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CHARITABLE STATUS FOR THE ADVANCEMENT OF RELIGION: AN ABOLITIONIST'S VIEW

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Introduction

One of the four heads of charity expounded in *Commissioners of Special Income Tax v Pemsel*[2] is the advancement of religion. This brief note will explain the need for reform of this area of law, and put forward an argument for abolition of this head entirely, rather than extension of the head to areas not currently covered by this head of charity.

The Need for Reform

While accepting the antiquity of this head of charity, it is worth stressing some obvious points about the changing status of religious bodies in England. Today, the decision whether to follow a particular religion, and which religion to choose from the plethora of available faiths, is essentially personal. It is possible to live a normal life without adherence to a particular faith. In particular, there is no legal obligation to follow a particular faith, to espouse particular views of theological doctrine, or to attend particular services. During much of the period when the law of charity developed, this relative marginalisation of religion was unknown. The regulation of, or conference of benefits upon, the monolithic State religion reflected complex social, political and legal links between Church and State.[3]

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2 [1891] AC 531.

3 cf M Bohlander, 'Public Peace, Rational Discourse and the Law of Blasphemy' (1992) 21 Anglo-Am LR 162.

It is obvious that this is no longer the case. Indeed, to a certain extent, charity law has recognised these changes by allowing non-Anglican,[4] and non-Christian,[5] religious faiths the benefits of charitable status. But the failure to extend these benefits beyond theist beliefs into other fundamental beliefs may have resulted in violation of United Kingdom international obligations.

The European Convention on Human Rights, to which the United Kingdom is a signatory, provides under Article 9 for freedom of thought, conscience and religion. Article 14 of the Convention provides that the Convention rights are to be afforded without discrimination on grounds including religion. If an area is dealt with by a substantive article such as Article 9, differential treatment in that area must be justified under Article 14, even if the differential treatment is not, in itself, guaranteed by the substantive Article.[6]

In this case, if the State provides fiscal and other benefits to one religion then, even though there is no obligation to provide benefits to religion at all, the benefits must be equally available to all belief structures covered by Article 9, unless good causes can be shown for not providing the benefit in a particular case.[7]

It seems clear that, in English law, not all belief systems protected by Article 9 are given charitable status under the religious head. For instance, according to the Commission on Human Rights, moral opposition to all warfare is a belief protected by Article 9,[8] but it does not have charitable status within the United Kingdom.[9] Even where a trust to further fundamental beliefs is charitable under a different head, such as other purposes beneficial to the community,[10] it must satisfy a more vigorous test of public benefit than under advancement of religion, and thus is the

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4 cf CEF Rickett, 'An anti-Roman Catholic Bias in the Law of Charity' [1990] Conv 34.

5 e.g., *Strauss v Goldsmid* (1837) 8 Sim 614.

6 *National Union of Belgian Police v Belgium* (1975) 1 EHRR 587; *Belgian Linguistics Case* (1968) 1 EHRR 252.

7 *Belgian Linguistics* at para 10; App 9369/81 v UK (1983) 5 EHRR 581; *Rasmussen v Denmark* (1984) 5 EHRR 50.

8 *Arrowsmith v UK* (1978) 3 EHRR 218; *Le Court Grandmaison and Fritz v France* (1989) 11 EHRR 46; *Faclini v Switzerland* (1993) 16 EHRR CD 13.

9 See P Todd, *Equity and Trusts: Cases and Materials* (London: Blackstone Press, 1989) 199.

10 This is the case for atheistic ethical structures. See *Re South Place Ethical Society* [1980] 1 WLR 1565.

subject of differential treatment.[11] It seems difficult to identify a substantial ground for treating fundamental non-metaphysical beliefs differently from fundamental metaphysical beliefs,[12] and I would submit the current differential treatment is contrary to the Convention.[13]

Of course, this is not necessarily an argument for abolition - extension of charitable status to all the structures protected by Article 9 would also satisfy the obligations under the Convention. In either case, the Convention indicates that some change in the law is required. Other factors suggest that abolition is more appropriate than extension.

