do with personal responsibility, civic engagement, equity, equality and compassion for the suffering – are fairly evenly shared among these groups, but for the purposes of this book the most important area of difference lies between those with religious beliefs and secularists (see, further, Chaps. 2 and 7).

2.2.4 *Christianity*

Over many centuries, Christianity has prevailed as the primary religion in England and since the Reformation this has taken the form of Protestantism as represented chiefly by the Church of England. The range of religions that now co-exist with Christianity in this jurisdiction is considerable and probably indeterminate. Islam, Hinduism, Sikhism and Judaism have a well-established presence and others including Druids, the Bahá'í Faith and such distinctive cultural entities such as the Rastafarians are also present. In addition there are a large and fluctuating number of organisations with a varying quotient of religious characteristics of which Mormons, Scientologists, Druze and Zoroastrians are perhaps among the most notable. Those of the Christian faith,⁸ however, continue to predominate and it is against the particular background of morality formed by Christian doctrines, canon law and secular activity that we must view contemporary issues of social equality: issues which, to some extent, can be seen in terms of a conflict of laws – canon law, charity law and human rights law.

2.2.5 *Confraternities*

Organizations, in the form of guilds⁹ or confraternities¹⁰ dedicated to putting Christian precepts into practice, have been in existence for at least the last millennium. Confraternities, as Flack explains, “were established for a variety of purposes but

⁸In the 2011 Census, Christianity was the largest religion, with 33.2 million people (59.3 % of the population). The second largest religious group were Muslims with 2.7 million people (4.8 % of the population). The proportion of the population who reported they have no religion has now reached one quarter. See, further, Office for National Statistics at: <http://www.ons.gov.uk/ons/re/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html>.

⁹See, Westlake, *The Parish Gilds of Mediaeval England*, 1919, where mention is made of “the gild of the Blessed Virgin Mary in the parish church of St Botolph at Boston founded in 1260 gave a yearly distribution of bread and herrings to the poor in alms for the souls of its benefactors”; cited in Brady, J. 1975. *Religion and the law of charities in Ireland*, 14. Belfast: Northern Ireland Legal Quarterly.

¹⁰See, Flack, T. 2008. Insights into the origins of organised charity from the catholic tradition of confraternities. Occasional paper for Australian Centre of Philanthropy and Nonprofit Studies, Queensland University of Technology, Brisbane.

fundamentally they were about laymen and women joining a voluntary association to receive mutual encouragement to live pious lives".¹¹ He adds that they may have existed in both the Eastern and Holy Roman Empires even before the sack of Rome in 410. Some had charitable purposes such as one with a special devotion to the sick and diseased, which flourished in Constantinople in 336, and others in the West which looked after abandoned children as early as 400 AD. The earliest Catholic lay confraternities were probably formed in Italy as early as the third century, but were certainly well established by the mid tenth century.

2.2.6 Christian Charitable Organisations in England

In mediaeval England, many schools and hospitals were founded by religious organizations. These include King's School Canterbury, founded in 597 and reputed to be the oldest English charity, and St John's Hospital in Malmesbury which dates from the early tenth century. During this period, provision for the poor remained primarily a matter for the church, which provided shelter and succour for the needy, rather than the State (see, further, Chap. 2).

Historically and currently, the contribution of religious organisations to total charitable activity in this as in all common law jurisdictions is inestimable.¹² They have been most obviously prominent in activities which serve to advance religion, sometimes with contentious outcomes, but have also often been engaged in putting in place social infrastructure both in common law countries and in developing nations. Religious organizations laid much of the foundations for our present health and education systems and often provided the staff and resources for their functioning and maintenance.

2.2.7 Canon Law and Christian Morality

Canon law in this jurisdiction, with its origins in Catholicism and Papal authority, predates the Reformation by several centuries but has since then formed the body of law, rules and regulations made or adopted by the Church of England and administered by the Church's ecclesiastical courts. The latter's terms of reference enabled them to deal not only with Church related matters but, until the mid-nineteenth century, they also had exclusive authority in respect of marriage, divorce, wills, and defamation.¹³ Leaving criminal issues to the secular courts, allowed the ecclesiastical

¹¹ Ibid.

¹² In November 2012, the Charity Commission estimated that nearly 20 % of charities then on the register were for the advancement of religion and many more charities had their roots in a faith ethos; of the religious charities, some 24,529 were Christian, 2,387 Jewish and 1,398 were Muslim.

¹³ The 1603 canons, for example, included directives such as: No Sentence for Divorce to be given upon the sole Confession of the parties (no. 96); In all Sentences for Divorce Bond to be taken for not marrying during each others Life (no. 97).

courts to focus on those civil issues where immorality was most likely to be manifested and be amenable to policing in accordance with the Church canons and doctrine. This Christian shaping of secular law, both unsurprising and rigorous, was recently acknowledged by Laws LJ in *McFarlane v. Relate Avon Ltd.* when he commented that “the Judaeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy”.¹⁴

2.2.8 *Charity*

‘Charity’, as a social construct, has a broader meaning than its legal definition. Its origins lie in the doctrine common to all religions that only by doing good works in this life can eternal salvation be assured in the next. The links between charity and religion, meaning the Christian religion for the purposes of charity law, are inescapable. Indeed, to subscribe to the Christian faith entailed obeying the duty to love one’s neighbour, an imperative requirement for the salvation of the soul.¹⁵ In its initial religious context, charity was thus “more a means to the salvation of the soul of the benefactor than an endeavour to diagnose and alleviate the needs of the beneficiary”.¹⁶ Indeed, the soul, not just of the giver but that of those already deceased, could be saved by acts of generosity to the poor: masses offered for the dead being accompanied by alms for the poor of the parish; chantries¹⁷ by endowments for the Church and monasteries; and guilds by bequests of property for the use of the Church.

2.2.9 *The Pious Use*

Gifts for pious uses, motivated by the concern of donors to ensure the redemption of their souls, were recognised as charitable gifts in the years prior to the Reformation. This ‘use’, the legal precursor of the ‘trust’, was a key concept developed in the

¹⁴ [2010] IRLR 872; 29 BHRC 249 at para 23.

¹⁵ Christianity was not unique in this respect: Buddhism teaches the love of mankind as the highest form of righteousness; Islam requires a tithe of one-tenth of income to be given to those in need; and the Jewish religion urges its followers to assist the poor and practice charity.

¹⁶ See, *Report of the Committee on the Law and Practice relating to Charitable Trusts*, (Cmnd. 8710), HMSO, London, 1952, at para 36.