Arguments for Abolition

One interesting line of argument is brought into particular relief by the prospect of expanding the definition of religion to include pacifism, atheism, ethical veganism, and the like.[14] The courts have refused to accept that trusts for a political purpose are charitable.[15] A number of reasons can be put forward for this, many of which are applicable to trusts for the advancement of religion. First, the legal process may not be an appropriate way of determining the worth of political purposes, which are better resolved in broader debate. The legal process would not seem any more suited to deciding religious matters, which in practice would disable the courts from having any control over what religious organisations were to receive the benefits of charitable status. This may not seem to follow - after all, declaring that a particular micro-faith destroys lives and departs from societal norms does not seem to reflect on its metaphysics.[16] But in practice,

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11 There is also an important rhetorical difference between a belief structure which is deemed charitable because of its nature, and one which is granted charitable status only upon it showing some additional tangible public benefit.

12 The arguments concerning Satanism will not be considered in this note, although it should be noted that differential treatment of Satanists may be justified under Article 17.

13 Compare R O Frame, 'Belief in a non-material reality - A Proposed First Amendment Definition of Religion' [1992] U. III. L Rev 819.

14 All of these purposes have been found to fall within the protection of Article 9 of the Convention. Perhaps the most extreme is ethical veganism - see *H. United Kingdom* (1993) 16 EHRR CD44.

15 For an introduction, see J E Martin, *Modern Equity* (1989) 404-407.

16 On the collateral point, see Council of Europe Parliamentary Assembly, *Report on Sects and New Religious Movements* 29/11/1991, Rapporteur Sir John Hunt, section 5-7.

judging the micro-faith as undesirable discounts any possible metaphysical benefit which may serve to counter the obvious public disbenefits.[17] It is clear that the metaphysical benefits are not justiciable but, in effect, if the courts wish to distinguish between religions they would be required to act on the basis that no metaphysical benefits existed.

Second, the courts' involvement in political trusts may endanger their neutrality, and a similar argument may apply to trusts for the advancement of religion. One obvious answer to this is that if the courts endorse all religious trusts, or indeed refuse all charitable status, they are acting neutrally. But the requirement of public benefit, which is discussed below, would seem to argue against the courts becoming, in effect, rubber stamps for all religious beliefs.[18] Additionally, there is a danger that some organisations that the courts might not wish to endorse could cite their charitable status as state approval.[19]

Thirdly, the fiscal benefits of charitable status are, in effect, subsidies - assuming a certain tax yield must be raised, every charitable organisation slightly increases the burden on all non-charitable organisations and individuals. If the United Kingdom really had a homogenous 'public' who could be found to benefit from charitable concerns, these subsidies might be unexceptional. But, as has been noted above, the United Kingdom is a religiously heterogeneous society. Would a Christian necessarily want to support Islamic proselytising, and vice versa? Or an atheist, teachings in Jewish theology? Subsidising religious organisations can, effectively, require committed persons to support religious organisations they passionately believe to be in error.[20] This problem would not be resolved by extending charitable status to all belief systems; indeed, the problem would be aggravated.

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17 cf. M Bohlander, op cit., 164.

18 This leaves aside the whole problem of the definition of 'religion'. See W P Marshall, 'Truth and the Religion Clauses' (1994) 43 De Paul L Rev 243; V D Ricks, 'To God God's, To Caesar Caesar's, and to Both the Defining of Religion', (1993) 26 Creighton L. Rev. 1053. The question has been dodged by the Council of Europe Report cited above, see ibid, section 3-4.

19 cf. Debates of the Parliamentary Assembly, 43 Ordinary Session, 23 Sitting, 5/2/1992 per Mr Rowe.

20 cf. M Bohlander, op cit., 164. This point does not imply that believers have a fundamental right to withhold payment of taxes on the basis of subsidy, merely that it is a policy point we need to consider. Given the special significance of religious beliefs, lack of consensus seems more significant in this field than, for instance, where a person who regards animals as property, to be dealt with as the owner sees fit, objects to the charitable status of the RSPCA. Contrast *Boussel du Bourg v France* (1993) 16 EHRR CD49.