¹⁷ A ‘chantry’ (from the Chanting of the Mass) was a religious service founded and endowed by a benefactor for the repose of the soul of one or more persons. It was an important institution of the mediaeval Church and very popular in the fourteenth and fifteenth centuries. See, Wood-Leigh, K., *Church Life under Edward III*, 1934, p. 91; cited in Brady, J, *Religion and the Law of Charities in Ireland*, op cit at p. 12.

fourteenth and fifteenth centuries which allowed feudal landowners to evade certain “incidents” (a form of property taxation) associated with the transfer of land on their death. Gradually, responsibility for the use¹⁸ was assumed by the Court of Chancery, which provided the means for their enforcement,¹⁹ until it was replaced by the trust as the means whereby a donor could impose a legal requirement upon a trustee or trustees to receive, retain and utilise a gift for purposes specified by the donor (see, also, Chap. 2).

2.2.10 *Altruism*

The single most important attribute of ‘charity’, as this term is known in all countries that share the common law tradition, is that it be unequivocally dedicated to the public benefit. Throughout the centuries the altruism²⁰ of the individual, generating the voluntary contribution of many for the public good, has always been held to be its vital and distinguishing characteristic.

2.2.11 *Discretion*

Donor discretion lies at the heart of charity and charity law. Any such exercise of discretion is necessarily accompanied by exclusionary criteria: the targeted beneficiaries are identified by a specification broad enough to be ‘public’ but sufficiently precise to exclude those outside donor intent. This exclusionary approach, exercised in favour of beneficiaries identified by their common affiliation to a specified religion, is clearly discriminatory in respect of all other religious and non-religious persons but has nonetheless attracted judicial endorsement. It is an approach that can only be accommodated with some difficulty in a human rights context (see, further, Chap. 7).

¹⁸ It became the practice to convey land ‘to A to the use of B’. While B had no legal estate in the lands which remained at common law the property of A, the Court of Chancery would recognise B’s beneficial or ‘equitable’ ownership of the land.

¹⁹ See, Jones, G. 1969. *History of the law of charity 1532–1827*, 3–4. Cambridge: Cambridge University Press.

²⁰ Meaning an unselfish concern for the welfare of others: a private act for public benefit. It was Comte’s *Philosophy of the Sciences* (translated by George Lewes, 1890) that first introduced the word “altruism” (from the French “*alteri huic*”) into the English language. See, further, Titmuss, R.A. 1970. *The gift relationship: From human blood to social policy*. London: Allen and Unwin.

2.3 Charity Law and Religion

Religion was not mentioned as a charitable purpose in the Statute of Charitable Uses 1601²¹ probably for reasons to do with the politics of religion in the years before and after the Reformation, but there was never any doubt as to the legal inseparableness of charity and religion. This was confirmed by the decision in *Pemsel*²² when Macnaghten LJ ruled that ‘the advancement of religion’ was a charitable purpose. Subsequently, the judiciary have added that for it to do so two conditions must be met²³: the organisation or gift must contribute to the advancement of ‘religion’, as interpreted by the courts²⁴ and it must promote the religious instruction or education of the public²⁵; a non-theistic organisation was initially held not to satisfy such conditions.²⁶ The prevailing legal presumption has traditionally been that such a charitable purpose is for the public benefit and this continues to be the case in all jurisdictions other than the UK where the presumption has been reversed since the completion of the charity law reform process (see, further, Chap. 6).

2.3.1 Charities and Charity Law

Charity in law has a technical meaning.²⁷ It is ancient, with its origins most probably lying in the *parens patriae*²⁸ responsibilities of the King (protecting the interests of charities, wards and lunatics), and over the past four centuries it continued to judicially evolve within the common law tradition with very little legislative interference. During this time it has taken root throughout nations, comprising the former British Empire, which have contributed to forming a body of jurisprudence that now, with varying emphases and subject to certain jurisdictional differences, constitutes charity

²¹ Also known the Statute of Elizabeth; 43 Eliz 1, c 4.

²² *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1879] AC 531.

²³ As explained in Warburton, J. 2003. *Tudor on charities*, 9th ed, 73. London: Sweet & Maxwell.

²⁴ See, *Dunne v. Byrne* [1912] AC 407.

²⁵ *Cocks v. Manners* (1871) LR 12 Eq. 574 at 585; *Yeap v. Cheah Neo v. One Cheng Neo* (1875) LR 6PC 381; *Re Joy* (1888) 60 LT 175; *Re Macduff* [1896] 2 Ch. 451; *Re Delaney* [1902] 2 Ch. 642 at 648; *Chesterman v. Federal Commissioners of Income Tax* [1926] AC 128; *Gilmour v. Coats* [1949] AC 426.

²⁶ See, for example, *Re Hummeltenberg* [1923] 1 Ch 237, when spiritualism was held not to meet the definition of ‘religion’ and *Bowman v. Secular Society Ltd* [1917] AC 406, where doubts were cast by Parker LJ on ‘humanism’.

²⁷ See, *Income Tax Special Purposes Commissioners v. Pemsel op cit*, where Macnaghten LJ said of ‘charity’ “of all words in the English language bearing a popular as well as a legal signification I am not sure that there is one which more unmistakably has a technical meaning ...” at p. 581.

²⁸ A parental jurisdiction inherently vested in the monarch, exercised by the Chancellor, delegated to the Court of Chancery and then administered by the High court and the Attorney General. See, Seymour, J. 1994. *Parens Patriae* and wardship powers: Their nature and origins. *Oxford Journal of Legal Studies* 14(2): 159–188.

law in the common law tradition. As understood within the terms of the Preamble to the 1601 Act, and as organised under the four *Pemsel*²⁹ heads, charity is an activity undertaken by bodies that vary greatly in type, size, legal form, longevity and in resources. The 1601 Act³⁰ has for four centuries provided a basic framework for the role and responsibilities of charity. The following purposes, identified in the Preamble as charitable, continue to provide the basis for modern charity law not only in this jurisdiction but across the common law world³¹:

The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

During the ensuing centuries, this area of law has come to acquire a number of principles and rules that now characterize it in a common law context.

2.3.2 Charitable Purposes

Lord Macnaghten's³² sparse statement of matters constituting charitable purposes fails to do justice to the immense volume and range of charities that have since been recognized as such by court and regulators, mostly under the 4th head with the aid of 'the spirit and intendment' rule.³³ It remains the case that to acquire or retain charitable status an entity must show that it can bring itself within the definition of "charitable purpose" and that its purpose (as stated in its governing documents) will be of "public benefit". While most religious organisations will seek charitable

²⁹ See, *Income Tax Special Purposes Commissioners v. Pemsel op cit*, where Macnaghten LJ first classified charitable purposes as follows:

Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

³⁰ A modified version of the Statute of Uses 1597 (39 Eliz. I, c.6).

³¹ As noted in Tudor. 2003. *Charities*, 9th ed, 3. London: Sweet & Maxwell, the wording of the Preamble closely resembles a passage in *The vision of Piers Plowman* by William Langland.

³² *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1879] AC 531 at p. 583. In recent years as a result of charity law reform, some jurisdictions have statutorily encoded these charitable purposes and a small number have gone further and added a *Pemsel* plus list (see, further, Chap. 6).

³³ As explained by Wilberforce L.J. in *Scottish Burial Reform and Cremation Society v. Glasgow Corporation* [1968] A.C. 138:

The purposes in question to be charitable, must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment of the Preamble to the statute, 43 Eliz. 1 c.4.at p. 154.

registration under the 3rd *Pemsel* head, many engaged in secular activities such as in education, health or social care may register their subsidiary organisations under other heads.

2.3.3 *Common Law Requirements*

The well-established requirements for a charity to be recognised as such are that an entity must derive from charitable intent, be confined exclusively to charitable purposes, be for the public benefit, be independent, non-profit-distributing and non-political.

The first is deceptive: while motive is important, the presence or absence of charitable intent is not itself usually determinative. In most common law jurisdictions³⁴ the test judicially applied to ascertain a donor's intention is objective i.e. the fact that a donor believed when making the gift that it was charitable will not prevent the courts from ruling otherwise and vice versa because "the court cannot inquire into the motives of the donor if the gift is in its nature a charity".³⁵ No matter how charitable the donor's intention may be, this will not make charitable a gift which does not satisfy the common law definition of 'charity', has no intrinsic merit,³⁶ breaches the law or is contrary to public policy.

The second rule is that to be charitable a gift must be exclusively dedicated to charitable purposes. Where the courts find any ambiguity or equivocation in a donor's expressed intention or any possibility of a gift being used partially for non-charitable purposes then they will deny the gift charitable status. For example, a trust the income from which was paid to "any one or more religious charitable or educational institution or institutions operating for the public good", was held to be in breach of the exclusivity rule and therefore void: the term "public good" was wider than public benefit for charitable purposes and like "philanthropic" and "benevolent" could not therefore be construed as exclusively charitable.³⁷

Thirdly, and most importantly, the gift must satisfy both arms of the 'public benefit test'; i.e. it must both confer an objectively verifiable 'benefit' and it must do so in favour of sufficient members of the 'public'. The test has traditionally been applied unevenly across the 4 *Pemsel* heads of charity: presumed satisfied per se in relation to religious purposes but falling most onerously upon all the relatively new purposes in the last category (see, further, below).

Fourthly, a charity is required under common law to be a free-standing, independent entity founded by and bound to fulfill the terms of the donor's gift. The duty resting on trustees to honour the terms of their trust and ensure that the objects of the charity prevail has always been seen as the primary means whereby the integrity of the donor's gift could be protected.

³⁴ Not in Ireland: see, for example, *In re the Worth Library* [1994] 1 ILRM 161, per Keane J at p. 193.

³⁵ See, *Hoare v. Osborne* (1866) LR 1 Eq, 585 per Kindersley VC at p. 588.

³⁶ *Re Pinion* [1965] Ch 85.

³⁷ *AG of the Cayman Islands v. Wahr – Hansen* [2000] 3 All E.R. 642.

Fifthly, while a charity does not compromise its status by making a profit, it will do so if any profit gained accrues to the benefit of individuals instead of being directed towards the fulfillment of the charity's objects. This can be problematic in the context of modern competitive trading practices in which many charities, including religious charities, are currently engaged. These profit-making enterprises are intended to raise funds for charitable purposes, but in practice the profits are often re-invested to 'grow' the business or increase market share, which can give rise to questions as to where the altruism and public benefit really lies.

Finally, the extent to which any political activity may be safely undertaken by a charity has long been fraught with uncertainty. The crucial issue is whether an organisation intends to pursue political activity as its principal objective or whether this is merely pursued ancillary to and in support of a main objective which is not itself political: the former is definitely incompatible with charitable status.³⁸ It is a rule that can inhibit assertive advocacy on behalf of the disadvantaged.

In determining whether a religion, a religious organization or a gift to such, can acquire or retain charitable status, all entities – including the Church of England – must satisfy these requirements.

2.3.4 *Charity Law and the Definition of Religion*

Religion, for the purposes of charity law, has been defined as “the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it.”³⁹ A body of case law precedents and related principles has accumulated to determine when religion, religious organisations and their activities meet the legal definition of ‘charity’.

From the earliest beginnings of charity law, the necessity of a theistic component for this charitable purpose was regarded as a given: almost exclusively interpreted as monotheism in the traditional Judeo-Christian culture; and this has remained the case in all common law jurisdictions until comparatively recently (see, further, Chap. 6). For many generations and throughout the common law jurisdictions the basic indicators, employed by judiciary and regulators to define ‘religion’ and differentiate a religious body from other bodies, have been a belief in a “supreme being” together with a shared commitment to faith and worship.⁴⁰

³⁸ See, for example, *Bowman v. Secular Society* [1917] A.C. 406, *National Anti-vivisection Society v. Inland Revenue Commissioners* [1948] A.C. 31 (HL) and *McGovern v. Attorney General* [1982] Ch. 321.

³⁹ *Keren Kayemeth Le Jisroel v. Inland Revenue Commissioners* (1931) 48 TLR 459 at p. 477. But also see *Thornton v. Howe* (1862), 54 ER, 1042, 31 Beav 14 where, in a doubtful ruling, the court held that a trust for the printing, publishing and propagation of the sacred writings of the late Joanna Southcote (who claimed to have been made pregnant by the Holy Ghost and was to give birth to the second Messiah) was a valid charitable trust for a religious purpose.

⁴⁰ See, Charity Commission, ‘Analysis of the law underpinning *Public Benefit and the Advancement of Religion*’, Feb 2008 at para.2.14 where the Commission concluded that the definition of a religion in English charity law was characterised by a belief in a supreme being and an expression of that belief through worship.

2.3.5 *Belief in a Supreme Being*

A religion will not gain judicial recognition as such unless its adherents at least profess belief in a “supreme being”. The view that the legal definition of religion could be satisfied by a system of belief which did not involve faith in a god was explicitly rejected by Dillon J in *Re South Place Ethical Society*.⁴¹ That case concerned a society the objects of which included “the study and the cultivation of a rational religious sentiment”. Ultimately Dillon J held that the Society was a charity, but on the basis that it was established for the advancement of education and benefit to the community.