Moving on to less theoretical issues, if the public pays, there should be public benefit. The advancement of religion head is very light on this - not only is any religion to be considered as better than none,[21] but, if there is some evidence that the trust will advance the particular faith in the broader community, public benefit is assumed.[22] The ethics, and economics, of providing public support via charitable status to any organisation without consideration of whether there is any benefit from the support, let alone a benefit which offsets the public loss incurred by charitable status, are seriously open to question.

This ties in with a related point, the difficulty of preventing fraudulent misuse of charitable status if the advancement of religion head were to be extended, or indeed even retained. When the only acceptable religion was the established Church, it was relatively straightforward to determine if a given trust sought to advance religion. Even when other major faiths were given this status, it was still possible to determine whether a trust was charitable by comparing it with the historical form of the religion in question. But as the United States courts are increasingly discovering, a plurality of seemingly religious organisations, some of which are suspected of seeking charitable status purely for the fiscal benefits - using the advancement of religion purely as a means to an end - are posing extremely difficult questions for the courts. The problem of dealing with possibly fraudulent claims under this head would be done away with if the head was abolished, but aggravated if the head was extended to non-metaphysical fundamental beliefs.

I would argue, therefore, that there are grounds for questioning the charitable status of the advancement of religion. Before considering what action might follow from this finding, it is useful to consider arguments in favour of extending charitable status to all systems protected by Article 9.

Arguments for Extending Charitable Status

In the argument that follows it is assumed that 'religion' is to be extended to all those fundamental belief systems covered by Article 9 of the Convention. If the term 'religion' is not to be redefined in this sense, the arguments that follow are for retention of existing law and against abolition. In either case, they need to be addressed as contrary to the abolitionist view.

It can be argued with considerable justification that religious organisations in the United Kingdom perform a number of beneficial, philanthropic functions. Granting these organisations charitable status may be an indirect way of providing

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21 *Gilmour v Coats* [1949] AC 457.

22 Consider *Neville Estates Ltd v Madden* [1962] Ch 832.

support for these functions. The principal problem with this argument is that it requires the State to supply support for an organisation, under logically unconnected criteria, in the hope and expectation that it will carry out the activities which the State actually seeks to support. It also carries with it the implication that exactly the same activities, when carried out by an organisation which does not fall within the religious head, will not be supported by the State. It is a distinction without difference to determine charitable status by reference to the motive and belief structures of the benefit provider, rather than by the benefit itself.

It may be that many of the tasks carried out by religious organisations would be charitable under the fourth head, other purposes beneficial to the community. It seems improbable, however, that every function carried out by a religious organisation is beneficial in this sense. In any case, why not test the actions of religious organisations for benefit under the fourth head, that of other purposes beneficial to the community? If the fourth head excludes publicly useful activities carried out by religious organisations, is that not simply an argument for widening the definition of the fourth head?

A second justification for the head is that religions provide for social cohesion, or in some other way a better society, and thus merit special status. There is some support for this in the new case law,[23] but it must be seriously open to question. A single state religion may further social cohesion, albeit at great cost, but it is difficult to see how supporting a multitude of religions, often contrary in theology and tradition, and sometimes even with a history of conflict, assists in any way. The broader social argument seems predicated on the moral superiority of the religious person over the non-religious person. While I would not argue that religions can never have useful social purposes, the blanket social advantages of religion remain to be proven in a legal context.

Conclusion

It seems obvious that, if abolition of the religious head is desirable, it would be inappropriate for the courts to take that step. Apart from the technical problems posed by precedent and existing statute law, any *ad hoc* abolition would have some startling effect on established religious trusts, many of which are very ancient. It must be remembered that charitable status, apart from the fiscal advantages concentrated on above, is ordinarily required for a valid purpose trust. Thus, if advancement of religion was declared not to be a charitable purpose, a large number of trusts would become, *ipso facto*, invalid. Abolition of charitable status must take place within a wider statutory framework capable of dealing with the transitional difficulties inevitable following a major change to an established legal rule.

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[23] See J E Martin, op cit, 416.

Such a change, while improbable given the contentious nature of such reform and the existing pressure on legislative time, would be desirable. The current law, as well as discriminating against some fundamental belief systems, fails to ensure that charitable status is given only to purposes producing a secular public benefit.