Belief in a supreme being, until relatively recently, was most usually interpreted in all common law countries to mean a Christian deity.⁴² The judiciary, however, gradually extended recognition beyond the monotheistic Christian religions. In *R v. Registrar General ex p. Segerdal*,⁴³ for example, Lord Denning M.R. viewed the religion of Buddhism as an exception to the general requirement of religion that it should involve reverence to a deity and that “Buddhist temples are properly described as places of meeting for religious worship”.⁴⁴

The approach of the Charity Commission towards organisations such as the Church of Scientology has been to hold that religion for the purposes of charity law constitutes belief in a supreme being, an expression of that belief through worship, and an advancement or promotion of the religion. It has also required evidence that the organisation, by engaging with and being openly accessible to the local community, was satisfying the public benefit test. In that case the Commission refused registration on the grounds that the organisation’s core practices of training and auditing (counselling) did not constitute worship of a supreme being,⁴⁵ even though it had been deemed charitable in the US,⁴⁶ and in Australia⁴⁷ though not in Canada.

2.3.6 *Worship of a Supreme Being*

In addition to belief in god or gods, members of a religion must practice a common form of worship and have a shared faith. Worship must have at least some of the

⁴¹ [1980] 1 W.L.R. 1565; (1980) 124 SJ 774; [1980] 3 All E.R. 918.

⁴² Although, in the US, the IRS took an early and clear view that charitable trusts could not be restricted to those that declared their belief in one ‘Supreme Being’.

⁴³ [1970] Q.B. 697 (CA).

⁴⁴ *Ibid.*, at p. 707.

⁴⁵ *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, Charity Commissioners Decision, 17th November 1999 at p. 24.

⁴⁶ In 1993, the IRS recognized Scientology as a “non-profit charitable organization,” and gave it the same legal protections and favourable tax treatment extended to other non-profit charitable organizations.

⁴⁷ *Church of the New Faith v. Commissioner for Pay Roll Tax* (1983) 49 ALR 65.

following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession. As noted by Dillon J. in *South Place Ethical Society*⁴⁸ it would not seem possible to worship with reverence a mere ethical or philosophical ideal. The Charity Commission⁴⁹ more recently have added that a religion should have “a degree of cogency, cohesion, seriousness and importance; an identifiable positive, beneficial, moral or ethical framework.”

2.3.7 Canon Law, Doctrines, Tenets etc.

Traditionally, the authority and integrity of a religion has been grounded in its particular corpus of laws, canons, ordinances and tenets. These comprise the essence of a religion: they commit and bind its members in collective adherence to an agreed interpretation of beliefs and rules. As stated in the Second Epistle of Peter, “no prophecy of the scripture is of any private interpretation”. The point of religious doctrine is to assure members that the one true way is as ordained in their set of beliefs and require them to demonstrate this and seek to convince others. There is no room for compromise. For the religious individual as for the religious organisation, private piety and public conduct must be synonymous. As has been said⁵⁰:

It belongs to the religious convictions of a good many religious people in our society that they ought to base their decisions concerning fundamental issues of justice on their religious convictions. They do not view it as an option whether or not to do it.

Lord Halsbury once explained the importance of doctrines for religion in the following terms⁵¹:

Speaking generally, one would say that the identity of a religious community described as a Church must consist in the unity of its doctrines. Its creeds, confessions, formularies, tests, and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community.

The presence of a body of beliefs or teachings, to which an organisation or individual is fully committed, has always provided good supportive evidence of the nature of their commitment – that it is to a religion – although “a religion can be regarded as beneficial without it being necessary to assume that all its beliefs are

⁴⁸ [1980] 1 W.L.R. 1565; (1980) 124 SJ 774; [1980] 3 All E.R. 918 at p. 1573A.

⁴⁹ See, Charity Commission, “*Analysis of the law underpinning Public Benefit and the Advancement of Religion*”, February 2008 at para C2.

⁵⁰ Woltersorff, N. 1997. The role of religion in decision and discussion of political issues. In *Religion in the public square: The place of religious convictions in political debate*, ed. R. Audi and N. Woltersorff. New York: Rowan and Littlefield.

⁵¹ See, *Free Church of Scotland v. Overtoun* [1904] AC 515, HL (Sc), per Lord Halsbury LC at pp. 612–3.

true”.⁵² This point finds support in the corollary: a gift to a religious body will fail if in the meantime the congregation has so changed its tenets that it is no longer identifiable as the religion previously known to the donor.⁵³ The broad principle, as once stated in *Thornton v. Howe*,⁵⁴ – that a gift for the advancement of religion will be upheld unless the tenets of the society “inculcate doctrines adverse to the very foundations of all religion” – is in this jurisdiction now, more simply, subject to the public benefit test.

The significance of doctrines can be overstated. This was evident in *Re Allen*⁵⁵ when Birkett LJ warned that:

when a testator uses the words ‘a member of the Church of England’, he must not be assumed to be speaking as a learned theologian or an ecclesiastical historian, with special meanings in his mind, or with refinements and reservations. He must be assumed to be an ordinary man using ordinary language.

Canon law is confined to the Catholic Church, the Greek Orthodox Church and the Anglican Church. Consisting of a body of ‘canons’ or rules that have been agreed and adopted by authority of the Church’s ecclesiastical body over many centuries, canon law functions in much the same way as its civil counterpart.

2.3.8 Religions in General

The court or Commission will take judicial notice of the fact that certain bodies have acquired standing as established religions. A gift for the advancement of religion in general has been upheld as charitable.⁵⁶

2.3.9 Differences Between Religions

The court or Commission will not inquire into the inherent validity of a particular religion nor does it examine the relative merits of different religions.⁵⁷ The broad principle was expressed by Walker L.C. in *O’Hanlon v. Logue*⁵⁸:

... a gift for the advancement of ‘religion’ is a charitable gift; and that in applying this principle, the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals or contain nothing contrary to law ...

⁵² *Gilmour v. Coats and others* [1949] AC 426.

⁵³ *A-G v. Bunce* (1868) LR 6 Eq 563.

⁵⁴ (1862) 31 Beavan 14.

⁵⁵ [1953] Ch 116 at p. 834.

⁵⁶ See, for example, *Attorney-General v. Pearson* (1817) 3 Mer 353 per Eldon L.J. where he held that a bequest to maintain and propagate the worship of God was charitable at p. 409.

⁵⁷ *Thornton v. Howe* (1862), 31 Beav 14. Also, see, *Nelan v. Downes* (1917) 23 CLR 546.

⁵⁸ [1906] 1 I.R. 247 at pp. 259–260.

Whether the subject of the gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality.

In practice it would seem improbable that the courts in this jurisdiction would now give special recognition to any one particular religion; even when that religion is ‘established’. In the words of Cross LJ “as between different religions, the law stands neutral, but it assumes that any religion is at least better than none”⁵⁹; though it may be that his latter proposition is now unsustainable in the light of the public benefit test and human rights considerations (see, further, Chap. 7).

2.3.10 *Discrimination Between Religions*

A gift will not fail to gain charitable status simply because it has been restricted to one specified religion. For example, in *Copinger v. Crehane*⁶⁰ a gift “for the advancement and benefit of the Roman Catholic religion” was upheld as charitable. In *In re Bonnet dec’d.*; *Johnston v. Langheld*⁶¹ the court dealt with the question of general charitable intention of a gift to the Lutheran Church where the question was whether the gift was to the Lutheran Church or to the Protestant Church in general. As the testator had been a member of the Lutheran Church the court held that it had been her intention to confer a benefit on that body.

2.3.11 *The Advancement of Religion*

Charity law in a common law context requires an entity to be not only so constituted as to satisfy the legal definition of religion, by having objects or purposes of a religious nature, but its activities and gifts to it must also advance religion, meaning that they must “promote or maintain or practice it and increase belief in the Supreme Being or entity that is the object or focus of the religion”.⁶² That this is not always the case was demonstrated in *Berry v. St Marylebone*,⁶³ when the Theosophy Society sought exemption from rates as a charity. It was held that theosophy did not come within the third head of charity because it provided no answer to the question: “what religion does the society advance and how does it advance it?”

⁵⁹ *Neville Estates Ltd v. Madden* [1962] Ch. 832, at p. 853.

⁶⁰ (1877) L.R. 11 Eq. 429.

⁶¹ [1983] I.L.R.M. 359.

⁶² See, Charity Commission, “The Advancement of Religion for the Public Benefit”, December 2008, at para C3.

⁶³ [1957] 3 All E.R. 677.

2.3.12 Advancement

As Denning LJ once remarked⁶⁴:

The word “advancement” connotes to my mind the concept of public benefit.... When a man says his prayers in the privacy of his own bedroom, he may truly be concerned with religion but not with ‘the advancement of religion’.

To advance religion is to do something positive in the name of that religion and directly relevant to its beliefs. The entity must demonstrate that its activities are in fact linked to and actually further the essence of the religion: they must not be merely supplementary, tangential or in furtherance of an ancillary, non-charitable purpose. For example, in *Keren Kaymeth Le Jisroel, Ltd v. Inland Revenue Commissioners*⁶⁵ the advancement of religion arose for consideration in relation to a company which had been established with the primary object of acquiring property in the Holy Land for the purpose of enabling the settlement of Jews. In that case, as in the more recent but not dissimilar application by a company called Good News for Israel, the Commission refused to grant charitable status.⁶⁶ The latter applicant organisation sought to advance the Jewish religion by (amongst other means) promoting the doctrine of Aliyah, being the promotion of the return of Jewish people to the land promised to them by God. The Commission considered that such activities, which sought to directly facilitate the settlement of Jewish people in Israel, had implications which went beyond the religious and spiritual. It was not, therefore, clear that these activities were solely directed to advancing religion.

Similarly, the members or staff of such a religious organisation will not be furthering that religion if they are engaged solely in activities that are of peripheral significance; a functional relationship of some importance for the accountability of those engaged, for example, as a caretaker or cleaner in a school run by a religious order. Indeed, as will become evident later, there are significant differences, with accompanying legal consequences, between: a religious adherent furthering their religion and giving effect to their religious beliefs through the terms and conditions of their chosen employment; such a person undertaking work in furtherance of a secular purpose; and a non-religious person undertaking work on behalf of a religious body (see, further, Chap. 7).

It is also the case that the beneficiaries must be appropriate. These are normally the followers or adherents, the wider church and the public generally, or, in the case of a charitable religious order, the beneficiaries are the members of that order

⁶⁴ *National Deposit Friendly Society Trustees v. Skegness UDC* [1958] 2 All ER 601.

⁶⁵ [1931] 2 KB 465; 100 LJKB 596; 145 LT 320; 47 TLR 461; *affirmed* [1932] AC 650 when Lord Hanworth M.R. observed:

... the promotion of religion means the promotion of the spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observance that serve to promote and manifest it.

⁶⁶ See, Charity Commission, “Decision on Application by the Good News for Israel (“GNFI”) for Registration as a Charity”, February 5, 2004.

and the wider public. In some cases, the ‘wider public’ can benefit by being able to participate in the rites and services of the religion, or by, for example, being the recipient of a charitable act undertaken by a follower or adherent as part of the practice of their religious belief.

2.3.13 *Traditional Types of ‘Advancement’*

There is a long tradition of engaging in certain activities or making certain types of gift that are customarily upheld as being for the advancement of religion. The courts, for example, have had little difficulty in finding that missionary work serves this purpose. All bona fide missionary work is regarded as equally charitable: whether seeking to advance Christianity in general or the interests of a particular religion. As Donovan J. has advised⁶⁷:

To advance religion means to promote it, to spread the message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.

Proselytizing or ‘spreading the word’, while naturally intrinsic to religious bodies, is associated also with the activities of religious charities and indeed provided the grounds for charity law’s most famous case. *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*⁶⁸ concerned the Moravian Church and its charitable purpose of “maintaining, supporting and advancing the missionary establishments among heathen nations”. The key issue was whether proselytizing to the heathen in a distant land was charitable without having any other object such as relieving poverty or advancing education. It was the decision of the Commissioners to discontinue granting income tax exemption for this missionary work that brought John Pemsel before the court in his ultimately successful action.⁶⁹

Christians have tended to regard proselytizing as part of their religious duties and this activity has been automatically granted charitable status within the common law jurisdictions. In *A-G v. Becher*,⁷⁰ for example, a gift to convert Catholics to the Church of England was upheld as charitable. However, proselytism is not without its problems: much depends on how it is manifested in practice. As has been pointed out⁷¹:

⁶⁷ See, *United Grand Lodge of Free and Accepted Masons of England and Wales v. Holborn Borough Council* [1957] 1 W.L.R. 1080; 121 J.P. 595; 101 S.J. 851; [1957] 3 All E.R. 281.

⁶⁸ [1891] AC 531 (H.L.).

⁶⁹ See, further, Bromley, K. 2000. The definition of religion in charity law in the age of fundamental human rights. Paper presented at ISTR conference, Dublin, .

⁷⁰ [1910] 2 IR 251.

⁷¹ See, *Kokkinakis v. Greece* A 260-A (1993), 17 EHRR 397, per Pettiti J. In this context it is perhaps worth noting that websites now often provide a platform for proselytism; some may well be caught by the *Kokkinakis* caveat. The Islamic Sharia Council, for example, is a registered charity. On its website, the Islamic Sharia Council, among other things, encourages polygamous marriage,

... a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism ... The latter represents a corruption or deformation of it ...

Moreover, it is important to bear in mind that proselytism acquired recognition as a charitable activity at a time when religious purposes benefited from a presumption that they were for the public benefit. It is difficult to see how court or Commission, when applying this test as they are now obliged to do, could possibly conclude that inducing someone to join a particular religion would be of benefit to the public.

In this jurisdiction, charitable status would most usually require the activities of religious organizations to have tangible public benefit outcomes. This could take the form of, for example, the followers or adherents putting the values of their religion into practice by taking positive actions to help others in society, such as visiting people who are distressed, sick or dying, or providing food and shelter to the homeless. The necessity to undertake secular activities is contentious: there is a view that it should be sufficient to satisfy the 'advancement' requirement that the members of religious organizations simply practice their faith in their daily life, demonstrating adherence to religious precepts; the virtuous lifestyle modelled by religious adherents being enough to advance that religion (see, further, below).⁷² Any of the following are now generally accepted as advancing religion⁷³:

1. the provision of sacred spaces, churches and worship services;
2. the provision of public rituals and ceremonies;
3. contributing to the spiritual and moral education of children;
4. contributing towards a better society for example by promoting social cohesion and social capital;
5. carrying out, as a practical expression of religious beliefs, other activities (such as advancing education or conflict resolution, or relieving poverty), which may also be charitable;
6. contributing to followers' or adherents' good mental and physical health; aiding the prevention of ill health, speeding recovery and fostering composure in the face of ill health;
7. providing comfort to the bereaved; and
8. healthcare and social care.

advises women to remain within violent marriages and advises that they do not have the right to refuse sex to their husbands. Where proselytism encourages conduct that is in breach of human rights and contrary to the law of the jurisdiction it cannot also be compatible with the public benefit. See, further, at:

<http://www.islamic-sharia.org/marriage-fatwas-related-to-women/validity-of-polygynous-marriage-9.html>

and

<http://www.islamic-sharia.org/marriage-fatwas-related-to-women/denying-husbands-marital-rights-2.html>.

⁷² See, *Neville Estates Ltd v. Madden* [1962] 1 Ch 832.

⁷³ See, Charity Commission, *The Advancement of Religion for the Public Benefit*, December 2008, at para. D2.

In some jurisdictions, other than the UK, this list would extend to include gifts for private prayer,⁷⁴ private masses⁷⁵ and to closed religious orders.⁷⁶ It must of course be borne in mind that a religious body may decide to channel its charitable activity not directly into the advancement of religion but through an alternative charitable purpose such as the advancement of education or the relief of poverty.

2.4 Religion and Public Benefit

The Preamble can be seen as the initial statement by ‘government’ of matters it regarded as constituting the public benefit and responsibility for which it believed could be borne by charity. The charitable purposes listed therein are those that government identified as the core business of charity, its *raison d’être*. This public benefit agenda comprises matters which continue to be of importance in all common law jurisdictions. The provision of health and social care services, training for employment, public utility provision and the physical maintenance of social infrastructure, are still very much the business of charities. Now as then, education, housing, the general alleviation of those in impoverished circumstances and the protection of citizens are also legally defined as contributing to the public benefit and therefore charitable. The capacity of charities to generate social capital, and the part played by religious organisations as providers of charity thereby reducing public spending, have ensured their support by government over the centuries and across the common law world.

2.4.1 The Public Benefit

The concept of public benefit lies at the heart of charity law: it serves to differentiate altruistic gifts intended for the benefit of strangers from private gifts intended to further the interests of the donor. Both the ‘public’ and the ‘benefit’ arms of the test must be satisfied. The challenge of marrying the concept of public benefit to the charitable purpose of advancing religion has, however, been considerably eased by the traditional legal presumption that gifts or trusts for this purpose are *ipso facto* for the public benefit.⁷⁷

⁷⁴ See, *Re White* [1893] 2 Ch 41.

⁷⁵ See, *O’Hanlon v. Logue* [1906] 1 I.R. 247.

⁷⁶ See, *In re Macduff*; *Macduff v. Macduff* [1896] 2 Ch 451.

⁷⁷ See, *National Anti-Vivisection Society v. IRC* 1948] AC 31.

2.4.2 Public

Charitable status requires benefit to be provided to the public or, as the test is sometimes described, “an appreciably important class of the community”.⁷⁸ While it does not impose an absolute bar on any private benefit accruing from a charitable gift, it does require that any private benefit conferred must be incidental. Where the access of potential beneficiaries to the benefits made available are in some way restricted this may compromise charitable status.⁷⁹

Where the class of beneficiaries is defined by its faith then the courts construe this as a non-personal relationship nexus and therefore intrinsically public in nature.⁸⁰ Typically, a religious charity is entitled to restrict access to its place of worship to the followers or adherents of that religion. However, the well-known hypothetical instance cited by Simonds LJ, when he pointed out that a bridge restricted to impecunious Methodists would breach the ‘public’ requirement, nicely illustrates an underlying dilemma.⁸¹ As he then noted, such a trust would fail the public requirement because the formally restricted class of beneficiaries means that the trust “does not serve the public purpose which its nature qualifies it to serve.”⁸² The point being that a bridge, unlike a place of worship, is clearly a public utility and to so restrict access to such a facility is to redefine it as ‘private’. Such a restriction dooms the trust because “it is not for the benefit of the adherents of the religion themselves that the law confers charitable status, it is in the interest of the public.”⁸³ A similar point was made in *Gilmour v. Coats* in which it was held that the spiritual benefit flowing to mankind from private piety does not fulfill this requirement – public benefit must be something which is “capable of legal proof”.⁸⁴

Access is also often restricted by fees which can again give rise to controversy. Fee-charging faith schools and hospitals may well be driven as much by considerations of profit as public benefit, but the fact that they nonetheless relieve pressure on the State, by diverting paying customers away from equivalent public services and so leaving greater service availability for others, can suffice to qualify for charitable status.⁸⁵ The growing involvement of charities, including religious charities, with commerce and profit is of some concern to courts and regulators in this jurisdiction (see, further, Chap. 8).

⁷⁸ *Verge v. Somerville* [1924] A.C. 496 at p. 499 (per Lord Wrenbury).

⁷⁹ The law is now uncertain in this regard, see *Independent Schools Council v. The Charity Commission* [2011] UKUT 421 (TCC) (13 October 2011).

⁸⁰ See, *IRC v. Baddeley* [1955] A.C. 572 and a class of “Methodists”.

⁸¹ *Ibid* at p. 592.

⁸² *Ibid* at p. 592.

⁸³ *Holmes and others v. HM Attorney General* [1981] transcript.

⁸⁴ *Gilmour v. Coats* [1949] 1 All ER 848 (H.L.).

⁸⁵ *Re Resch's Will Trusts*, *Le Cras v. Perpetual Trustee Co Ltd* [1968] 1 AC 514 (PC). Also, see, *Joseph Rowntree Memorial Trust Housing Association Limited v. AG* [1983] Ch 159 (Ch).

2.4.3 Benefit

The requirement that organisations, or gifts to them, should also satisfy the benefit arm of the public benefit test has proven controversial. This is partly because in the words of Wright LJ, what is construed as ‘benefit’ in the charity law sense will “vary from generation to generation”.⁸⁶ Mainly, however, in a religious context the difficulty lies in the extent to which private piety can be construed to be of public benefit. This has been particularly contentious in relation to gifts made to, or for the use of, a closed contemplative religious order,⁸⁷ for the saying of a private mass,⁸⁸ or for services in a private chapel⁸⁹ which, in some jurisdictions, have been found not to be charitable both because of their long association with superstitious uses (see, further, Chap. 3) and because intercessory prayers and the example set by leading pious lives were viewed as being too vague in terms of their benefit to the public.⁹⁰ The approach taken in this jurisdiction was summarized by Harman J. in *Re Warre’s Will Trusts*, a case concerning a retreat house, when he said: “pious contemplation and prayer are, no doubt, good for the soul, and may be of benefit by some intercessory process, of which the law takes no notice, but they are not charitable activities.”⁹¹ In *Cocks v. Manners*⁹² Sir Wickens V-C held that the Dominican Convent, a contemplative order of nuns, was not charitable. A view endorsed some years later by Rigby L.J. who made a similar finding in relation to the Dominican Convent which was not charitable as it abstained “even from good works as regards the outside public”.⁹³ The judicial view that private piety in a convent does not tend, directly or indirectly, to edify the public was succinctly encapsulated in the ruling of Farwell J. who observed that there was no charity in attempting to save one’s soul because charity, that is charity in law, was necessarily altruistic.⁹⁴ In *Gilmour v. Coats*,⁹⁵ the

⁸⁶ See, *National Anti-Vivisection Society v. IRC* [1948] A.C. 31 at p. 42.

⁸⁷ See, for example, *Cocks v. Manners* [1871] 12 Eq 574 where a contemplative order of nuns, was found to be not charitable in contrast to the Irish case *Maguire v. Attorney General* [1943] I.R. 238 when a similar convent was held to be a “spiritual powerhouse” and a bequest to it was charitable. However, note also the decisions of the Charity Commissioners in approving the charitable status of the Society of the Precious Blood (1989) 3, and the Catholic, Stanbrook Abbey in 2002 both contemplative orders but with a degree of outreach.

⁸⁸ See, for example, *Kehoe v. Wilson* (1880) 7 L.R. Ir. 10. Also, see, *Re Hetherington’s Will Trusts* [1990] Ch. 1 where it was held that the celebration of a religious rite in private does not contain the necessary element of public benefit.

⁸⁹ *Hoare v. Hoare* (1886) 56 LT 147.

⁹⁰ *Gilmour v. Coates* [1949] AC 426. Also, see, *Trustees of the Congregation of Poor Clares of the Immaculate Conception v. The Commissioner of Valuation* [1971] NI 114 at p. 169, per Lowry LJ: an Order which has no other purpose other than to achieve its own sanctification by private prayer and contemplation is not an association with charitable objects.

⁹¹ [1953] 1 WLR 725.

⁹² [1871] 12 Eq 574.

⁹³ *In re Macduff; Macduff v. Macduff* [1896] 2 Ch. 451 at p. 474.

⁹⁴ *In re Delany; Conoley v. Quick* [1902] 2 Ch. 642 at p. 648.

⁹⁵ [1949] AC 426.

House of Lords placed their seal on this traditional interpretation, applied an objective test and ruled that a gift to a Carmelite priory was not charitable because of an absence of the requisite public benefit. However, unlike most charity law decisions emanating from this source, their lordships approach has not found favour everywhere: while the courts in Canada have shared their view, it has been rejected in both Ireland⁹⁶ and Australia.⁹⁷

2.4.4 *Presumption of Public Benefit*

The principle that gifts generally expressed to be for the advancement of religion should be presumed to be for the public benefit was judicially recognised more than a century ago and has been accepted throughout the common law world. As was stated in *In re White*⁹⁸:

... a bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a 'charitable' purpose, and that the law applicable to 'charitable' bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose.

Once the court recognised a religious body as such then, unless the purpose of a gift was clearly in some way illegal or immoral it was generally presumed charitable. As Lord Langdale MR stated in *Baker v. Sutton* "all the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose".⁹⁹ From an early stage, however, some judges were arguing that even religious purposes must demonstrate a public benefit¹⁰⁰; an argument that centered on the above closed religious order conundrum. The justification then provided by Sir John Wickens for denying charitable status, though not accepted or followed in many other common law jurisdictions, was that¹⁰¹:

It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or edification of the public...

In certain circumstances the presumption could always be rebutted and the gift then considered not to be of public benefit as, for example, if the organisation in

⁹⁶ See, for example, the ruling of Dixon J. in *Bank of Ireland Co Ltd v. Attorney General* [1957] IR 257 in which he confirmed the charitable status of an order of Discalced Carmelite nuns, engaged solely in a life of contemplation and prayer, living in cloistered solitude in their convent, having strictly limited contact with outside persons, and having no outside activities of any kind.

⁹⁷ See, Extension of Charitable Purposes Act 2004, s.5.

⁹⁸ [1893] 2 Ch. 41; followed in *In re Bain, Public Trustee v. Ross* [1930] 1 Ch. 224.

⁹⁹ *Baker v. Sutton* (1836) 1 Keen 224.

¹⁰⁰ See, for example, *Heath v. Chapman* (1854) 2 Drewry 417, 426; 61 ER 781, per Sir RT Kindersley VC at p. 784.

¹⁰¹ *Cocks v. Manners* (1871) LR 12 Eq. 574, at p. 585, per Sir John Wickens VC.

question operated solely for profit, or if it employed oppressive psychological manipulation of its followers or potential followers.¹⁰² Now, in this jurisdiction (and other UK jurisdictions, but nowhere else), the presumption has been reversed: since conclusion of the charity law reform process all bodies and gifts to them, dedicated to this charitable purpose, must demonstrate public benefit if they are to acquire or retain charitable status (see, further, Chap. 6).

2.4.5 *Religion and Social Capital*

The concept of ‘social capital’ has been coined to explain the motivation of individuals who engage in collective activity for altruistic purposes. It refers also to the environment of mutual trust, resulting from that engagement, which can be conducive to promoting public benefit by channeling collective activity into building the components of civil society.¹⁰³ Religion brings with it a capacity for social cohesion to which other groups can only aspire but it has proven to be challenging in the context of social capital because of its capacity, in differing circumstances, to generate either pluralism or polarization. To some extent this characteristic is one it shares with charity.

2.4.6 *Social Capital and Charity*

Government has a vested interest in facilitating the growth of charities. It can only gain from supporting entities that: generate a vibrant and diverse participative form of democracy; attract the involvement of volunteers; bolster a sense of social obligation and civic responsibility; thereby fostering the growth of social capital and consolidating civil society. Altruistic activity, a sufficient ‘good’ in itself, also acts as a model for others and can galvanize local communities into more responsible citizenship through bonding activities that accrue to the common good.

The larger charities, because of their institutional nature, pastoral concerns and longevity, are well positioned to reinforce and continue established social norms: some, such as religious or faith based organisations, are often accused of having a conservative if not reactionary influence and can have a strong investment in maintaining the status quo. Their longevity, coupled with financial and information resources, together with expertise and credibility established over generations of close engagement with vulnerable communities, place charities in a singularly strong position to provide the necessary continuity of concerned involvement to those communities with potential to threaten government stability. By absorbing the needs of minority groups, assuaging

¹⁰² Ibid. Wickens V-C initially suggested that the “benefit” quotient of a religious organisation for the “public” lay in its moral and spiritual values which could be found in its beliefs, doctrines and practices (at p. 585).

¹⁰³ See, further, Putnam, R. 2000. *Bowling alone*, 19. New York: Simon & Schuster.

the dissatisfaction of the alienated, mediating on behalf of the socially excluded and involving armies of volunteers in community care activities, charities can make a unique contribution to maintaining social cohesion.

2.4.7 *Religion, Charity and Social Capital*

The debate regarding religion's contribution to or detracting from social capital has generated much academic comment.¹⁰⁴ It is a discussion not presently permitted due to lack of space but some points must be made at this stage, as it is a theme with considerable significance for this book (see, further, Chap. 8).

Religious, or faith based, organizations, mostly tend to be politically conservative – but not always. On the one hand, because of their institutional nature and longevity, such charitable entities can reinforce and sustain established social norms and may exercise a reactionary influence when faced with the prospect of political change.¹⁰⁵ On the other, their pastoral concerns, established over generations of close engagement with vulnerable communities, can prompt them to be at the forefront of such change particularly when religion itself is being politically suppressed.¹⁰⁶ Religion, charity and charitable religious organizations share an approach that leans towards deference, acceptance and fortitude which can be problematic in some social contexts.¹⁰⁷

Religion and the charitable activities of religious organizations have an undoubted capacity to generate social capital. However, the controversy as to whether religion is primarily for member benefit or public benefit, more inclusive than exclusive, is probably as old as religion itself. There are those who take the view that religion, religious organisations, the activities of the latter and gifts to them, are all essentially member benefit driven: that “altruism” the defining characteristic of charity is absent as, fundamentally, the primary motivation of all concerned is the very private matter of personal salvation; and everything that constitutes the purpose of advancing religion is subsidiary to this personal purpose. Religion, while cementing relationships between its adherents, preferences and sharply differentiates that religion from all others: the ‘bonding’ form of social capital provided by religion is at the price of the ‘bridging’ form.¹⁰⁸ The tendency for religious charities to be both very active and very partisan has served to emphasise differences, increase social polarization and raise tensions. This potential, for religion to be more malign than benign, was a

¹⁰⁴ See, for example: Hitchens, C. 2007. *God is not great: The case against religion*. London: Atlantic Books; and

Mendieta, E., and J. Van Antwerpen (eds.). 2011. *The power of religion in the public sphere*. New York: Columbia University Press.

¹⁰⁵ As occurred in some South American countries in the last half of the twentieth century.

¹⁰⁶ As occurred in Poland towards the end of the twentieth century.

¹⁰⁷ Such as the use of contraceptives to combat the spread of AIDS in Africa and to lift communities out of poverty by controlling population growth.

¹⁰⁸ Ibid.

matter of concern to Lord Scott of Foscote who spoke for the House of Lords in *Gallagher v. Church of Jesus Christ of Latter-Day Saints*¹⁰⁹:

[S]tates may...recognise that, although religion may be beneficial both to individuals and to the community, it is capable also of being divisive and, sometimes, of becoming dangerously so. No one who lives in a country such as ours, with a community of diverse ethnic and racial origins and of diverse cultures and religions, can be unaware of this. Religion can bind communities together; but it can also emphasise their differences. In these circumstances secrecy in religious practices provides the soil in which suspicions and unfounded prejudices can take root and grow; openness in religious practices, on the other hand, can dispel suspicions and contradict prejudices.

2.5 Conclusion

For the love of God – was, in all probability, the first instinctual motivation for charity.¹¹⁰ It has always been open to question whether this indicated a primary concern for self or for others: altruism or personal salvation: public interests or private? The blending of religion and charity in the charitable purpose of ‘for the advancement of religion’ has perpetuated that initial uncertainty.

The common law foundations for charity law, in this as in many other of the world’s leading developed nations, lie in the Statute of Charitable Uses 1601, particularly in the wording of its Preamble, and in the judicial principles and precedents, most notably the decision in *Pemsel*, established over the following centuries. In the post-Reformation years ‘religion’ and ‘charity’ were defined and practiced in accordance with clear terms of reference, mutually agreed and jointly applied by Church and State, within a resolutely Protestant culture. For some centuries there was no uncertainty as to the duality of their social roles: a monotheistic deity was to be worshipped as required by Church of England doctrines; with related public and private morality issues policed by the ecclesiastical courts; and charity law administered accordingly. It was during this period that standards of public morality, particularly in regard to the sanctity of marriage together with the illegality and sinfulness of sexual relations outside it, became entrenched. Over time, as other religions became accepted and the interpretation of ‘charity’ broadened, the judiciary and the Charity Commission gave more consideration to the part to be played by the public benefit principle as a determinant of charitable status.

Of all the concepts and principles underpinning charity law none is now more important than the requirement that charity must contribute to the ‘public benefit’; this is its governing and distinguishing principle. The chapters that follow will examine just how religion and charity have coexisted and consider the importance and effectiveness of the public benefit principle as the arbitrator between public and private interests.

¹⁰⁹ *Gallagher v. Church of Jesus Christ of Latter-Day Saints* [2008] 1 WLR 1852, 1867 at para 51.

¹¹⁰ Equally, of course, it also provided the motivation for the Crusades (led by the Knights Templar, a charity) and for many wars ever since.



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